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Converged Markets - Converged Power?

Regulation and Case Law

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Regulation and Case Law

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Eleven years ago, the European Audiovisual Observatory published the IRIS Special entitled "Television and Media Concentration".[1] Back then it still seemed meaningful to restrict the publication to the regulation of traditional forms of concentration in the broadcasting sector and, to this end, collect and analyse information on specific national concentration rules and relevant competition-law decisions.

Today the means by which enterprises can control the media sector are increasingly subtle and attach to virtually all stages of the value chain. Market power and media dominance can be based on a strong copyright portfolio as much as on the control of platforms and transmission networks. Vertically integrated businesses have advantages over competitors engaged in only one of the markets and therefore dependent on players of the up- and/or downstream markets. The advantages are especially pronounced for those undertakings that are able to build simultaneously on a rich repertoire of audiovisual content, various media services and priority transmission arrangements or that can control such infrastructure.

While eleven years ago broadcasting was most likely the number one audiovisual media service to shape public opinion and to contribute to the prospering of a competitive as well as culturally rich audiovisual media sector, today more and more other services have a wide audience reach and strong market capacities. Accordingly, not only broadcasters but also platform operators and providers of audiovisual on-demand media services are likely to be or to become subjected to legislative, administrative and court actions addressing market power and/or dominant positions. More recently, the issue of dominance has emerged also in relation to manufacturers of reception devices, such as Connected TV sets.

Traditionally, legislators seek to limit the (market) power of individual players in order to keep several competitors in a given market and in order to restrict the impact that any of them may have on the views of the public. Since the audiovisual media sector is converged and services are more and more connected, this traditional approach comes up against questions such as whether and to what extent media-specific regulation is still justifiable or – in the context of general competition law – the question what markets ought to be distinguished given that digitisation and verticalisation of the audiovisual sector has changed the existing business models and practices.

1) The full title reads: IRIS Special "Television and Media Concentration – Regulatory Models on the National and the European Level", it was edited and published by the European Audiovisual Observatory (Strasbourg) in 2001. For more information, see www.obs.coe.int/oea_publ/iris_special/2001.html

While in a converged environment state intervention through media-specific rules or the application of general competition law continues to be important for regulating the audiovisual media sector, these mechanisms are not (and have never been) the only ones.

Traditionally, the audiovisual media sector has also been shaped and strengthened by positive incentives. These were set by the state or privately organised funds in order to promote a viable audiovisual industry that is able and likely to produce and disseminate the type and variety of content considered desirable for society and/or assessed as being (otherwise) under-represented in media offerings. Positive incentives can target practically all activities of the audiovisual industry. Measures reach from the direct funding of projects to beneficial tax schemes, and apply to various geographies, from regional to supranational settings.

The European Audiovisual Observatory has published a very comprehensive report on "Public Funding for Film and Audiovisual Works in Europe"[2] offering rich information on the activities and policies of public funding bodies. Additionally, the KORDA database[3] informs about the details of individual funding programmes in all Observatory member states. A legal publication of the Observatory[4] has already dealt with the manifold obligations that states have imposed on broadcasters to support cinematographic productions. It is because of these additional information resources but also for the sake of keeping this IRIS Special to a manageable size that we have decided not to include information on positive incentive measures in this publication.

Nevertheless, it is important to keep in mind that the policy of a state concerning pluralism and diversity of the audiovisual sector is likely to rely on both types of interventions, that is, restrictive measures in the widest sense and positive incentives. Often the lack of negative interventions can only be understood in light of positive actions in support of the national industry and vice versa.

An alternative to both limiting and encouraging interventions, are content obligations aimed at ensuring a diverse media output. Such obligations exist for various media (e.g. obligation to air children's programmes, news, etc.) and mainly, but not exclusively, for public service media (linked to their remit).[5] Other examples are the positive content obligations of the Audiovisual Media Services Directive regarding European works and works created by independent producers. This publication will not look at their role for the same reason of manageability mentioned before. Rather this publication will focus on the negative incentives, that is, regulation curtailing the freedom of market players to handle their business as they like or see economically prudent. Relevant rules are to be found in the legal framework of the European Union as well as in the national laws.

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2) See Public Funding for Film and Audiovisual Works in Europe (September 2011), www.obs.coe.int/oea_publ/funding/fundingreport2011.html , but also IRIS *plus* 2011-2 "An Insight into Selected Film Funding Systems", www.obs.coe.int/oea_publ/iris/iris_plus/2011-2.html

3) KORDA may be accessed free-of-charge at: http://korda.obs.coe.int/

4) This topic was the subject of our IRIS Special publication "Broadcasters' Obligations to Invest in Cinematographic Production" (European Audiovisual Observatory, Strasbourg 2006), which – though not updated recently – still gives an idea about various forms of obliging broadcasters to support the creative industry. For more information see www.obs.coe.int/oea_publ/iris_special/2006_01.html

5) See IRIS Special "The Public Service Broadcasting Culture" (European Audiovisual Observatory, Strasbourg 2007), www.obs.coe.int/oea_publ/iris_special/2007_01.html

The **first part** of this book explores the European Union approach to limiting media power, an approach still dominated by the application of competition law as a result of the fact that competition law continues to be *the* area where EU law directly addresses market power and exercises strict control over the internal market. The author explains the general functioning of competition law and other regulatory instruments and then specifically how the various services provided in the audiovisual sector are regulated and in particular, what markets are to be distinguished. The activities thereby touched upon reach from producing audiovisual media content to organising, offering and finally distributing services that are all needed to bring this content to the consumer.

The **second part** of this publication contains a description of the legal frameworks of 11 European countries used to address media power at the very same stages of the value chain covered by the EU contribution. For each of these countries you will find in particular information on the regulation of audiovisual media services and enabling services, platform and converged services, and finally distribution services.

In contrast to the contribution on the EU legal framework, the variety of legal areas that form part of a national regulatory picture is quite large. For example, copyright law (including control of private copyright arrangements) can limit the power of content producers to strike exclusivity deals or it may order the opening of audiovisual media archives to other market participants. Licensing regimes regulate market entry and thus determine which undertakings may at all compete or not compete in a given market. Media-specific anti-concentration rules address dominant and gate-keeping positions in various dimensions. They limit the power of undertakings to dominate any given market but also to concentrate above a certain limit by vertically organising their businesses. And they set limits to simultaneous ownership of similar services which serve different markets (also referred to as cross-ownership). More recently, national legislators have introduced provisions that specifically address gate-keeping functions between an audiovisual media service and its user or an audiovisual media service and its delivering platforms. Legal and policy concepts such as must-carry, net neutrality, access rules and compatibility rules are some of the buzz words which illustrate further the wide range of legal instruments that states might apply to address media power. They also indicate that they might be used in response to very different aspects of market power.

All instances of alleged market power addressed by media-specific rules must generally pass the test of compatibility with general competition law. It is in particular in the area of competition law where the legal framework is detailed by the courts' evaluation of market power and their delineation of markets.

Given that audiovisual media services are not simply a commercial business but also carry weight for achieving societal and cultural goals as well as state policies, they are often delivered in fulfilment of a public service mandate. For these public service media many countries apply an – at least in some way – altered legal framework for controlling their market power, a fact of which this publication also takes account.

The **third part** of this book brings in economic background in the form of different overviews concerning audience market shares for television and video online. This data puts the legal information into a real life context.

The **fourth and final part** of this publication seeks to tie together the common threads in state regulation of media power, to work out the main differences and to hint to some unusual solutions. Here and there it will weave in aspects of EU law that have influenced the national legal frameworks.

The eleven countries were selected for this study because they either represented major markets for audiovisual media services in Europe, or because they could develop outside the corset of the internal market, or because they had some interesting unique feature, for example the ability to attract major market players despite lacking an adequately sized market. In addition we tried to keep a certain geographical balance.

The concept for this IRIS Special was developed in-house with the strong and essential support of our partners, the Institute for European Media Law (EMR) and the Institute for Information Law (IViR). From the partners' side Alexander Scheuer, Tarlach McGonagle and Catherine Jasserand-Breeman also helped identify the experts who contributed to this study. The same colleagues co-edited individual contributions. We thank all of them as we very much thank the individual authors for working jointly towards more transparency of a truly complicated subject that in many ways manifests the challenges of regulating converged markets and related market power.

Strasbourg, 22 October 2012

Wolfgang Closs
Executive Director

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Part I

Regulation of Market Power in a Converged and Connected Audiovisual Media Sector at EU Level

EUROPEAN UNION

Ralf Capito
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A. Introduction

The European Union's competition law system contributes to one of the primary goals of the Union, i.e. to ensure that competition in the internal market is not distorted.[1] This system basically rests on three pillars.[2] First, Article 102 of the Treaty on the Functioning of the European Union (TFEU)[3] (formerly Article 82 EC) prohibits undertakings from committing an abuse of a dominant position. Second, Article 101 TFEU (formerly Article 81 EC), in general, prohibits all business practices between two or more undertakings that restrict free competition in the common market. Third, the EC Merger Regulation (ECMR)[4] aims at preventing mergers significantly reducing competition. These three pillars are accompanied by numerous implementing legislative measures as well as guidelines by the Union and, in particular, by the European Commission which, together with the national competition authorities, enforces the Union's competition rules.

Apart from competition law, the European Union's (sector-specific) framework for the electronic communications sector (hereinafter: the Regulatory Framework) has gained considerable importance when it comes to regulating market power in the media sector. The regulatory framework mainly consists of five directives and was revised in 2009.[5] Notably, the regulatory framework is based on the principle of separating the regulation of transmission from the regulation of content meaning that it does not cover the content of services delivered over electronic communications networks and services.[6] It focuses on the regulation of significant market power with regard to electronic communication networks mainly but not only stemming from the former monopolised telecommunications markets. Unlike EU competition law, the regulatory framework is primarily enforced by the so-called national regulatory authorities (NRAs).

1) See Article 3(2)(g) TFEU.
2) This chapter does not cover the rules on state aid under Articles 107 *et seq*. TFEU. For an overview of the issues relating to funding of (public service) broadcasters, see Mestmäcker/Schweitzer, in: Immenga/Mestmäcker, *EU-Wettbewerbsrecht* (5th edition, 2012), Art. 106(2), paras. 127 *et seq*.
3) Consolidated version, [2010] OJ C 83.
4) Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings, [2004] OJ L 24/1, hereafter referred to as ECMR or Merger Regulation.
5) Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), and 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), [2009] OJ 337/37 and Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [2009] OJ 337/11.
6) Recital 5 Framework Directive. See also Article 1(3) Framework Directive and M. Libertus, [2001] 6 *IJCLP* 1.

The relationship between EU competition law and the regulatory framework is rather straightforward in that sector-specific legislation does not rule out parallel action from competition authorities in the relevant sector. For the EU competition rules, this follows already from the fact that EU law takes precedence over national legislation.[7] Sector-specific regulation and competition law are complementary sets of rules sharing the same goals while operating with different instruments.[8]

The following section gives an overview of how this legislative framework is nowadays applied in the media sector with regard to market power. After describing the way the different competition law and regulatory instruments work (B.), the subsequent section is structured along the common value chain of media services: audiovisual media services and enabling services (C.I.), platform and converged services (C.II.) and distribution services (C.III.). Each part will explain the relevant markets associated with these services and describe the main competition law and regulatory issues arising in these markets.

B. Overview of the instruments of EU competition law and the EU regulatory framework for electronic communications

I. Article 102 TFEU – Abuse of market power

Article 102 TFEU prohibits undertakings from committing an abuse of a dominant position held within a substantial part of the common market where that abuse has an effect on trade between member states. In the media sector, the provision plays a role in particular with regard to the refusal to supply content.[9] To determine whether an undertaking has abused its dominant position, a multi-step analysis is required:

- Firstly, one needs to define the relevant product and geographic market(s) for which dominance has to be assessed.
- Secondly, the undertaking in question must be dominant, i.e. in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and customers and ultimately of its consumers.[10]
- Thirdly, this undertaking must have abused its position. According to the Court of Justice of the European Union (ECJ), the term "abuse" relates to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the dominant undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[11]
- Finally, an abuse of a dominant position will only be prohibited if it affects trade between member states.[12]

It is settled case law that Article 102 TFEU like the other provisions of EU competition law generally also applies to public service broadcasters.[13] Even though the Commission has taken only few formal decisions based on Article 102 TFEU, very often the mere threat of a Commission investigation into a company's allegedly abusive behaviour, causes companies to change or adapt their conduct in the market.

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7) R. Klotz, in: Ch.Koenig/A.Bartosch/J.-D.Braun/M.Romes (eds), *EC Competition and Telecommunications Law*, (2nd edition, 2009), p. 108.
8) Ibid. See ECJ, Case C-280/08P, *Deutsche Telekom v. Commission*, [2010] ECR I- 9555; EGC, judgment of 29 March 2012, Case T-336/07, *Telefónica* v. *Commission* (not yet reported).
9) See *infra* C.I.3.
10) See ECJ, Case 27/76, *United Brands v. Commission*, [1978] ECR 207, para. 38.
11) See ECJ, Case 85/76, *Hoffmann-La Roche v. Commission*, [1978] ECR 461, para. 91.
12) See ECJ, Case 42/84, *Remia v. Commission*, [1985] ECR 2545, para. 22. The prerequisite of effect on trade between member states in Article 102 TFEU serves as a rule of jurisdiction, thereby drawing a boundary between the application of Union and national competition law.
13) See e.g. ECJ, Case 155/74, *Sacchi*, [1974] ECR 409, paras. 13 *et seq*. At least as long as it is not shown that the said prohibitions are incompatible with the performance of the broadcasters' tasks.

1. Market definition in EU competition law, in particular under Article 102 TFEU

Before an abuse of a dominant position can be ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.[14] The so-called concept of dominance enshrined in Article 102 TFEU therefore stipulates that economic power of an undertaking can only exist in relation to a particular market[15] and can only be assessed in relation to the relevant market(s). The same concept applies in general to the assessment of mergers as well as to the analysis of competition effects of alleged anticompetitive behaviour of undertakings under Article 101 TFEU. The general purpose of any market definition is to identify the competitive constraints faced by firms irrespective of the provision of competition law, which is applied.[16]

The Commission's approach to market definition has been clarified in its 1997 Notice on the Definition of Relevant Market for the Purposes of EU Competition Law.[17]

When assessing the competitive constraints faced by an undertaking under investigation, the Commission will consider the product[18] and the geographic dimension of the relevant market.

1.1. The relevant product market

The 1997 Notice on Market Definition characterises a relevant product market as comprising all those products which the consumer regards as interchangeable or substitutable because of the products' characteristics, their prices and their intended use.[19] The definition plainly illustrates that substitutability of a given product with other products by the consumer constitutes the central criterion in any definition of the relevant product market.[20]

The price of a product is an important factor in evaluating whether products are substitutes.[21] If similar products sell at widely differing prices in the same geographic area, they are unlikely to be close substitutes.[22] In the majority of cases, however, product markets need to be defined by a product's characteristics and its intended use. Products which have the same characteristics may be possible substitutes.[23] In this context, a product's functional characteristics are usually more important than its appearance or physical or chemical make-up.[24] Regarding the intended use of a product,[25] products needed for a specific purpose belong to the same market as products that satisfy the same need.[26]

Apart from demand substitutability, the Commission will also take into account supply substitutability when considering the competitive constraints on an undertaking. If suppliers of other products are able to switch production to the products in question this can have a considerable disciplinary effect on competitive behaviour.[27] These constraints posed by the supply side have to be taken into consideration whenever they "are equivalent to those of demand substitution in terms of effectiveness and immediacy".[28]

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14) EGC, Case T-62/98, *Volkswagen AG v. Commission*, [2000] ECR II-2707, para. 230.
15) See ECJ, Case C-209/98, *Entreprenorforeningens Affalds*, [2000] ECR I-3743, para. 57.
16) See e.g. S. Weatherill/P. Beaumont, *EU Law: The Essential Guide to the Legal Workings of the European Union* (4th edition, 2008), p. 745. However, there are some (minor) differences in the way markets are defined under the different provisions of the Treaty and the ECMR 2004, see R. Capito in: EMR, *Media Markets Definitions 2003*, para. 1.13 *et seq.*
17) See Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, [1997] OJ C 372/5, hereafter referred to as the "1997 Notice on Market Definition", para. 7. For a brief account on the legal status of the Notice, see R. Whish, *EC Competition Law*, p. 31; see also R. Capito in: EMR, *Media Markets Definitions 2003*, para. 1.06 *et seq.*
18) Here, the term product market is used as a synonym for product and service markets.
19) 1997 Notice on Market Definition (supra footnote 17), para. 7.
20) D. Hall in: *Bellamy & Child*, para. 6-096.
21) Cf. J. Briones Alonso [1994] *ECLR* 195 (200).
22) See C. Jones/E. González-Díaz, *The EEC Merger Regulation*, at p. 112.
23) See 1997 Notice on Market Definition, para. 36.
24) See L. Ritter/W. D. Braun/F. Rawlinson, *EC Competition Law: A Practitioner's Guide* (The Hague/London/New York, Kluwer Law International, 1999), p. 25.
25) 1997 Notice on Market Definition, para. 36.
26) See R. Whish, *Competition Law*, p. 32. Other criteria playing an important role when determining demand-side substitutability are the views of competitors and consumers as well as consumer preferences.
27) See J. Briones Alonso, [1994] *ECLR* 195 (205).
28) 1997 Notice on Market Definition, para. 20. Otherwise the competitive constraints posed by new suppliers possibly entering a market will be labelled as potential competition.

1.2. The geographic dimension of markets

It is also necessary, when delineating markets, to identify the relevant geographic market.[29] Theoretically, the relevant geographic market can be everything from global, Union-wide, transnational or national to regional or local. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas where the conditions of competition are appreciably different.[30]

The scope of the geographic market may be determined by national preferences or preferences for national brands, language, culture and life style, and the need for a local presence. Therefore, in the case of consumer products the Commission generally tends to consider the geographic market to be national.[31] Moreover, the current geographic pattern of purchases, the trade flows and pattern of shipments, high barriers to entry, and switching costs as well as the ongoing integration of the internal market are to be taken into consideration.

1.3. Particularities of defining markets in the media sector

Any market definition must take into account the particularities of the respective sector. The particularities of the media sector are best described by the Commission's words in *Vivendi/Canal+/Seagram*:

> "The structure of the media industry is multidimensional and complex. Indeed, different players such as content providers, rightsholders, content distributors, operate in the value chain from the production of content such as films, pay-TV programming, and music, to its delivery via theatres, pay-TV channels or Internet *'portals'*."[32]

The media sector is characterised by a number of distinctive features. The complex supply chains involving several stages of production are only one example. It seems also noteworthy, that many of the markets across the media sector have experienced, and continue to experience, rapid change. These changes are closely related to the phenomenon of convergence, i.e. the coming together of media, telecommunications and information technologies into unified platforms and networks.[33] At the same time, in some media sectors consumption is becoming fragmented involving special-interest offers with smaller numbers of copies of audiovisual works and limited reach possibly indicating smaller product markets.

In most cases involving media, the Commission assesses the market from the demand side applying the usual criteria.[34] A particularity of market definition in the media sector is the role of trading relationships. In the context of TV markets, the Commission has emphasised that the existence of trading relationships is a precondition for a market.[35]

Furthermore, the use of retail demand to define corresponding upstream wholesale markets is an essential tool of market definition in the media sector. The Commission, for instance, employed this method in relation to the upstream markets for access to digital interactive services platforms[36] and the wholesale markets for the acquisition of broadcasting rights.[37]

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29) Compared with other jurisdictions, the geographic dimension of the relevant market plays a rather important role in market definition in EU law, see C. Canenbley, [1996] *Fordham Corp. L. Inst.* 307, 307.
30) See 1997 Notice on Market Definition, para. 8.
31) See e.g. Commission, Decision 97/540/EC, *Coca-Cola/Amalgamated Beverages* (Case No IV/M.794), [1997] OJ L 218/15, paras. 95 *et seq.*
32) Commission, Case IV/M.2050, 13 October 2000, *Vivendi/Canal+/Seagram*, para. 14.
33) See Europe Economics, *Market Definition in the Media Sector*, para. 2.1.24. See also Ch. Whiddington, "European Union", in: M. de Avillez Pereira (ed.), *Antitrust and New Media*, pp. 184 *et seq.*
34) See R. Capito in: EMR, *Media Markets Definitions 2003*, para. 1.233.
35) The market definitions resulting from this approach are described *infra* C.I.
36) See Commission, Case COMP/JV.37, 21 March 2000, *BSkyB/Kirch Pay TV*, para. 32.
37) See Commission, Decision 2000/400/EC, *Eurovision* (Case IV/32.150), [2000] OJ L 151/18, para. 42.

With regard to the geographical scope of media markets, different regulatory regimes, language barriers, cultural factors, and copyright restrictions are the determinant factors in almost all segments of the sector.[38] This leads very often to the geographic boundaries of media markets being confined to one country or at least a single language area.[39]

2. Assessing dominance under Article 102 TFEU

The question of dominance is simply a question of economic power.[40] A firm's ability to hinder the maintenance of effective competition, demonstrated by the fact that it can operate to an appreciable extent independently of its competitors and customers, may derive from several factors which if taken separately would not necessarily be determinative for a finding of dominance.[41] Amongst these factors, the market share held by a firm is clearly the strongest indicator of market power even though it is not a conclusive criterion.[42]

According to the ECJ, undertakings with very high market shares will, in the absence of exceptional circumstances indicating otherwise, be considered dominant.[43] Market shares of 70% and above are considered to be very high.[44] Market shares of 45% to 70%, however, will require the assessment of additional factors such as the share of the largest firm compared to those of its competitors, and the stability of market shares over time. Dominance can also be indicated by the absence of countervailing power on the demand side, and the allegedly dominant undertaking's access to capital as well as its overall size and economic strength. Moreover, the vertical integration of companies, quite a common feature in the media sector,[45] is also viewed as a significant indicator of dominance.[46]

The clear wording of Article 102 TFEU ("one or more undertakings") shows that the provision applies not only to single dominance but also to joint dominance of several undertakings.[47]

3. Abuse of a dominant position

Article 102 TFEU does not prohibit the existence of a dominant position in itself. Instead, the dominant firm bears a "special responsibility" not to distort competition in the market.[48] Under the Union's competition law, dominant undertakings may protect their own commercial interests by taking reasonable steps as they deem appropriate to protect those interests. However, such behaviour must not have the purpose of strengthening that dominant position and, thereby, abuse it.[49]

The notion of abuse is not defined by the Treaty. Instead, Article 102 TFEU provides a non-exhaustive list of possible abuses.[50] The Commission and the Courts of the European Union have not confined themselves to the different types of abuse enumerated by Article 102 TFEU but also challenged numerous other practices. As a general principle, any conduct by dominant firms which

38) See e.g. Commission, Decision 1999/242/EC, *TPS I* (Case IV/36.237), [1999] OJ L 90/6, para. 40.
39) However, the convergence of the different media, the rollout of broadband Internet access and the advancing integration process might lead to multinational or Union-wide media markets in the future.
40) See S. Weatherill/P. Beaumont, *EU Law: The Essential Guide to the Legal Workings of the European Union* (4th edn, 2008), p. 864.
41) ECJ, *Hoffmann-La Roche v. Commission*, [1978] ECR 461, para. 39.
42) Market shares are generally measured by looking at the value and volume of a market, see R. Fowler/J. Skilbeck in: *Bellamy & Child*, para. 9-040.
43) See ECJ, Case C-62/86, *AKZO v. Commission*, [1991] ECR I-3359, para. 60.
44) See e.g. ECJ, Case 40 etc./73, *Suiker Unie*, [1975] ECR 1663, para. 379.
45) See E.-J. Mestmäcker/H. Schweitzer, *Europäisches Wettbewerbsrecht* (2nd ed., 2004), § 25 para. 60.
46) See e.g. ECJ, *United Brands v. Commission*, [1978] ECR 207, paras. 69-81, 85-90.
47) See EGC, Case T-392/99, *Airtours v. Commission*, [2002] ECR II-2585, paras. 62 *et seq.* For an account on the concept after the judgment see e.g. S. Baxter/F. Dethmers, [2006] *ECLR* 148 *et seq.*
48) See ECJ, Case 322/81, *Michelin v. Commission*, [1983] ECR 3461, para. 57.
49) See ECJ, *United Brands v. Commission*, [1978] ECR 207, para. 189; EGC, Case T-65/89, BPB Industries and British Gypsum v. Commission, [1993] ECR II-389, para. 69; Joined Cases T-24/93 et al., Compagnie Maritime Belge Transports v. Commission, [1996] ECR II-1201, para. 107.
50) See e.g. ECJ, Case 6/72, *Continental Can v. Commission*, [1973] ECR 215, para. 26.

seriously and unjustifiably[51] distorts competition or leads to a further weakening of competition will be prohibited in so far as it affects trade between member states.[52] The Courts also stressed that the concept of abuse is an objective concept meaning that the subjective intentions of dominant firms are irrelevant to a finding of abuse.[53]

One can broadly distinguish between two types of abuse: "exploitative" abuse, i.e. the simple exploitation of "consumers" in the relevant market, and "exclusionary" abuse, i.e. the use of dominance to prevent or hinder competition from other "undertakings".[54] According to Article 102(a) and (b) TFEU examples of exploitative conduct are:

- excessive pricing;
- the imposition of other unfair trading conditions;
- the limiting of production, markets or technical development to the prejudice of consumers.

Exclusionary abuse inter alia covers:

- predatory[55] and discriminatory pricing;
- the granting of loyalty rebates,
- the refusal to deal or supply and
- the tying of customers.[56]

II. Article 101 TFEU

Article 101 TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101 TFEU may, however, be declared inapplicable in the case of agreements etc. which contribute to an improvement in the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit (Article 101(3) TFEU). Only agreements etc. that contain no other restrictions than those indispensable to achieve these objectives qualify for an exemption under Article 101(3) TFEU provided that, in addition, they do not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question. In the media sector, Article 101 TFEU gains considerable importance, *inter alia*, for the selling of rights to broadcast media content such as football and film rights.[57]

The primary objective of Article 101 TFEU is to ensure free and fair competition as a means of enhancing consumer welfare and of ensuring efficient allocation of resources. Even though this provision does not directly address the issue of market power, the competition law regime of the EU may not be fully understood without it. Applying Article 101 TFEU requires a two-step analysis. It has to be clarified whether an agreement between undertakings

1. has an anti-competitive object, or actual or potential anti-competitive effects;[58] and
2. brings about pro-competitive benefits that outweigh these restricting effects.[59]

Article 101 TFEU not only covers formal agreements which are legally enforceable. It applies to all kinds of collaboration agreements between trade associations or more informal understandings.[60] The provision applies to horizontal as well as to vertical agreements. This means that it covers not only agreements between competitors acting on the same level of the value chain but also all kinds of restrictive practices occurring in vertical relationships, i.e. between companies active on different levels of production.

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51) Where a dominant undertaking can provide an objective justification, its conduct will not amount to an abuse, see e.g. EGC, *British Airways v. Commission*, [2003] ECR II-5917, para. 293.
52) See R. Fowler/J. Skilbeck in: *Bellamy & Child*, para. 9-040.
53) See ECJ, *Hoffmann-La Roche v. Commission*, [1978] ECR 461, para. 91.
54) See R. Lane, *EC Competition Law*, p. 150; D. Sinclair, [2004] *ECLR* 491 (492 *et seq.*).
55) Predatory pricing is, in essence, the setting of prices by a dominant company at a rather low level in order to eliminate or weaken its competitors, see R. Fowler/J. Skilbeck in: *Bellamy & Child*, para. 9-076.
56) ECJ, *Continental Can v. Commission*, [1973] ECR 215, para. 14.
57) See *infra* C.I.2. and C I.3.2.
58) Commission, Notice 2004/C 101/08, *Guidelines on the Application of Art. 81(3) EC*, [2004] OJ C 101/97, para. 11.
59) Ibid., para. 11.
60) Commission, Decision 84/191/EEC, *Nuovo Cegam* (Case IV/30.804), [1984] OJ L 99/29.

III. The EC merger regulation

A merger occurs when two or more formerly independent entities unite.[61] Naturally, such joining of forces can create a more permanent change on the market than merely temporary agreements between undertakings.[62] These changes may be positive or negative: a merged entity may enhance its efficiency and be able to realise the costs savings and integration gains offered by the internal market. A merger may also avoid an undertaking's failure. The acquisition or strengthening of a position of market power through a merger may, however, also result in an increase in the market price of the products or services on the relevant market and, thus, lead to a distortion of competition. Any merger control regime, therefore, seeks to enable competition authorities to scrutinise *ex ante* the changes in market structure and the possible effects of a proposed merger on competition before deciding on whether or not two or more undertakings may merge.[63]

In 1989, the Council of the EU adopted a first merger control regulation[64] which soon became the most important instrument of the EU's competition policy.[65] On 1 May 2004 the current Merger Regulation, accompanied by the Commission's Horizontal Merger Guidelines,[66] replaced the old merger regime.[67]

Since the 1990s, the media sector has experienced strong concentration tendencies. Therefore, merger control at EU level played and continues to play an important role. To date, the Commission has handled over 140 cases under the Merger Regulation dealing with the media sector and in particular with mergers in the pay-TV sector.[68]

1. Scope of the merger regulation

Pursuant to its Article 1(1), the Merger Regulation applies to all concentrations. A concentration arises where a change of control on a lasting basis results either from the merger of two or more previously independent undertakings, or from the acquisition of control of an undertaking. It is irrelevant whether the change of control is triggered by a purchase of securities or assets, a contract or any other means (Article 3(1) ECMR).

The scope of the Merger Regulation is further limited by a rule of jurisdiction expressed through the requirement that the concentration must have an EU dimension for EU law to apply. According to Article 1(2) ECMR, concentrations have a Union dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million and the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same member state. In addition to these general thresholds, Article 1(3) ECMR sets out special thresholds catching concentrations that even though they are below the thresholds of subsection 2, show consequences in at least three member states. Notably, for the Merger Regulation to apply, no cross-border concentration is required. However, even where a concentration has a Union dimension it may be dealt with by the member states' competition authorities after referral upon request according to Article 4(4) ECMR.

61) A.Jones/B.Sufrin, *EC Competition Law*, p. 847.
62) Cf. D.G. Goyder, *EC Competition Law*, p. 335.
63) A.Jones/B.Sufrin, *EC Competition Law*, p. 699.
64) Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations Between Undertakings, [1989] OJ L 395/1, corrigendum [1990] OJ L 257/14.
65) Since the coming into force of the ECMR in 1990 until 30 June 2012, a total number of 5 009 concentrations have been notified to the Commission.
66) Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2004] OJ C 31/03, hereafter referred to as Horizontal Merger Guidelines.
67) For an account of the changes, see e.g. T.Soames/S.Maudhuit [2004] *ECLR* 57 *et seq.*, 75 *et seq*. and 144 *et seq*.
68) See European Commission case search on: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2. (Date of research 22 July 2012). For specific media cases under the Merger Regulation see *infra* C.I.3.2 and C.II.2.1.

2. Market definition and the competitive assessment

A proper definition of the relevant market is a must for assessing the effects of any concentration on competition.[69] After having delineated the relevant product and geographic markets, the Commission has to conduct the test pursuant to Article 2 ECMR to determine whether a concentration is compatible with the common market. Council Regulation 139/2004/EC reworded the substantive test for that merger appraisal. According to Article 2(3) ECMR, a concentration which would **s**ignificantly **i**mpede **e**ffective **c**ompetition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market (so-called SIEC-test).

The meaning of the concept of significant impediment to effective competition can be derived from the objectives of the Merger Regulation and from the Horizontal Merger Guidelines.[70] Merger control seeks to prevent concentrations that, by significantly increasing the market power of firms, would be likely to deprive consumers of the benefits of effective competition, such as low prices, high quality products, a wide selection of goods and services, and innovation.[71] "Increased market power" in this sense is the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.[72]

According to Recital 25 of the ECMR 2004, a concentration may significantly impede effective competition through causing either *non-coordinated* effects or *co-ordinated* effects. A concentration has co-ordinated effects where it changes the nature of competition in such a way that firms which previously were not co-ordinating their behaviour, are now significantly more likely to do so by raising prices or otherwise harming effective competition.[73]

Non-coordinated effects occur where a concentration eliminates important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to co-ordinated behaviour.[74] Recital 25 ECMR states that the notion of "significant impediment to effective competition" in Article 2(2) and (3) ECMR should be interpreted as extending, beyond the concept of dominance, to the anti-competitive effects of a concentration that result from the non-coordinated behaviour of those undertakings that otherwise lack a dominant position on the market concerned. Accordingly, a merger may cause non-coordinated effects by affording an undertaking the market power which enables it to behave to an appreciable extent independently of its competitors and customers and ultimately of its consumers.

Non-competition objectives do not play a role in the assessment of concentrations. This is particular true for media pluralism even though the following reasoning could theoretically lead to a different result. According to Article 167(4) TFEU, the EU – when acting under other provisions of the Treaties – shall take cultural aspects into account and especially respect and promote the diversity of its cultures. Being a so-called integration provision,[75] Article 167(4) TFEU might be construed so as to oblige the Commission to also consider the impact that media concentrations may have on media pluralism when assessing the compatibility of mergers and acquisitions with the common market. In addition, Article 21(4) of the Merger Regulation recognises that member states may take appropriate measures to protect legitimate interests, such as plurality of the media. Obviously, securing media pluralism may be achieved as a side-effect of attempts to avoid the creation or strengthening of a dominant position.[76]

69) See EGC, Case T-342/99, *Airtours plc* v. *Commission*, [2002] ECR II-2585, para. 19; ECJ, Joined Cases C-68/94 and C-30/95, *France* v. *Commission*, [1998] ECR I-1375, para. 143. There are some minor differences in the market definition process under Article 102 TFEU and the Merger Regulation, see R. Capito in: EMR, *Media Markets Definitions 2003*, paras. 1.13 *et seq*.

70) For an analysis of the meaning of the SIEC-test, see S.Baxter/F.Dethmers, [2005] *ECLR* 380 *et seq*.; J. Schmidt, [2004] *CMLRev* 1555 *et seq*.;

71) Horizontal Merger Guidelines, para. 8.

72) Ibid.

73) Co-ordinated effects may also exist where co-ordination is made easier, more stable or more effective for firms which were co-ordinating prior to the merger, see Commission, Horizontal Merger Guidelines, para. 22 lit. b).

74) Commission, Horizontal Merger Guidelines, para. 22 lit. a).

75) See P.J.G.Kapteyn/P.VerLoren van Themaat, *Introduction to the Law of the EC,* at p. 1114.

76) See E. Psychogiopoulou, [2005] *ELRev* 838 (858).

Nevertheless, this non-competition objective has not yet been explicitly recognised as an objective of the EU's merger control.[77]

IV. The regulatory framework

One of the main objectives of the regulatory framework is to harmonise the regulation of electronic communications in the internal market. In this respect, the harmonisation of procedural requirements has become crucial. This is best reflected by the detailed procedure of market regulation prescribed by Articles 15 and 16 Framework Directive.[78] This system ensures that National Regulatory Authorities (NRAs) throughout the EU follow the same rules when imposing, maintaining or withdrawing regulatory obligations.

The process of market regulation which is mainly implemented by the NRAs roughly follows three steps:[79] firstly, the NRAs define the relevant markets within the electronic communications sector; secondly, they analyse the relevant markets in order to assess whether or not effective competition exists; and thirdly, if they find a lack of effective competition on a market, they impose appropriate remedies according to the Regulatory Framework, namely the Access Directive[80] and the Universal Service Directive.[81]

1. Market definition

According to Article 15(3) Framework Directive, NRAs shall define relevant markets that are appropriate to national circumstances in accordance with the principles of competition law. The purpose of market definition under the regulatory framework is to identify the competitive constraints faced by firms. In order to promote a harmonised approach of national procedures used to define markets, Article 15 Framework Directive empowers the Commission to adopt a recommendation on relevant product and service markets, identifying the markets within the electronic communications sector which warrant sector-specific regulatory intervention. After having issued a first recommendation in 2003, the Commission issued its second recommendation[82] in 2007 naming seven product and service markets within the electronic communications sector susceptible to *ex-ante* regulation. Unlike in 2003, the Commission no longer regards the market for broadcasting transmission services (to deliver broadcast content to end users) as a market susceptible to *ex-ante* regulation.[83] NRAs are obliged *to take utmost account* of the Commission's recommendation in the market definition procedure.[84] In fact, only a few NRAs have adopted market definitions which are not in line with the definitions recommended by the Commission.

2. Market analysis – effective competition

Article 16(2) of the Framework Directive stipulates that if the Universal Service Directive (USD) or the Access Directive require a decision of the NRAs about whether or not they will impose, maintain, amend or withdraw obligations on undertakings, the NRAs shall determine on the basis of their market analysis referred to in Article 16(1) Framework Directive whether a relevant market is *effectively*

77) See Commission, Case COMP/M.5932, 21 December 2010, *NewsCorp/BSkyB*, paras. 304 *et seq*; see also E. Psychogiopoulou, [2005] *ELRev* 838 (858), identified Commission, Decision 2004/422/EC, *Lagardère/Natexis/VUP* (Case COMP/M.2978), [2004] OJ L125/54 as being the only merger case where "serious efforts were deployed to reconcile cultural with economic precepts". See also Economic and Social Committee, Opinion on "Pluralism and concentration in the media", [2000] OJ C 240/19, paras. 2.1 *et seq*.

78) Directive 2002/21/EC, supra footnote 5.

79) For a more thorough analysis of this process, see J.-D. Braun/R. Capito, in: Ch.Koenig/A.Bartosch/J.-D.Braun/M.Romes (eds), *EC Competition and Telecommunications Law* (2nd edition, 2009), pp. 343 *et seq*.

80) Directive 2002/19/EC supra footnote 5.

81) Directive 2002/22/EC supra footnote 5.

82) Commission Recommendation 2007/879/EC, on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation, 2007 [OJ] L 334/65. The recommendation is currently under review.

83) For a broader account on this market see C.III.1.

84) Article 15(3) Framework Directive.

competitive. Where a market is deemed to be effectively competitive, NRAs shall not impose or maintain any sector-specific regulatory obligations and shall, where applicable, remove existing obligations. Where a market is not effectively competitive, NRAs shall impose sector-specific regulatory obligations, or maintain or amend such obligations where they already exist (Article 16(3) and (4) Framework Directive). There is no effective competition in a market if one or more undertakings have significant market power in that market. The market analysis is essentially the analysis of a market to establish the existence of significant market power. The concept of significant market power is, therefore, the central concept of EU telecommunications law. As a rule, undertakings will only be subject to sector-specific regulation where they are found to have significant market power.

3. Imposing of appropriate regulatory remedies

If a market lacks effective competition, the NRAs must impose appropriate remedies on the undertaking with significant market power according to the Access Directive and the USD. The regulatory framework provides NRAs with a full set of instruments to address the competition problems identified in a market. These remedies range from the detailed regulation of access (e.g. to a network or parts of it), resale and non-discrimination obligations to *ex-ante* regulation of access fees on the basis of costs. In 2009, the EU legislator even added the power to impose functional separation on network operators as an *ultima ratio* to this toolbox of remedies.

Exceptionally, the regulatory framework also enables NRAs to intervene in markets where they do *not* find significant market power. The most important examples are the power to intervene to ensure end-to-end connectivity of users and the power to ensure accessibility for end-users to digital broadcasting services.[85] In addition, the regulatory framework contains a large number of other regulatory obligations which member states – as the case may be – must or may impose on undertakings and which do not primarily aim to regulate market power but rather ensure consumer or data protection or other regulatory goals. These obligations will not be covered here.

C. Applying competition law and the regulatory framework to the media sector

I. Audiovisual media services and enabling services

An audiovisual media service is defined by the EU's Audiovisual Media Services (AVMS) Directive as a service under the editorial responsibility of a media service provider, the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks. Such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service.[86]

1. Relevant markets

With regard to AVMS the European Commission has produced a large number of decisions defining markets in the media sector. For instance, the usual supply chain in TV broadcasting consists of the licensing and acquisition of audiovisual content, the wholesale supply of TV channels and the provision of retail TV services (linear and non-linear). The following overview takes into account the major definitions of relevant markets adopted in merger as well as in antitrust cases**.**

1.1. TV broadcasting

With regard to TV broadcasting markets, the Commission held that the main distinction needs to be drawn between the market for retail distribution of pay-TV (subscriptions) and the market

85) See Article 5(1) Access Directive.

86) See Article 1 lit. a) i) of Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1.

for free-to-air TV (advertising). This is because of the different trading relationships involved, the different conditions of competition, the price of the services and the characteristics of the two types of television.[87] In the case of advertising-financed private television and public service television financed through fees and partly through advertising, a trading relationship exists between the programme supplier and the advertising industry. In the case of pay-TV, however, the (main) trading relationship is between the programme supplier and the viewer as subscriber.[88] The Commission, in its *Newscorp/Telepiù* decision, hinted that the ongoing digitalisation of free-to-air TV could in the future blur the distinction between the two markets.[89] In its recent *News Corp/BSkyB* decision,[90] however, the Commission kept the distinction despite the continuous spread of digital TV throughout the EU and regardless of considerable criticism[91] of the criterion of trading relationships.

The Commission recognised, on the one hand, that free-to-air TV exercises a certain constraint on pay-TV and that there is an interaction between both markets, in particular in countries "where free-to-air TV offers a wide choice of channels, some containing what would be considered as attractive contents". On the other hand, in the Commission's view this did not suffice for giving up the distinction of the two markets because the differences in financing between free-to-air TV and pay-TV and the fact that, from the standpoint of the viewers, these offerings are not substitutable, mean that these services belong to separate product markets. The Commission also pointed to its findings in *NewsCorp/Premiere* that pay-TV and free-to-air TV are still clearly distinct markets because of the different type of content and programme schedules offered by pay-TV and free-to-air TV, limited demand-side substitutability due to the absence of subscription fees in free-to-air TV and limited supply-side substitutability due to the different business models of the two types of broadcasters.

The Commission does not see a reason to distinguish between markets for analogue and digital pay-TV.[92] Whether or not (pay-TV) retail markets need to be subdivided according to the modes of transmission of TV signals such as terrestrial, cable, satellite and DSL may differ *inter alia* according to the different degree of penetration that these modes achieve in the different member states. Although the Commission found indications for the existence of such submarkets with regard to the French pay-TV markets, the question was left open in *UGC/Noos*.[93] The Commission has also abstained from drawing a distinction concerning transmission modes in its most recent decisional practice.[94] However, in *Nordic Satellite Distribution*, the Commission considered that, in the Nordic region, DTH satellite distribution of pay-TV constituted a market distinct from the operation of pay-TV via cable networks.[95]

So far, so-called pay-per-view (PPV) or near-video-on-demand[96] (NVOD) services offered by pay-TV operators alongside regular pay-TV services such as basic tier and premium (film, sport and special interest) channels, have not been found to constitute markets of their own.[97] Generally,

87) See e.g. Commission, Case COMP/M.5121, 25 June 2008, *NewsCorp/Premiere*, para. 16. The Commission's approach to delineate TV markets by having recourse to the views of the consumer is criticised by E. J. Carter [2001] *World Competition* 93, 100 *et seq*.

88) Commission, *Case COMP/JV.37,* 21 March 2000*, BSkyB/Kirch Pay TV*, para. 24.

89) Basically, some of the differences between free-to-air TV and pay-TV – the different hardware requirements and the distinct functionalities – could cease to exist in the future, see Commission, Decision 2004/311/EC, *Newscorp/Telepiù* (Case COMP/M.2876), [2004] OJ L110/73, para. 34 *et seq.* In 2010, the Commission released Newscorp from a commitment made in the original merger procedure, see Commission, Press Release IP 10/983 of 20 July 2010. The Commission may modify commitments if the market circumstances have changed significantly. Although this was the case in the Italian TV market, the Commission did not touch upon the issue of market definition.

90) Case COMP/M.5932, 21 December 2010, *News Corp/BSkyB*, para. 99.

91) See e.g. German Monopoly Commission [Monopolkommission], XI. Hauptgutachten 94/95, paras. 240, 936 and XIII. Hauptgutachten 1998/99, Tz. 611.

92) Digital TV is only a further development of analogue TV and, therefore, does not constitute a separate relevant product market from a competition point of view. Similarly, it can be expected that high-definition television (HDTV) as a further development of digital television standards will not lead to the delineation of separate markets for HDTV.

93) See Commission, Case COMP/M.3411, 17 May 2004, *UGC/Noos*, para. 25

94) Commission, Case COMP/M.5932, 21 December 2010, *NewsCorp/BSkyB*, para. 105; Case COMP/M.5121, 25 June 2008, *NewsCorp/Premiere*, para. 20.

95) See Commission, Decision 96/177/EC, *Nordic Satellite Distribution* (Case IV/M.490), [1995] OJ L53/20, para. 58 *et seq.*

96) With NVOD subscribers wanting to watch a film are batched up for the next start time. NVOD can be seen as a pre-stage of video-on-demand (VoD) services which leave it at the complete discretion of the end-consumer to watch a given film at a given point in time.

97) However, in its last decision dealing with theses issues, the Commission saw indications for retail PPV/NVOD services making up a market separate from the market for pay-TV channel services, see Commission, Case COMP/C.2. 38.287, 29 December 2003, *Telenor/Canal +/Canal Digital*, para. 55.

the geographical scope of TV broadcasting markets is held to be national or, at most, relating to linguistically homogeneous areas. This view is primarily founded in the different regulatory regimes, cultural factors, copyright restrictions, and most importantly language barriers.

1.2. Acquisition of broadcasting rights

Audiovisual content comprises all the "entertainment products" that can be broadcast via TV. Upstream of broadcasting markets, broadcasters and intermediaries seek to acquire from rights owners content to broadcast. Following a step-by-step approach, the Commission's decisional practice defined several markets at this level. In particular it distinguishes between rights to sports events and premium films.[98] Such content is regarded to be a "driver" for pay-TV. In particular, sport programmes covering widely popular sports or major international events are often able to achieve high audience shares and are generally considered to be particularly suited to carry advertisements, as reflected by the amount of sponsorship involved in these programmes.[99]

The markets for sports rights are further segmented. In *Eurovision*, the Commission saw "a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international".[100] Major sports events such as the Summer and the Winter Olympic Games, and the Football World Cup, appear to be largely independent of whatever other major sports are broadcast at a similar time. Therefore, broadcasters will be inclined to pay much higher prices for these events.[101] Moreover, in *Newscorp/Telepiù*[102] and *UEFA Champions League*[103] the particularities of football as broadcasting content led to the definition of a separate market for broadcasting rights of football events played regularly throughout the year. The Commission argues that only rights to broadcast football events such as national (top) league football or the UEFA Champions League may attract high audience figures, specific audiences or provide a certain brand image for broadcasters.

The Commission also separates the markets for the acquisition of film rights into a market for broadcasting rights for feature films and a market for broadcasting rights for made-for-TV programmes.[104] The latter market excludes productions which are made by broadcasters and are only intended for captive use, so-called in-house productions.[105] The Commission has also considered – although it has left this question open – that a distinction may need to be drawn between US-produced films and other films, indicating that the relevant market for films is mainly composed of commercially "successful films", which in general tends to correspond to films produced by the Hollywood majors.[106]

In *Vivendi/Canal+/Seagram*, distinct markets for broadcasting rights for films were identified according to the different timing and windows of the exhibition of films.[107] Film rights are generally exploited according to a special exhibition schedule (so-called "pay periods" or "windows").[108] Premium films can be broadcast on pay-TV only after the film has been shown in theatres, been available on

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98) See Commission, Case IV/M.1574, 3 August 1999, *Kirch/Mediaset*, para. 15; Decision 1999/242/EC, *TPS I* (Case IV/36.237), [1999] OJ L 90/6, para. 34.

99) See Commission, Case IV/M.779, 7 October 1996, *Bertelsmann/CLT*, para. 18. The reasoning employed by the Commission to draw a distinction between sports and film rights has been criticised by E. J. Carter [2001] *World Competition* 93, 111 *et seq.*

100) Commission, Decision 2000/400/EC, *Eurovision* (Case IV/32.150), [2000] OJ L 151/18, para. 43. The Commission's Decision was successfully challenged before the EGC. However, the Court, in fact, upheld the market definition adopted by the Commission, see EGC, Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, *Métropole télévision SA*, [2002] ECR°II-3805, para. 57. See also D. Brinkman/E. Vollebregt, [1998] *ECLR* (281) 283 *et seq*.

101) Commission, Decision 2000/400/EC, *Eurovision* (Case IV/32.150), [2000] OJ L 151/18, para. 42.

102) Commission, Decision 2004/311/EC, Newscorp/Telepiù (Case COMP/M.2876), [2004] OJ L110/73, para. 66.

103) See Commission, Decision 2003/778/EC, *UEFA Champions League* (Case C-2/37.398), [2003] OJ L 291/25; para. 77. See also Commission, Case COMP/C-2/37.214, 19 January 2005, *Bundesliga*, para. 17 and Case COMP/M.4519, 18 January 2007, *Lagardère/Sportfive*, para. 10.

104) See Commission, Case IV/M.2050, 13 October 2000, *Vivendi/Canal+/Seagram*, para. 17. Confusingly, this market is also sometimes referred to as the market for TV productions, see Commission, Case IV/M.779, 7 October 1996, *Bertelsmann/CLT*, para. 17; Case IV/M.553, 20 September 1995, *RTL/Veronica/Endemol*, para. 29.

105) See Commission, Case IV/M.1958, 29 June 2000, *Bertelsmann/GBL/Pearson TV*, para. 11; see also Commission, Case COMP/M.4353, 22 September 2006, *Permira/All3media Group*, para. 10.

106) Case COMP/M.5932, 21 December 2010, *NewsCorp/BSkyB*, para. 65.

107) See Commission, Case IV/M.2050, 13 October 2000, *Vivendi/Canal+/Seagram*, para. 18. See also Decision 2004/311/EC, *Newscorp/Telepiù* (Case COMP/M.2876), [2004] OJ L110/73, para. 34 *et seq.*, para. 59.

108) See M. Kuhr, *Media Windows in Flux – Challenges for Audiovisual Media Chronology*, IRIS *plus* 2008-4.

video/DVD and offered on a pay-per-view basis.[109] Films broadcast in the time period of usually six months thereafter, are so-called first-window films. The first window is followed by a second window of approximately the same duration before films, finally, become available for the free-to-air TV market. In this respect, the Commission defined a market for the acquisition of broadcasting rights for so-called first-window films by pay-TV operators.[110]

Regarding broadcasting markets the Commission is of the opinion that the geographical scope of markets for the licensing/acquisition of broadcasting rights to audiovisual content (film and other content) is national or, at most, relates to linguistically homogeneous areas. The main reason is that broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only apparent exceptions of licensing for a linguistic area such as Germany, Austria and parts of Switzerland or for areas with a particular common socio-cultural background (for example Scandinavia).[111]

2. Competition law cases dealing with AVMS

There is a considerable number of judgments by the Courts of the Union and of Commission decisions that apply competition law to AVMS.[112] For reasons of space, this section only highlights some of them in order to give the reader an overview.[113]

2.1. FA Premier League v. Karen Murphy – Exclusive rights and territorial restrictions

In a very recent case, *FA Premier League v. Karen Murphy*, the ECJ dealt with issues relating to the exclusive licensing of (football) broadcasting rights to broadcasters.[114] Mrs. Murphy, the owner of a pub in the UK, showed live in her pub Premier League football matches using a Greek satellite system. The FA (Football Association) Premier League had granted the licence for the live broadcasting of Premier League football matches in the UK to Sky and ESPN. At the same time, the (vertical) licensing agreements between the FA Premier League and broadcasters prohibited broadcasters from supplying decoding devices that would allow their broadcasts to be decrypted and used outside the territory for which the broadcasters held the licence. The question that brought the case before the ECJ was whether the licence agreements between the Premier League and the broadcasters infringed competition law – that is Article 101 TFEU – by restricting competition.

The ECJ held, in essence, that "an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market".[115] Thus, agreements which aim to partition national markets according to national borders or make the interpenetration of national markets more difficult must be regarded as agreements restricting competition. In fact, the respective provisions in the broadcasting licences eliminated all (cross-border) competition between broadcasters for those services.

The ECJ also maintained that the territorial restrictions in the broadcasting licences did not qualify for an exemption under Article 101(3) TFEU. Competition law recognises that the aim of intellectual property rights is to ensure protection for the rightsholders concerned of the right to exploit commercially the marketing or the making available of the protected subject matter, in particular by the granting of licences in return for payment of remuneration.[116] However, this does not guarantee them the opportunity to demand the highest possible remuneration.[117] Rightsholders are ensured only appropriate remuneration for each use of the protected subject matter. In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In

109) See Commission, Case COMP/JV.37, 21 March 2000, *BSkyB/Kirch Pay TV*, para. 43.
110) See Commission, Case IV/M.2050, 13 October 2000, *Vivendi/Canal+/Seagram*, para. 18.
111) Case COMP/M.5932, 21 December 2010, *NewsCorp/BSkyB*, para. 73.
112) For an exhaustive case list, see http://ec.europa.eu/competition/sectors/media/cases.html
113) Some other cases have already been covered in section C.I.1. or will be covered in section C.I.3.
114) ECJ, Joined Cases C-403/08 and C-429/08 [2011] ECR I (not yet reported).
115) Ibid., para 139.
116) See, for instance, Joined Cases C-92/92 and C-326/92, *Phil Collins and Others*, [1993] ECR I-5145, para. 20.
117) ECJ, Joined Cases C-403/08 and C-429/08 [2011] ECR I (not yet reported), para. 108.

particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service.[118]

In the case in question however, the rightsholders received a premium payment in exchange for the guarantee of an absolute territorial exclusivity. This, in turn, led to artificial price differences between the partitioned national markets. Therefore, the ECJ concluded that a restriction which consists in the prohibition on using foreign decoding devices could not be justified in light of the objective of protecting intellectual property rights. It was consequently regarded as infringing Article 101 TFEU.

The ECJ adopted a similar approach to intellectual property rights under Article 102 TFEU. In *Kanal 5 and TV 4*,[119] the question arose under which circumstances a copyright management organisation would abuse its dominant position in regard to remuneration paid for the television broadcast of copyright protected musical works. This would be the case if the remuneration constituted excessive pricing within the meaning of Article 102 TFEU. The ECJ held that a remuneration model according to which the amount of the royalties corresponds partly to the revenue of the television channels is not abusive as long as that part is overall proportionate to the quantity of copyrighted musical works actually broadcast or likely to be broadcast. This, however, only holds true for as long as there is no other method to identify more precisely the use of these works and the audience reached. In addition such a method should not disproportionately increase the costs for the management of contracts and the supervision of the use of the works managed.[120]

2.2. Apple – Selling of online media content

In 2007, the Commission opened formal proceedings into alleged territorial restrictions in online music sales agreements between major record companies and Apple.[121] Apple operates a series of iTunes online stores in the European Economic Area which sell music and video downloads. Although the following case deals with music distribution there is no reason why the same considerations should not also apply to video content.

Apple basically had established different (online) stores in the UK and other European countries. iTunes verified the consumers' country of residence through their credit card details. As a result, a German resident could only buy music from the German iTunes store, a UK resident only from the UK store. This practice caught the Commission's attention as the prices for the downloading of music in the different member states varied. Music downloads in the UK were significantly more expensive than in other EU countries.

The Commission alleged that distribution agreements between Apple and major record companies contained territorial sales restrictions which violated Article 101 TFEU. Had this been confirmed the same approach the ECJ took in *FA Premier League v. Karen Murphy*[122] with regard to territorial restrictions would have applied. However, the antitrust proceedings further allowed the Commission to clarify that there was no agreement between Apple and the major record companies regarding how the iTunes stores were organised in Europe.[123] It turned out that the structure of the iTunes store was rather chosen by Apple to take into account the country-specific aspects of copyright laws. The fact that Apple during the investigation decided to equalise prices for downloads of songs from its iTunes online stores in Europe led the Commission in 2008 to formally close the proceedings.

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118) Cf. ECJ, Case C-61/97, *FDV,* [1998] ECR I-5171, para. 15, and Case C-52/07, *Kanal 5 and TV 4*, [2008] ECR I-9275, paras. 36 *et seq*.
119) Case C-52/07, *Kanal 5 and TV 4*, [2008] ECR I-9275.
120) See ECJ, Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-9275.40. For a fuller account on the application of Article 102 TFEU to collection societies see R.Capito, in Castendyk/Dommering/Scheuer, *European Media Law*, 2008, Article 82 EC, paras. 41 *et seq*.
121) Cases COMP/C-2/39154, *PO/iTunes*, and COMP/C-2/39174. See Commission, Press Release MEMO/07/126 of 3 April 2007.
122) See *supra* C.I.2.1.
123) See Commission, Press Release IP/08/22 of 9 January 2008.

3. Specific competition law and regulatory issue: must-offer

With the ongoing digitalisation of media content, the availability of new forms of distributing and selling this content to end-users, and in particular the increasing importance of "exclusive" content, some platform operators and service providers complain that they cannot obtain access to certain types of content. The issue has been – at least in some circumstances – further aggravated by the fact that some content owners have been very reluctant to license their content to new media such as online music platforms, IPTV or mobile TV platforms.[124] It is, however, almost impossible for IPTV providers, for instance, to enter a market without offering their customers the most popular TV channels because they cannot compete with cable and satellite TV (platforms). While this issue has been addressed by media regulation in some EU member states (and more may follow), the question arises how EU competition law and the regulatory framework deal with the problem.

3.1. Article 102 TFEU – Must-offer from dominant undertakings

The refusal to supply (certain) media content can be addressed under Article 102 TFEU if the conditions of an abuse by a dominant undertaking are met. The application of Article 102 TFEU to these cases is, however, highly controversial. In particular, where the requested content was protected by (national) copyright laws (as in the media sector), the Union Courts and the Commission have struggled to reconcile the need to protect exclusive intellectual property rights and the fundamental principles of the Treaty regarding competition. Article 102(b) TFEU prohibits dominant undertakings from limiting production, markets or technical development to the prejudice of consumers. The subcategory of "refusal to supply" was added to this category of abuse.[125] The leading case on refusal to grant access to content is *Magill.*[126] There, the three main broadcasters in Ireland each published, either themselves or through subsidiaries, weekly television guides on their own programming. They refused to license their weekly programme listings (schedules)[127] to Magill TV Guide and thus deprived Magill of the ability to publish a comprehensive TV guide comprising all listings. The programme listings were copyrighted under national law.[128] The Commission decision, which was upheld by the ECJ, found that the broadcasters had infringed Article 102(b) TFEU.[129]

In its ruling, the ECJ maintained that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position,[130] cannot in itself constitute an abuse of a dominant position.[131] However, the exercise of an exclusive right may, in "exceptional circumstances", involve abusive conduct. The ECJ ruled that the circumstances in *Magill* were indeed exceptional. Firstly, the refusal to provide the requested information had prevented the appearance of a new product for which there was a consumer demand, namely the publishing of a comprehensive weekly guide to television programmes. Secondly, the refusal lacked an objective justification. Thirdly, the broadcasters denied access to raw material which was "indispensable" for the product (the compilation of a TV Guide), whereby the rightsowners reserved to themselves the secondary market (in this case the market of weekly television guides) and thus excluded all competition on that market.

The conditions for a finding of refusal to supply (first named in *Magill*) have since then been construed narrowly. In *IMS Health*, the ECJ maintained that an undertaking holding a copyright acts

124) Conventional media companies had and sometime still have little incentive to disseminate or licence rights across new media, because of fears that their core revenues will be cannibalised, see N. Nikolinakos, [2005] *CTLR* 13 (13).

125) See ECJ, Case 6-7/73, *Commercial Solvents Corporation et al. v. Commission,* [1974] ECR 223.

126) ECJ, Case C-241/91 *Magill*, [1995] ECR I-743.

127) The weekly listings of future programmes were produced in the course of the programme scheduling process and were available two to four weeks before transmission.

128) The fact that the programme information itself is copyright protected is quite a unique feature of Irish copyright law.

129) See Commission, Decision 89/205/EEC, *Magill TV Guide/ITP, BBC and RTE* (Case IV/31.851), [1989] OJ L 78/43, para. 23. The three broadcasters "use copyright as an instrument of the abuse, in a manner which falls outside the scope of the specific subject-matter of that intellectual property right".

130) The mere ownership of an intellectual property right does not, of itself, confer a dominant position on the undertaking in question, see ECJ, Case 40/70, *Sirena v. EDA*, [1971] ECR 69, para. 16.

131) ECJ, Case C-241/91 *Magill*, [1995] ECR I-743, para. 49. See also ECJ, Case 238/87, *Volvo v. Veng*, [1988] ECR 6211, para. 7 *et seq.*

abusively if it refuses to give access to a product or service, which is indispensable for carrying on a particular business, if the following three cumulative conditions are satisfied:

- the refusal is preventing the emergence of a new product for which there is a potential consumer demand,
- the refusal is unjustified and
- it is such as to exclude any competition on a secondary market.[132]

Furthermore, it is necessary that two different stages of production can be identified and that they are interconnected in that the upstream product is indispensable for supply of the downstream market.[133] Other cases have shown that the criterion of “indispensability” of content for the business of the company trying to acquire the content is not easily fulfilled.[134]

It remains doubtful whether Article 102 TFEU is an effective tool to achieve “must-offer” from broadcasters. In many cases broadcasters will not be in a dominant position.[135] If a broadcaster is dominant, however, it may be obliged to offer its TV channels on non-discriminatory terms if the channels are indispensable to compete on the secondary downstream market. However, considering the fact that competition proceedings based on Article 102 TFEU may take some time (which is detrimental in a sector developing as fast as the media sector) it does not come as a surprise that, for instance, IPTV operators have not enforced must-offer through this provision of competition law so far.

3.2. Article 101 TFEU and the ECMR – Must-offer as a condition

Having highlighted the shortfalls of Article 102 TFEU concerning right owners’ refusal to give media service operators access to content, it seems interesting to see how the Commission tackled the related competition problems under Article 101 TFEU[136] and the Merger Regulation. The Commission has different instruments at its disposal for enforcing competition under these provisions than it has for Article 102 TFEU: under Article 101 TFEU the Commission may oblige undertakings to respect the commitments which they offered in order to meet the competition law concerns of the Commission about an agreement involving the undertakings.[137] Under the Merger Regulation the Commission can attach conditions to a declaration of compatibility and/or to ensure compliance with any commitments agreed.[138]

Based on Article 101 TFEU, for instance, the German Football League and the FA Premier League were forced to make available rights, namely to sell media rights for top league football matches, to broadcast content on mobile phones.[139] The commitments, however, did not go so far as to impose the obligation to sell these rights on a non-exclusive basis. For someone seeking access to content, decisions under Article 101 TFEU have the clear advantage that the commitments are directly enforceable in national courts. In *Newscorp/Telepiù*,[140] a merger case, the Commission imposed both structural and behavioural conditions on the merged entity in order to facilitate and promote competition in the Italian pay-TV market. The primary object of the remedy package was to ease access for TV operators to premium content. Newscorp *inter alia* had to waive its exclusive rights for non-satellite transmission of

132) ECJ, Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 38. See also D. Ridyard, [2004] *ECLR* 669 (670) who puts the economic foundation of the first two conditions into question.
In its Decision, Case COMP/37.792, 24 March 2004, *Microsoft/Windows 2000*, the Commission seems to have dispensed with the third condition that all competition on the secondary market must be eliminated. In fact, the dominant firm’s market share on the relevant server software market was estimated at around 60%. See Microsoft’s appeal in Case T-201/04, *Microsoft v. Commission,* and Case T-167/08 *Microsoft v. Commission*.

133) ECJ, Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 38.

134) See EGC, Case T-504/93, *Tiercé Ladbroke v. Commission*, [1997] ECR II-923.

135) Noteworthy, the German Federal Cartel Office (Bundeskartellamt) has repeatedly found the two big German private broadcasters (Pro7Sat1 and RTL) to be jointly dominant on the TV advertising market, see Bundeskartellamt, Press Release of 18 March 2011, http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-03-18_PM_RTL-P7S1__Final.pdf

136) See, for instance, Commission, Decision 2003/778/EC, *UEFA Championsleague* (Case C.2/37.398), [2003] OJ L 291/25, paras. 43 *et seq.* and Case C.2/37.214, 19 January 2005, *Bundesliga*, Annex Section 4.8. By these decisions, rights owners were forced to also offer rights to broadcast sports contents via 3G.

137) Article 9 Regulation No. 1/2003, [2003] OJ L 1/1.

138) See Article 6(1) lit. a and Article 8(2) ECMR.

139) Commission, Decision 2004/C 115/02, *FA Premier League* (Cases C.2/38.173 and 38.463), [2003] OJ L 115/3, and Case COMP/C-2/37.214, 19 January 2005, *Bundesliga*, Annex Section 4.8.

140) Commission, Decision 2004/311/EC, *Newscorp/Telepiú* (Case COMP/M.2876), [2004] OJ L 110/73.

films, top football and other sports events.[141] In addition, it was forced to offer premium contents on a wholesale basis to non-satellite operators.[142]

These examples of decisional practice suggest that Article 101 TFEU and the Merger Regulation can prove much more powerful for addressing the issue of must-offer than Article 102 TFEU.

3.3. Must-offer under the regulatory framework

The regulatory framework does not explicitly address the issue of must-offer. According to Article 31 of the Universal Service Directive (USD), member states may impose *must-carry* obligations, for the transmission of specified radio and television broadcast channels on undertakings providing electronic communications networks.[143] It is obvious from the wording of Article 31 USD that member states are not obliged to establish a must-carry regime but may do so. Clearly, there is no obligation on member states to establish a must-offer regime. At the same time the regulatory framework does not prohibit member states from adopting rules on must-offer. Given the breadth and the level of detail of the regulatory framework one might argue that member states may only regulate where the regulatory framework explicitly gives them this discretion. Must-offer obligations deal first and foremost with access to content. As already mentioned, the regulatory framework does not cover the content of services delivered over electronic communications networks and services. Following this line of thought, the regulatory framework does not have to be seen as preventing member states from establishing rules on must-offer. Therefore, calls for combining must-carry and must-offer in a way that broadcasters with must-carry status be subject to a must-offer obligation to provide their programmes to all platform providers[144] do not appear to be completely unreasonable, particularly when these are based on the intention to provide a level playing field for these two different players in the value chain.[145] They do not find any support, however, in the provisions of the Regulatory Framework.

II. Platform operators and converged services

The notion "media platform" describes a variety of services and is – also due to ever evolving markets – far from having a clear and precise meaning. In essence, it catches all (digital) media services that allow real-time and/or delayed delivery of AVMS to multiple networks such as fibre, copper, mobile, cable, satellite or digital terrestrial broadcasting networks. At the same time, there are numerous devices to receive the content made available through the platform such as Smart TVs, set-top boxes, computers, smart phones or tablets.[146] With the ongoing process of convergence, the increased availability of fixed and mobile broadband connections and innovations in the terminal market, media platforms become more and more important compared to traditional forms of media consumption.

1. Relevant markets

Many of the relevant markets on which platform operators are active have been detailed above.[147] However, this section will look closer at those markets which specifically deal with the issue of operating AVMS platforms. These issues are best illustrated by the Commission's decision in *Telenor/Canal+/Canal Digital*,[148] although the case dates back to 2003. The complex agreements in this case

141) Ibid., Annex Part II. 2.
142) Ibid., Annex Part II.
143) On must-carry obligations see *infra* C.III.2.1.
144) See Cullen International, *The Regulation of Broadcasting Issues under the New Regulatory Framework*, 2006, p. 136, available at: http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/reg_bc_issues_under_nrf/broadcasting_study_report.pdf
145) See Alexander Scheuer/Sebastian Schweda, Progress in the Must-offer Debate? Exclusivity in Media and Communication, in European Audiovisual Observatory (ed.), IRIS *plus* 2008-10.
146) For a similar definition see ITV Dictionary, http://www.itvdictionary.com/definitions/digital_media_platform_dmp_definition.html
147) *Supra* C.I.1.
148) For an overview of all relevant clauses of the agreement see Commission Decision, Case COMP/C.2. 38.287, 29 December 2003, *Telenor/Canal +/Canal Digital*.

concerned *inter alia* exclusive supply and distribution (of pay-TV premium content channels), the joint acquisition of sports and movie licences and non-compete obligations in relation to the distribution of PPV/NVOD channels. The Commission reflected on the possibility of distinct retail markets for pay-per-view (PPV) and near-video-on-demand (NVOD) services. According to the Commission, several differences between PPV/NVOD and other pay-TV channel services speak in favour of separate markets. Whereas PPV channels contain recently released films shown immediately after the expiry of the video distribution window (usually a period up to six months from the date of the film's release), pay-TV premium channels generally show these films only following also the completion of the PPV window (usually an additional three months period).[149] Furthermore, consumers using PPV may choose from a certain number of films without – at least to a certain extent – being submitted to the programming constraints and schedule of premium pay-TV channels. However, since it would not have changed the outcome of the competition assessment the Commission did not adopt such a market definition.

Wholesale markets upstream of the retail market for pay-TV services have also featured quite often in the decisional practice of the Commission, like the wholesale market for the supply of pay-TV premium content channels and PPV/NVOD film channels.[150] The Commission defined a wholesale market for the supply of film and sport channels for pay-TV without deciding whether the market was further segmented according to the different types of channels. Demand on the retail market was assessed to delineate the wholesale market given that pay-TV operators' demand for particular channels reflected the demand of their subscribers.[151] The Commission reasoned that the price and characteristics of pay-TV channels composed of recently released films and exclusive live coverage of attractive sports events differ significantly from those of basic channels. Film and sport channels attract higher viewing figures and the subscription to such channels is far more expensive. While thematic or general interest pay-TV channels are supplied to customers as part of a package, film and sports channels are charged on an individual basis. At the same time the market for the supply of film and sport channels for pay-TV was thought to be separate from other content acquisition markets, such as those for buying single events or contents for the purpose of assembling TV packages.[152]

The Commission has repeatedly defined a market for the wholesale provision of technical services necessary for pay-TV.[153] The operation of pay-TV requires a special technical infrastructure and services which are either provided by the pay-TV operator himself or other firms. These services essentially comprise a number of very different elements, typically conditional access (CA) systems, middleware, manufacturing of set-top boxes and set-top box technology. The most important element seems to be the CA system, an encryption technology used by pay-TV broadcasters in order to manage and control content distribution while protecting the content from unauthorised access.[154] CA systems also enable pay-TV operators to charge their subscribers for access to content. The choice and operation of a particular CA system is a strategic decision for the pay-TV operator that goes to the core of the pay-TV offering. In fact, CA systems protect the most important asset of a pay-TV platform, its content.[155] Switching from one CA system to another is an expensive and cumbersome process. For these reasons the Commission defined a separate market, i.e. that of the provision of CA solutions.

2. Competition law and other cases dealing with platform operators

2.1. NewsCorp/Premiere – Third-party access to a satellite platform

In June 2008, the Commission cleared NewsCorp's acquisition of the German pay-TV operator Premiere subject to conditions.[156] This secured NewsCorp *de facto* control of Premiere, which was dominant in the German retail market for pay-TV. In the merger proceedings, the Commission had

149) See Commission Decision, Case COMP/C.2.-38.287, 29 December 2003, *Telenor/Canal +/Canal Digital*, para. 55.
150) Commission Decision, 1999/2935, *British Interactive Broadcasting/Open* (Case IV/36.539), [1999] OJ L 312/1, para. 29; Case COMP/M.2876, 2 April 2003, *Newscorp/Telepiù*, para. 74.
151) Commission Decision, 1999/2935, *British Interactive Broadcasting/Open* (Case IV/36.539), [1999] OJ L 312/1, para. 28.
152) See Commission, Case COMP/M.2876, 2 April 2003, *Newscorp/Telepiù*, para. 74; Commission Decision, 2001/98/EC, *Telia/Telenor* (Case IV/M.1439), [2001] OJ L 40/1, paras. 277 *et seq*.
153) See only Commission Case COMP/M.5121, 25 June 2008, *NewsCorp/Premiere*, para. 40.
154) Ibid., para. 42.
155) Ibid., para. 44.
156) Ibid.

raised *inter alia* concerns about the vertical effect of the concentration with regard to CA systems for pay-TV. The transaction created a vertical link in relation to CA systems because NewsCorp (through its subsidiary NDS) was the leading supplier of CA systems (and middleware) in the EU and Premiere was a key buyer of CA systems in Germany.[157] NDS wanted to start supplying CA systems with a view to becoming Premiere's sole supplier of encryption technology by 2012 at the latest. The Commission feared that Premiere's dominant position would be strengthened through the switch to NDS's CA system as this could have the practical effect of rendering Premiere's set-top-box base less open for third-party access by existing or potential pay-TV operators. The existing arrangements between Premiere and its CA service provider at the time granted other pay-TV operators in Germany access to Premiere's satellite set-top boxes.

To address the competition concerns identified by the Commission, NewsCorp submitted commitments confirming that the provider of technical services would continue to be in a position to grant third-party access to Premiere's satellite platform in the same way as before the merger. Specifically, a sublicensing agreement between Premiere and its provider of technical services was concluded with regard to NDS's CA technology. All other rights necessary to give third-party pay-TV operators access to Premiere's satellite platform in Germany would also be given to the technical service provider, as would be the necessary hardware to implement the NDS CA system at the head-end of Premiere's satellite platform. On the basis of these conditions the merger was cleared by the Commission.

2.2. Commission v. Sweden – Competition in digital terrestrial networks

In *Commission v. Sweden*, the Commission threatened to refer Sweden to the ECJ as it had failed to liberalise a part of the market for electronic communications.[158] According to a Commission Directive[159] member states had to abolish by July 2003 all exclusive rights for the provision of electronic communications services, including the encryption of broadcasting programmes. Until 2008, however, Sweden still maintained legislation providing that access to all digital terrestrial broadcasting programming and services should be controlled by a single open system for the entire network. The company entrusted with the operation of this system, Boxer TV-Access AB, should construct, install and maintain this encryption system and be responsible for the handling and distribution of the common access card. In practice, this system led to a situation where Boxer was the only company that could actually provide not only encryption but also the distribution of digital TV programmes in Sweden via the terrestrial network. Under the pressure of an infringement proceeding, Sweden finally gave in and amended the legislation in question to end Boxer TV-Access's monopoly in 2008. Thereupon the Commission closed the infringement proceedings.[160]

III. Distribution (network operators)

Nowadays AVMS reach their audience through a number of different ways and networks. Traditional (digital) terrestrial, satellite and cable network operators see the rise of new means of distributing AVMS via copper, fiber or even mobile networks through IPTV or WebTV platforms. While the average penetration of IPTV within the EU remains relatively low (8.1% of all households),[161] the service is growing quickly with the continuous rollout of broadband networks. This in many ways improves the position of broadcasters and platform operators that seek to distribute their content to the end-user.[162] Nevertheless, the vertical relationships between the market players active at this stage of the value chain and players operating further down the chain still pose some regulatory challenges.

157) Ibid., para. 67.
158) See Commission, Press Release IP 06/1411 of 17 October 2006.
159) Article 2 Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, [2002] OJ L 249/21.
160) Commission, Press Release IP 08/878 of 5 June 2008.
161) See Commission, Electronic Communications Market Indicators, 2012, p. 62, available at: http://ec.europa.eu/information_society/digital-agenda/scoreboard/docs/pillar/electronic_communications_2012.pdf
162) The current dispute between public broadcasters and cable TV operators over distribution fees in Germany may serve as an example of this, see www.broadbandtvnews.com/2012/06/26/german-cable-war-escalates/

1. The relevant market(s)

In 2003, under the Regulatory Framework, the Commission had defined broadcasting transmission services to deliver broadcast content to end-users as a market susceptible to *ex-ante* regulation.[163] Almost all NRAs followed this Recommendation and delineated the respective (national) markets accordingly. They imposed regulatory obligations on network operators offering broadcasting transmission services such as price controls.[164] In 2007, the Commission decided that the market should no longer be subject to *ex-ante* regulation in a majority of member states. On the basis of increased competition between network operators and because access problems related to public interest objectives could be addressed by must-carry provisions (Article 31 Universal Service Directive), the market was withdrawn from the recommended list.[165]

2. Specific regulatory issues

2.1. Must-carry rules

Must-carry rules are obligations on network operators to carry a specific content.[166] These rules serve to foster and protect media pluralism and cultural diversity. According to Article 31(1) USD member states "may impose reasonable 'must-carry' obligations, for the transmission of specified radio and television broadcast channels … on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public." Member states may, however, only impose must-carry obligations on network operators where a significant number of end-users of such networks use them as their *principal means* to receive radio and television broadcast channels and only to the extent that the obligations are proportionate and transparent and also necessary to meet clearly defined general interest objectives.[167] To that extent Article 31 USD recognises the fundamental freedom to provide services (Article 56 TFEU). Since Article 31 USD does not define the general interest objectives, they must be defined by the member states in conformity with EU law.[168] Member states may determine an appropriate remuneration and they have to review must-carry rules regularly.

A large number of member states have made use of Article 31 USD. Throughout the EU a wide variety of must-carry rules exist and despite the relatively clear provision of Article 31 USD must-carry rules have been fiercely debated. The reason is obvious at least for the network operators such as cable operators who are subject to must-carry: through digitalisation of broadcasting content and the upgrade of cable networks, capacity restraints which were one reason to introduce must-carry obligations have been significantly reduced. There have been several judgments on must-carry rules following intervention by the Commission or complaints from network operators. The ECJ highlighted its general approach to Article 31 USD by the following statement in *Kabel Deutschland*:

"It follows that Article 31(1) of the Universal Service Directive cannot be interpreted so as to undermine national legislation which, in compliance with Community law, pursues general interest objectives, in particular those relating to regulation of content and audiovisual policy. In accordance with that division of powers, Article 31(1) of the Universal Service Directive … does not establish a right for a cable operator to choose which channels to broadcast, but limits that right in so far as it may exist under applicable national law."[169]

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163) Market No. 18 Commission Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC, [2003] OJ L 114/45.

164) Only Belgium and Bulgaria did not follow this example.

165) See Explanatory Memorandum to Commission Recommendation 2007/879/EC, on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation, SEC(2007) 1483/2, pp. 47 *et seq*.

166) See Cullen International, "The Regulation of Broadcasting Issues under the New Regulatory Framework", 2006, p. 17.

167) It should be noted that the wording in the German language version of Article 31 Universal Service Directive was changed when the Regulatory Framework was revised in 2009 ("ausdrücklich festgelegte Ziele" instead of "klar umrissene Ziele") while the text in the English version remained the same. It may, however, not be concluded from this change that the EU legislator intended a change in the meaning of the provision.

168) ECJ, Case C-336/07, *Kabel Deutschland Vertrieb und Service*, [2008] ECR I-10889, para. 30.

169) Ibid., para. 34.

The most recent case *Commission v. Belgium*[170] summarises the current state of the ECJ's case law on must-carry. The Commission had initiated an infringement procedure against Belgium as it believed the member state had not properly implemented Article 31 USD.

The Court agreed with the Commission that Belgian legislation dating from 1995 infringed Article 31 USD. It held that Article 31(1) USD requires that must-carry obligations only be imposed where they are necessary to meet clearly defined general interest objectives and are proportionate and transparent.[171] It is clear from this provision as well as from Article 56 TFEU that member states may impose must-carry in order to safeguard pluralism through a cultural policy, which is connected with the fundamental right of freedom of expression. However, the requirements implementing such policy must in no case be disproportionate in relation to that aim.[172] The ECJ went on to note that "[c]learly, the mere statement of a general policy objective, which is not accompanied by any additional factor capable of enabling operators to determine in advance the nature and effect of the precise conditions and obligations to be fulfilled if they apply for the award of 'must-carry' status, does not permit these requirements to be met."[173] Belgian law did not clearly define the criteria relied upon when selecting TV broadcasters benefiting from must-carry status and was, thus, not sufficiently precise to ensure that the broadcasters thus selected were those whose content, in its entirety, was capable of meeting the general interest cultural objective pursued.

The ECJ also found that other aspects of Article 31 USD where not sufficiently reflected in Belgian law. Belgium had failed to observe the principle of transparency as the law in question fell short of defining the criteria to be met for the award of must-carry status to broadcasters. Belgian law only stated that the King designated by Order adopted by the Council of Ministers those organisations which were to benefit from must-carry. However, a transparent procedure would require that the criteria to be met for the award of must-carry status be known to the broadcasters capable of benefiting from the must-carry obligation.[174] Moreover, the Court criticised the fact that Belgian law stipulated that must-carry automatically applied to *all* programmes of broadcasters receiving must-carry status.[175] Instead, member states are required to strictly limit such status to those channels having an overall content which is capable of attaining the general interest objective pursued.[176]

2.2. Market access for broadcasters

Restrictive rules by member states on market access of broadcasters have also been a concern in the application of the Regulatory Framework. The ECJ's judgment in *Centro Europa 7* highlights these issues.[177] Centro Europa 7 had been granted terrestrial television broadcasting rights for analogue TV by the Italian authorities. In order to make use of these rights, Centro Europa 7 had to await the national allocation plan for radio frequencies: this plan was never adopted while incumbent broadcasting stations were allowed to make *de facto* use of the frequencies under a provisional regime.

On referral from the Italian Council of State (*Consiglio di Stato*) the ECJ held that the Treaty does not require national monopolies having a commercial character to be abolished completely, but instead requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of member states.[178] However, Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between member states more difficult than the provision of

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170) ECJ, Case C-134/10, *Commission v. Belgium*, [2011] ECR I (not yet reported).
171) Ibid., para. 50.
172) Ibid., para. 53; Case C-250/06, *United Pan-Europe Communications Belgium SA* a.o. *v. État Belge*, [2007] ECR I-11135, para. 44.
173) ECJ, Case C-134/10, *Commission v. Belgium*, [2011] ECR I (not yet reported), para. 54.
174) Ibid., para 60. See also ECJ, Case C-336/07, *Kabel Deutschland Vertrieb und Service*, [2008] ECR I-10889, para. 24.
175) ECJ, Case C-134/10, *Commission v. Belgium*, [2011] ECR I (not yet reported), para. 64
176) Ibid., para. 63. The Court also maintained that Belgian law infringed Article 31 USD by not limiting must-carry obligations to network operators that have a sufficient number of end-users who use that network as their principal means of receiving broadcast television programmes.
177) ECJ, Case C-380/05, *Centro Europa 7*, [2008] ECR I-349. See also V. Moscon, Italy: Case of Centro Europe 7, IRIS 2008-7/25. In a similar matter the Commission recently threatened to take Bulgaria in front of the ECJ as the member state is alleged to have infringed Union law when it assigned in 2009 the five spectrum lots available for digital terrestrial broadcasting via two contest procedures, limiting without justification the number of undertakings that could enter the market concerned, see Commission, Press Release IP 12/298 of 22 March 2012.
178) Ibid., para. 78.

services purely within one member state. Implementing this principle into secondary law, Article 3(1) Authorisation Directive[179] forbids member states to prevent an undertaking from providing electronic communications networks and services.[180] The Court also maintained that an operator cannot exercise effectively its rights to access the television broadcasting market which it derives from EU law without broadcasting radio frequencies. Therefore, Article 5(2) Authorisation Directive states that where it is necessary to grant individual rights to the use of radio frequencies, those rights must be granted "through open, transparent and non-discriminatory procedures". The findings of the Court allow to conclude that the Italian authorities had infringed *inter alia* Article 56 TFEU and the Authorisation Directive because the process of the *de facto* allocation of radio frequencies to the incumbent networks and – at the same time – the omission to allocate frequencies to operators such as Centro Europa 7 when the latter had already been granted rights could not be qualified as an open, transparent and non-discriminatory procedure.

2.3. Net neutrality

The debate on net neutrality is certainly one of the most complex and at the same time fiercest debates ever conducted in telecoms and media regulation. It essentially stems from the fear that Internet Service Providers (ISPs) will limit access to certain types of content, applications or services. The issue first came up in the United States when a cable operator was revealed to have throttled peer-to-peer traffic on its network and the debate as to whether such practices should be prohibited soon reached Europe. While some have been arguing that every bit and every byte on the Internet should be treated equally by ISPs, the Internet industry believes that such regulation would hinder the development of new services and business models. While it is certainly impossible here to give an overview of all the different aspects and arguments exchanged on the matter, a few remarks shall be made on the current state of regulation in the EU and its effect on the media industry.

Unlike the US, the EU has taken what could be called a "wait and see" approach to net neutrality. Neelie Kroes, Vice-President of the Commission, recently put the Commission's approach that way: "I want to ensure that Internet users can always choose full Internet access – that is, access to a robust, best-efforts Internet with all the applications you wish. But I don't like to intervene in competitive markets unless I am sure this is the only way to help either consumers or companies. Preferably both. In particular because a badly designed remedy may be worse than the disease – producing unforeseen harmful effects long into the future."[181] And indeed, some may argue that the competitive structure of communications markets in the EU will keep ISPs from restricting their customer's Internet access.

When the regulatory framework was revised in 2009, it sought to safeguard this competition through transparency measures and low barriers to switch in order to make sure that customers can choose their ISPs on the basis of the quality of the Internet access they offer. Under Article 22 USD, national regulatory authorities are able to require ISPs to publish comparable, adequate and up-to-date information for end-users on the quality of their services. In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, national regulatory authorities are also able to set minimum quality-of-service requirements. At the same time, Article 21 USD requires ISPs to inform their customers about any change to conditions limiting access to and/or use of services and applications and to provide information on any procedures to measure and shape traffic. Member states had to transpose these provisions by May 2011 into their national law. With one exception (the Netherlands[182]), no member state so far seems to have rules on net neutrality in place which deviate from the Regulatory Framework. The Commission and national regulatory authorities are closely following the implementation of the regulatory framework and, in particular, how ISPs deal with Internet services provided by competitors such as VoIP and instant message providers.[183]

179) Directive 2002/20, supra footnote 5.

180) ECJ, Case C-380/05, *Centro Europa 7*, [2008] ECR I-349, para. 83.

181) See Blog of Neelie Kroes, Post of 29 May 2012, http://blogs.ec.europa.eu/neelie-kroes/netneutrality/

182) In the Netherlands a law was passed which requires ISPs to treat all Internet services equally. ISPs are not allowed to discriminate between third-party and their own services, nor may they charge extra for access to Internet services such as VoiP or instant messaging. See Article 7.4a of the Telecommunications Act as amended.

183) See, for instance, BEREC, Report on the public consultation on the draft BEREC Guidelines on Transparency in the scope of Net Neutrality, December 2011, BoR (11) 66, available at: http://erg.eu.int/doc/bor11_66_transparencyinput.pdf

Part II

Regulation of Market Power in a Converged and Connected Audiovisual Media Sector at National Level

SWITZERLAND

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I. Audiovisual media services and enabling services

1. Approach with regard to public service media

It is the declared aim of Swiss media policy to obtain a strong, attractive and independent (basic) public service. This is also a reflection of specific national circumstances: on an international comparison, the Swiss markets are extremely small, particularly in the radio and television sector, especially as Switzerland with its four national languages does not constitute a single media market but is divided into several language regions that vary in size and are inevitably part of the far larger markets of the neighbouring countries in which the same language is spoken (the so-called "next-door giant phenomenon"). The annual revenues of Swiss television stations are no more than a fraction of the amount generated by their foreign competitors, and this has contributed to a situation in the case of television where foreign programmes have for some time accounted for significantly more than half the market share. There is hardly any other European country in which the audience has such a strong preference for foreign stations.

If Swiss programme providers are to be able to compete on the domestic media market against their strong foreign competitors, it is essential for them to concentrate their scarce resources. The Swiss legislature has accordingly decided to retain a strong Swiss Broadcasting Corporation (Schweizerische Radio- und Fernsehgesellschaft – SRG), which as a public undertaking organised as an entity subject to private law (*Verein* – association), receives the bulk of the licence fees obtained and may also finance its activities from advertising and sponsorship.

Swiss law regards distortion of competition on the domestic broadcasting market as an unavoidable price to be paid for the SRG's competitiveness vis-à-vis foreign broadcasters. However, the market position that the Swiss legislature wants the SRG to have leads to a conflict with the second main objective of Swiss broadcasting policy, which is to ensure competition between several domestic broadcasters so that a large variety of opinions are expressed in the interests of democratic opinion-forming and diverse cultural processes.[1]

Legal limits are therefore imposed on the activities of the powerful SRG: it must not abuse its financial strength and reputation to jeopardise the existence of its private Swiss competitors. Swiss law ensures a certain balance between the SRG and other domestic market players, a balance that does not primarily come about through **general competition law**: while the SRG is based on rules (for

1) Federal Council's Dispatch of 18 December 2002 concerning the comprehensive revision of the Federal Act on Radio and Television (RTVA; Bundesgesetz über Radio und Fernsehen – RTVG), Federal Gazette (Bundesblatt – BBl) 2003, p. 1594; www.admin.ch/ch/d/ff/2003/1569.pdf . In its message to the parliament, the government (Federal Council/Bundesrat/Conseil fédéral) comments on the basis of Swiss law on the draft of the decree it has proposed.

example, in its licence) that give it special rights to enable it to fulfil its public-service remit, it is not possible to apply the Cartel Act (section 3(1)(b) CartA).[2] However, that Act does apply to activities of the SRG outside those areas in which the distortion of competition meets the legislature's intention. For example, the Competition Commission (Wettbewerbskommission – WEKO), which is responsible for ensuring the enforcement of the Cartel Act, carried out several preliminary investigations against the SRG concerning the possible unlawful practices by market-dominant companies (section 7 Cartel Act). These investigations related for example to the establishment of the production company and SRG subsidiary tpc (WEKO final report of 4 February 2004) and to the allegation of discrimination against independent production companies (WEKO final report of 9 May 2008). In both cases, the Competition Commission was unable to find any indications of abuse.

The scope available to the SRG is mainly limited by the fact that the Swiss Government (Federal Council/ *Bundesrat/Conseil fédéral*) imposes various limits on it in its **broadcasting licence**.[3] For example, section 13 of the licence limits the nature and number of SRG radio and television programmes and the extent of the online service. In addition, the licence obliges the SRG to work with the Swiss music and film industry, the Swiss audiovisual industry, national media libraries and other Swiss broadcasters (sections 16-20).

A further balance is created by the **Federal Radio and Television Act** (RTVA)[4] through specific provisions that protect other market players from the influence of the SRG with regard to their economic – and indirectly also their journalistic – development. Mention should be made for example of:

- Limits imposed on the SRG (and companies it controls) for activities that are not laid down in its licence and could have an adverse impact on the other Swiss media companies. These activities must be notified in advance to the Federal Office of Communications and may under certain circumstances be prohibited (section 29 RTVA).
- Limits imposed on the SRG's shareholdings in other broadcasters: such shareholdings require the approval of the Federal Department for the Environment, Transport, Energy and Communication (DETEC/*Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation*; UVEK) (section 37 RTVA).

On the other hand, specific rules contained in the RTVA for safeguarding diversity, for example in connection with the award of broadcasting licences (sections 44 and 45 RTVA; more on this in section 2 below on the regulation of market access) are not relevant for the SRG, which has a legal entitlement to a broadcasting licence (section 25(1) RTVA).

2. Regulation of market access

Although it has been possible to broadcast a radio or television programme in Switzerland without a licence since 2007, this instrument is still extremely important in practice as a licence is required by any broadcaster that wishes to have a share of the reception licence fees (fee-splitting mechanism) or wants a guarantee of the wireless terrestrial distribution of its programme, for example via UHF or digital platforms.[5]

2.1. Threat to diversity of opinion and programming as an obstacle to the grant of a broadcasting licence (section 44(1)(g) RTVA)

The Federal Act on Radio and Television links the grant of a broadcasting licence in section 44 to a total of seven general requirements (including financial viability and the separation of editorial from economic activities). The most important prerequisite with regard to media concentration is the minimum requirement inserted into the Act by the parliament that the applicant should not jeopardise the diversity of opinion and offerings (section 44(1)(g) RTVA). In their case law, the courts have held

2) The Federal Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act /Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen [Kartellgesetz]) is available at: www.admin.ch/ch/d/sr/c251.html and in its English translation at www.admin.ch/ch/e/rs/c251.html
3) Broadcasting licence for SRG SSR idée suisse (Konzession SRG) of 28 November 2007, available at: www.admin.ch/ch/d/ff/2007/8557.pdf (not available in English)
4) Federal Act on Radio and Television of 24 March 2006 (RTVA / Radio- und Fernsehgesetz; RTVG), available at: www.admin.ch/ch/d/sr/c784_40.html and in its English translation at: www.admin.ch/ch/e/rs/c784_40.html
5) Sidler, Oliver, "CH-Switzerland: New Radio and Television Act Adopted", *IRIS* 2006-5/11. All IRIS articles are available via the IRIS Merlin database at: http://merlin.obs.coe.int

that this threat is to be understood within the meaning of section 74 RTVA, i.e. the broadcaster must have and actually abuse a market-dominant position.[6]

- In order to assess a **market-dominant position** the Department (DETEC), which is the authority responsible for granting a broadcasting licence, must consult the Competition Commission pursuant to section 74(2) RTVA. However, this consultation is not necessary in the case of every licence application as the DETEC only has to consult the Commission "when the existence of a market-dominant position cannot simply be denied and there are at least some indications of abuse".[7] Based on the details provided by the Commission, the DETEC examines whether an applicant has a market-dominant position with regard to the journalistic information it provides on politics, the economy, culture, society and sport. In order to establish whether this is the case, it is first necessary to determine the relevant market – a complicated, multifaceted and time-consuming exercise, especially in the media and telecommunications fields. In the Department's opinion, defining the market must be based on journalistic criteria: the print media, radio, television and the Internet complement one another with regard to the provision of information and must accordingly be assessed as separate product markets. The Department believes that the provision of high-quality radio or television programmes – even when parallel state subsidies are paid through the fee-splitting mechanism – requires a certain business size, especially in the case of multimedia publishers.[8]

- The Act curbs the **abuse** of a market-dominant position in the relevant market (section 74(1)(a) RTVA). This applies not only in the radio and television sector but the entire media system: a threat to diversity – and therefore an obstacle to the grant of a broadcasting licence – exists for example when an applicant abuses its dominant position on the newspaper market.[9] A case of media abuse may for instance be involved when a market-dominant media company forbids its editor to review books from other media publishers.[10] Establishing whether a practice constitutes abuse is always a thorny undertaking: firstly, it is difficult to narrow down in terms of its impact on competition (for example, under Swiss competition law it is only illegal in specific circumstances to practise price discrimination or charge unreasonably high prices). Secondly, the concept of abuse as employed in the RTVA differs from that employed in the Cartel Act: the Swiss Parliament wants economic criteria to be the decisive factor and not diversity of opinion. In 2009, the Federal Administrative Court criticised the lack of clarity in the criteria for establishing the existence of media abuse, and the Department has now defined the concept in more precise terms (see I.3.2 below).

At any rate, for a licence to be denied it is not enough for abuse to have occurred in the past. Rather, there must be a likelihood that the media company will also abuse its position in the field of journalism in the future, because the grant of a radio or television broadcasting licence serves as a forward-looking measure to ensure the provision of a journalistic public service.[11]

In practice, the examination of this precondition for granting a broadcasting licence has proved time-consuming and can in fact take several years: whereas most of the radio and television broadcasting licences could be granted in 2008 and 2009, it has so far (2012) generally not been possible to do so in three coverage areas owing to the failure to clarify the question of the abuse of a market-dominant position. In those areas, the programmes can only be received because the Department granted the broadcasters of Tele Ostschweiz (now TVO), Radio Grischa and Radio Argovia provisional licences in 2010. The purpose of these temporary measures is to guarantee that the regional public service desired by the legislature is also provided in the period preceding the final reassessment, thus avoiding any disadvantage for the population.[12]

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6) Judgment of the Federal Administrative Court (Bundesverwaltungsgericht – BVGer) A-7799/2008 of 3 December 2009 (Südostschweiz Radio), E. 3.6.3; www.bvger.ch
7) BVGer A-7799/2008, E. 4.2; www.bvger.ch
8) Licence award decision of the DETEC of 3 November 2011, Tele Säntis AG and TVO AG, E. 3.2.2.1; www.bakom.admin.ch/dienstleistungen/entscheiddatenbank/index.html?lang=de&entscheid=85 (confirmed by the BVGer in judgment A-6542/2011 of 22 August 2012; www.bvger.ch).
9) BVGer A-7799/2008, E. 4.3.
10) BVGer A-7799/2008, E. 4.8.
11) Licence award decision of the DETEC of 3 November 2011, Tele Säntis AG and TVO AG, E. 3.3.1.3, confirmed by the BVGer, judgment A-6542/2011 of 22 August 2012, E. 8; www.bvger.ch
12) The BVGer accepted the provisional grant of the licence in its judgment A-897/2010 of 23 August 2010. In respect of the East Switzerland coverage area, it finally confirmed the grant of a licence to the regional television programme TVO in its judgment A-6542/2011 of 22 August 2012; www.bvger.ch

Up to now, a licence has not been refused pursuant to section 44(1)(g) RTVA, but the Swiss Government has warned that this precondition for granting a licence could make it difficult to meet the constitutional requirement to provide a public service: it is conceivable that the Department might no longer grant any radio or television broadcasting licences in small areas with only one media company, and the government has therefore proposed abolishing this precondition.[13]

2.2. If applicants are equally qualified, preference to be given to those that most contribute to diversity of opinion and offerings (section 45(3) RTVA)

Section 45(3), first sentence, RTVA states that if there are more applications than licences the applicant best able to fulfil the service remit shall be chosen. It is conceivable that several applicants are essentially equaivalent in this respect,[14] in which case the Act gives preference to the one that most contributes to diversity of opinion and offerings (section 45(3), second sentence, RTVA).

Such a situation in which there is no significant difference between the applications occasionally arises in practice, for example during the last licensing round in Coverage Area 10 (Zurich-North Switzerland), where the award of the licence had to be decided on the basis of the independence of the two applicants. This was assessed against the background of the specific characteristics of the media landscape in the coverage area concerned. All media levels had to be taken into account, i.e. not only the existing situation in the broadcasting sector but also the print sector. Tele Top AG, which is independent of any publishing house, was therefore given preference over TeleZüri, which belonged to Tamedia AG, a major Swiss media company with numerous national and international print publications as well as, at that time, electronic media in the greater Zurich and Berne areas.[15]

2.3. Maximum of two licences per broadcaster (2+2 rule pursuant to section 44(3) RTVA)

In 2006, the Swiss Parliament inserted an unusual provision (against the government's will) into the new Act on Radio and Television: radio and television broadcasters or the companies that own them may acquire no more than two television and two radio broadcasting licences (section 44(3) RTVA). The purpose of this rule is to combat media concentration not only by means of the abovementioned criteria (section 45(3) RTVA) but also in quantitative terms. The principal reason for the restriction is to prevent horizontal concentration: the few big publishers that mainly operate in the print sector should not be able to buy up as many radio and television stations as they want and in this way divide up the Swiss market among themselves.

In practice, this inflexible rule has led to publishers selling off companies before acquiring radio and television stations as they would otherwise have more than two licences. In some cases it is debatable whether a company still maintains control. In this connection, the Federal Office of Communications follows the Competition Commission's practice regarding the definition of control in the Ordinance of 17 June 1996 on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO)[16] according to which a company controls another when its (voting) shares, contractual agreements or the *de facto* situation make it possible for it to exercise a determining influence on the other company's strategically important decisions or enable it to prevent such decisions. It has, however, emerged that, despite this restriction, it is in principle possible to operate a radio franchise model that involves more than two licensed radio stations with the same format (such as Radio Energy in the Zurich, Berne and Basle areas). A precondition for this is, according to the Federal Office of Communications, that the franchisor (Ringier AG in the case of Radio Energy) only has a minor shareholding in the third radio station and the individual radio stations remain sufficiently independent from one another with regard to the fulfilment

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13) Government's explanatory report on the amendment to the RTVA of 10 April 2012, section 1.2.2.2; www.bakom.admin.ch/dokumentation/gesetzgebung/00909/04016/

14) See on this BVGer A-7761/2008 of 9 December 2009 (Arc TV SA), E. 6.2.

15) Licence award decision of the DETEC of 31 October 2008, Tele Top AG und Tamedia AG, E. 2.4.2; www.bakom.admin.ch/dienstleistungen/entscheiddatenbank/index.html?lang=de&entscheid=42&leitsatzsprachen=de|fr|it&page_num=8&page_num=8

16) Order on the Monitoring of Company Mergers of 17 June 1996, available at: www.admin.ch/ch/d/sr/c251_4.html and its English translation at: www.admin.ch/ch/e/rs/c251_4.html

of their remit. However, this franchise model has already led to debate in the public and political arena.[17]

The maximum number of licences pursuant to section 44(3) RTVA also applies to the new digital broadcasting technologies. In the government's view, this restriction has the disadvantage that it acts as an obstacle to technological development: the expensive introduction of the new technologies depends on financially strong market players, but many media companies already possess two UHF radio stations and are therefore *de facto* no longer able to invest in digital broadcasting. In 2012, the government therefore proposed enabling provision to be made for exceptions to the 2+2 rule in the future in the case of new broadcasting technologies.[18]

3. Media-specific rules to prevent concentration

Apart from rules relating to the award of licences, the 2006 RTVA also contains specific instruments to combat media concentration (in sections 74 and 75). These also apply to media companies that have already been granted licences and to radio and television broadcasters that do not require licences.

The government's aim in inserting the new rules on concentration into the RTVA was to create a specific instrument for the broadcasting sector that goes beyond the instruments to safeguard competition contained in the Cartel Act.[19] While the purpose of the latter is to promote competition in the interests of a free-market system, the RTVA goes beyond adopting a purely economic approach: the key aim of the rules to combat media concentrations is to guarantee pluralism of opinion and, therefore, competition in the field of journalism. The media system should express as broad a range of social, political, cultural and ideological currents of opinion within a democratic state as possible. The Act proceeds upon the basic assumption that increasing media concentration is problematic in the light of these key media functions. However, media concentration can also have a positive effect when it enables the companies concerned to obtain the economic strength necessary to produce high-quality journalism.

As in the case of the award of licences (see section 2 above), the main objective is to prevent the abuse of a market-dominant position, and this will not happen by enacting inflexible rules: the Swiss legislature has consciously refrained from introducing the same ownership restrictions or statutory limits on market share laid down in neighbouring countries.[20] The purpose of the less explicitly worded rules in the RTVA is to enable the broadcasting authority to take account of the current media situation.

3.1. Precondition 1: dominant position in the relevant market (section 74(1)(a) RTVA)

The procedure laid down in broadcasting legislation for assessing the existence of a market-dominant position (section 74(2) RTVA) employs the terminology of antitrust legislation. The starting-point is accordingly the practice of the Competition Commission, which when defining the market relies on section 11(3) of the Merger Control Ordinance. However, the Federal Department for the Environment, Transport, Energy and Communication (DETEC) adapts this practice to the special circumstances of the journalistic markets. An examination is conducted, for example, of a dominant position on the radio and television market for (local and regional) information in the fields of politics, business, culture, society and sport. The advertising markets are also relevant.

3.2. Precondition 2: abuse of the dominant position (section 74(1)(a) and (b) RTVA)

In order to define abuse of journalistic power, the Department assumes that a wide variety of content, players, points of view and interests should be reflected and discussed in a democratic society. It describes as improper practices the conduct of market-dominant media companies likely to restrict

17) Cf. Interpellation 12.3053 of Councillor (Ständerat) Claude Janiak of 29 February 2012: "Radiokonzession als Handelsware?" ("Radio broadcasting licences as tradable commodities?"), www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20123053

18) Government's explanatory report on the amendment to the RTVA of 10 April 2012, section 2.10.

19) Dispatch on the RTVA, BBl 2003, p. 1646; www.admin.ch/ch/d/ff/2003/1569.pdf

20) Dispatch on the RTVA, BBl 2003, p. 1647; www.admin.ch/ch/d/ff/2003/1569.pdf

the media users' ability to form opinions freely and comprehensively and take decisions. In the licensing authority's opinion, abuse exists for example[21] when

- no equal journalistic access is granted for different opinions and interests;
- relevant subjects in the fields of politics, business, culture, society and sport are dealt with either one-sidedly or ignored;
- an attempt is made in an untransparent way to influence democratic decision-making processes by means of a one-sided selection of opinions and players;
- recognised professional rules of journalism are disregarded (for example by breaching the journalists' code of conduct).

There is only a threat to diversity when the journalistic **abuse of power is systematic**. It is regarded as systematic when it can be proved that the broadcaster has abused its journalistic power either on a few occasions in the same way or on many occasions in different ways.[22]

The examination also considers possible structural and organisational corrective mechanisms. For example, abuse may be discounted if a broadcaster strictly separates its editorial and content department from the commercial side of its business and guarantees journalistic independence in an editorial statute.[23]

3.3. Extension to media-related markets other than radio and TV (section 74(1)(b) RTVA)

According to section 74(1) RTVA, the examination of the question of market dominance is not limited to radio and television as core journalistic markets (monomedia concentration) but covers the entire media system with both upstream and downstream markets. These media-related markets include for example the procurement of information (via news agencies for instance), access to sports and film transmission rights, and the print sector. It is also necessary to consider the downstream distribution markets, for example with regard to the distribution of television programmes by cable and satellite, the wireless distribution of radio programmes and home deliveries of press products.

3.4. Measures in the case of the abuse of a market-dominant position (section 75 RTVA)

Even if there is a threat to diversity of opinion and offerings, the authority is not legally required to take action: despite abuse of a market-dominant position, intervention might in some circumstances prove unnecessary, for example because the desired programme coverage can for economic reasons only be guaranteed by concentrating resources.[24]

If the authority decides to initiate measures, it can take action both against a (licensed or non-licensed) broadcaster and against another company operating on the radio and television market that poses a threat to diversity owing to its abuse of its market-dominant position. Outside the radio and television market, however, the broadcasting authority must not intervene. The negative impact of a multimedia monopoly in the broadcasting and press sectors can accordingly be corrected or mitigated by means of intervention on the broadcasting side.

In section 75(2), the Act lists a number of possible measures:

- precautions to safeguard diversity (such as granting airtime to third parties or ensuring co-operation with other market players);
- precautions against corporate journalism (such as issuing editorial statutes to ensure editorial freedom);
- adaptation of corporate or organisational structures (for example by hiving off individual company divisions) – but only when other measures are obviously insufficient.

In practice, the Department has not ordered any such measures up to now.

21) Licence award decision of the DETEC of 3 November 2011, Tele Säntis AG and TVO AG, E. 3.3.1.2; confirming BVGer A-6542/2011, E. 8.
22) Licence award decision of the DETEC, op. cit., E. 3.3.1.3; confirmed in BVGer judgment A-6542/2011, E. 8; www.bvger.ch
23) Licence award decision of the DETEC, op. cit., E. 3.3.4.2.4.
24) Dispatch on the RTVA; BBl 2003, p. 1647.

4. Complementing media-specific rules with provisions of competition law

The media sector is also the subject of antitrust monitoring by the **Competition Commission**, which can examine both the existence of unlawful restraints on competition (**monitoring of abuse**, section 7 of the Cartel Act) and plans to merge companies with a certain annual turnover (**investigation of mergers**, section 9 of the Cartel Act).

In the case of the monitoring of abuse, only those markets where there are indications of possible abuse are examined with respect to the question of market dominance.[25]

In the case of the investigation of mergers, which is particularly important for the media sector, up to 2004 section 9(2) of the Cartel Act contained more stringent rules requiring media companies to notify their intention to merge.[26] For media policy reasons, the planned turnover threshold was reduced twentyfold, which led to the competition authority dealing with a large number of media mergers until 2004. Although it declared the majority unobjectionable without conducting an in-depth examination, it did block individual media sector mergers[27] or permit some subject to conditions[28] as they would have resulted in or increased a market-dominant position.

The more stringent merger rules in the media sector were, however, abolished because the Cartel Act, the sole purpose of which is to protect competition, is not suitable for dealing with media issues. In the Competition Commission's view, the only real threats to competition exist when mergers take place between the big Swiss publishers. Mergers are now only investigated in cases of national economic importance (i.e., according to section 9(1)(a) of the Cartel Act, when the total turnover is at least CHF 2 billion or the turnover in Switzerland itself is at least CHF 500 million). Raising the specific thresholds has meant that the bulk of media takeovers and mergers in Switzerland are now no longer subject to review under antitrust law.

In addition to the monitoring of abuse and the investigation of mergers by the Competition Commission, Switzerland has a specific instrument in competition law to prevent unfair prices being charged by powerful companies: price monitoring. On the basis of the Price Monitoring Act (*Preisüberwachungsgesetz* – PÜG) of 20 December 1985,[29] the Price Inspector (*Preisüberwacher/Surveillant des prix*)[30] can also recommend or even order certain price reductions in the media sector. This concerns for example the level of the radio and television reception licence fees (according to section 70(3) RTVA, in its decision on the licence fee the government must take account of the Price Inspector's recommendations and publicly state its reasons for any deviations from them). The Price Inspector has also obtained price reductions in the area of cable television, for example (see III.1 below).

4.1. Market definition

The Competition Commission defines a large number of small and very small markets in the media sector. As part of its work reviewing mergers between large multimedia companies, it must regularly examine all of them to check whether a market-dominant position is being established or increased.[31]

4.2. Monitoring of advertising markets

Media products are, unlike most other goods, offered on two markets at the same time: media companies both offer users journalistic information and provide advertisers with space for their advertising messages. There is strong interaction between the usage market and the advertising market.

25) Cf. "Vorabklärung: Jahres-Umsatz-Prämien und Konzernabschluss in Printmedien", *Recht und Politik des Wettbewerbs* (publication of the Swiss competition authorities) 2001-1, pp. 64 ff., available at: www.weko.admin.ch/dokumentation/00157/index.html?lang=de
26) Cf. BBl 2002, p. 2022; www.admin.ch/ch/d/ff/2002/2022.pdf
27) Cf. Decision in the Berner Zeitung AG/20 Minuten (Schweiz) AG case, *Recht und Politik des Wettbewerbs* 2004-2, pp. 529 ff.
28) Cf. Decision in the NZZ-Espace-Bund case, *Recht und Politik des Wettbewerbs* 2004-2, pp. 484 ff.
29) Available at: www.admin.ch/ch/d/sr/9/942.20.de.pdf
30) www.preisueberwacher.admin.ch/
31) Cf. Tamedia/PPSR decision, *Recht und Politik des Wettbewerbs* 2009-3, pp. 245 ff.

The more users a medium is able to show that it has, the more interesting it is for the advertising industry. Conversely, additional revenues on the advertising market enable a media company to improve the quality of its product, which in turn leads to more users and increased advertising income. The Competition Commission therefore normally also takes the advertising markets into account in its work monitoring media companies.[32]

4.3. Monitoring of content markets through the negotiation of copyrights: sports and film rights

The markets for sports and film rights are also subject to the monitoring of abuses and the review of mergers. For example, the Competition Commission examined the acquisition of a stake by the leading telecommunications company Swisscom in the film rights trader Cinetrade AG and gave the go-ahead on 7 March 2005 without imposing any conditions. The share in Cinetrade facilitated Swisscom's entry into the film business and thus enabled it to complement its core activities telephony and Internet with television (triple play). In the Competition Commission's opinion, the merger led neither in the pay-TV market nor in the market for the procurement of first transmission rights for films and sports to a market-dominant position that might result in the elimination of effective competition.[33] The cable network operator Cablecom unsuccessfully challenged the Competition Commission's decision.[34]

The Competition Commission is currently examining as part of a preliminary investigation whether Cinetrade AG (in which Swisscom holds a 49% stake) unlawfully abuses a market-dominant position with regard to live sports broadcasts. Cinetrade AG, which has a stake in the pay-TV provider Teleclub, awards the bulk of live broadcasting rights for football and ice hockey in Switzerland. In the case of the IPTV provider Swisscom-TV, access to live matches costs less per month than the same package available from the other cable network providers. The Competition Commission is now examining the reasons for this difference in price.

5. Must-offer provisions and obligations to open programme libraries to competitors

5.1. Must-offer

Swiss law contains no provision obliging public service providers (especially the SRG) to make content financed by licence fees available to other radio or television broadcasters for second and third use. The government expressly decided against a motion tabled by an MP in this connection in 2002. The imposition of such an obligation would not only be problematic from the point of view of copyright but also of media diversity as it would provide a company with economic incentives to dispense with its own research and productions and broadcast SRG content instead. The media diversity desired would be replaced by the assimilation of programmes between private broadcasters and the SRG on the one hand and between the various private offerings on the other.[35]

5.2. Programme library access for competitors

Swiss law also contains no provisions obliging the SRG to give competitors access to programme libraries. Other broadcasters thus have no rights beyond those available to the general public to consult the public service broadcasters' programme libraries. In Switzerland, the content of most radio and television programme libraries is not open to the public, but this situation is under review. There is a legal basis (section 21 RTVA) for obliging broadcasters (the SRG and private companies) to deposit their programmes with a publicly accessible archive.

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32) Cf. Decision in the case of Berner Oberland Medien AG/Co-operation of Berner Oberland AG with Berner Zeitung AG, in *Recht und Politik des Wettbewerbs* 2000-3, pp. 422 ff.

33) Competition Commission's media release, available at: www.news.admin.ch/NSBSubscriber/message/attachments/14241.pdf , and detailed reasons for the decision in *Recht und Politik des Wettbewerbs* 2005-2, pp. 363 ff.

34) Federal Court's judgment 2A.161/2006 of 12 October 2006; www.bger.ch/jurisdiction-recht

35) Government's statement of 26 June 2002 on the motion tabled by Peter Weigelt; www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20023140

6. Special rules for services that enable or facilitate reception

In the case of the reception of digital television, it is a long-standing problem that various Swiss providers of telecommunications services contractually oblige their users to rent or purchase the (proprietary) set-top boxes that they make available. As this obligation not only restricts the users' freedom of choice but also competition on the market for the reception of digital television by cable, the government proposed an amendment to the RTVA in 2010: a new section 65a RTVA would authorise the government to enact provisions allowing the free choice of device for receiving digital television programmes.[36]

However, the government's proposal was rejected by the parliament,[37] which considered the proposed provision no longer necessary as technological developments meant that users could in the meantime choose between various television delivery platforms (cable, DTT, satellite, IPTV or Web TV). Furthermore, the parliament believed that there was a risk of distortion of competition inherent in the provision and was worried that interface specifications that did not meet the very latest technological standards might be ordered for reception devices.

II. Platform operators and converged services

Various gatekeepers can abuse their position in the distribution of radio and television programmes in order to foreclose the market. A conceivable possibility is to bring about distribution bottlenecks in the case of multiplex operators, set-top boxes for the reception of digital television, or navigation systems (electronic programme guides – EPGs).

General competition law can provide some help in combating such abuses. Apart from this, open access through specific rules on the provision of programmes is protected in sections 63-65 RTVA. These rules give broadcasters the right to access technical processing of programme services or equipment on a fair, reasonable and non-discriminatory basis. Multiplex operators, for example, have to bear this in mind if they do not already have to distribute a programme owing to statutory or officially ordered access rights (see III.4 below). Furthermore, the RTVA contains rules on open programming interfaces, technical standards, encryption and unbundling. For example, the government can prescribe open interfaces or even specific technical standards if this is necessary to safeguard diversity of opinion.

III. Distribution (network operators)

1. Fee rates

The RTVA does not contain any provisions concerning distribution fee rates, which are subject to an agreement between the telecommunications services provider and the broadcaster in the context of their freedom to engage in economic activities. However, it follows from the legal texts that programmes of broadcasters with must-carry status (see III.4 below) must be distributed free of charge, which means that the distribution costs must be paid by the telecommunications services provider.

It is necessary to distinguish between the distribution costs and the costs of feeding the programme signal into the distribution network. The courts have ruled that the latter costs are to be borne by the broadcaster.[38]

Particularly noteworthy are the special powers of the Price Inspector, who has obtained various price reductions from the leading cable network operator Cablecom, which supplies more than 50% of Swiss households. For example, after several months of negotiations he reached a mutual agreement

36) Aubry, Patrice, "Federal Council in Favour of Free Choice of Decoder for Receiving Digital TV", *IRIS* 2010:10/19.
37) See www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20100084
38) BVGer judgment A-8389/2010 of 21 July 2011 (Schweizer Sportfernsehen SSF v. 20 telecommunications services providers), E. 6.6 ff.

with Cablecom in 2010 on the prices for the cable television connection and the basic analogue and digital radio and television package.[39]

2. Access

Also in the area of the distribution of radio and television programmes, either via wired or wireless terrestrial technologies, the Broadcasting Act obliges telecommunications services providers to offer their services on a fair, reasonable and non-discriminatory basis (section 51(2) RTVA). Up to now, this rule has not been applied in practice but a dispute in this connection is pending with the Federal Office of Communications.

3. Network neutrality

Switzerland has so far enacted no legal rules on network neutrality. If telecommunications companies suppress unwelcome content or discriminate against individual offerings the supervisory authority responsible for telecommunications – the Federal Office of Communications – could probably take no action owing to the current legal situation.

In 2012, a question was asked in the parliament whether there was any plan to enact legal rules in Switzerland based on the Dutch model. In reply, the minister responsible for media issues stated that the matter would be examined in connection with the revision of the Telecommunications Act.[40]

4. Must-carry rules

The programmes with must-carry status are defined by section 59 RTVA. They are the licensed programmes of the SRG and the programmes of licensed private broadcasters with a performance mandate (subsection 1). The SRG programmes must be distributed throughout Switzerland and the programmes of the licensed private broadcasters must be distributed in their supply areas by wire.

Moreover, the government, based on section 59(2) RTVA, has specified in the Ordinance of 9 March 2007 on Radio and Television (RTVO/*Radio- und Fernsehverordnung* – RTVV) programmes of foreign broadcasters that, owing to their special contribution to education, cultural development or the unrestricted formation of opinion, also have must-carry status and must be distributed throughout Switzerland by wire. These programmes are ARTE, 3sat, TV5, ARD, ORF 1, France 2 and Rai Uno as well as Euronews – in the language of the linguistic region concerned.

Furthermore, the Federal Office for Communication can grant must-carry status to other broadcasters' programmes if they make a particular contribution to the constitutional public service remit (section 60 RTVA; see I.2 above). If the preconditions exist, the extent of the obligation to broadcast depends on the application made. Up to now, only two programmes have attained must-carry status in this way: a special-interest channel for popular sports[41] and the youth channel Joiz.[42]

Must-carry status currently still covers analogue and digital distribution, but if a telecommunications service provider's business model does not yet include digital distribution that provider is only obliged to ensure analogue distribution.

39) See http://www.preisueberwacher.admin.ch/themen/00019/00025/
40) See http://www.parlament.ch/ab/frameset/d/n/4904/381895/d_n_4904_381895_381951.htm
41) See http://www.bakom.admin.ch/dienstleistungen/entscheiddatenbank/index.html?lang=de&entscheid=23&leitsatzsprachen=de|fr|it&page_num=8
42) See http://www.bakom.admin.ch/dienstleistungen/entscheiddatenbank/index.html?lang=de&entscheid=69&leitsatzsprachen=de|fr|it&page_num=3&page_num=3&page_num=3&page_num=3

5. Complementing rules with provisions of competition law

Based on general competition law, the largest Swiss cable network operator (Cablecom AG) was obliged in 2002 to continue to feed the digital pay-TV service of Teleclub AG into its cable network. According to the Competition Commission in its decision, Cablecom had abused its market-dominant position as the leading cable network operator by refusing to take the Teleclub programmes. Also unacceptable was Cablecom's demand that Teleclub AG agree to dispense with the requirement to use its own set-top boxes for the reception of its programmes.[43]

43) Sidler, Oliver, "Dispute between Cablecom and Teleclub", *IRIS* 2002-7:7/12, and Hilger, Caroline, "End of Dispute between Cablecom and Teleclub", *IRIS* 2003-6:8/13.

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GERMANY

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I. Audiovisual media services and enabling services

1. Regulation of market power in the case of public service media

While private broadcasters have long been subject to comprehensive legal provisions specifically relating to media concentration (see I. 2 and 3 below), the rules for commercial activities of public service broadcasters were revised and extended by the *12. Rundfunkänderungsstaatsvertrag* (12th amendment to the Inter-State Broadcasting Agreement.[1] They implement commitments made by Germany to the European Commission in state aid proceedings concerning the funding of public service broadcasting.[2] The aim of the new Articles 16a ff. of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – RStV)[3] is, on the one hand, to ensure that broadcasters' commercial activities[4] are only carried out under market conditions (Article 16a(1), 3rd sentence, RStV), which means that cross-subsidies through licence fees are prohibited.[5] On the other hand, the participation of broadcasters in commercial enterprises is linked to certain conditions imposed in order to prevent their involvement in activities extraneous to broadcasting and ensure sufficient influence on the business activities of these enterprises (Article 16b RStV). These provisions are complemented by a ban on the assumption of liability for commercial affiliated companies (Article 16e RStV). There are also specific monitoring mechanisms (Articles 16c and 16d RStV).[6]

1) *Zwölfter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Zwölfter Rundfunkänderungsstaatsvertrag)* of 18 December 2008, which came into force on 1 June 2009, www.rlp.de/no_cache/ministerpraesident/staatskanzlei/medien/?cid=90&did=5801&sechash=df732219

2) See European Commission, letter to the German Foreign Minister of 24 April 2007 concerning state aid, E 3/2005, K(2007) 1761 endg., paras. 322 ff., http://ec.europa.eu/eu_law/state_aids/comp-2005/e003-05.pdf ; on the institution of the proceedings, see. Kleist/Scheuer, "Klärung von Grundsatzfragen – Die EU überprüft die Finanzierung des öffentlich-rechtlichen Rundfunks", *Funkkorrespondenz* 10/2005, pp. 3 ff.

3) *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV)* in the version of the *15. Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (15th amendment to the Inter-State Broadcasting Agreement – RÄStV) of 15/17 December 2010; unofficial consolidated version with amendments to the 13th RÄStV and text of the 15th RÄStV available at : www.urheberrecht.org/law/normen/rstv/. Unless otherwise stated, references below to the RStV refer to the version that will apply from the entry into force of the 15th RÄStV on 1 January 2013.

4) In the following, the term "broadcasters" refers to the regional (*Land*) broadcasters belonging to the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (Association of German Public Service Broadcasters – ARD) and to Germany's second public service channel Zweites Deutsches Fernsehen (ZDF).

5) Explanatory memorandum to the *12. Rundfunkänderungsstaatsvertrag* (12th amendment to the Inter-State Broadcasting Agreement), p. 25, www.rlp.de/no_cache/ministerpraesident/staatskanzlei/medien/?cid=90&did=5806&sechash=4fba63e6

6) For details of the nature of Germany's promises to the Commission, see Thomas Kleist, "Die Umsetzung des EU-Kompromisses im 12. Rundfunkänderungsstaatsvertrag", *promedia* 2/2008, www.promedia-berlin.de/fileadmin/Archiv/2008/02/promedia200802-online02.pdf

The duration and times of commercial breaks in public service television programmes are also limited (by Article 16 RStV): the annual average on the first ARD channel and on the second channel Zweites Deutsches Fernsehen (ZDF) must not exceed 20 minutes on weekdays (Monday to Saturday). Moreover, no more than one-fifth of the advertising time may be used up in any one-hour period. No advertising may be broadcast on these and other public service channels after 8pm on weekdays or on Sundays and national public holidays. Product placements and references to sponsors do not count towards advertising times, but the 8pm limit will also apply to sponsorship (with the exception of sports events) from 1 January 2013. This means that these broadcasters are limited in their ability to compete in the advertising market.

In addition to the RStV, the *Gesetz über Wettbewerbsbeschränkungen* (Restraints on Competition Act – GWB) is applicable. Attention should be paid, *inter alia*, to the rules on awarding public contracts (Sections 98 ff. GWB).

2. Regulation of market access

2.1. Public service television and public service telemedia

Public service broadcasters are not required to obtain a licence or register with the authorities[7] as their remit and programming follow from Articles 11 ff. RStV. Article 11b RStV expressly mentions the names of the public service television channels.

According to Article 11d RStV, the remit also covers certain telemedia. In the case of new public service telemedia services or changes to them, a three-stage test normally has to be carried out in accordance with Article 11f(4) to (7) RStV.[8] After conducting a quantitative and qualitative inventory of the telemedia already freely accessible on the market, it is then also necessary to examine the impact that the proposed services would have on the market (Article 11f(4)(3) RStV). The relevant body of the broadcaster concerned will then examine whether the service is covered by the remit and communicate the result to the authority responsible for exercising legal supervision, which merely checks whether the decision complies with the law.

2.2. Private broadcasting and private telemedia

The provisions applicable to private broadcasters are Articles 20 ff. RStV. In addition, rules of *Land* law or interstate agreements concluded between several (but not all) *Länder* may also apply[9] but they only have an effect if the RStV does not contain any provisions on a particular issue.[10]

a) Obligation to obtain a licence

Only private broadcasting services are required to obtain a licence (Article 20(1)(1) RStV). Article 2(1), first sentence, RStV states that broadcasting is the organisation and dissemination, with the aid of electromagnetic waves, of moving images and sound for simultaneous reception by the public on the basis of a programming schedule. The condition of simultaneous reception excludes purely on-demand services. According to the second sentence, the term "broadcast" also covers encrypted services or those only available against an additional payment. Broadcasting mainly differs from

7) On the terms "broadcaster" and "telemedia", see I. 2.2. a) below.
8) On the three-stage test, see Thomas Kleist, loc. cit. (Fn. 6); Christian Bron, "Financing and supervision of public service broadcasting", *Public Service Media: Money for Content*, IRIS *plus* 2010-4, European Audiovisual Observatory, p. 17f.; Verena Wiedemann, "Wie die Anstalten die Entscheidungen ihrer Gremien zum Dreistufentest vorbereiten und begleiten sollten", *Arbeitspapiere des Instituts für Rundfunkökonomie an der Universität zu Köln*, Heft 257, 2009, www.rundfunk-institut.uni-koeln.de/institut/pdfs/25709.pdf
9) For reasons of space and in the interests of clarity, in the following we generally dispense with a description of provisions of *Land* law.
10) Article 1(2) RStV. See on this also Communication No. 6/08 of 8 April 2008 from the *Kommission zur Ermittlung der concentration im Medienbereich* (Media Concentration Commission – KEK), www.kek-online.de/kek/information/publikation/kek_mitteilung_6.pdf

telecommunications services because of the “organisation” of the programmes offered, which goes beyond the mere transmission of a signal.[11]

Finally, “telemedia” are defined by the third sentence of Article 2(1) as all electronic information and communications services that neither *exclusively* consist in the transmission of a signal of existing telecommunications services or telecommunication-based services[12] nor constitute broadcasting. In particular, telemedia services are those that (only) provide on-demand audiovisual content. According to Article 54(1), first sentence, RStV and section 4 of the Telemedia Act, they do not require a licence and registration.

Furthermore, Article 2(3) RStV contains negative definitions. For example, Internet services offered to fewer than 500 users at the same time do not constitute broadcasting (Article 2(3)(1) RStV).[13]

b) Personal licence criteria

The personal requirements applying to providers of national broadcasting services are governed by Article 20a RStV (such as the need to have a residence in the European Economic Area). The relevant provision from the point of view of the law relating to media concentration is Article 20a(2), second sentence, RStV, which applies to *Aktiengesellschaften* (public limited companies): a licence may only be granted if, under its articles of association, the company only issues registered shares and, perhaps also, preference shares without voting rights. This is in order to ensure clarity with regard to the ownership structure of the broadcaster and the extent of its shareholders' role in decision-making.[14] With the exception of churches and universities, Article 20a(3), first sentence, RStV provides that broadcasting licences may not be granted to legal entities subject to public law, their legal representatives and senior staff, as well as political parties[15] and voter associations. According to Article 20a(3), second sentence, RStV, the ban on issuing a licence also applies to companies affiliated to the aforementioned legal entities pursuant to section 15(1) of the *Aktiengesetz* (Stock Corporation Act). These provisions apply *mutatis mutandis* to foreign public and state-run bodies (Article 20a(3), third sentence, RStV).

The reason for the exclusions in the case of public bodies lies in the constitutional requirement of the separation of the state from the media: the state may not simultaneously be the holder and guarantor of the basic right to freedom of expression.[16] Indirect state influence on programming, for example via the allocation of transmission capacities, is also prohibited. The *Kommission zur Ermittlung der concentration im Medienbereich* (Media Concentration Commission – KEK) has been dealing with an application by the Bundestag for a licence to operate a parliamentary television channel since 2006. The Bundestag planned to transmit the parliamentary debates, which, with the approval of the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority), had so far only been fed encrypted into the Berlin cable television network and delivered as Web TV on the Internet, across the whole of Germany unencrypted by cable and satellite. It is debatable whether the state would in this case be assuming the role of a broadcaster (which would not be permissible according to Article 20a(3) RStV) or whether Article 2(3)(4) RStV would apply – i.e., that the service would not constitute broadcasting as the unedited plenary debates with no commentary could not be regarded as a journalistic-editorial offering. The proceedings are currently suspended as the Bundestag did not pursue its plans any further. The public service documentary channel Phoenix announced its intention

11) See the definition of a telecommunications service in Article 3(24) of the *Telekommunikationsgesetz* (Telecommunications Act – TKG) of 22 June 2004 (BGBl. (Federal Gazette) I, p. 1190), last amended by Article 1 of the Act of 3 May 2012 (BGBl. I, p. 958), available (in German) at: www.gesetze-im-internet.de/tkg_2004/ . This definition explicitly also includes broadcasting transmission services.

12) Telecommunication-based services are defined in Article 3(25) TKG as “services where the flow of content cannot be divided in terms of time and space and where the content is provided during the telecommunications connection”.

13) For details of additional criteria that distinguish Internet-based services, see KEK Communication No. 4/07 of 16 November 2007, www.kek-online.de/kek/information/publikation/kek_mitteilung_4.pdf

14) See the explanatory memorandum to the 10th RÄStV “Zu Nummer 11”, p. 8, www.rlp.de/no_cache/ministerpraesident/staatskanzlei/medien/?cid=94&did=5802&sechash=4fc3ce33

15) On the other hand, the provision in Article 6(2)(4) of the *Hessisches Privatrundfunkgesetz* (Hessian Private Broadcasting Act), which prohibited parties and voter associations from acquiring any shareholding in a private broadcaster, was declared unconstitutional owing to a violation of the freedom to broadcast, which also applies to political parties. Cf. *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG), judgment of 12 March 2008 (“13th broadcasting judgment”), Case 2 BvF 4/03, www.bverfg.de/entscheidungen/fs20080312_2bvf000403.html

16) BVerfGE (Official Collection of Federal Constitutional Court Decisions) 12, 205, 263.

to extend the transmission of parliamentary sittings,[17] but the *Kommission für Zulassung und Aufsicht der Landesmedienanstalten* (Media Licensing and Monitoring Commission – ZAK), which is responsible for taking a decision on this, does not regard the planned service as eligible for approval.[18]

Another problematic issue were the plans of the partially state-owned telecommunications company Deutsche Telekom AG (DTAG), which, as a broadband provider, also operates an IPTV platform via which Bundesliga football matches could be watched in the programme "Liga total". DTAG had acquired the broadcasting rights but sublicensed them to Constantin Sport Medien GmbH, which also edited "Liga total". DTAG also heavily advertised the football programme itself, so that it was debatable whether DTAG could be regarded as a broadcaster within the meaning of Article 2(2)(14) RStV.[19]

c) Licensing procedure

The applicant for a licence has a duty to make available all information and documents relevant for examining the application, in particular details of shareholdings, capital investments and voting rights (Article 21 RStV). In order to establish the facts, the *Landesmedienanstalt* (*Land* Media Authority – LMA) responsible has extensive investigative powers and rights to request information (Article 22 RStV).

d) Factual preconditions for the award of licences

As part of the procedure for awarding licences for broadcasting programmes nationwide, it is necessary to examine whether the applicant already possesses a dominant power to shape opinions as a result of the programmes attributable to it. If that is the case, then no additional programmes may be approved (Article 26(3) RStV). According to Article 36(4) RStV, the KEK, as an organ of the relevant *Land* Media Authority, is ultimately responsible – especially in the licensing procedure – for assessing the question of diversity of opinion and, therefore, the existence of a dominant power to shape opinions.[20]

Article 25 RStV also contains general provisions on the need to observe diversity of opinion but they do not provide for additional regulatory options.[21] If the requirements under media concentration law to observe diversity of opinion are met, the relevant *Land* Media Authority can therefore no longer reject a licence application from the point of view of diversity.[22]

The two German national television programmes with the widest geographical reach must, according to Article 25(4) RStV, establish at their own cost independent non-networked regional programmes to show events in the *Land* concerned.

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17) See on the KEK proceedings *Elfter Jahresbericht* (11th annual report) p. 61 f., www.kek-online.de/Inhalte/jahresbericht_07-08.pdf

18) ZAK, "Derzeitige Rechtslage lässt Parlamentsfernsehen des Deutschen Bundestages nicht zu – Rundfunk muss staatsfern sein", Press Release 08/2011 of 16 March 2011, www.die-medienanstalten.de/presse/pressemitteilungen/kommission-fuer-zulassung-und-aufsicht/detailansicht/article/zak-pressemitteilung-082011-derzeitige-rechtslage-laesst-parlamentsfernsehen-des-deutschen-bundest.html

19) According to an expert report that came to light on 19 March 2012, DTAG's influence on Constantin Sport Medien GmbH is so great that the latter cannot act independently. The offering is therefore in breach of the law ("nicht rundfunkfähig") (see the 19 March 2012 issue of *Computerwoche*, www.computerwoche.de/management/compliance-recht/2507325/). See also Hoeren/Kroll, "Die Deutsche Telekom und der freie Rundfunk", *Legal Tribune Online*, 13 February 2012, www.lto.de/recht/hintergruende/h/staatlich-kontrolliertes-bundesliga-tv-die-deutsche-telekom-und-der-freie-rundfunk/

20) Paschke et al., *Hamburger Kommentar Gesamtes Medienrecht*, 2008, 103 (marginal no. 48). Cf. Articles 36(1) and 4 RStV. On the substantive preconditions for determining the existence of a dominant power to shape opinions, see I. 3 below.

21) Rossen-Stadtfeld, "§ 25 RStV Rn. 1", in Hahn/Vesting, *Beck'scher Kommentar zum Rundfunkrecht*, 2008; Paschke et al., 2008, p. 241, marginal no. 90. On the details, see Häussermann/Scheuer, Country Report Germany in *Television and Media Concentration*, IRIS Special, European Audiovisual Observatory, Strasbourg 2001, p. 10.

22) According to BVerfGE 97, 298, 312 ff., as a result of the basic right to freedom of broadcasting, applicants have an individual right to a licence; Paschke et al. agree (p. 225 f., marginal no. 9 with further references). A different view is held by Hartstein et al. in "§ 20 RStV", marginal no. 5, in which it is pointed out that, although the Federal Constitutional Court has acknowledged the existence of an individual right to a licence, the legislators have in several provisions created some leeway for the *Land* Media Authority responsible.

3. Rules on media concentration

The examination of shareholdings, mergers and similar activities from the point of view of diversity of opinion is a sector-specific form of monitoring concentration. Its purpose – in contrast to antitrust legislation – is not to counteract excessive economic power but avoid dangers to journalistic diversity. Its reference is therefore the term "*vorherrschende Meinungsmacht*" ("dominant power to shape opinions") coined by the Federal Constitutional Court (BVerfG).[23] The Court's demand to establish a "positive system" for the field of broadcasting that fleshes out in law the basic right to broadcasting freedom comprises in particular rules to prevent the concentration of power to shape opinions. Both an "internal pluralistic" guarantee of diversity of opinion, that is to say plurality ensured within the broadcaster itself, and an "external pluralistic" guarantee as provided for by Articles 26 ff. RStV (more on this below) are conceivable. On the other hand, a mere subsequent check does not meet the fundamental-rights requirements because it could only with difficulty, if at all, correct negative developments.[24] The Federal Constitutional Court also considers general competition law on its own to be insufficient "to guarantee the required degree of diversity in the offerings of the electronic media". Antitrust law and media law, it says, have different objectives and the development of a dominant power to shape opinions can "only be counteracted by employing the instruments of the media-specific monitoring of concentration and ensuring diversity".[25]

According to Article 26(1) RStV, a broadcaster can in principle operate as many programmes as it wants,[26] and only the existence of a dominant power to shape opinions imposes limits on this principle. According to Article 26(2) RStV, a dominant power to shape opinions is assumed to exist when the annual average audience share of programmes attributable to a particular company exceeds a certain figure.[27]

What programmes are attributable to a company depends on the provisions of Article 28 RStV.[28] Of particular relevance are the different types of shareholding in the case of vertical concentration, such as between a broadcaster and a platform operator or network operator. The KEK had to deal with this question in connection with an application for a licence to operate the "Arena Bundesliga" digital pay-TV programme[29] which consisted of the encrypted transmission of first and second Bundesliga matches and was to be fed under a platform agreement into the cable networks of the regional operators iesy GmbH & Co. KG (iesy) and ish NRW GmbH, a wholly owned iesy subsidiary. The applicant, Arena Sport Rechte und Marketing GmbH, was associated with iesy in such a way that it had to be considered part of it in accordance with Article 28(1) RStV. However, as the programme did not yet have an audience share at that time and iesy operated no other television or radio programmes the KEK saw no indication that a dominant power to shape opinions would come about even if it were approved. In the future, however, it was necessary to ensure, in accordance with Articles 52 and 53 RStV,[30] that other providers were given non-discriminatory access to the technical and programme platforms of iesy or its parent Unity Media GmbH.

A dominant power to shape opinions is always assumed to exist when the total audience share of the attributable programmes reaches at least 30% (Article 26(2), first sentence, RStV). If a company has a dominant position on a "related media-relevant market" or an overall analysis of its activities on the

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23) BVerfGE 73, 118, 159f.
24) BVerfGE, 57, 295, 320, 323, 326.
25) *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG), judgment of 24 November 2010, Case 6 C 16.09, para. 39, www.bverwg.de/pdf/1455.pdf
26) The rule accordingly differs from earlier provisions that determined the existence of a power to shape opinions according to the number of programmes attributable to a broadcaster. Cf. Article 21(1) of the *Staatsvertrag über den Rundfunk im vereinten Deutschland* (Inter-State Agreement on broadcasting in the unified Germany) of 31 August 1991, www.urheberrecht.org/law/normen/rstv/RStV-00b-1991/text/1991_03.php3; Article 8(5) of the *Staatsvertrag zur Neuordnung des Rundfunkwesens* (Inter-State Agreement on the reform of broadcasting) of 1 to 3 April 1987, www.urheberrecht.org/law/normen/rstv/RStV-00a-1987/text/1987_02.php3
27) See on this IRIS Special 2001, op. cit. (Fn. 22), pp. 7 ff.
28) See IRIS Special 2001, op. cit. (Fn. 22), p. 8.
29) KEK, decision of 11 April 2006, ref. KEK 330, www.kek-online.de/kek/verfahren/kek330arena.pdf . See also Carmen Palzer, *Cable Operator as Broadcaster*, IRIS 2006-4/19, http://merlin.obs.coe.int/iris/2006/4/article19.en.html ; Max Schoenthal, *Decisions on Bundesliga Broadcasts*, IRIS 2006-6/14, http://merlin.obs.coe.int/iris/2006/6/article14.en.html
30) The legal reference here is to the RStV in the version of the 8th RÄStV applicable at the time of the KEK's decision. See www.urheberrecht.org/law/normen/rstv/RStV-08/text/

television and related market reveals an ability to influence opinions that corresponds to this audience share, then an (actual) audience share of 25% is sufficient (Article 26(2), second sentence, RStV). However, when calculating the figure a further 2% may be deducted under the "bonus rule" contained in the third sentence of Article 26(2) when regional programming is included in the general-interest programme with the widest geographical reach, in accordance with Article 25(4) RStV. An additional 3% is to be deducted when, pursuant to Article 26(5) and Article 31 RStV, the broadcaster grants third parties the airtime mentioned in Article 26(2).

The existence of a dominant power to shape opinions must not only be examined during a licensing procedure (in accordance with Article 26(3) RStV; see I. 2 above) but on a regular basis as it may change as a result of changes in audience figures or shareholdings. In order to be able to recognise developments relevant in the context of the law relating to media concentration in good time and take any countermeasures necessary, Article 29, first sentence, RStV provides that the broadcaster must notify the relevant *Land* Media Authority of all planned changes to shareholdings. If a licence would not be permissible under the changed conditions, the authority may not endorse the change as unobjectionable. If a change in shareholding, to which the Media Authority cannot give its endorsement, is carried out nevertheless, according to the fourth sentence of Article 29 RStV, the licence shall be revoked under the relevant provisions of *Land* legislation (see for example Article 48 of the *Saarlandisches Mediengesetz* (Saarland Media Act)).[31]

If the company attains a dominant power to shape opinions solely as a result of its own economic development – i.e., without acquiring shareholdings in other companies or without being granted licences to operate new programmes – it must, according to Article 26(4) RStV, agree with the KEK on certain measures proposed by the latter, pursuant to Article 26(4), first sentence, RStV, and carry these measures out within a reasonable time if it is to avoid the otherwise mandatory revocation of its licences (para. 4, third sentence).[32] Possible measures include a reduction in its audience share or in the market power on related media-relevant markets and taking steps to ensure diversity, especially by granting airtime to third parties and setting up a programme advisory board.

An extremely contentious issue is whether there is also scope outside Article 26(2) RStV for establishing the existence of a dominant power to shape opinions within the meaning of Article 26(1). The KEK proceeds on the assumption that Article 26(1) constitutes a statement in its own right and that the details specified in paragraph 2 are merely examples.[33]

The above dispute took on considerable practical significance: in a decision of 10 January 2006, the KEK refused to endorse as unobjectionable the planned takeover of ProSiebenSAT.1 Media AG (P7S1) by Axel Springer AG (AS),[34] which would have resulted in the establishment of Germany's second largest media company after Bertelsmann AG. P7S1 was the sole shareholder of several television companies and the KEK regarded the planned change in the shareholdings in these companies as the establishment of a dominant power to shape opinions. As a consequence of the decision, AS did not buy the shares and, instead, the private equity funds KKR and Permira acquired stakes in the company shortly afterwards.[35] (On the assessment of the case from the point of view of competition law, see I. 4 below.)

The KEK's decision was particularly noteworthy as the body did not base it on the presumption in Article 26(2) RStV but on Article 26(1). Although the total audience share on the television market

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31) At the beginning of 2005, the *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office – BLM) revoked the licence of the regional broadcaster tv.münchen for refusing to disclose its ownership structure despite several requests to do so made on the basis of the obligation to provide information contained in section 9(1) of the *Bayerisches Mediengesetz* (Bavarian Media Act – BayMG). See on this Rainer Grosshans, *Regional Broadcaster tv.münchen Loses Broadcasting Licence*, IRIS 2005-3/17, http://merlin.obs.coe.int/iris/2005/3/article17.en.html

32) See IRIS Special 2001, op. cit. (Fn. 22), p. 9f.

33) KEK, *Auf dem Weg zu einer medienübergreifenden Vielfaltssicherung (4. Konzentrationsbericht)*, 2010, pp. 378 ff., www.kek-online.de/Inhalte/mkbericht_4_gesamt.html . For additional arguments in this context, see KEK, decision of 10 January 2006, ref. KEK 293-1 bis -5, www.kek-online.de/kek/verfahren/kek293prosieben-sat1.pdf , pp. 72 ff.

34) KEK, decision of 10 January 2006, op. cit. (Fn. 34).

35) This had become possible after AS had decided to dispose of all the shares in the company it had previously held. Instead, it took over the portal bild.t-online.de, which it had hitherto operated together with DTAG. Cf. Alexander Scheuer, *Ownership Changes in the Media Market*, IRIS 2008-3:Extra, http://merlin.obs.coe.int/iris/2008/3/article102.en.html

would have been below 25% even after the planned ownership changes, the Commission assessed the power of AS to shape opinions as so great overall that it would have been an obstacle to the programmes being awarded licences. The Commission based this assessment in particular on the fact that AS held a "partially dominant and, at any rate, without exception significant position" on a majority of other related media-relevant markets, especially daily newspapers.[36] The decision refers to the Federal Constitutional Court's arguments in its "Fourth Broadcasting Judgment", in which the judges pointed to the dangers to diversity of opinion if the influence on shaping opinions in broadcasting became combined with the influence in the press field.[37] The "absolute dominance" of AS in the daily press and its significant positions on magazine and online markets enabled its power to shape opinions to reach a level that – even after deducting the audience share of non-networked regional programmes that contribute to diversity – corresponds to an audience share of at least 42%.[38] The Commission expressly pointed out that, although the biggest competitor of P7S1 on the television market, Bertelsmann AG (majority shareholder of the RTL Group), also has a high audience share, it does not hold a position comparable to that of AS on the daily press market.

AS lodged an appeal to the *Bayerischer Verwaltungsgerichtshof* (Bavarian Administrative Court – BayVGH),[39] which ruled in its favour in a decision that may turn out to be only temporary: the KEK had, the court said, "in several respects exceeded" its discretion. In particular, the influence on shaping opinions on related media-relevant markets should not have been included in its assessment because the 22.06% audience share was well below the 25% limit mentioned in Article 26(2), second sentence, RStV. Moreover, the Commission should have taken into consideration the figures contained in the standard examples and not replaced them by its own figures. According to media reports, the Commission has indicated its intention to appeal to the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG) against the denial of leave to appeal.[40] Should this appeal be allowed, the relationship between Article 26(1) and Article 26(2) RStV could be clarified once and for all in the foreseeable future. The case had already been brought before the BVerwG in an appeal on points of law (*Revision*) after the appeal lodged by AS to the BayVGH had initially been dismissed as inadmissible[41] but the BVerwG had referred the case back to the BayVGH for a determination of the merits.[42] In its judgment, the BVerwG acknowledged the separate scope of application of Article 26(1) RStV (in addition to Article 26(2) RStV): the standard examples in paragraph 2, it said, were not to be understood as definitive rules but also permitted a different assessment when the limits had not been completely reached. The precondition for this, however, was the existence of a ground that corresponded to the standard examples in terms of its significance. Furthermore, the Commission should in its assessment also take account of the figures mentioned by the legislators in the case of the standard examples, but in its most recent judgment the BayVGH did not regard this as having been guaranteed.

Transnational shareholdings in media companies constitute a special case. Here, the provisions of the RStV aimed at ensuring diversity of opinion do not in principle take effect. Only foreign public or state bodies may, according to Article 20a(3), third sentence, RStV, neither be licensed as broadcasters nor have a shareholding in a broadcaster as an affiliated company. However, the ban does not cover public shareholdings, which do not constitute affiliation within the meaning of section 15 of the *Aktiengesetz* (Stock Corporation Act) and it most definitely does not apply to foreign private investors. An amendment to the *Außenwirtschaftsgesetz* (Foreign Trade and Payments Act – AWG)[43] that came into force in 2009 permits acquisitions of shareholdings in German companies by non-EU/EFTA foreign nationals to be examined and, if necessary, prohibited if they would jeopardise the "public order or

36) See KEK, decision of 10 January 2006, op. cit. (Fn. 34), 87.

37) BVerfGE 73, 118, 175.

38) The calculation already included deductions of 3% for airtime granted to third parties and 2% for regional programmes pursuant to Article 26(2), third sentence, RStV, although the KEK noted in the same part of its decision that the full bonus for regional programmes could only be reached in the future as the current regional programmes on the SAT.1 channel did not meet the conditions of Article 25(4) second to fourth sentences, RStV.

39) BayVGH, judgment of 14 January 2012, ref. 7 BV 11.285, www.vgh.bayern.de/BayVGH/documents/7BV11.285.pdf

40) *Der Spiegel* 16/2012, 16 April 2012, www.spiegel.de/spiegel/print/d-85065981.html

41) BayVGH, judgment of 7 September 2009, ref. 7 BV 08.254, www.vgh.bayern.de/BayVGH/documents/7BV08254_anonymisiert_.pdf . See also Anne Yliniva-Hoffmann, *BayVGH Upholds Axel Springer AG Complaint about P7S1 Takeover*, IRIS 2012-4/15, http://merlin.obs.coe.int/iris/2012/4/article15.en.html

42) BVerwG, judgment of 24 November 2010, ref. 6 C 16.09, op.cit (Fn. 26), www.bverwg.de/pdf/1455.pdf.

43) *Außenwirtschaftsgesetz* in the version of its promulgation on 27 May 2009 (BGBl. I S. 1150), last amended by section 1 of the Regulation of 15 December 2011 (*Bundesanzeiger* 2011, 4653), available at: www.gesetze-im-internet.de/awg/index.html

security of the Federal Republic of Germany" (section 7(2)(6) AWG). However, according to section 53(1), second sentence of the *Außenwirtschaftsverordnung* (Foreign Trade and Payments Regulation – AWV) only shareholdings of at least 25% of the voting rights are subject to such an examination. The inclusion of other companies for the purposes of calculating the acquirer's shareholding is governed by section 53(1), third sentence, AWV in a similar way to Article 28 RStV. In order to prevent transactions aimed at evading the rules, if there are any signs of such evasion taking place an acquisition by a resident of another EU/EFTA member state can also be prohibited if a non-EU/EFTA foreign national possesses at least 25% of the voting rights in the company concerned (section 53(1), sixth and seventh sentences, AWV). The body responsible for the examination pursuant to section 7(2)(6) AWG is the *Bundesministerium für Wirtschaft und Technologie* (Federal Ministry for Business and Technology) (section 28(2)(3) AWG). The existence of this situation is determined according to EU law (cf. section 7(1)(4) AWG, which refers to the current Articles 52 and 65 of the Treaty on the Functioning of the European Union). Section 7(2)(6) AWG accordingly also states that "an actual and sufficiently serious danger ... that affects a basic interest of society" must be present. The Court of Justice of the European Union (CJEU) has generally recognised that the maintenance of a pluralistic broadcasting sector is an overriding requirement in the public interest and may justify restrictions on fundamental freedoms.[44]

Conversely, the national provisions on diversity of opinion also impose no restrictions on shareholdings of German investors in foreign media companies (cf. Article 26(1) RStV, which only mentions the organisation of programmes within Germany), provided that the shareholding does not serve the purpose of circumventing the German rules.[45] On the other hand, foreign companies must also be included among those considered pursuant to Article 28(3) RStV for the purpose of calculating the extent of the power to shape opinions in Germany.

Articles 25 ff. RStV do not apply to companies that provide private telemedia without offering broadcasting services at the same time. These providers are only subject to the provisions of Articles 54 ff. RStV. These rules do not (yet[46]) contain media-specific provisions on concentration.

4. Competition law

Antitrust legislation, with its clearly different key objective of preventing the development of a "market-dominant position", remains applicable alongside the media-specific provisions regulating concentration in the RStV. The aim of the GWB[47] is to maintain economic competition on the media market. In contrast to the preconditions set out in Article 26 RStV, the GWB does not prevent the development of market dominance as a consequence of an individual company's business activities. Compliance with competition law is only checked when a merger with another company is to take place or a company abuses its market dominance.

The possibilities for the antitrust authorities to intervene[48] are essentially limited to three situations: the authority responsible can, firstly, take action against cartels that restrict competition (sections 32 and 1 GWB); secondly, it can oblige companies to cease abusing their dominant position on a market (sections 32 and 19 ff. GWB); and, finally, it can prohibit planned company mergers likely to establish or strengthen a market-dominant position (sections 35 ff. GWB).

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44) CJEU, judgment of 25 July 1991, Case C-288/89 – *Gouda*, para. 23; CJEU, judgment of 3 February 1991, Case C-148/91 – *Veronica*, para. 9. The maintenance of pluralism "is intended to preserve the diversity of opinions, and hence freedom of expression" (CJEU, judgment of 5 October 1994, Case C-23/93 – *TV10*, para. 25).
45) See on this Hartstein et al., "§ 26 RStV", marginal no. 6.
46) On developments towards concentration in the field of Internet media services from the point of view of the communication sciences and media economics – including the phenomenon of cross-media interrelationships – see Christoph Neuberger/ Frank Lobigs, "Die Bedeutung des Internets im Rahmen der Vielfaltssicherung", *ALM-Schriftenreihe* Bd. 43, Berlin 2010. On the other hand, Tobias Schmid, in Rolf Schwartmann, *Praxishandbuch Medien-, IT- und Urheberrecht*, 2008, p. 105, para. 50, suggests basing reforms of the rules on concentration in broadcasting on the "much more liberal situation with regard to the press".
47) Available at: www.gesetze-im-internet.de/awg/index.html
48) If the impact of an act in breach of antitrust legislation extends beyond Germany's borders, the *Bundeskartellamt* (Federal Cartel Office – BKartA) is always responsible for dealing with the matter (Article 48(2) GWB). The same applies when – as in the case of the monitoring of mergers (see Article 36 GWB) – the BKartA is explicitly mentioned in the law as the competent authority.

In the area of the audiovisual media, the *Bundeskartellamt* (Federal Cartel Office – BKartA) has mainly assessed planned mergers in the last few years.[49] Among other things, the authority has also had to deal with the above plans of AS to take over P7S1. The two companies had given notice of the share takeover as a planned merger in accordance with sections 35(1) and 39 GWB. Only a few days after the KEK's decision, the BKartA also prohibited the merger.[50] The market analysis had revealed that the merger would lead among other things to the strengthening of the joint dominance of the P7S1/Bertelsmann AG duopoly on the television advertising market.[51] The BKartA believed that the measures promised to remedy the situation were insufficient. In particular, it said, with respect to proposed licence conditions there was a lack of effective possibilities of carrying out checks and imposing sanctions.

The BKartA and the KEK co-operate pursuant to Article 39a RStV and section 50c GWB in cases involving both an antitrust and a media law component. AS also lodged a judicial appeal against the BKartA's decision but lost its final appeal to the *Bundesgerichtshof* (Federal Court of Justice – BGH) in 2010.[52]

In 2011, the BKartA prohibited another merger involving P7S1:[53] the company planned a joint venture with its competitor RTL interactive GmbH, which belongs to the RTL Group, to set up an Internet-based video on demand (VoD) platform called Amazonas. In the BKartA's estimation, the joint company to be set up for this purpose would have further increased the duopolistic market dominance of the nationwide television advertising market. In addition to the harmonisation of important competition parameters between the companies involved, especially in the case of so-called "in-stream video advertising",[54] the antitrust authority was worried about incentives to make it difficult for operators of other advertising-funded VoD platforms to access television content and thus weaken their market position. This would also have adverse consequences for competition on the in-stream video advertising market. At the same time, the BKartA regarded the memorandum of understanding to set up the joint venture as a breach of the ban on establishing a cartel, especially as the companies involved intended to use the joint venture to influence the situation on the in-stream video advertising market "in a targeted way in their common interest". As early as 2007, the BKartA took action against the advertising marketers of P7S1 (SevenOne Media) and the RTL Group (IP Deutschland) because it regarded as unlawful the share deals of the two companies, which together had a dominant position on the television advertising market.[55]

On the other hand, the central marketing model for the transmission rights to the first and second division games of the Bundesliga from the 2013/14 season onwards passed the antitrust test.[56] Although the BKartA established that the planned exclusive marketing of the rights via Deutsche Fußball Liga GmbH (DFL) would lead both to significant restrictions on competition on the national market for transmission rights and to an extremely adverse impact on the international market, a final assessment of whether this would breach the ban on establishing a cartel was not necessary as

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49) Rupprecht Podszun, in "Fernsehkartellrecht – Die Entscheidungspraxis des Bundeskartellamts", *Multimedia und Recht* 2007, 761 ff., discusses the basic thinking of the BKartA when assessing concentration in the field of television on the basis of four decisions (including those described below).

50) BKartA, decision of 19 January 2006, ref. B6-103/05.

51) However, only just under three months later the BKartA approved the takeover of n-tv Nachrichtenfernsehen GmbH & Co. KG by RTL Television on the ground that the advertising market duopoly would have continued to exist if it had been prohibited as the n-tv programme would then have been taken off the air: BKartA, decision of 11 April 2006, ref. B6 - 142/05, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-142-05.pdf?navid=91 . See on this Carmen Palzer, *Green Light for RTL Group's Takeover of News Channel n-tv*, IRIS 2006-6/16, http://merlin.obs.coe.int/iris/2006/6/article16.en.html

52) BGH, decision of 8 June 2010, ref. KVR 4/09, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=53625&pos=0&anz=1 . See on this Anne Yliniva-Hoffmann, *BGH Confirms Ban on Merger between Springer and ProSiebenSat1*, IRIS 2010-7/12, http://merlin.obs.coe.int/iris/2010/7/article12.en.html

53) BKartA, decision of 17 March 2011, ref. B6-94/10, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf . See on this also Peter Matzneller, *Federal Cartel Office Prohibits Joint Video Platform of RTL and ProSiebenSat.1*, IRIS 2011-5/15, http://merlin.obs.coe.int/iris/2011/5/article15.en.html

54) The BKartA understands the term in-stream video advertising to mean an advertising video that is similar to a television commercial and is linked to an online video "targeting the actual interest of the online user".

55) Paul Göttlich, *ProSiebenSat.1 and RTL Accept Heavy Fines from the Federal Cartel Office*, IRIS 2007-10/14, http://merlin.obs.coe.int/iris/2007/10/article14.en.html

56) BKartA, decision of 12 January 2012, ref. B 6-114/10, www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/B6-114-10_inkl_Anlage.pdf

the BKartA regarded its doubts as having been dispelled owing to the extensive commitments given by the parties and accordingly discontinued the proceedings in accordance with section 32b GWB. The tailoring of the rights packages according to distribution platforms should, it said, be seen as balanced. Moreover, as the commitments provided for extensive obligations to show matches on the part of the companies acquiring the rights it was possible to avoid any one bidder buying up all the rights merely to prevent competitors from reporting on those matches. In the subsequent bidding procedure, the pay-TV provider Sky obtained the rights to transmit matches live on pay-TV both via the traditional distribution platforms and IPTV, as well as on web and mobile TV. The previous IPTV distributor, DTAG, will, according to media reports, transmit the Sky signal in future via its IPTV service "Entertain". Its own television channel "Liga total" will, however, be discontinued (see *supra* I.2.2.b) as the company was unable to agree with Sky on the purchase of IPTV transmission rights.[57] The BKartA traditionally keeps a close eye on the marketing of the transmission rights for Bundesliga matches.[58]

5. Must-offer, access to archives

Up to now, German law has not provided for an extensive, expressly stipulated obligation on the part of broadcasters or other providers of audiovisual media to provide their content to specific or, indeed, all network and platform operators that wish them to do so. Owing to the guarantees given broadcasters by copyright and related rights legislation (sections 20, 20b, 87 of the *Urheberrechtsgesetz* (Copyright Act)[59]), broadcasters can decide on the distribution of the transmission signal. This is confirmed by numerous judgments on the interpretation of these rules.[60] Network operators must therefore reach an agreement with broadcasters on retransmission rights.[61] Actual must-offer rules can hardly be inferred from the public service remit (Article 11 RStV) either, but a duty on the part of broadcasters only to conclude exclusive agreements for content that is actually to be commercially exploited may follow from the basic right to free access to information.[62]

Extensive obligations to offer their own television programme to platform and network operators may be imposed on television broadcasters from the point of view of competition law if they have a dominant market position, but it is not known whether any such decisions have been taken by the antitrust authorities.[63]

On the other hand, a must-offer obligation for broadcasters to competing television companies with regard to certain (sports) content follows from the state aid proceedings mentioned at the beginning of this article: in those proceedings, the Federal Government undertook to ensure that broadcasters guarantee transparency in their business policy in the area of sports rights. In particular, this includes their either exploiting the rights they have acquired to transmit sports events or offering them to third parties in a transparent sublicensing procedure.[64]

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57) www.ftd.de/it-medien/medien-internet/:bundesligarechte-telekom-begraebt-liga-total/70042180.htm

58) The BKartA also tolerated the co-operation between the pay-TV broadcaster Premiere and Arena, provided that it was terminated by 30 June 2009. Cf. Adrian Schneider, "Kartellamt toleriert Arena/Premiere-Kooperation", *Telemedicus*, 18 July 2007, www.telemedicus.info/article/313-Kartellamt-toleriert-ArenaPremiere-Kooperation.html

59) *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights) of 9 September 1965, *Bundesgesetzblatt* (BGBl.) I S. 1273, in the version of the Law of 22 December 2011, BGBl. I p. 3044, available at: www.gesetze-im-internet.de/urhg/

60) See on this Caroline Hilger, *Digital Cable Transmission Needs Broadcaster's Consent*, IRIS 2003-2/9, http://merlin.obs.coe.int/iris/2003/2/article9.en.html ; Sebastian Schweda, *Cable Network Operators Must Pay Licence Fees to VG Media*, IRIS 2010-4/15, http://merlin.obs.coe.int/iris/2010/4/article15.en.html ; Anne Yliniva-Hoffmann, *BGH Rules on Cable Retransmission Right*, IRIS 2010-6/17, http://merlin.obs.coe.int/iris/2010/6/article17.en.html

61) See on this Anne Yliniva-Hoffmann, *FRK and RTL Deutschland Agree on Cable Retransmission*, IRIS 2012-5/17, http://merlin.obs.coe.int/iris/2012/5/article17.en.html . For additional details on this subject, see Caroline Hilger, *ANGA and Premiere Reach Settlement*, IRIS 2001-5/7, http://merlin.obs.coe.int/iris/2001/5/article7.en.html

62) Reinhard Hartstein et al., "Vor § 11 RStV", end of para. 42.

63) On the problematic negotiations (also) involving German broadcasters concerning the transmission of their programmes on the Internet platform Zattoo and the German DVB-H platform, see Alexander Scheuer/Sebastian Schweda, *Progress in the Must-offer Debate? Exclusivity in Media and Communication*, IRIS *plus* 2008-10, www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2008.pdf.en . No obligations in this regard are contained either in the BKartA decision on the marketing model for the first and second division Bundesliga matches mentioned above (Fn. 57) or in the commitments made in these proceedings.

64) European Commission, op. cit. (Fn. 2), p. 78, para. 355.

II. Platform operators and converged services

1. Provisions of media law

With the 10th RÄStV, rules on regulating digital platforms were inserted into the RStV (cf. Articles 52 ff. RStV). These are given concrete form in content and procedural terms in the *Zugangs- und platformsatzung* (Rules on access and platforms – ZPS) enacted on the basis of Article 53 RStV[65] (cf. Article 53, first sentence, RStV and Rule 1(1) ZPS).[66]

According to Article 2(2)(13) RStV, a platform operator is anyone who "combines broadcasts and comparable telemedia by means of digital transmission capacities or digital data streams, including from third parties, with the aim of making these offerings available as a full service, or anyone who decides on the selection of the combined content. Anyone who exclusively markets broadcasting content or comparable telemedia is not a platform provider". On the other hand, if a service provider's offering is limited to the technical transmission of broadcast signals that company does not fall within the definition of the term platform provider but is, as a provider of telecommunications services, exclusively subject to regulation under the *Telekommunikationsgesetz* (Telecommunications Act – TKG).[67]

Certain platforms for which the legislators saw no need to enact regulations[68] are, however, excluded from a number of important rules, for example on platform occupancy, technical freedom of access and the system of charges (Article 52(1) RStV). This applies for example to platforms in open networks, such as the Internet, provided that they do not have a dominant market position there.[69] These provisions are also not applicable either to platforms that only retransmit an already authorised overall offering unchanged or to those that do not have many users.

Providers not covered by an exemption must notify the relevant LMA of the planned launch of the platform one month in advance. Explicit authorisation is not required but the provider must, pursuant to Article 52(2) RStV, meet the personal conditions set out in Article 20a (1) and (2) RStV and state this in its notification in accordance with Article 52(3)(1) RStV. It must also state how it implements the requirements to be met by platform providers laid down in Articles 52a to 52d RStV (Article 52(3)(2) RStV). At the request of the LMA responsible, the platform provider must submit the necessary documentation. The procedural provisions of Articles 21 to 24 RStV also apply *mutatis mutandis* (Article 52e(1) RStV).

Some of the new provisions aim to ensure diversity of opinion. For example, Article 52b(1) RStV imposes extensive obligations on private providers with regard to the television programmes carried by their platforms: a maximum of one-third of the transmission capacity must be available for the national public service television programmes (ARD and ZDF) and the so-called "third programmes" distributed by the relevant *Landesrunkfunkanstalt* (*Land* broadcasting authority), for the two private television programmes that contain regional windows pursuant to Article 25(4) RStV, and for the local and regional television programmes licensed in the Land concerned (Article 52b(1)(1)(1) RStV). A further maximum one-third proportion is to be provided for digital television programmes and telemedia, which the platform provider must select from the point of view of diversity. It must both include a large number of programme providers and ensure qualitative diversity by taking account of different programme offerings (Article 52b(1)(1)(2) RStV). Otherwise, the platform provider is in principle free to decide what programmes to carry (Article 52b(1)(1)(3) RStV). If there is insufficient capacity to implement these rules fully, they must be applied in accordance with the overall capacity, with priority always given to public service television programmes (Article 52b(1)(2) RStV).

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65) *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung* (Rules on freedom of access to digital services and on the regulation of platforms) pursuant to Article 53 RStV, of 11 November 2008, available at: www.blm.de/apps/documentbase/data/pdf1/zgs_08.pdf

66) Some of the provisions existed before the entry into force of the 10th RÄStV (cf. Article 53 RStV in the version of the 9th RÄStV) but they did not impose obligations on the newly created group of platform providers but on providers of telecommunications services.

67) See III below.

68) Explanatory memorandum to the 10th RÄStV, op. cit. (Fn. 14), pp. 4, 27.

69) The existence of a dominant market position is to be determined in a manner analogous to section 19 GWB; Rule 1(2)(1) ZPS.

The rules on technical freedom of access also serve the purpose of ensuring diversity of opinion and supply (Article 52c(1), first sentence, RStV). The distribution of broadcast and comparable telemedia offerings must accordingly not be unfairly impeded or unjustifiably discriminated against through the technical features of services that control access to the platform functions (this is specified in more detail by the standard examples in Rule 4(2) and 3 ZPS). How the platform provider or the end-user device manufacturer, which has an indirect obligation, is actually to make the access available is explained by Rules 14 f. ZPS. The obligations mentioned therein essentially correspond to those for providers of telecommunications services under the TKG.[70] The platform provider also has obligations to ensure equality and non-discrimination with respect to its scale of charges (Article 52d, first sentence, RStV, Rule 17(1) ZPS).

The regulation of platforms is at the interface of federal and *Land* competences, and decisions on possible breaches of the obligation to provide unhindered access to conditional access systems and application programming interfaces (APIs) or on infringements of the provisions concerning the scale of charges are therefore made by the LMA responsible in agreement with the *Bundesnetzagentur* (Federal Network Agency – BNetzA) pursuant to Article 52e(2) RStV. It is not known whether any such proceedings have actually taken place.

2. General competition law

The development of a dominant market position is counteracted on the market for platform providers by general competition law. The BKartA has essentially taken decisions on three planned mergers in the last few years.

At the end of 2004, the authority gave the green light to the takeover by the satellite operator SES Global Europe of Digital Playout Center GmbH (DPC), a wholly owned subsidiary of the pay-TV broadcaster Premiere Fernsehen GmbH & Co. KG (now Sky Deutschland).[71] The merger would, it said, lead to the strengthening of the market dominance of SES Global Europe on the German-speaking market (at most) for transponder capacities for direct-to-home transmissions because this would result in the "vertical integration of the market-dominant satellite operator with the only service provider able to grant access to the Premiere satellite and private cable network set-top box infrastructure",[72] but improvements would at the same time be made to the conditions for competition on the downstream market for pay-TV and this would outweigh the disadvantages of market dominance.

According to the BKartA, the establishment of a joint venture consisting of three major mobile telephone operators for the purpose of setting up a mobile television platform also gave no grounds for assuming there was a danger of dominance on any of the markets concerned.[73] In the antitrust case taking place at the same time[74] the BKartA did establish significant restrictions on competition but it discontinued the proceedings after the parties had, *inter alia*, undertaken not to combine the purchase of DVB-H services either contractually or *de facto* with that of television or video services via mobile networks. Nor would the activation of the DVB-H service be made dependent on the use of

70) See section III below. On the arrangements for the regulation of platforms in the TKG, RStV and ZPS and on the individual differences, see Merkel/Roßnagel/Scheuer/Schweda, *Sicherung der Interoperabilität als Ziel der Regulierung der Rundfunkübertragung*, *Studie im Auftrag des Bundesministeriums für Wirtschaft und Technologie*, 2009, pp. 56 ff., 79 ff., www.bmwi.de/BMWi/Redaktion/PDF/S-T/sicherung-und-interoperabilitaet-der-rundfunkuebertragung,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf

71) BKartA, decision of 28 December 2004, ref. B 7 – 150/04, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion05/B7-150-04.pdf . Cf. on this also Carmen Palzer, *Federal Cartels Office Authorises SES Astra's Takeover of Digital Playout Center*, IRIS 2005-2/13, http://merlin.obs.coe.int/iris/2005/2/article13.en.html . The decision was confirmed by the *OLG Düsseldorf* (Düsseldorf Court of Appeal) in its decision of 18 October 2006, ref. VI-Kart 2/05 (V), www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2006/VI_Kart_2_05__V_beschluss20061018.html. See on this also Thorsten Ader, *OLG Düsseldorf Rules on Cartel Procedure against SES Astra*, IRIS 2006-4/14, http://merlin.obs.coe.int/iris/2006/4/article14.en.html

72) BKartA, op. cit. (Fn. 72), p. 39, para. 132.

73) BKartA, decision of 13 August 2007, ref. B7 – 61/07, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion07/B7-61-07.pdf . See also Harald Evers*, Federal Cartel Agency Approves DVB-H Consortium*, IRIS 2007-9/12, http://merlin.obs.coe.int/iris/2007/9/article12.en.html

74) BKartA, decision of 29 October 2007, ref. B7 - 17/06, www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B7-17-06.pdf

mobile telephone devices that, apart from mobile telephone signals, are only able to receive DVB-H signals. Moreover, it should also be made possible to receive DVB-H signals on non-mobile devices. These undertakings, the authority said, were sufficient to ensure that the mobile television market employing different standards remained open.

It is worth reiterating the authority's refusal to authorise the joint VoD platform "Amazonas":[75] For the BKartA, the proposals of the two parties to the proceedings enter into commitments in order to compensate for their dominant position on the in-stream advertising market were insufficient. In particular, the companies had, it said, opposed designing the offering as an open technical platform available to competing VoD providers. It had accordingly not been possible to classify it as only a technical service provider (as claimed by the companies involved). A similar proposal by public service broadcasters is currently being considered by the competition authority: at the end of 2012, ARD and ZDF are planning to launch the online platform "Germany's Gold", which is to be set up by a private for-profit company in accordance with the provisions on broadcasters' commercial activities (Articles 16a ff. RStV, see I. 1 above) and financed by advertising or usage fees. Unlike the Amazonas case, the competition watchdogs saw no breach of merger control rules because a dominant market position would neither come about nor be strengthened as a result of the joint venture. However, the BKartA is examining a possible breach of the ban on cartels.[76]

III. Distribution (network operators, hardware and software developers, terminal equipment manufacturers)

1. Sector-specific provisions

The competition among telecommunication network operators and service providers is primarily regulated by the TKG, which to a large extent transposes the EU regulatory framework for electronic communications. The regulatory authority responsible, the *Bundesnetzagentur* (Federal Network Agency – BNetzA), establishes what markets might be subject to sector-specific regulation by means of a market definition for the sector concerned pursuant to section 10 TKG. If a subsequent market analysis pursuant to section 11 TKG reveals that there is no effective competition on a particular market, the BNetzA can issue regulatory orders to companies with considerable market power (section 13 TKG). The obligations they contain may refer in particular to matters relating to the provision of access (sections 19 ff. TKG) and the scale of charges on the relevant wholesale market (sections 30 ff. TKG) or to a downstream retail market (section 39 TKG).[77] There are special provisions for competitors' access to scarce resources such as frequencies (sections 52 ff. TKG).

The transmission of broadcast signals using the traditional distribution channels (terrestrial, cable, satellite) – and therefore outside the "classical" telecommunications networks – was defined according to the European Commission's old "recommendation on relevant markets" as a separate market ("Market no. 18"), which comprised the national and regional markets that were functionally comparable in this respect. Until 2010, the BNetzA believed it was necessary to regulate various programme in-feed and signal delivery markets in the case of cable networks as well as the market for the terrestrial transmission of FM radio signals. In the authority's view, the satellite transmission market is transnational and therefore falls within the sphere of responsibility of the European Commission.[78] Following a public consultation, it published on 10 November 2010 new regulatory orders[79] removing

75) See I. 4 above.
76) BKartA, press release of 28 November 2011, www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-11-28_PM_2.pdf
77) The decisions of the BNetzA's Decision Chambers 2 and 3, which are responsible for the regulation of the wholesale and retail markets, can be searched in a database (http://beschlussdatenbank.bundesnetzagentur.de).
78) See on this Carmen Palzer, *Federal Network Agency Notifies Market No. 18 Analysis*, IRIS 2006-9/9, http://merlin.obs.coe.int/iris/2006/9/article9.en.html
79) Available at: www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2010/2010_001bis100/BK3-10-083_bis_085_BKV/Beschluss_BK3-10-085.pdf?__blob=publicationFile , www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2010/2010_001bis100/BK3-10-083_bis_085_BKV/BK3-10-084_Beschluss.pdf?__blob=publicationFile , www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2010/2010_001bis100/BK3-10-083_bis_085_BKV/BK3-10-083_Beschluss.pdf?__blob=publicationFile

the cable markets from the sector-specific regulation, stating that the current measures on the cable in-feed market had essentially corresponded to the possibilities available under general competition law. The authority regarded the signal delivery market as no longer requiring regulation owing to the drop in demand compared with the number of cable network operators. On the other hand, it noted, Media Broadcast GmbH still had considerable power vis-à-vis content providers on the market for the provision of facilities for transmitting analogue FM radio signals.[80] The BNetzA accordingly retained the subsequent monitoring of this company's charges.[81] On the other hand, it completely excluded from its market analysis the competition among transmitter operators (whether for legal or factual reasons is not known).[82] The authority considered the regulation of the transmission markets for terrestrial television as no longer, or not yet, necessary as early as 2007: the market for the provision of transmission facilities for the distribution of analogue signals was, it said, "in terminal decline" and the market for the transmission of DVB-T signals was still being built up, so that, "at any rate for the next two years", it was only to be subject to general competition legislation.[83] Since then, the BNetzA has not undertaken a reassessment of the market for transmitting digital terrestrial television.

Special (access) rules for the transmission of broadcast signals are contained in sections 48 ff. TKG. They impose obligations on different players and have as their objective the establishment of the maximum possible technical interoperability. This should make it possible to prevent the development of competition-restraining technical bottlenecks, which may arise due to the use of proprietary systems.[84]

With regard to the interoperability rules, the BNetzA has, as far as is known, only issued decisions in respect of section 48(3)(1) TKG, which states that digital television sets must be able to display signals based on the standard European encrypting algorithm (common scrambling algorithm, or CSA). In view of the increasing transmission of television signals in connection with broadband-based IPTV, the BNetzA initially granted an exception for TV sets that receive and display signals sent via this distribution channel.[85] The reason it gave at that time was that a CSA-based conditional access system did not exist for signals distributed in this way so the requirement issued to set manufacturers was unreasonable.[86] The exemption was inserted in an amended form into the law in 2007 but was deleted again following the recent change in the law.

Must-carry rules concerning certain television programmes to be distributed via analogue cable networks are not contained in the TKG but, according to Article 51b(3) RStV, in the media legislation of the *Länder* since the main purpose of such provisions is to ensure diversity of opinion and services (Article 51b(3), second sentence, RStV). For example section 19(1) of the *Landesmediengesetz Nordrhein-Westfalen* (North Rhine-Westphalia Regional Media Act LMG NRW)[87] provides that channels must principally be allocated to the public service programmes provided for this *Land*,[88] to the local

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80) BNetzA, Presidential Chamber's ruling on the regulatory orders for broadcasting transmission services, ref. nos. BK3-10-083 to 086, published on 10 November 2010, www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2010/2010_001bis100/BK3-10-083_bis_085_BKV/Festlegung_der%20 Praes_kammer.pdf?__blob=publicationFile . See on this Sebastian Schweda, *Federal Network Agency Issues Regulatory Orders for Broadcasting Transmission Services*, IRIS 2007-6/12, http://merlin.obs.coe.int/iris/2007/6/article12.en.html

81) BNetzA, regulatory orders for broadcasting transmission services for the delivery of broadcast content to end-users, Market 18 of the old 2003 recommendation, in respect of Media Broadcast GmbH, decision of 15 July 2010, ref, BK 3b-10-086, www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2010/2010_001bis100/BK3-10-086_BKV/Beschluss_BK3_10_086.pdf?__blob=publicationFile

82) Although the EU regulatory framework for electronic communications explicitly also covers the regulation of access to infrastructure, such as buildings, aerials and masts, and section 2(2)(2) TKG also calls for "the promotion of strongly competition-oriented telecommunications markets" in this area, the possibilities of the sector-specific regulation of site operators in domestic law seem to be trailing behind the EU requirements. At any rate, the BNetzA has so far not identified a separate market for this.

83) BNetzA, "Konsultationsentwurf Rundfunk-Übertragungsdienste zur Bereitstellung von Sendeinhalten für Endnutzer", *Amtsblatt der BNetzA* no. 4 of 22 February 2006, 294 ff., www.bundesnetzagentur.de/DE/DieBundesnetzagentur/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK3-GZ/2006/2006_001bis100/BK3-06-013bis017/AnlageKonsultationsentwurfId5146pdf.pdf?__blob=publicationFile

84) Cf. Viktor Janik in Geppert/Piepenbrock/Schütz/Schuster, *Beck'scher TKG-Kommentar*, 2006, section 48(4).

85) BNetzA, Communication 251/2006 on the application of section 48 (ABl. BNetzA 13/2006 of 5 July 2006, p. 1813).

86) On the criticism concerning the exemptions granted at that time, see Merkel et al., op. cit. (Fn. 71), p. 69 f.

87) Law of 2 July 2002, last amended by the Law of 8 December 2009 (GVBl. NRW, p. 728).

88) Rules in the media law of Lower Saxony to broadcast certain television channels were declared compatible with Community law by the Court of Justice of the European Union (CJEU) in 2008: CJEU, judgment of 22 December 2008, Case C-336/07, available at: http://curia.europa.eu; Christina Angelopoulos, *German "Must-Carry" Case Closed, but Belgium Is Taken to Court*, IRIS 2009-10:Extra, http://merlin.obs.coe.int/iris/2009/10/article102.en.html

radio programmes and to the locally relevant university programmes. For the channels available after that, section 19(2-8) LMG NRW contains detailed allocation rules that grant significant decision-making powers, especially to the *Landesanstalt für Medien* (Regional Media Office – LfM) as the media authority responsible. Channels still available can then be allocated by the network operator in accordance with the law (section 19(9) LMG NRW). For the assignment of channels in digitised cable networks, section 21 LMG NRW essentially refers to the rules on allocating platform channels (see section II above).

The TKG contains no rule obliging network operators to maintain network neutrality. A rule entitled "Netzneutralität" (network neutrality) was inserted into the last amendment to the law (section 41a TKG) but it only contains a provision empowering the BNetzA to "lay down the fundamental requirements for non-discriminatory data transfer and non-discriminatory access to content and applications" and thus prevent arbitrary action to lower the quality of a service or prevent the unjustified slowing down of the data traffic (subsection 1). The BNetzA can also specify in a Technical Regulation the quality standards applying to services (subsection 2) but has not done so up to now.[89] In the discussion of network neutrality, the duality of the regulatory powers available under telecommunications law and media law once again becomes apparent: In a position paper, the ZAK set out the difference between the open Internet and the platform offerings in the closed parts of the network (e.g., IPTV or radio and television on broadband cable) and, in particular, called for the balance between the two to be safeguarded by means of a guarantee of the functioning of the open Internet to enable media offerings to become "genuinely involved in the opinion-forming process".[90]

2. General competition law

Sector-specific regulation is complemented by the rules of general competition law. In the context of broadcasting transmission platforms, the BKartA was mainly required to deal with the issue of concentration on the cable network market in the past, when level 3 regional network operators[91] took over level 4 cable network operators (domestic networks) or other level 3 operators. Most recently, the US company Liberty Global, Inc., the parent of the operator Unitymedia GmbH, itself the result of a merger between the ish, iesy und Tele Columbus networks,[92] took over the regional network operator Kabel BW after it had been able to dispel the doubts expressed by the BKartA[93] by making a number of commitments.[94] According to press reports, Liberty could also be interested in taking over Kabel Deutschland GmbH.[95] If that were to happen, the German cable network, which was split into several regional networks after its sale by DTAG, would once again be under the same roof.

89) On the proposal to ensure network neutrality by adopting for Internet access providers the must-carry principle applying to cable networks, see Bernd Holznagel, "Netzneutralität als Aufgabe der Vielfaltssicherung", *Kommunikation & Recht*, 2010, pp. 95 ff.

90) ZAK, *Keine inhaltebezogene Priorisierung im offenen Internet – Thesen der Medienanstalten zur Netzneu-tralität*, 21 January 2011, www.die-medienanstalten.de/fileadmin/Download/Publikationen/Positionen/Digitale_Welt/ZAK-Thesen_zur_Netzneutralitaet_21012011.pdf

91) BKartA, decision of 3 April 2008, ref. B7 – 200/07, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B7-200-07.pdf . See also Nicole Spoerhase-Eisel, *Takeover of Orion Cable Networks by Kabel Deutschland Approved*, IRIS 2008-6:Extra, http://merlin.obs.coe.int/iris/2008/6/article104.en.html

92) BKartA, decision of 20 June 2005, ref. B7 – 22/05, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion05/B7-22-05.pdf, and BKartA, decision of 21 June 2005, ref. B7 – 38/05, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion05/B7-38-05.pdf?navid=92 . See also Carmen Palzer, *ISH / IESY Merger Referred to Federal Cartels Office*, IRIS 2005-3/4, http://merlin.obs.coe.int/iris/2005/3/article4.en.html

93) Peter Matzneller, *BKartA Has Serious Concerns about Kabel-BW's Takeover by Liberty*, IRIS 2012-1/20, http://merlin.obs.coe.int/iris/2012/1/article20.en.html

94) BKartA, decision of 15 December 2012, ref. B7 – 66/11, www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B7-66-11.pdf. See on this Peter Matzneller, *BKartA Approves Liberty's Takeover of Kabel BW*, IRIS 2012-2/17, http://merlin.obs.coe.int/iris/2012/2/article17.en.html

95) Astrid Maier, "Grünes Licht – Unitymedia darf Kabel BW übernehmen", *manager magazin online*, 13 December 2011, www.manager-magazin.de/unternehmen/artikel/0,2828,803370,00.html

ES SPAIN

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I. Audiovisual media services and enabling services

Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual (Audiovisual Act 7/2010 of 31 March 2010)[1] provides a general legal framework for both private and public service audiovisual media in Spain and transposes the Audiovisual Media Services Directive into Spanish law. The Audiovisual Act also introduced an independent regulatory authority, the *Consejo Estatal de Medios Audiovisuales* (National Council for Audiovisual Media – CEMA), but the current government has decided not to launch the CEMA and instead it is planning the introduction of a "superauthority" responsible for the enforcement of competition law and the supervision of the telecommunications, postal, media, energy and transport sectors.

1. Approach to public service media[2]

According to the Audiovisual Act, the public audiovisual media service is an essential service of general economic interest. The state, the Autonomous Communities (Spanish Regions) and the Local Entities are allowed to provide public audiovisual media services with the aim to broadcast free-to-air general or thematic channels, excluding channels dedicated to the exclusive broadcast of commercial communications. The general objectives of public service are established in a framework mandate (*mandato marco*) for a period of nine years, but each public service channel has to have a programme contract (*contrato programa*) where the public service content is explicitly identified.[3] Activities or content which do not comply with the public service function cannot be financed with public money. Significant new services may only be added if they fit the public service mission and do not alter the competition in the audiovisual market. In practice, this public value test has not been applied yet, because the public service broadcaster RTVE Corporation has not launched new significant services and the CEMA, which is the authority responsible for such evaluation, is not operational.

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1) *Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual*, available at: http://noticias.juridicas.com/base_datos/Admin/l7-2010.html. An unofficial English translation can be found at: wwwfr.uni.lu/content/download/31319/371626/file/Spain_translation.pdf
2) Articles 40-43 of the Audiovisual Act.
3) RTVE Corporation's programme contract has not been adopted yet. RTVE drafted a programme contract for the period 2010-2013, but the government did not accept it for financial reasons.

Funding rules

The Audiovisual Act regulates spending control mechanisms for public audiovisual media services. Public service broadcasters should aim at the structural separation of their activities, in order to ensure transfer prices and respect for market conditions.[4] They must not underprice their offerings and services, or use public compensation to outbid private competitors for broadcasting rights of high value content.

With regard to media ownership, the Audiovisual Act forbids the participation of public administrations or public service audiovisual media in the share capital of private audiovisual media service providers. Moreover, in the area of national coverage, the state cannot reserve or award to public service audiovisual media more than 25% of the available frequency spectrum for the provision of national television services, in accordance with the National Technical Plan.

RTVE Corporation

The national public service broadcaster, RTVE Corporation, is further regulated by Act 17/2006 on state-owned radio and television[5] and Act 8/2009 on the funding of the Spanish Radio and Television Corporation.[6] Act 8/2009 excluded advertising as a source of income and introduced a new financial model for the RTVE Corporation[7] based on a direct subsidy from the state plus an allocation of 80% of the amount perceived by the state through the tax on the use of spectrum frequencies and the amount collected through two new taxes: one imposed on telecommunication operators offering audiovisual services nationwide (0.9% of their income), and another imposed on commercial television companies operating nationwide pay or free-to-air services via cable, satellite or terrestrial networks (1.5% of their income for pay-TV broadcasters and 3% for free-to-air TV broadcasters).[8]

Act 8/2009 guarantees direct support from the state so as to enable financial equilibrium in case other resources are reduced, as long as the national public service broadcaster's expenditure is in line with a pre-approved budget. It also introduced limits on RTVE Corporation's expenditure: it cannot spend more than 10% of its total annual budget on sports rights' acquisition from a general interest sporting events list designed by the CEMA, and cannot buy rights for the first-run broadcasting in prime time of more than 52 films made by major international production companies.

Regional public service broadcasting

Public service media in Spain replicate the decentralised administrative structure of the state, which has three levels: national, regional and local. At regional level, there are currently 13 public service broadcasters.

On 1 August 2012, an amendment to the Audiovisual Act was adopted by the Spanish Parliament,[9] introducing a new legal framework for regional public service broadcasters, which aims to allow regional public service broadcasters greater flexibility in the provision of their audiovisual media services. According to this amendment, the Autonomous Communities may opt for direct or indirect management of their public service broadcasters through various models including public-private partnership. If an Autonomous Community chooses not to provide public service broadcasting, it may then call for tenders

4) See also *Ley 4/2007, de 3 de abril, de Transparencia*, available at: http://noticias.juridicas.com/base_datos/Admin/l4-2007.html
5) *Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal*, available at: http://noticias.juridicas.com/base_datos/Admin/l17-2006.html
6) *Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española*, available at: http://noticias.juridicas.com/base_datos/Admin/l8-2009.html
7) See also *Real Decreto 1004/2010, de 5 de agosto, por el que se desarrolla la Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española*, available at: http://noticias.juridicas.com/base_datos/Admin/rd1004-2010.html Due to the financial crisis, the Spanish Government is currently rethinking RTVE Corporation's financial model.
8) The European Commission has referred Spain to the Court of Justice of the EU, considering that the tax on telecommunication operators is incompatible with EU telecoms rules. See Digital Agenda: Commission refers France and Spain to Court over 'telecoms taxes', IP/11/309 of 14 March 2011, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/309
9) *Ley 6/2012, de 1 de agosto, de modificación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, para flexibilizar los modos de gestión de los servicios públicos de comunicación audiovisual autonómicos*, available at: http://noticias.juridicas.com/base_datos/Admin/l6-2012.html

to award the available licences to private service providers. Moreover, an Autonomous Community may transfer its public service broadcaster to a third party in accordance with its specific legislation.

If an Autonomous Community opts for a model of indirect management or any other instrument of public-private partnership for the provision of a public service audiovisual media service, then it may participate in the capital of the broadcaster providing this service.

The amendment allows arrangements between regional public service broadcasters for joint production or editing of content for improving the efficiency of their business. It also introduces obligations on regional public service broadcasters such as a maximum limit of expenditure for the financial year in question and the obligation to submit an annual report.

2. Regulation of market entry[10]

The Audiovisual Act distinguishes between audiovisual media services that are provided on terrestrial airwaves, which require a prior licence granted on the basis of a public competition, and those that are provided through means other than terrestrial airwaves (e.g. cable, satellite, IPTV, VoD), which only require prior notification to the competent regulatory authority.[11]

Licensed services

A licence provides the exclusive right to use a part of the frequency spectrum according to a national technical plan.[12] The licence specifies the area of territorial coverage for the broadcast, the number of channels, the allocated multiplex and whether the broadcast shall be free-to-air or paid for through a conditional access system.[13]

With regard to market power, the relevant requirements for a natural and a legal person respectively to hold an audiovisual media licence are the following:

- A natural person must be a citizen of a member state of the European Economic Area (EEA) or of any state which recognises the right to hold an audiovisual licence for Spanish citizens (principle of reciprocity).
- A legal person must have its registered office in a member state of the EEA or in any state that recognises the right to hold an audiovisual licence for Spanish legal persons. The participation in its share capital of natural or legal persons from countries that are not members of the EEA must also comply with the principle of reciprocity.
- The shares in a licensee's capital held by a natural or legal person from a country that is not a member of the EEA should not directly or indirectly exceed 25%. Furthermore, the total shares in a licensee's capital held by natural or legal persons from countries that are not members of the EEA should be less than 50%.

VoD services

Prior to the adoption of the Audiovisual Act, VoD services were classified as electronic communications services (like near-VoD, and the transmission of information, text, image and sound) and therefore regulated by the Spanish legislation on telecommunications.

Since the adoption of the Audiovisual Act, VoD services are audiovisual media services provided that they:

- are offered by individuals or legal entities having effective editorial control on the selection of programmes and content;
- do not merely transmit or carry the signal of audiovisual media programmes.

10) Articles 22-30 Audiovisual Act.
11) The government and the Autonomous Communities determine the notification procedures for their respective areas of competence.
12) The state has competence to establish this national technical plan, therefore Autonomous Communities can only tender licences once the state has adopted the plan for the relevant part of the frequency spectrum.
13) For more information on conditional access systems see *infra*.

3. Media-specific anti-concentration rules[14]

Natural and legal persons are allowed to hold shares or voting rights simultaneously in different television service providers, but they are not allowed to acquire significant holdings (see *infra*) in more than one television service provider with national coverage when the average audience of all the channels of the providers in question exceeds 27% of the total audience for the 12 consecutive months prior to the acquisition. This limit aims fundamentally at preventing the merger of the two main private broadcasters Antena 3 and Telecinco.

All audiovisual media service providers must register at either a national or regional registry, depending on their area of coverage. So-called significant shareholders in audiovisual media service providers must also register, indicating the percentage of capital they hold. For the purposes of the Audiovisual Act, significant shareholders have the direct or indirect ownership of:

a) 5% of share capital
b) 30% of voting rights, or a lower percentage, if such percentage allows the holder to elect more than half of the members of the board of directors of the company in the 24 months following the acquisition of the voting rights.

Natural or legal persons from countries that are not members of the EEA can only own shares or voting rights if their countries recognise reciprocal rights. In any case, an investor from outside the EEA may not own more than 25% of the shares of a company holding a licence. Moreover, a company holding an audiovisual licence may not have more than 50% of its capital held by shareholders from outside the EEA.

Moreover, neither natural nor legal persons may acquire significant holdings or voting rights in more than one television audiovisual media service provider:

a) When national audiovisual media service providers as a whole own spectrum rights which go beyond the technical capacity of two multiplex channels.
b) When regional audiovisual media service providers as a whole own spectrum rights which go beyond the technical capacity of a multiplex channel.

Another rule aims to ensure respect for pluralism of information: natural and legal persons holding shares in the capital of a nationwide television service provider may not acquire significant holdings or voting rights in the capital of another provider of the same category, if this would prevent the existence of at least three different private national television service providers.

4. Competition law

Competition Act 15/2007 of 3 July 2007[15] provides the legal framework for free competition in the Spanish market. The *Comisión Nacional de la Competencia* (National Competition Commission – CNC) is the independent public agency in charge of preserving, guaranteeing and promoting effective competition in markets at the national level, and ensuring consistent application of the Competition Act.

Abuse of dominant position

The CNC defines a dominant position as “a situation in which one company is able to behave relatively independently in the market without taking suppliers, customers or competitors into account”.[16] The Competition Act does not prohibit dominant positions *per se*. However, any abuse by

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14) Article 36 Audiovisual Act.

15) *Ley 15/2007, de 3 de julio, de Defensa de la Competencia*, consolidated version available at: http://noticias.juridicas.com/base_datos/Privado/l15-2007.html . An unofficial English translation of the consolidated act is available at: www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=Core_Download&Method=attachment

16) See www.cncompetencia.es/Default.aspx?TabId=101&item=176 . This follows the definition introduced by the Court of Justice in the United Brands case (27/76 of February 1978), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0027:EN:HTML

one or more undertakings of their dominant position in all or part of the national market is forbidden (Article 2 of the Competition Act). The abuse may consist in one of the following conducts:

a) Direct or indirect imposition of prices or other unfair trading or services conditions.
b) Limitation of production, distribution or technical development to the unjustified prejudice of undertakings or consumers.
c) Unjustified refusal to satisfy the demands of purchase of products or provision of services.
d) Application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others.
e) Subordination of the conclusion of contracts to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

Economic concentrations

Economic concentrations must comply with the media-specific anti-concentration rules of the Audiovisual Act (see *supra*) and with the provisions of the Competition Act. Different to the sector-specific provisions of the Audiovisual Act, which aim at preserving media pluralism, the concentration rules of the Competition Act focus on the protection of free competition in the market.

According to Article 7 Competition Act, an economic concentration arises when a permanent change takes place in the control of the whole or part of one or more undertakings as a result of:

a) the merger of two or more previously independent undertakings, or
b) the acquisition by an undertaking of control of the whole or part of one or more undertakings, or
c) the creation of a joint venture and, in general, the acquisition of the joint control of one or more undertakings, when they perform on a permanent basis the functions of an autonomous economic entity.

The Competition Act defines "control" as the possibility of exercising decisive influence on an undertaking, in particular through:

a) ownership or the right to use all or part of the assets of an undertaking;
b) contracts, rights or any other means which confer decisive influence on the composition, voting or decisions of the organs of the undertaking.

Economic concentrations must be notified to the CNC prior to their implementation[17] when at least one of the following two circumstances occurs:

a) as a consequence of the concentration, a share equal or higher to 30% of the relevant product or service market at a national level or in a geographical market defined within the same, is acquired or increased.[18]
b) the global turnover in Spain for all the participants in the last accounting year exceeds EUR 240 million, provided that at least two of the participants achieve an individual turnover in Spain of more than EUR 60 million.

The economic concentration in question is suspended until the CNC (or the government in exceptional cases, see *infra*) issues an express (or tacit[19]) authorisation or the CNC decides to lift the suspension.

When the CNC assesses economic concentrations it takes into account, among others:

a) the structure of all the relevant markets;
b) the market position, economic and financial power of the undertakings affected;
c) the real or potential competition of undertakings located either within or outside of the national territory;

17) Concentrations with a Community dimension as defined in the EU's Merger Regulation are not affected by the obligations mentioned in the Competition Act, unless the European Commission referred a concentration case back to Spanish authorities. See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:en:NOT

18) Mergers where in Spain the total turnover of the company acquired or assets acquired in the last financial year is below or equal to EUR 10 million are exempted from this procedure, provided that the participants do not have individual or joint shares of equal or more than 50% in any of the affected markets, nationally or in a defined geographic market within the national market.

19) See Article 38 Competition Act for more information on the effects of administrative silence in cases of economic concentration.

d) suppliers' and consumers' alternatives for accessing supplies or markets;
e) any barriers to entry in these markets;
f) supply and demand trends for the relevant products and services;
g) the demand and supply's effects on the market position of the undertakings affected;
h) the economic efficiencies derived from the concentration operation and, in particular, how the concentration may contribute to improving the production or commercialisation systems and the competitiveness of businesses, and the extent to which these efficiencies are transferred to consumers, specifically, in the form of a bigger or better supply and of lower prices.

Exceptionally, the government may authorise economic concentrations on general interest grounds.[20]

Recent merger cases

The Spanish free-to-air TV market is currently experiencing a major concentration process: Telecinco acquired Cuatro in 2011 and Antena 3's project to acquire La Sexta has been authorised by the CNC. Nevertheless this concentration process is far from being closed.

Telecinco/Cuatro[21]

On 28 April 2010 Telecinco[22] reported to the CNC its intention to acquire Cuatro.[23] This concentration operation had been previously notified by both companies to the European Commission, which referred it back to the CNC considering that it was best placed to assess the case.[24]

According to the CNC, Telecinco and Cuatro are two of Spain's leading free-to-air TV operators, and therefore their merger would affect the entire value chain of the TV-related audiovisual sector. The resulting market structure and the existing entry barriers would generate risks to effective competition in some of the markets considered, especially in the Spanish TV advertising market. These effects would be further worsened because Telecinco holds shares in the satellite platform Canal+ (formerly called Digital+).

The CNC considered two main threats to competition:

- television advertising market: given the total audience of the channels which the new entity resulting from the merger ("the new operator") would manage, if advertising time on these channels were to be marketed jointly, this could become an indispensable outlet for advertisers. Moreover, already the current arrangement of the TV advertising market could allow and encourage tacit co-ordination between the new operator and its main competitor, Antena 3.

- acquisition of audiovisual content: the new operator would have a strengthened bargaining position with regard to the purchase of audiovisual content. This would affect competitors in the market for free-to-air TV and smaller content providers.

On 28 October 2010, the CNC approved the merger subject to commitments finally given by Telecinco.[25] The initial term for the commitments is three years, extendable for another two if the market circumstances that made them necessary do not change. The main commitments undertaken by Telecinco are the following:

20) See Articles 10.4 and 60 Competition Act.
21) For all documents related to the merger Telecinco/Cuatro see:
www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?numero=C/0230/10%20&ambito=Concentraciones
22) Telecinco's main lines of business are free-to-air (FTA) television, advertising, exploitation of audiovisual content, production and distribution of audiovisual products, news agency activities and telemarketing. Telecinco is controlled by Mediaset, a company traded on the Milan Stock Exchange and which, in turn, is ultimately controlled by Fininvest, the holding company of the Fininvest Group, with interests in the audiovisual, publishing and financial services sectors.
23) Cuatro operates the free-to-air television business of Prisa, owns the licence for one national DTT multiplex and manages the greater part of Prisa's TV advertising business.
24) See Asunto No COMP/M.5776 – Telecinco/Cuatro, SG-Greffe(2010)/2775/2776, C(2010) 1686, 11 March 2010, available at: http://ec.europa.eu/competition/mergers/cases/decisions/M5776_20100311_201220_254239_ES.pdf
25) See press release of the CNC of 29 October 2011, available at:
www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=281957&Pag=1

- Telecinco agrees not to sell through a single commercial offer ("commercial package") advertising time or any other form of commercial communication time on its two most viewed free-to-air channels (hereinafter, the "main channels"). Furthermore, the aggregate audience of the channels included in each commercial package will not exceed 22%. It also agrees not to develop commercial policies, and in particular price policies, which constitute tied selling to advertisers of different commercial packages of advertising time. Furthermore, it agrees not to manage together with Cuatro advertising on free-to-air DTT channels of third parties. In the case of advertising on pay-TV channels, Telecinco undertakes to manage advertising on the pay-TV channels of third parties through a separate company and with clearly differentiated commercial policies. As long as Telecinco remains a co-shareholder in the satellite platform Canal+ with Prisa or Telefónica, it must not sell advertising packages which include Prisa or Telefonica media. Furthermore, Telecinco must apply market conditions to Prisa or Telefónica if they buy advertising airtime from Telecinco.

- Telecinco will limit to three years the duration of contracts for the purchase of exclusive premium audiovisual content, such as films and series, without including preferential acquisition rights or rights of extension. It limits to five years the period of exclusive exploitation of a film on free-to-air TV. The channel also commits to restricting its ability to exclude national television producers as suppliers of programmes to free-to-air TV competitors. Telecinco also accepts limits to the purchase of the most attractive audiovisual contents, premieres of cinema films and television series from major studios as well as major sporting events. These limits aim to prevent Telecinco from using its simultaneous presence on the pay and free-to-air television markets to monopolise free-to-air TV audiovisual contents.

- Telecinco accepts commitments which serve to limit its power in the free-to-air TV market and which also indirectly serve to safeguard competition in the television advertising market. Telecinco will not extend its offer of free-to-air TV channels by leasing DTT channels from third-party operators, and will not block quality enhancements in the television channels that may be launched by its competitors Net and La Sexta, with which the merged entity shares DTT multiplexes until 2015. Also, Telecinco undertakes to maintain its current policy of assigning its free-to-air channels to the pay-TV platforms free of charge.

In August 2011, the CNC fined Telecinco EUR 3.6 million for breaching the obligation to submit in due time the action plan to enforce its commitments. And on 6 June 2012, the CNC opened formal proceedings[26] against Mediaset (owner of Telecinco) on the basis of the following allegations:

- Mediaset breached the requirement for advertising companies Publiespaña and Publimedia to be functionally separate from each other, as the same persons were members of the managing bodies of both enterprises.
- Mediaset had unjustifiably delayed waiving its pre-emptive rights for the acquisition of audiovisual content and had also delayed or omitted granting option rights for adjusting the term of contracts in force. Furthermore, Mediaset had included prohibited clauses in certain contracts for the acquisition of audiovisual content.
- CNC found *prima facie* evidence that Mediaset had breached a commitment related to the advertising market by implementing a strategy to link, de facto, the sale of advertising time on its different channels, a strategy strengthened by the recent introduction of a new advertising sales model by Mediaset.

The decision to launch proceedings opens a maximum period of six months for the case to be investigated and resolved by the CNC.

26) See Notice regarding case SNC/0024/12, available in English at: www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=143357&Command=Core_Download&Method=attachment

Antena 3/La Sexta[27]

On 15 March 2012, Antena 3 notified to the CNC the purchase of 100% of La Sexta's[28] share capital. This concentration operation had been previously referred back to Spain by the European Commission for analysis by the CNC.[29]

According to the CNC, this merger could encourage Antena 3 and Mediaset (owner of Telecinco) to coordinate their business behaviour in the television advertising market, thereby harming competition. Furthermore, Antena 3's bargaining power for acquiring the most attractive audiovisual content could be strengthened, which could affect the ability of other free-to-view television operators as well as smaller editors and producers of audiovisual content to compete in this market.

On 11 July 2012, the CNC authorised the merger subject to conditions that aim at safeguarding free competition.[30] The conditions are valid for five years.

The first condition concerns the television advertising market. The new operator resulting from the merger ("the new operator") must:
- annul its agreements for joint management of advertising on third-party DTT channels, and cannot sign new agreements of this type.
- sell separately and through different companies the advertising time of its two television channels with the widest audience. Each of these companies may market only advertising time of TV channels whose joint audience does not exceed an average of 18% per semester.
- publish at least quarterly its advertising offers that will include at least the possibility of purchasing advertising space on an individual basis in each of the television channels of Antena 3.
- abstain from developing trade policies that impose certain types of advertising over other types. In particular, the companies marketing the new operator's advertising time shall not prioritise the joint selling of advertising on several TV channels instead of the individual selling of advertising time for each channel.
- offer advertising time on simulcast only if the advertiser requests it expressly in writing. This obligation does not apply to the company which markets advertising time for the channel Antena 3.
- abstain from making commercial offerings to advertisers and media agencies conditional on a minimum rate of investment or Gross Rating Points (GRP).[31]
- abide by minimum principles of transparency, objectivity, predictability and legal certainty in the negotiations with advertisers and media agencies.

The second condition includes obligations aimed to limit the market power of Antena 3 in the free-to-air TV market. This indirectly serves to ensure competition in the market for television advertising. The new operator must abstain from:
- leasing DTT channels of third-party operators in order to extend its offer of free-to-air TV channels.
- blocking technology-related quality improvements of third-party television channels in a shared DTT multiplex.

The third condition concerns the market availability of audiovisual content. The new operator must:
- limit the duration of its contracts for exclusive acquisition of audiovisual content to three years, and exclude rights of first refusal as well as extension rights.
- refrain from imposing exclusivity rights in agreements with national TV production companies that prevent them from offering audiovisual content to free-to-air TV competitors.

27) For all documents concerning the Antena 3/La Sexta merger see:
www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?numero=C/0432/12&ambito=Concentraciones
28) Antena 3 and La Sexta are both among the main free-to-view television operators in Spain.
29) See Case No COMP/M.6547 – ANTENA 3/ LA SEXTA, C(2012) 1840, 14 March 2012, available at:
http://ec.europa.eu/competition/mergers/cases/decisions/m6547_20120314_201220_2390652_EN.pdf
30) See CNC press release of 13 July 2012, *La CNC condiciona la adquisición de La Sexta por Antena 3*, available at:
www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=149433&Command=Core_Download&Method=attachment
31) See http://en.wikipedia.org/wiki/Gross_rating_point

The fourth condition specifies obligations to supply regular information on the activities of the new operator in the relevant markets.

In a press release of 17 July 2012,[32] Antena 3 stated that it considered the conditions imposed by the CNC as unfair and discriminatory and announced that it would appeal the decision. According to the broadcaster, the decision imposes new restrictions and greater obligations compared to what was imposed in the Telecinco/Cuatro merger (see *supra*) and this in spite of the fact that the Antena 3/ La Sexta merger would create a smaller TV operator and have therefore less impact on the competition in the television market. The decision would put Antena 3/La Sexta at a competitive disadvantage in relation to Mediaset, it would strengthen the latter's dominant position in the free-to-air and pay-TV sectors to the detriment of other operators and thus make the envisaged merger unviable.

On 24 August 2012, the Spanish Government, based on its competence to authorise economic concentrations on general interest grounds (see *supra*), decided to relax the conditions imposed by the CNC for the acquisition of La Sexta by Antena 3.

5. Must-offer obligations[33]

The Audiovisual Act imposes on electronic communications service providers the obligation to grant access to their networks to audiovisual media service providers and independent producers in accordance with the legislation on telecommunications and the technical capacities of their network. They also have to guarantee that the images and sound are broadcast in conditions allowing effective interactivity.

The terms and conditions for access shall be freely agreed upon between the parties. However, the Audiovisual Act introduces some must-offer/carry obligations in order to ensure that pluralism is maintained. The RTVE Corporation has to grant cable, satellite and Internet Protocol (IPTV) broadcast transmission services free access to its radio and television channels. Private audiovisual media services licensed for national coverage have to facilitate access to their main free-to-air television channels, after agreeing on suitable remuneration with the retransmitting party. This is a fundamental change in Spanish legislation, since previously private free-to-air broadcasters had to provide their broadcasts free of charge to cable and satellite platforms. However, this obligation only applies to their main channels and not to thematic channels such as Neox, Nova, Divinity, Energy and FDF. Local and regional channels are also excluded from this obligation.

6. Consumer equipment and conditional access

The provision of conditional access systems and services is regulated by Royal Decree 2296/2004.[34] According to the Decree, providers of conditional access services must:

a) offer digital TV service providers on fair, reasonable and non-discriminatory terms the technical means they need to enable the reception of their TV services by decoders.
b) keep separate financial accounts regarding the provision of conditional access services.

Owners of conditional access systems have the obligation to license to manufacturers of consumer equipment a common interface that allows the connection of other conditional access systems on fair, reasonable and non-discriminatory terms.

These conditions are reflected in Article 24.1 Audiovisual Act, which states that "the systems and conditional access services to access digital terrestrial television services in the form of payment by conditional access must be open".

32) See www.antena3.com/noticias/economia/comunicado-antena-condiciones-cnc_2012071700254.html
33) Article 31 Audiovisual Act.
34) *Real Decreto 2296/2004, de 10 de diciembre, por el que se aprueba el Reglamento sobre mercados de comunicaciones electrónicas, acceso a las redes y numeración*, available at: http://noticias.juridicas.com/base_datos/Admin/rd2296-2004.html

7. EPGs

Electronic Programme Guides (EPGs) are regulated in the seventh additional provision of the Telecommunications Act. Paragraph 2 states that "to the extent necessary to ensure end-user access to certain digital broadcasting services, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission – CMT) may impose ... obligations on operators that operate application programming interfaces (APIs) and electronic programme guides (EPGs) to facilitate access to these resources on reasonable, fair and nondiscriminatory terms". This rule prevents closed EPGs, but does not define their content and functionalities. Royal Decree 2296/2004 confirmed this mandate of the CMT.

Some policy proposals to clarify the obligations of EPGs have been made on official technical forums, but so far they have not resulted in any regulation.[35]

8. Access to audiovisual archives

The Spanish legislation on broadcasting makes little reference to archives. Act 17/2006 includes among the functions of public service radio and television "to watch over the preservation of audiovisual archives" (Article 3.o). The sixth additional provision of the Audiovisual Act establishes a general obligation to preserve the archives of audiovisual media service providers. However, access to those archives by other operators is not regulated. In practice, access and consultation of public service broadcasters' archives is reserved for researchers and teachers, with appropriate accreditation and prior authorisation. With regard to private broadcasters, access to archives is limited to internal staff. However, both private and public service broadcasters make available to other operators their archives in exchange for payment, the amount of which depends on the type of rights granted by the operator and the duration of these rights.[36]

II. Platform operators and converged services

In order to understand the Spanish regulation of network operators and their relationship with audiovisual media service providers it is necessary to describe briefly the Spanish market context. In 2011, 80% of TV viewing time in Spain took place on DTT channels, another 15% on cable and the remaining 5% on satellite.[37] This is partly explained by the distribution of reception equipment in Spanish households. In 2011, 97% of Spanish households had DTT receivers, 12.4% cable, 4.5% an IPTV connection and 21.8% a satellite dish.[38]

The distribution of audiovisual media services in Spain reflects the preference of citizens for free-to-air DTT. Network operators who distribute television via satellite, cable or IPTV have a market share well below the leading network operator distributing DTT signals (for competition issues in the DTT distribution market see *infra*).

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35) See Eladio Gutiérrez, "Herramientas de información y control en manos de padres, educadores y ciudadanos en general en el ámbito de la televisión digital", in ICMEDIA, *La protección del menor tras la ley general de la comunicación audiovisual: perspectivas y retos*, May 2012, available at: www.icmedianet.org/wp/wp-content/uploads/2012/05/Proteccion-Menor1.pdf . See also Carmen Fuente y Raquel Urquiza, "Las EPG como herramientas de información y control", *Telos, 84,* Julio-Septiembre 2010, available at: http://sociedadinformacion.fundacion.telefonica.com/DYC/TELOS/SOBRETELOS/Nmerosanteriores/DetalleAnteriores_84TELOS_DOSSIER4/seccion=1268&idioma=es_ES&id=2010083109410001&activo=6.do

36) Antonia Salvador, "Políticas de salvaguardia y acceso en los archivos audiovisuales de televisión. Marco jurídico y nuevos servicios interactivos en la televisión digital", *Dercom, 2,* Junio-Agosto 2010, available at: http://derecom.com/numeros/pdf/salvador.pdf

37) Barlovento Comunicación, *Análisis televisivo 2011*, available at: www.barloventocomunicacion.es/images/publicaciones/ANALISIS_TELEVISIVO_2011[2].pdf

38) AIMC, *Marco General de los medios en España 2012,* p. 64.

1. Platform operators

Electronic communication service providers are regulated by the Spanish legislation on telecommunications (see *infra*). In principle, operators of platforms for audiovisual services are operators of electronic communications and therefore fall under the telecoms regime. However, these service providers may also provide audiovisual media services, in which case they are also audiovisual media service providers and subjected to the Audiovisual Act.

2. Hybrid TV

The Spanish audiovisual industry, co-ordinated by the ministry of industry, tourism and trade, reached a consensus in November 2011 to select the Hbb TV system as the standard for hybrid television. This standard has been driven by European public broadcasters and has already been adopted by France, Germany, Austria and the Netherlands.[39] However, the regulatory challenges posed by Hybrid TV have not been addressed in Spain yet.

III. Distribution (network operators)

The Spanish telecommunications sector is regulated by Telecommunications Act 32/2003 of 3 November 2003[40] and secondary legislation. This legislative framework does not include sector-specific anti-concentration rules, so the general competition rules (explained *supra*) apply.

The CMT is an independent public body with the mission to establish and monitor specific obligations for operators in the telecommunications market, to promote competition in markets for audiovisual services, to resolve conflicts between operators and, where appropriate, to act as an arbitration body for dispute resolution.

1. Multiplex management

The transmission of DTT audiovisual signals is performed through a multiplex that carries several digital channels. In Spain it is common for different TV operators to share a multiplex. In such a case they may agree to manage the multiplex themselves or have a third party take care of this management.

In order to avoid possible conflicts, most national TV operators delegated the management of their multiplex to a third-party telecommunications operator.[41] In the last two years some conflicts arose between local TV operators in the Canary Islands and Madrid, usually because TV operators had not agreed on the third party responsible for the management of the multiplex. The CMT mediates such conflicts[42] and also intervenes if an agreement disrespects basic principles that could affect the rights of minority TV operators within the multiplex. If TV operators fail to agree on who should manage the multiplex, the CMT foresees that the recruitment shall

- follow a procedure that allows the presentation of different offers from interested parties;
- be based on the principle of transparency; and
- allow only transparent and non-discriminatory bids, which differentiate prices for different services offered and do not discriminate between TV operators.

39) Foro Técnico de la televisión digital. *Especificación de receptores de televisión digital terrestre para aplicaciones interactivas*, available at: www.televisiondigital.es/Terrestre/ForoTecnico/receptor-tdt/Documents/ReceptoresTDT_interactivos.pdf

40) *Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones*, available at: http://noticias.juridicas.com/base_datos/Admin/l32-2003.html

41) See María Trinidad García Leiva, *Política pública y Televisión Digital: El Caso de la TDT en España y el Reino Unido*, CSIC, p. 235.

42) See *CMT, Informe anual 2011*, p. 167.

If the multiplex manager is a company owned by any of the TV operators that share the multiplex, the CMT will monitor more closely the compliance with these principles, may exert more control over the prices of tenders and supervise transfers within the group. Finally, in order to safeguard competition the CMT considers that contracts signed between the multiplex manager and the TV operator should not exceed five years.[43]

2. Transmission of audiovisual signals

The main operator managing the DTT distribution network in Spain is Abertis Telecom, the telecommunications division of Abertis, a Spanish company which manages mobility and telecommunications infrastructures. Abertis Telecom dominates the DTT signal distribution market (from transmitter station to households), with 86.2% of the total market turnover. The remaining operators are regional and share in the remaining 13.8%.[44] The dominant position of Abertis Telecom is also significant in the DTT signal transport market (from TV operator to TV transmitter station) where it is the second largest provider with a market share above 30%. On top of that it also owns 47.5% of Overon, the leader in the DTT signal transport market (Mediapro is the other shareholder).

Abertis has a small number of clients (national TV operators), which it forces to sign long-term contracts. This makes it very difficult for competitors to enter the market and extremely easy for Abertis to establish barriers to competition. It is therefore not surprising that Abertis' network activities especially in the DTT signal distribution market have prompted the CNC and the CMT to take stands on competition issues on several occasions (see *infra*). In 2009 the CMT classified Abertis Telecom as an operator with significant market power (SMP) and therefore subject to specific obligations to introduce more competition in that market. Abertis was obliged to grant access to its network of locations and centres for broadcasting DTT signals and to allow interconnection when access was impossible. In its decision the CMT reasoned that such access is an asset that cannot be replicated and one that is essential for the provision of the DTT signal transport and distribution services.[45]

The results of the decision did not meet the expectations. The CMT proposed in July 2012 to deregulate the market and eliminate these obligations because they have prevented the emergence of a national competitor. Indeed, since 2009 only 0.13% of the transmitting centres received requests for colocation services and only 0.05% of the sites requests for interconnection. The CMT believes that the intervention powers of the CNC are sufficient to limit the restrictive practices in which Abertis might incur as the incumbent operator.[46]

Recent decisions concerning operators of transmission networks

In May 2009, Abertis was sanctioned for imposing abusive conditions on commercial broadcasters (Case 646/08 *Axion v. Abertis*). According to the CNC, Abertis abused its dominant position, because the duration and discount structure designed into its contracts foreclosed the market for the provision of television signal transport services and prevented commercial broadcasters from entering into contracts with other network operators. Abertis was fined with the second highest sanction ever imposed by the CNC, nearly EUR 22.7 million, for demanding high penalties in case of early cancellation of contracts signed in 2006 with broadcasters Sogecable, Telecinco, Antena 3, Net TV and Veo TV. It was also penalised for imposing an excessively long contract duration in contracts entered into with Veo TV in 2006, and with Sogecable, Telecinco and Net TV in 2008. The CNC censored the discounts offered by Abertis in the negotiations prior to the conclusion of the contracts signed in 2006, which enabled broadcasters to get lower prices if they contracted signal broadcasting jointly in all possible regional subdivisions. Abertis appealed this decision before the *Sala de lo contencioso administrativo de la*

43) See CMT Resolution of 14 February 2008, available at:
www.cmt.es/c/document_library/get_file?uuid=224a6c46-9636-4bd9-9070-bd581d6bd0c0&groupId=10138
44) See *CMT, Informe anual 2011*, p. 167.
45) See *Oferta de Referencia para el Acceso a los Centros emisores de Abertis Telecom, S.A*, available at:
www.cmt.es/c/document_library/get_file?uuid=524237fd-8ab7-476d-b07b-b9a15ca7e02d&groupId=10138
46) CMT, Nota de prensa, "La CMT propone desregular el mercado del servicio portador de difusión de la señal de televisión", 16 July 2012.

Audiencia Nacional (administrative chamber of the National Court), which upheld the CNC's decision in February 2012.[47]

On 30 November 2009, SES Astra Ibérica S.A.[48] filed a complaint with the CNC against Abertis Telecom S.A.U. for abuse of a dominant position. The allegation was that Abertis had prevented competitors from entering the market for digital terrestrial television (DTT) signal transport and distribution services. On 8 February 2012, the CNC Council confirmed the abuse by Abertis in the market for wholesale services of access to broadcasting centres for transmission of DTT signals in Spain and the market for the retail services of transporting DTT signals in Spain because Abertis had squeezed the margin between its wholesale and retail prices.[49] The CNC found that, given the prices at which the company provides access to its centres and the terms that it has agreed with customers in the retail market, competitors have no margin for survival in the DTT signal transport and distribution services markets. This type of practice, called "margin squeeze", is considered an abuse under EU and Spanish competition law. The CNC Council fined Abertis EUR 13,755,000.

Abertis has appealed this decision before the *Sala de lo contencioso administrativo de la Audiencia Nacional* (administrative chamber of the National Court). The case is pending.

3. Net neutrality

In Spain there is no specific regulation of net neutrality. Therefore the general principles of transparency, non-discrimination and neutrality of telecommunication infrastructure and services are applied. The net neutrality issue was discussed in parliament during the debate on the Telecommunications Bill introduced by the previous government in 2011.[50] However, the bill was never adopted. The current government is drafting a new Telecommunications Bill that will be sent to parliament during the last quarter of 2012 and is expected to include the regulation of net neutrality.

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47) For all documents relative to this case see: www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=646%2f08&Ambito=Conductas

48) Astra is a satellite operator providing television, radio, Internet and other data services.

49) For all documents relative to this case see: www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0207%2f09&Ambito=Conductas

50) See El País, "El grupo socialista quiere garantizar por ley la neutralidad de la Red", available at: http://tecnologia.elpais.com/tecnologia/2011/07/20/actualidad/1311152467_850215.html . See also Europa Press, *La Asociación de Internautas aplaude el "histórico acuerdo" en favor de la neutralidad en la Red en el Senado*, 1 December 2011, available at: www.europapress.es/sociedad/noticia-asociacion-internautas-aplaude-historico-acuerdo-favor-neutralidad-red-20101201144543.html. See also El Mundo, "El Senado vota en contra de la neutralidad de la Red por falta de consenso", 17 November 2011, available at: www.elmundo.es/elmundo/2010/11/17/navegante/1289988204.html

FRANCE

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Introduction

The control of the market power of audiovisual operators is based on the co-existence of the anti-concentration provisions[1] of audiovisual law and the supervision of mergers required by competition law. Law no. 86-1067 of 30 September 1986 on freedom of communication, as amended, gives the licensing authority *Conseil supérieur de l'audiovisuel* (CSA) the power to regulate content and public freedoms in the audiovisual sector. In the case of the private sector, its supervisory work begins when new frequencies are granted at the end of the statutory tendering procedure.[2] The CSA licenses the use of frequency bands or assigned frequencies, which use is regulated by agreements between the CSA and the operator.[3] In return for the right granted free of charge to use audiovisual frequencies,[4] providers are subject to obligations to produce and broadcast European and original French-language works and must comply with the rules on advertising and the protection of the public.[5] The CSA monitors the fulfilment of these obligations[6] and can withdraw the licence in the event of a substantial change in the data on the basis of which the licence was issued.[7]

These provisions do not apply to the public service channels,[8] which have priority access to frequencies at the government's request. They carry out public service remits[9] defined in a set of conditions laid down by decree[10] and have to comply with obligations to contribute to programme

1) Sections 39-41 of Law no. 86-1067 of 30 September 1986.
2) Idem, section 22.
3) Licence issued by the CSA for each new service broadcast terrestrially other than those operated by the national broadcasting companies, subject to the conclusion of an agreement between the CSA and the broadcaster, idem, section 28.
4) These provisions comply with Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (the so-called "Authorisation Directive"), which, according to Article 5(2), allows member states to make the allocation of frequencies conditional upon the pursuit of objectives in the public interest.
5) Decree no. 2010-747 of 2 July 2010 on the contribution to the production of cinematographic and audiovisual works by television services broadcast terrestrially, JORF (Official Gazette) no. 0152 of 3 July 2010 p. 12098, Decree no. 2009-1271 of 21 October 2009 on the contribution to audiovisual production by providers of television services broadcast terrestrially in analogue mode, JORF no. 0245 of 22 October 2009, p. 17673, Decree no. 2010-1379 of 12 November 2010 on on-demand audiovisual media services, JORF no. 0264 of 14 November 2010 p. 20315, Decree no. 2010-416 of 27 April 2010 on the cinematographic and audiovisual contribution by providers of television services and providers of radio services distributed by networks that do not use frequencies assigned by the *Conseil supérieur de l'audiovisuel*, JORF no. 0100 of 29 April 2010 p. 7774.
6) The CSA may order sanctions for non-compliance with the obligations imposed on them by statutory and regulatory provisions and by the principles set out in idem, sections 1, 3(1) and 42 ff., for the private sector, and section 48, for the public service defined in section 44.
7) Idem, section 42(3).
8) Idem, sections 44 and 45.
9) Idem, section 43(11).
10) Idem, section 48.

creation specified by "contracts on objectives and resources" concluded with the state.[11] They are subject to monitoring by the CSA[12] with respect to their compliance with the obligations imposed by statute and regulation. Section 10 of Law no. 2000-769 of 1 August 2000, amending section 49 of the 1986 Law,[13] brought the statutory system for the exploitation of the audiovisual programme archives of the public sector into line with that of the private sector. The public channels thus retain the ownership of their programmes and may, like the private channels, entrust their exploitation to the National Audiovisual Institute (INA),[14] which is responsible for the preservation and presentation of the audiovisual heritage. The latter retains[15] its monopoly on the use of programme extracts.

Since 2009,[16] the Competition Authority (*Autorité de la concurrence*) has been in charge of supervising company mergers.[17] It takes action to guarantee effective competition on the pay-TV and free-to-air TV markets and the television advertising market by taking account of the maintenance of the balances in the sector and, in particular, the funding of content creation, as reflected in its decision no. 12-DCC-100 of 23 July 2012 on the acquisition of TPS and Canalsatellite by Vivendi Universal and Groupe Canal Plus (GCP). In 2009, the legislature limited the power of distributors with regard to the organisation of their service by ordering compliance with the logical numbering of channels, taking due account of operators' freedom to trade.

The arrival of smart TV (connected TV), which enables content from audiovisual devices and the Internet to be shown on the same screen, calls into question the relevance of the criteria of the anti-concentration provisions and necessitates a redefinition of the scope of the law on audiovisual media, especially with respect to this category of electronic communications operators. The government has initiated a discussion on merging the audiovisual regulator CSA and the Electronic Communications and Postal Services Regulator (*Autorité de régulation des communications électroniques et des postes* – ARCEP).

In addition, the development of the direct over-the-top (OTT) delivery of audiovisual media services on the "best effort" Internet network is leading to tensions on the interconnection market between content and applications providers (CAPs) and their transit operators on the one hand and Internet access providers (IAPs) on the other.[18] Some IAPs try to introduce a paid component into their peering relationship with CAPs, or even with transit services.[19] The discriminatory practices implemented by the network operators[20] are an attempt to undermine the neutrality of the Internet[21] and reduce the range of audiovisual content available to web surfers and, in the near future, "telesurfers". On 20 September 2012, in the proceedings concerning the *Cogent v. France Télécom* complaint, the Competition

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11) Idem, section 53.
12) Idem, section 48(1)(B) and the penalties provided for by sections 48(2) ff.
13) Section 49 idem states: "II … The institute shall remain the owner of the technical media and equipment and the holder of the rights, transferred to it before the publication of Law no. 2000-719 of 1 August 2000, to the commercial use of the audiovisual libraries of the national broadcasting companies and the company mentioned in section 58. However, the national broadcasting companies and the company mentioned in section 58 each retain their own right to the priority use of these libraries …".
14) Law no. 92-546 of 20 June 1992 on legal deposit (*dépôt legal*) created a statutory obligation for broadcasters that requires television and radio channels broadcasting in France to deposit all their French programmes broadcast on air in the archives of the National Audiovisual Institute. Articles L. 131-2 and L. 132-3 of the Heritage Code (*code du patrimoine*).
15) Section 47(II) of Law no. 82-652 of 29 July 1982 assigns to INA the task of commercialising the national broadcasting companies' programme libraries, which it owns after a period of five years following the date of their first broadcast. Fiction is excluded from INA's exploitation monopoly and remains the property of the public channels. In April 1987, TF1 became the owner of the former ORTF's programme libraries.
16) The reform of the Commercial Code, introduced by Law no. 2008-776 of 4 August 2008 on the modernisation of the economy (LME) and by Order no. 2008-1161 of 13 November 2008 modernising the regulation of competition, transferred the monitoring of mergers from the Minister of the Economy to the Competition Authority.
17) Articles L. 430-1 to L. 430-7 of the Commercial Code.
18) See on this question Eléonore Scaramozzino, *La télévision européenne face à la TV.2.0 ?*, Ed Larcier, 2012.
19) This component would only apply to traffic that results in exceeding the maximum asymmetry ratio defined in the IAPs' peering rules.
20) *A viable future model for the Internet*, report published in 2011 by A.T. Kearney Inc. at the request of the operators France Télécom, Deutsche Telekom, Telecom Italia and Telefónica (Spain). A review of the report is provided in particular in *Are traffic charges needed to avert a coming capex catastrophe?* (Robert Kenny, Communications Chambers, 2011) and in *Net discrimination won't buy you next-generation access* (Diffraction Analysis, 2012). Draft report to the Parliament and the Government on Internet neutrality, Public Consultation from 16 May to 20 June 2012, proceedings of ARCEP, May 2012.
21) See in particular on this question Susanne Nikoltchev (Ed.), *Why Discuss Network Neutrality?*, IRIS *plus* 2011-5, European Audiovisual Observatory, Strasbourg 2011.

Authority acknowledged the IAPs' right to charge for their interconnection services. ARCEP applied the new powers granted to it by the 2009 Telecoms Package to analyse the interconnection market, which has become a challenge for smart TV.

I. Audiovisual media services and enabling media services

The law on audiovisual services has introduced anti-concentration provisions aimed at preserving internal and external pluralism. However, its criteria are no longer relevant for controlling the influence of the operators. The Competition Authority has limited the power of the dominant operators by invoking in particular the "must-offer" and "must-carry" obligations in order to preserve access to the television markets. Its action has been complemented by the legislature with the rules it has enacted on the organisation of the provision of the distributors' services. However, limits have been imposed on controlling the dominant pay-TV operators' power in order to safeguard the funding of content creation.

1. Controlling the market power of the operators of audiovisual services by enforcing the anti-concentration provisions of audiovisual law

The legislature wanted to avoid an individual or legal entity having the sole ability to determine the editorial content of a television service, especially one transmitted by terrestrial means. To this end, in section 39 of the 1986 Law, as amended, it introduced a ceiling for capital shareholdings. In the name of the principle of national independence, section 40 seeks to prevent the proportion of the capital or voting rights held by foreign entities (other than those established in the EU) in a broadcasting company holding a terrestrial licence exceeding 20% if the service is provided in French.

As far as "external" pluralism is concerned, the legislature has enacted two sets of provisions designed to limit the possibility of the simultaneous control of several television channels. First of all, in section 41 of the 1986 Law it enacted rules specifying a maximum number of licences that an individual or legal entity may accumulate for the same audiovisual communication delivery system. The same individual or legal entity may now only hold, either directly or indirectly, no more than seven[22] licences relating to a national service broadcast by terrestrial means in digital mode, but this is subject to the condition that the programmes are produced by separate companies. This limit on the number of licences does not apply to cable and satellite channels or to the public sector.[23]

Secondly, the law limits the possibilities of accumulating shares in companies that hold licences for a national television service broadcast by terrestrial means.[24] The legislature has established binding thresholds designed to limit concentration, all media combined, at both the national and at the regional level.[25] The system limits the shareholdings of the same company in several media on the basis of the "two situations out of three" rule (terrestrial television, sound radio broadcasting and daily press), which applies both at the regional and national levels.[26] However, this rule proves to be unevenly binding for the different media since the ceilings are much lower for radio, and even lower for television, than for the press. Up to now, the main impact of the regulations on media concentration has been to limit cross-shareholdings between the press and audiovisual media. These rules do not cover certain forms of "vertical" concentration with other sectors or activities that constitute just as much a threat to freedom of expression, pluralism of information and diversity of creation.[27]

22) Law no. 2000-719 of 1 August 2000 set the limit at five licences, but Law no. 2004-669 of 9 July 2004 subsequently increased it to seven.
23) Section 41 and idem, section 26.
24) Section 39 of the 1986 Law.
25) Sections 41(1), 41(1(1), 41(2) and 41(2)(2) of the 1986 Law, as amended.
26) The 2/3 rule (two situations out of three) in the 1986 Law. At the national level, sections 41(1) and 41(1)(1) provide that a company may not be in more than two of the following situations: holding a licence for one or more terrestrial television services serving more than four million inhabitants; holding a licence for one or more radio services serving more than 30 million inhabitants; publishing or controlling one or more daily newspapers or publications accounting for more than 20% of total circulation in France. (An equivalent rule exists at the regional and local levels, sections 41(2) and 41(2)(1)).
27) Emmanuel Derieux and Agnés Granchet, *Droit des médias*, LGDJ, Extenso Editions, no. 688, 2010, p. 221.

2. Controlling the power of the dominant players through competition law

The Competition Authority analyses mergers on the basis of competition law and can issue orders to dominant operators in cases where the commitments proposed by the latter do not enable the problems identified to be addressed.

On the pay-TV market, the TPS/Canalsatellite merger in 2006,[28] which led to the consolidation of the pay-TV activities of TPS and Groupe Canal Plus (GCP), was authorised subject to compliance with 59 "behavioural" commitments[29] aimed at limiting the power of GCP on the upstream audiovisual rights acquisition markets, the intermediate markets for the production and the commercialisation of paid special-interest channels, as well as the downstream pay-TV distribution market. In its decision of 20 September 2011,[30] the Authority established that GCP had circumvented its commitments on distribution, especially by lowering the quality of TPS. These instances of non-compliance were liable to "thwart the objectives pursued by the authorisation decision, namely the re-establishment and maintenance of sufficient competition on the pay-TV market". This conduct led the Authority to withdraw, on the basis of the provisions of Article L. 430-8, paragraph IV, of the Commercial Code, the authorisation issued in 2006 and to order the parties, unless they restore the pre-merger situation, to renotify the merger.

In its decision of 23 July 2012, the Authority held that the merger had placed GCP in a lasting virtually monopsonistic position on the markets for the acquisition of rights to recent American and original French-language films, coupled with a monopoly on the market for the production of premium channels, and a dominant position on the market for the production of film channels.[31] In view of the inadequacy of the commitments proposed by the parties to ensure sufficient competition, the Authority instructed them to implement specific measures to remedy the situation.[32]

On the upstream market, the Authority set a framework for rights acquisition policy by making the commitments imposed in 2006 more stringent. For example, it limited the duration of "output deals" with the American studios and ordered the separate acquisition of broadcasting rights for the different release windows of American[33] and French films. It prohibited GCP from concluding framework contracts for the purchase of broadcasting rights with holders of French rights or any other contract with equivalent effect.[34] Limitations on exclusivity were imposed with regard to the exploitation of non-linear rights on the video on demand market.[35] It took a further step on controlling GCP's market power by ordering GCP to dispose of its minority shareholding in the company providing the Orange Cinéma Séries channels (Orange Cinéma Séries-OCS).[36] By issuing this order the Competition Authority created the conditions for restoring the autonomy of GCP's main competitor on the market for the acquisition of premium rights other than sports rights.[37] It ordered GCP not to introduce non-compete clauses or clauses placing a ceiling on investments in production.

28) The operation by GCP to acquire Direct 8 and Direct Star, the two free-to-air DTT channels of the Groupe Bolloré Intermédia in September 2011 is currently being examined by the Competition Authority.
29) Decision of the Minister of the Economy no. C 2006-02 of 30 August 2006, p. 85-86.
30) Competition Authority's Decision 11-D-12 of 22 September 2011 on compliance with the obligations contained in the decision authorising the acquisition of TPS and Canalsatellite by Vivendi Universal and Groupe Canal Plus.
31) Decision no. 12-DCC-100 of 23 July 2012, on the acquisition of sole control of TPS and Canalsatellite by Vivendi and Groupe Canal Plus, para. 666.
32) Article 430(7) of the Commercial Code.
33) 1(a) and 1(b). The cost of the rights to broadcast films in the 1st and 2nd windows will have to be established individually in each of the contracts, without the possibility of a combination discount between these rights or with the rights to recent American series, Decision 12-DCC-100 of 23 July 2012.
34) 1(c) - 1(e), idem.
35) 7(a) and 7(b), idem.
36) 2(a) – The company Orange Cinéma Séries-OCS, a general partnership established between the companies Orange Cinéma Séries and Multithématiques, a subsidiary of GCP, for the provision and exploitation of the package of television channels known as Orange Cinéma Séries, comprises the channels Orange CinéMax, Orange CinéHappy, Orange CinéChoc, Orange CinéNovo and Orange CinéGéants, idem.
37) "It is important to ensure that the service provided by Orange, which has in the last few years been the only credible alternative to that of GCP in the premium film segment before being incapacitated by the agreement with GCP, regains its competitive autonomy …", Decision no. 12-DCC-100, para. 677.

On the free-to-air television market, the Competition Authority intervened in the TF1/TMC-NT1 merger.[38] In its decision of 26 January 2010,[39] it pointed out that sharing would, firstly, have enabled overall group programming costs to be reduced by making optimum use of the rights acquired by the TF1 group on three unencrypted channels instead of one[40] and, secondly, made it possible to improve programming quality with the support of cross-promotion,[41] which would have strengthened the group's dominant position on the advertising market. In order to limit the group's power on the upstream rights acquisition market,[42] the group had made a number of commitments[43] aimed at limiting the possibilities of rebroadcasting[44] works and programmes internally.[45]

With regard to the advertising market, on which it holds a dominant position,[46] the group undertook not to carry out any cross-promotion of programmes of the channels TMC and NT1 on the channel TF1[47] and to maintain the independence of the programmes of TF1 vis-à-vis the two other channels by marketing their advertising space autonomously.[48]

The Competition Authority's authorisation for the merger between GCP and the two free-to-air DTT channels Direct 8 and Direct Star[49] was made subject to compliance with "behavioural" commitments aimed at preventing the strengthening of GCP's dominant position on the upstream market.[50] GCP undertook to limit its policy of acquiring rights to broadcast in clear[51] on the market for recent American films, previously unshown French films and the catalogue films of StudioCanal. The purchases will have to be carried out by two different units, one responsible for the pay-TV sector and the other for free-to-air TV.[52] Rights already acquired by GCP to show sports events of so-called "major importance" that have to be broadcast "on a free television service"[53] and would not be shown unencrypted on the Canal+ audiovisual service will have to be disposed of following a transparent and non-discriminatory competition tendering procedure involving all interested broadcasters. In connection with the agreement with the channel Direct 8, now D8, to preserve the balances on the free-to-air television market, the CSA, on 18 September 2012, limited the unencrypted broadcasting of previously unshown series produced by the major American studios to no more than one prime time slot a week on average for three years followed by 80 prime time slots for the next two years. The regulator also introduced a minimum period of 18 months between the broadcasting of previously unseen French series on Canal+ and on D8, thus limiting the practice of sharing programmes.

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38) TMC and NT1 are two general-interest free-to-air DTT channels.

39) Decision no. 10-DCC-11 of 26 January 2010 on the acquisition of sole control by the TF1 group of the company NT1 and Monte-Carlo Participations (AB group).

40) Idem, para. 450.

41) Idem, paras. 451 ff.

42) Idem, paras. 452 to 482, para. 587.

43) These commitments were made for a period of five years from the decision authorising the transaction and will have to be implemented from the date of the notification of the decision (26 January 2010). They may be examined at the request of TF1 and by decision of the Authority in the event of a substantive change in the de jure or de facto circumstances prevailing at the time the authorisation was given.

44) Section 38 of the agreement between the CSA, acting on behalf of the state, and the company Télévision Française 1.

45) Paragraphs 600-603, especially for American series, original French-language audiovisual works belonging to the cultural heritage, original French-language series and throwaway programmes, idem, incorporated into sections 36 *ter* 36 *quater* of the CSA-TF1 agreement.

46) In its decision, the Authority noted that, with a market share of almost 50%, the TF1 group had a dominant position on that market that could only be strengthened by the acquisition since, although TMC and NT1 currently had very small market shares (less than 2% in total), they seemed to have considerable growth potential.

47) Paragraphs 606-607 of Decision no. 10-DCC-11 of 26 January 2010, incorporated into section 36 of the CSA-TF1 agreement.

48) Idem, para. 608.

49) Decision no. 12-DCC-101 of 23 July 2012.

50) The acquisition of the channels Direct 8 and Direct Star will enable Groupe Canal Plus to acquire rights at the same time to original French-language audiovisual works belonging to the cultural heritage for both pay- and free-to-air TV. CSA Opinion, p 84.

51) As GCP owns StudioCanal with its first-class portfolio of French and European films, it will not be able to broadcast more than 20 previously unshown films on Direct 8 and Direct Star. Of these films, the group will not be able to exercise a pre-emptive option to acquire the rights to more than two high-budget films (more than 15 million euros), three medium-budget films (10 to 15 million) and five low-budget films (7 to 10 million) (2.2). As regards the unencrypted broadcasting of previously unshown American films and recent American series, GCP will not be able to conclude one or more framework agreements with more than one American studio (2.1), dossier 11-0239-commitments phase II, of 20 July 2012.

52) Idem, 2.6.

53) Sections 20(2) and 20(3) of the 1986 Law, adopted by the provisions of Articles L. 333(6) to L. 333(9) of the Sports Code (*code des sports*).

3. Regulating the numbering of services limits the distributors' power to organise their services in the way they want

Direct access by selecting a number is the preferred way of accessing television services in France. The issue of numbering and the position in a category have been identified by the CSA as likely to influence the audience of a particular channel.[54] Section 34(4) of the Law of 30 September 1986 obliges distributors to grant access to free-to-air DTT channels, at the request of these service providers, "on fair, reasonable and non-discriminatory terms". Law no. 2009-258 of 5 March 2009 added to this section a second subsection providing that distributors that do not observe the principle of "logical numbering" must reserve for these channels a homogeneous group that complies with this sequence and is placed immediately after a multiple of 100. The logical character of the numbering means that numbers are sequential.

On 17 December 2009, in two decisions on numbering[55] in the schedule of the CanalSat service distributed by the company Canal+ Distribution, the CSA interpreted the provisions of this new subsection of section 34(4) as prohibiting distributors from structuring their service plan by partially complying with the principle of logical numbering for the benefit of the incumbent channels.

On 9 July 2010,[56] the *Conseil d'Etat* set aside these two decisions on the ground of a mistake of law. In its opinion, the legislature did not prohibit partial compliance with the principle of logical numbering limited to the incumbent channels since that compliance was justified by an objective difference in the situation. It held that the provisions of section 34(4) of the 1986 Law "require the distributors concerned either to allocate to all national channels that are also broadcast in clear by terrestrial means in digital mode the logical number specified by the *Conseil supérieur de l'audiovisuel* for their transmission in this mode or to ensure that numbers are adopted in their service plan in sequential order, beginning with a whole number immediately following a multiple of 100, while at the same time retaining the ability to place them in other positions in their service plan that are determined according to the thematic group to which each belongs, the order of these groups in the service plan and the order of the channels within the group …".

4. Seeking a balance between controlling the dominant distributor's market power and ensuring the funding of content creation

In its decision no. 12-DCC-100 of 23 July 2012 on the acquisition of TPS and Canalsatellite by Vivendi Universal and GCP, the Competition Authority states that practices implemented by the merged entity have discouraged the development of alternative pay-TV services, especially by Internet access providers. The Authority made the "must-carry" obligation more stringent compared with 2006, in particular setting the number of independent channels that must be included in the CanalSat service at a minimum of 55% of the number of channels distributed and compelled the group to ensure that such channels be offered technical, commercial and pricing conditions based on transparent, objective and non-discriminatory terms.[57] It also ordered the distribution of channels holding premium rights.[58]

The Authority also made the "must-offer" obligation more stringent by requiring that all film channels that GCP provides or might provide, with the exception of the Canal+ channels, be made available on a non-exclusive basis and at transparent, objective and non-discriminatory prices to all distributors that ask it to do so and by ordering that the quality of the unbundled channels be maintained. However, it did not order the unbundling of the channels of the Canal+ package, which would have put an end to

54) Deliberation no. 2007-167 of 24 July 2007 on the numbering of television services in the programme offerings of service distributors on electronic communications networks that do not use frequencies assigned by the CSA.

55) Decision no. 09-835 of 17 December 2009 on a dispute between the companies BFM TV and Canal+ Distribution and CSA Decision no. 09-836 of 17 December 2009 on a dispute between the companies RJ 12 and Canal+ Distribution.

56) *Conseil d'Etat*, 9 July 2010, Canal+ Distribution, no. 335336, decision on a report of the 5th Subsection of the Litigation Section, Sitting of 30 June 2010.

57) Idem, Orders: 3) Inclusion of independent channels.

58) Idem. "The term premium channel refers to a film channel belonging to the regulatory categories of 'first exclusive runs' or 'first broadcasts' within the meaning of Decree no. 90-66 of 17 January 1990 or a channel broadcasting premium sports events, that is to say with the rights to show matches from League 1, popular foreign championships or the Champions League."

GCP distributing its package itself on all distribution platforms. This measure would have jeopardised the maintenance of the investment of Canal+ in film production, which depends on controlling the relationship between the channel provider and the subscriber. According to the National Film Council (*Conseil national du cinéma* – CNC), threatening the self-distribution mechanism would have an adverse effect on the revenue from the tax on television services, which is provided for by Article L. 115(6) of the Cinema and Animated Image Code (*code du cinéma et de l'image animée*) and is allocated to the CNC.[59]

In its opinion,[60] the CSA had stressed that the measure concerning self-distribution could change the amount paid by Canal+ in respect of its obligations to invest in cinematographic and audiovisual works. Since the amount involved to meet the obligations to contribute to content creation is proportional to the provider's turnover, and as GCP is the main investor in terms of the volume and value of original French-language films,[61] the measure would have caused uncertainty for part of the funding of French cinema. The Authority confined itself to ordering the legal and accounting separation of the activities of channel provision and distribution.[62] This restriction in controlling GCP's power is motivated by a concern to preserve the content creation funding model, the regulation of which strengthens this operator's market power.

II. Platform operators and convergent services

In its report on the problems of concentration in the media field, the 2005 Lancelot Commission[63] stressed that technological developments had undermined the foundations of the Law of 30 September 1986, which, in the case of audiovisual communication services, largely bases the anti-concentration provisions on placing a ceiling on the number of licences to use radio-electric frequencies that a single operator may accumulate. The doubts about the relevance of this ceiling have been emphasised by the group charged with reporting on smart TV,[64] which pointed out that the Competition Authority had been prompted to take action on mergers even though the criterion relating to the maximum number of channels had been met.[65] In addition, this limitation is not applicable to cable and satellite channels and, in view of the development of the delivery of audiovisual media services on the Internet, its scope for limiting an operator's power to influence public opinion is reduced.

The Lancelot Commission opted[66] for a criterion based on the actual audience share when all media are combined, believing that it was the only criterion directly linked to the aim of safeguarding pluralism and limiting the influence that an operator can acquire with regard to shaping public opinion.[67] The Commission recommended that the limit on the audience share should not apply to public channels. The group reporting on smart TV proposed "developing the rules for controlling media concentration in order to take more account of the audience shares and market shares on the various broadcasting platforms".[68]

59) Idem, paragraphs 350, 670 and 671. "GCP is supported on this by the CNC, which, first of all, believes that the self-distribution mechanism is a fundamental element of the Canal+ business model, which makes it possible, as a result of a direct connection with a key source of revenue in the form of subscriptions, to ensure the premium quality of programmes, with high programming costs that bear no comparison to those of the other special-interest channels … It is also persuaded that anything that might jeopardise this mechanism would be prejudicial to investments in film and audiovisual production". This tax is under discussion between the French Government and the European Commission.
60) Opinion no. 2012-10 of 2 May 2012 to the Competition Authority on the renotification of the acquisition of the companies TPS and Canalsatellite by Vivendi and GCP.
61) For "first-run cinema services", it must devote a minimum of 26% of its total resources to European cinematographic works, including at least 22% original French-language works. As it collects subscriptions directly from its customers, it must devote at least 12.5% of its total resources in the current financial year, and every year, to the purchase of rights to broadcast European cinematographic works, including at least 9.5% original French-language works. CSA Opinion no. 2012-10.
62) 9(a) and 9(b), Decision no. 12-DCC-100 of 23 July 2012.
63) Set up by Decree no. 2005-217 of 8 March 2005.
64) Report to the Minister for Culture and Communications and the Minister responsible for Industry, Energy and the Digital Economy on smart TV, remit given to Mr Takis Candilis, Mr Philippe Lévrier, Mr Jérémie Manigne, Mr Martin Rogard and Mr Marc Tessier; Rapporteur: Mr Mohammed Adnène Trojette, November 2011.
65) See the analysis above at I.2. of the TF1/NT1-TMC and Canal+/ Direct 8 and Direct Star mergers.
66) The choice was between a criterion based on the actual audience share and a system based on the share of the advertising market or the share of total sector turnover.
67) The choice of a criterion based on the actual audience share appears all the more relevant as the legal control of mergers already identifies the possible anti-competitive effects of a merger on the advertising market, so that it seems less essential to take them into account in sectoral legislation. p.76.
68) Proposal no. 4, Report on smart TV; November 2011.

Consequently, the media-based conception of broadcasting law reduces the scope of audiovisual regulation, which is not applicable to OTT services. In practice, the application of the 1986 Law is limited to linear services and audiovisual media services,[69] which are defined as communication services available to the public by electronic means enabling programmes to be viewed at the moment chosen by the user and on demand, on the basis of a catalogue of programmes of which the selection and organisation are controlled by the provider of that service.[70] In practice, this essentially means catch-up TV and video on demand, which excludes a large number of delinearised audiovisual media services, such as online community platforms like YouTube and Dailymotion, which are currently governed by Law no. 2004-575 of 21 June 2004 on confidence in the digital economy. The President of the CSA[71] believes that in choosing to place the emphasis on content, these platforms carry out "work" similar to "that of content providers" and must accordingly be subject to the provisions of audiovisual law.

On 16 February 2012, the CSA set up a commission made up of public and private players in the audiovisual sector to look into the use of smart TV and gain a better understanding of this new-generation television.[72] It is divided into five focus groups[73] and is intended to become a natural forum for discussions between stakeholders in smart TV. It will make recommendations and proposals accompanying the development of the use of this technology.

On 21 August 2012, the government announced an overall review[74] of the regulation of the audiovisual sector, telecoms and the Internet, following which proposals will be made for the legislative and regulatory changes necessary at this time of converging technology.[75] This work should enable the anti-concentration provisions to be adapted to changes in the distribution of audiovisual content and in the influence of the new players in the field of smart TV.

III. Delivery (network operators, hardware and software developers, terminal equipment manufacturers)

The interconnection market ensures the overall connectivity of the Internet and guarantees each user's ability to send and access the information of his or her choice. This market, which is not regulated, is characterised by the opaque practices developed by the operators. On 29 May 2012, the Body of European Regulators for Electronic Communications (BEREC), the consultation agency set up by the third Telecoms Package, published the results of its traffic management investigation, which showed that several fixed and mobile network operators and service providers apply certain usage restrictions (blocking or slowing down certain services) affecting a significant number of subscribers in Europe.[76] The Competition Authority supported settlement-based peering in the *Cogent v. France Télécom* case. ARCEP has used its new powers to monitor the trends in the interconnection market and set minimum quality requirements. In addition, legislative work is underway to adopt provisions aimed at compelling terminal equipment manufacturers to enable their devices to be used on all networks. ARCEP is continuing its work on this subject.

69) The term on-demand audiovisual media services was introduced into French law by section 36 of the 2009 Law amending section 2 of the 1986 Law.
70) Section 36 of the Law of 5 March 2009 amending section 2 of Law no. 86-1067 of 30 September 1986.
71) On 13 March 2012, the President of the CSA wrote to the President of the Association of Internet Community Websites (*Association des sites internet communautaires* – ASIC) to inform him that he considered these platforms to be video services like the others.
72) CSA communication no. 257 – February 2012, www.csa.fr/Etudes-et-publications/Les-dossiers-d-actualite/Une-commission-de-suivi-pour-la-television-connectee
73) "Economy and competition", "Financing of creative content", "Protection of vulnerable groups", "New advertising formats" and "Technological challenges".
74) Merger between the CSA and ARCEP: the prime minister has asked the minister for industrial recovery, the minister for culture and communications and the minister responsible for the SMEs, innovation and the digital economy to let him have proposals for such a merger.
75) This review will be based on the positions of ARCEP and the CSA and co-ordinated with the one conducted by Pierre Lescure on Act II of the cultural exception.
76) MEMO/12/389, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/389&format=HTML&aged=0&language=fr&guiLanguage=en

1. The interconnection issue in the regulation of audiovisual operators

On 10 May 2011, the transit operator Cogent complained to the Competition Authority about the refusal of the network operator France Télécom to provide its new interconnection capacities free of charge, claiming that this constituted abuse of a dominant position. The refusal led to a slowing down in the transmission of its clients' content, especially the videos of the Megaupload website. On 20 September 2012,[77] the Competition Authority ruled that the network operator had not refused the transit operator access. However, in view of the imbalance in the exchange of traffic, France Télécom was entitled to ask for payment for providing new capacities, in accordance with its interconnection policy. Nevertheless, France Télécom had to enter into commitments to formalise its relations with its transit operator (Open Transit) in order to facilitate the future prevention and control of any margin squeeze practices. The Competition Authority did not consider it necessary to order the separation of the activities of internet access providers and those of transit operators. This decision is the first delivered by any competition authority in the world on the question of interconnection charges, which is a much-discussed issue in the context of the debate on Internet neutrality.[78]

2. ARCEP's new powers regarding net neutrality

Directives 2009/13/EC and 2009/140/EC, transposed into French law by Order no. 2011-1012 of 24 August 2011[79] and supplemented by two decrees,[80] granted ARCEP new powers with regard to service quality, information gathering and the settlement of disputes. ARCEP is empowered to gather data not only from operators[81] but also providers of online communication services to the public, this data consisting of "information or documents concerning the technical conditions and charges for traffic conveyance applied to their services".[82] It has exercised this new power in connection with the deliberations on interconnection and traffic routing. In its decision no. 2012-0366,[83] adopted on 29 March 2012, it initiated the gathering of information for the purpose of establishing the technical conditions and charges for interconnection and data conveyance between operators and providers of content and application services with an impact on users situated in France. ARCEP thus considers itself in a position to monitor the trends that have developed on this data interconnection market, to analyse them and to draw the necessary conclusions for its work and for carrying out its role of settling disputes. However, this initiative is meeting with the hostility of the operators, which question its legal basis and claim that it is disproportionate since no actual shortcomings have been identified.[84]

As far as the settlement of disputes is concerned, the changes made to Article L. 36-8 of the Post and Electronic Communications Code (*code des postes et communications électroniques* – CPCE)[85] are leading to an increase in the powers of ARCEP, which will now be asked to resolve a dispute between

77) Decision no. 12-D-18 of 20 September 2012 on practices in the reciprocal interconnection services sector with regard to Internet connectivity, www.autoritedelaconcurrence.fr/pdf/avis/12d18.pdf

78) Press release of 20 September 2012: Internet Traffic– Peering Agreements www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1971

79) In application of Law no. 2011-302 of 22 March 2011 introducing various provisions adapting the legislation to EU law on health, the workplace and electronic communications, JORF no. 0069 of 23 March 2011 p. 5186. The aim of Order no. 2011-1012 of 24 August 2011 relating to electronic communications is, according to Title 1, to transpose Directives 2009/136/EC and 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending five directives from 2002, JORF no. 0197 of 26 August 2011 p. 14473.

80) Decree no. 2012-436 of 30 March 2012 transposing the new European regulatory framework for electronic communications, JORF no. 0078 of 31 March 2012 p. 5907 and Decree no. 2012-488 of 13 April 2012 amending the obligations of electronic telecommunications operators in accordance with the new European regulatory framework, JORF no. 0090 of 15 April 2012 p. 6919.

81) Operators are also required to inform ARCEP, at its request or at intervals that it specifies, of "all interconnection, access and traffic routing agreements" that they conclude (section D. 98-11).

82) Article L. 32(4) CPCE.

83) www.arcep.fr/uploads/tx_gsavis/12-0366.pdf

84) Replies to ARCEP's public consultation, Plan to collect quarterly information on the technical conditions and charges for interconnection and data conveyance, www.arcep.fr/uploads/tx_gspublication/synth-cp-interco-neutralite-mars2012.pdf . Verizon has filed an action for the annulment of this decision before the *Conseil d'Etat*.

85) The changes brought about by the Order of 24 August 2011 to Article L. 36(8) CPCE result from a combined reading of the new provisions of Article 20 of the Framework Directive concerning the settlement of a dispute and Article 2 of the Access Directive which defines the term access.

an operator and a "company providing online public communication services",[86] insofar as the dispute is about the "reciprocal technical conditions and charges for traffic routing" between these parties. ARCEP has also been asked to rule on the slow speeds regularly experienced by subscribers to the broadband provider Free when viewing YouTube videos.[87]

Pursuant to Article L. 36-6 CPCE, ARCEP is able to set minimum service quality requirements if this proves necessary. Before the end of 2012 it will adopt a decision precisely laying down the indicators that will have to be measured and published for fixed networks in addition to the measures already carried out on mobile networks.[88]

3. Terminal equipment suppliers and the question of neutrality

Article R. 20-22 CPCE compels every operator to accept all terminal equipment compatible with its network. However, the converse requirement that terminal manufacturers must enable their equipment to be usable on all networks is not necessarily guaranteed. In the absence of legislation specifically and explicitly governing this type of practice, it is competition law that applies and, on a case by case basis, has to determine whether the terms of the agreement between a manufacturer of terminals and a network operator are acceptable or not.

In its decision no. 08-MC-01 of 17 December 2008,[89] the Competition Authority spoke out against the exclusivity practices of the operator Orange for the distribution of iPhones, which excluded any marketing of the iPhone on Orange's competitor networks and were calculated to strengthen the company's dominant position on the mobile telephone services market and directly weaken competition. In November 2009, Apple and Orange abandoned selling the iPhone on an exclusive basis in France.[90]

The private member's bill of Senator Marsin[91] and the draft law strengthening consumer rights, protection and information[92] accordingly proposed amending Article L. 34-9 CPCE to prohibit manufacturers of equipment capable of being connected to electronic communications networks from limiting or blocking the use of their equipment to access the networks of certain operators of telecommunications networks that are open to the public and provide the latter with electronic communications services, the only exception to this being on grounds of public interest. In addition, in order to prevent instances of the blocking of content or applications by the terminal device itself, the same draft law provides for improving consumer information on any restrictions there might be on the use of certain devices (Article L. 34-9-1-1). ARCEP is continuing its work on the subject[93] in order to provide a diagnosis of the problems associated with terminal devices and determine the appropriate courses of action.[94]

86) The term "company providing online public communication services" refers to online public communication services, which are defined in section 1 of the Law of 21 June 2004 on confidence in the digital economy as "all transmissions, upon individual request, of digital data that do not constitute private correspondence, through an electronic communications process enabling the reciprocal exchange of information between the sender and the recipient". In practice, this means companies that provide content or services on the Internet.

87) www.alain-bazot.fr/index.php/interconnexion-les-freenautes-pas-libres-de-surfer-a-plein-tube/

88) Report to the Parliament and the Government on Internet neutrality, pp. 41 ff.

89) Decision no. 08-MC-01 of 17 December 2008 on practices implemented in the distribution of iPhones, www.autorite delaconcurrence.fr/pdf/avis/08mc01.pdf, confirmed by the Paris Court of Appeal in its judgment of 4 February 2009 www.autoritedelaconcurrence.fr/doc/ca08mc01_iphone_fev09.pdf , set aside by the Court of Cassation in its judgment of 16 February 2010 on grounds of inadequate reasoning, www.autoritedelaconcurrence.fr/doc/cass_08mc01_fev2010.pdf

90) Decision 10-D-01 of 11 January 2010 on practices implemented in the distribution of iPhones, www.arcep.fr/fileadmin/reprise/textes/juris/2010/10-d-01.pdf, Decision no. 08-MC-01 of 17 December 2008 on practices implemented in the distribution of iPhones, www.autoritedelaconcurrence.fr/pdf/avis/08mc01.pdf, confirmed by the Paris Court of Appeal in its judgment of 4 February 2009 www.autoritedelaconcurrence.fr/doc/ca08mc01_iphone_fev09.pdf , set aside by the Court of Cassation in its judgment of 16 February 2010 on grounds of inadequate reasoning, www.autoritedelaconcurrence.fr/doc/cass_08mc01_fev2010.pdf

91) www.senat.fr/propositions-de-loi/marsin_daniel04096s.html

92) www.assemblee-nationale.fr/13/projets/pl3508.asp

93) www.arcep.fr/uploads/tx_gspublication/synt-cp-conso-180211.pdf

94) Proceedings of ARCEP, Report to the Parliament and the Government on Internet neutrality, September 2012, pp. 66-69, www.arcep.fr/uploads/tx_gspublication/rapport-parlement-net-neutralite-sept2012.pdf

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I. Audiovisual media services and enabling services

1. Approach to public service media

There is no specific competition regime applicable just to public service media (PSM) in the UK. For regulatory purposes, the definition of PSM includes, in addition to the BBC, the services provided by S4C, every Channel 3 service, Channel 4, Channel 5 and the public teletext service.[1] All are considered to constitute part of the audiovisual market in the UK and their presence is taken into account when, for example, determining market definition and dominance.

However, separate rules exist for the BBC. Since the Charter (2006), its activities are overseen by the BBC Trust, a body which is instructed to act in the public interest.[2] It licenses the BBC services[3] and applies a public value test to the licensing of new services.[4] Each such licence must identify how the service contributes to the promotion of "public purposes" as defined in the Agreement and Charter[5] and must contain performance indicators. As well as being concerned to ensure the delivery of public service, the Trust considers the impact of the BBC's activities in the wider market in addition to the application of competition rules,[6] though it may sometimes wait for the outcome of any investigation by those authorities responsible for applying competition law, as it did in the Project Kangaroo.[7] The Competition Commission (CC) blocked that joint venture. By contrast, the Trust approved the successor project to Kangaroo – Project Canvas, subject to a number of conditions.[8] It concluded that any potential negative market impact was outweighed by the public value of the proposal. Although the initial partners to the joint venture were the BBC, ITV and BT, and subsequently included Channel 4, Channel 5 and Arquiva, the joint venture did not fall within the competition authorities' remit. All broadcasters are subject to the sectoral powers of the Office of Communications (Ofcom) (see below 3. and 4.2).

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1) Communications Act 2003, s. 264(11).
2) See generally on the regulatory structure, Woods, L., "Regulation and Extra-Legal Regulation of the Media Sector" in Goldberg, Sutter and Walden (eds), Media Law and Practice (OUP, 2009).
3) Previously this was the responsibility of the Department for Culture, Media and Sport (DCMS). All licences were re-issued in 2008 following a public consultation.
4) Article 24 BBC Charter 2006 (Cm 6925).
5) Clause 17(2) BBC Agreement.
6) See e.g. decision on Project Jam: BBC Press Office, Post closures follow suspension of BBC Jam, 14 May 2007, available at: www.bbc.co.uk/pressoffice/pressreleases/stories/2007/05_may/14/jam.shtml
7) Kangaroo was a three-way joint venture between BBC Worldwide, ITV and Channel 4, which planned to offer UK consumers (paid-for) on-demand programmes from all three broadcasters in a single place. The technology was subsequently bought by Arquiva and launched as Seesaw, but then withdrawn in October 2011.
8) Decision of the BBC Trust of 25 June 2010, available at: www.bbc.co.uk/bbctrust/news/press_releases/2010/canvas.html

2. Regulation of market entry

The existing Channel 3 and 5 licensees hold their broadcasting licences following a competitive tender process, set out in the Broadcasting Act 1990 (BA90); at stake were the terrestrial frequencies on which these licensees broadcast.[9] The Channel 4 licence did not form part of this process: Channel 4 is a statutory corporation owned publicly.[10] Similarly, a special regime applied to S4C, the Welsh language broadcaster established under the 1980 and 1981 Broadcasting Acts under the control of the S4C Authority and funded by the Department for Culture, Media and Sports (DCMS). In a multi-platform world, the benefits deriving from the status as public service licensee comprise prominence on electronic programme guides and reserved capacity on multiplexes that enable such licensees to broadcast to over 98.5% of the UK population. In addition to a fee, the licensees were subject to programme obligations.[11]

The current licences expire on 31 December 2014. The Communications Act 2003 (CA03) permits their renewal but, according to section 229 CA03, Ofcom must report to the Secretary of State assessing the capacity of the existing Channel 3 and Channel 5 licence holders to "contribute to the fulfilment of the purposes of public service television broadcasting ... at a cost ... that is commercially sustainable." There have been significant changes in the market, notably the fragmentation of audiences, the introduction of new services and the drop in advertising revenues which has raised questions about the continued viability of the current system.[12] Nonetheless, Ofcom recently concluded that Channel 3 and Channel 5 could continue so to contribute.[13] This does not mean that the licences will automatically be renewed.

As regards linear services, Television Content Licensable Service (TCLS)[14] licences are available to those who fulfil the criteria in the CA03 (essentially the fit and proper person test[15]). TCLS licences are not numerically limited but the granting of those licences does not include the right to use transmission capacity; this is an issue for the licence holder to negotiate with the distribution networks/platforms. A TV-like VoD service (an on-demand programme service (ODPS) under the legislation)[16] must pre-notify the relevant service to the Authority for Television On Demand (ATVOD) (and pay a fee), but does not need to obtain a licence.

3. Media-specific anti-concentration rules

The media ownership rules contained in the BA90 (as amended by the Broadcasting Act 1996 – BA96)[17] constituted a complex web of rules relating to persons who could not hold licences, accumulation of media interests,[18] cross-media ownership rules and contiguity rules. Following the coming into force of the CA03, aspects of media ownership, which previously were subject to specific limits, were left to regulation by the competition authorities: there are no restrictions on accumulation of TV licences.

9) S. 7 Wireless Telegraphy Act 2006 (replacing s. 158 Communications Act) requires Ofcom to reserve sufficient multiplex capacity for "qualifying services" within the meaning of the Communications Act.

10) Originally it was owned by the Independent Broadcasting Authority, the predecessor to the Independent Television Commission (ITC) until 1993 (the ITC's functions were taken over by Ofcom in 2003). Its board is appointed by Ofcom in conjunction with the Department for Culture Media and Sports.

11) Channel 4's obligations were amended by the Digital Economy Act.

12) Ofcom, Ofcom's Second Public Service Broadcasting Review: Putting Viewers First, 21 January 2009, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/psb2_phase2/statement/psb2statement.pdf

13) Ofcom, Licensing of Channel 3 and Channel 5: A report to the Secretary of State under section 229 of the Communications Act 2003, 23 May 2012, available at: http://stakeholders.ofcom.org.uk/broadcasting/tv/c3-c5-licensing

14) Defined in s. 232 CA03 – note this can be a service consisting of television programmes, just an electronic programme guide, or a mixture of both. The definition excludes two-way services. Note this section was amended by the Statutory Instrument implementing the Audiovisual Media Services Directive (AVMSD), The Audiovisual Media Services Regulations 2009, SI 2009/2979.

15) See Gibbons, T., "The United Kingdom - Television and Media Concentration" in IRIS Special, Television and Media Concentration: Regulatory Models on the National and the European Level, European Audiovisual, Observatory, Strasbourg 2001, p. 25 et seq.

16) S. 368A CA03; see further ATVOD Guidance (edition 3.1), 19 October 2010, available at: www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf.

17) For an overview see Gibbons, T., *op. cit.*, p. 19 et seq.

18) Prior to the CA03 the Carlton/Granada merger would not have been permitted. It was still subject to the merger regime: see Carlton Communications Plc / Granada Plc, Report 7 October 2003 (Cmnd 5952).

Other restrictions, on non-EEA ownership of broadcasters for example, were also removed. While the CA03 was seen as relaxing the regime controlling the accumulation of media interests found in the BA90 and BA96, it contained certain provisions with regard to competition in general and media mergers. In addition, Ofcom has a general duty, "to further the interests of consumers in relevant markets, where appropriate by promoting competition".[19] It must also ensure "the maintenance of a sufficient plurality of providers of different television and radio services".[20] In practice this has meant keeping media ownership under review generally, and advising the minister as to the need for change.[21] The CA03 also included sectoral competition powers for Ofcom: it may include licence conditions in each broadcasting licence in terms that it considers appropriate "for ensuring fair and effective competition in the provision of licensed services or of connected services",[22] which it must review.[23] Ofcom has exercised these powers in the context of must-offer conditions, discussed below at 1.5.

Certain provisions remain: prohibitions and limitations on the holding of licences by certain groups,[24] e.g. for national public telecommunications operators with an annual turnover in excess of GBP 2 billion; rules relating to the provision of news to Channel 3 licensees (to ensure that there remains a different voice from that of the BBC);[25] and restrictions on the holding of a Channel 3 licence and national newspapers and certain accumulations of local media. No person may acquire a Channel 3 licence if he or she runs one or more national newspapers with an aggregate market share of 20% or more; and a Channel 3 licensee may not acquire an interest of 20% or more in a body corporate running one or more national newspapers with an aggregate market share of 20% or more.[26] Rules exist to take into consideration company groups and also familial relationships.

Comparable restrictions on cross-media ownership – affecting PSM television operators – exist at the local radio level, also to ensure a plurality of voices. The Media Ownership (Local Radio and Appointed News Provider) Order 2003 provides, inter alia, that no single person may hold together: a local analogue radio licence; a regional Channel 3 licence whose potential audience includes 50% of the audience of the analogue radio service; and one or more local newspapers which have a local market share of 50% or more in the local coverage area. Even following Ofcom's most recent Media Ownership Review,[27] these rules still stand.

4. General competition law impact on media markets

There are three independent bodies entrusted with the enforcement of competition policy in the UK: the Office of Fair Trading (OFT), the Competition Commission (CC) and the Competition Appeals Tribunal (CAT). This current[28] system is a marked change from the previous regime, which lacked transparency.

4.1. Overview over competent authorities and legal framework

The OFT investigates anti-competitive practices in markets and mergers. The CC carries out in-depth investigations into specific mergers or market activities and may impose remedies, but only does so when the situation is referred to it by an appropriate person.[29] It is the CC which is the determinative body in the process, subject to review by the CAT, a specialist judicial tribunal.[30] Many of Ofcom's decisions using sectoral powers are likewise subject to appeal to the CAT.

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19) S. 3(1)(b) CA03.
20) S. 3(2)(d) CA03.
21) S. 391 CA03.
22) S. 316 CA03.
23) S. 318 CA03.
24) Comprising either total or partial prohibitions and found in Schedule 2 to the BA90 as amended, discussed by Gibbons, T., *op. cit.* (footnote 15).
25) National news on Channel 3 must be provided by an "appointed news provider" – s. 282 and 283 CA03.
26) CA03, Schedule 14, part 1.
27) Ofcom, Review of Media Ownership Rules, 14 November 2006, available at: http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-ownership/rules.pdf.
28) Note there are plans for further reform.
29) Section 58(2A)-(2C) Enterprise Act 2002. The CC also hears references under the CA03 in relation to communication pricing cases: ss. 192-193 CA03.
30) See generally Robertson, A., "Judicial Review of Competition Law" [2001] *Judicial Review* 84.

The Competition Act 1998 introduced two prohibitions mirroring Articles 101 and 102 TFEU: the Chapter I prohibition and the Chapter II prohibition, respectively. The Enterprise Act supplemented this regime by introducing a criminal offence: the cartel offence. The offence has not been used in relation to the media sector but the Chapter I and Chapter II prohibitions have been considered. For example, there have been repeated complaints about BSkyB, albeit with limited success. Competitors claimed that it abused a dominant position by: exercising a margin squeeze on distributors of its premium channels, by offering those channels in mixed bundles; or by offering certain discounts with regards to those premium channels.[31]

Under the Enterprise Act, the OFT has powers to investigate mergers and is to refer them[32] to the CC where there is a "relevant merger situation".[33] The test is whether there is a realistic prospect that a merger will lead to a substantial lessening of competition (SLC) in a UK market. The CC decides on appropriate remedies bearing in mind "the need to achieve as comprehensive a solution as is reasonable and practicable".[34]

4.2. Media-specific competition law regime and relevant practice

In cases where a merger raises certain public interest issues, such as media plurality, the secretary of state also may refer mergers to the CC.[35] The BSkyB/ITV merger was the first time these powers were used.[36] The public interest considerations set out in section 58(2C) Enterprise Act may apply in the context of mergers involving broadcast media enterprises or cross-media mergers involving both broadcast media enterprises and newspaper enterprises.[37] Given the rules are based on the licensing regime under the BA90 and 96, it would seem not to include ODPS.

As a first stage, if the secretary of state thinks there may be a public interest issue, both the OFT and Ofcom are required to report in a specified form,[38] with Ofcom dealing with the media plurality implications.[39] Ofcom's role applies once the secretary of state has decided to intervene; Ofcom does not advise the secretary of state on whether to intervene in a merger on media public interest grounds. According to guidance, intervention would normally only occur in cases where media ownership rules were removed by the CA03.[40] Relevant public interest considerations include:[41] plurality of the media;[42] the need for a wide range of high-quality broadcasting appealing to a wide range of tastes and interests; and the need for media companies to have a genuine commitment to the objectives of section 319 CA03 (the negative standards with which broadcasters must comply and which apply to broadcasters rather than to the press).

31) Decision of the Director General of Fair Trading, decision CA98/20/2002, 17 December 2002, application to vary rejected, decision of OFT, 29 July 2003, available at: www.oft.gov.uk/shared_oft/ca98_public_register/decisions/sky2.pdf . See also NTL's complaint in respect of a joint promotion run by BT in conjunction with BSkyB, 15 May 2003, available at: www.oft.gov.uk/shared_oft/ca98_public_register/decisions/btbskyb.pdf

32) S. 22 in relation to completed mergers and s. 33 Enterprise Act regarding anticipated mergers.

33) Defined in s. 23 Enterprise Act: where two or more enterprises have ceased to be distinct enterprises; or the value of the turnover in the United Kingdom of the enterprise being taken over exceeds GBP 70 million. Under s. 26, two enterprises cease to be distinct where they are brought under common ownership or common control. There are three types of control: ownership; ability to control policy; and ability materially to influence policy. Sky's 17.5% holding in ITV, the largest single holding by far, was held to lead to an ability materially to influence policy.

34) S. 35(4) Enterprise Act.

35) S. 58(2A)-(2C) Enterprise Act 2002.

36) British Sky Broadcasting Group PLC / ITV PLC merger: Acquisition by British Sky Broadcasting Group PLC of 17.9 per cent of the shares in ITV PLC, 14 December 2007, Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc, 29 January 2008, both available at: www.competition-commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv. See also Hutton, J., in Hansard of 29 January 2008: www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080129/wmstext/80129m0001.htm

37) For newspaper mergers see S. 58(2A) and (2B) Enterprise Act.

38) S. 44 Enterprise Act.

39) S. 44A Enterprise Act 2002; s. 61A Enterprise Act 2002; see also Ofcom, Ofcom Guidance For The Public Interest Test For Media Mergers (May 2004).

40) DTI, Enterprise Act 2002: Public Interest Intervention in Media Mergers - Guidance on the Operation of the Public Interest Merger Provisions Relating to Newspaper and Other Media Mergers (hereinafter "DTI, Media merger Guidance"), May 2004, available at: www.bis.gov.uk/files/file14331.pdf, p. 37.

41) S. 58(2C) Enterprise Act.

42) See *British Sky Broadcasting Group v. Competition Commission* [2010] EWCA Civ 2; [2010] 2 All ER 907 (CA (Civ Div)), noted Pheasant, J., Rab, S., and Sukhtankar, A., "The Court of Appeal judgment in British Sky Broadcasting Group Plc v. Competition Commission and the limits of media plurality regulation" [2010] 31 E.C.L.R. 318.

As a second stage, having received the reports, the secretary of state decides whether to refer the matter to the CC. On receiving any such reference, the CC undertakes an investigation and considers whether consultation is necessary.[43] The CC may make a determination that there is a SLC and the secretary of state must accept the findings of the CC on this point. Thereafter, it is for the secretary of state to determine whether any such merger is contrary to the public interest. Any anti-competitive outcome is considered contrary to the public interest unless countervailing public interests which justify it are present.[44] In considering the impact of a merger on range and quality of broadcast services the secretary of state may look at "any relevant information as to how either the broadcasting or newspaper enterprise have run their affairs".[45] Thus a company's compliance with broadcasting standards generally and also the issue of whether news provision on other services provided has been impartial are potentially relevant factors.[46]

While it seems that there is a preference for divestiture over behavioural remedies generally, in regulated sectors there is some preference for behavioural remedies.[47] Nonetheless, in the *BSkyB/ITV* decision, Sky was required to divest its holdings to below 7.5% (although this was combined with behavioural undertakings).[48] The CC rejected the possibility of complete divestiture here as it would have been more comprehensive than was necessary; partial divestiture would meet the CC's statutory obligation. By contrast, the merger of Arquiva and NGW (below III) resulted in an extensive package of behavioural remedies.

The Enterprise Act also gave the OFT and the sector regulators power to investigate markets, and potentially to refer those markets (rather than the individual firms in those markets) to the CC for investigation.[49] Here, the CC determines whether any feature or combination of features in a market prevents, restricts or distorts competition, constituting an adverse effect on competition (AEC). An AEC can arise from the market structure; the conduct of suppliers or buyers; or the conduct of customers.[50] In such a case, the CC has a duty to remedy it as comprehensively as possible.[51] The majority of the market investigations undertaken by the CC have been in regulated industries, including the media and communications sectors. An example can be seen in Ofcom's reference for an investigation into the supply and acquisition of Subscription Pay-TV Movie Rights and into the wholesale supply and acquisition of packages including "Core Premium Movies" channels.[52] The provisional findings were that there was an AEC.[53] Possible remedies included: limiting the number of major studios from which Sky may license exclusive first subscription pay-TV window content; restricting the range of exclusive rights which Sky may license from the major studios; or "must retail" (or must-offer) measures.[54] The decision was reversed in the light of "a number of material developments in the market",[55] although at the time of writing, the findings are still open to comment. This assessment as to the impact of subscriber VoD streaming services such as Netflix, differs from that of Ofcom. The CC nonetheless noted that competition in the overall pay-TV retail market was ineffective.

43) S. 104A Enterprise Act.
44) S. 45(6) Enterprise Act.
45) DTI, Media mergers Guidance, p. 31.
46) DTI, Media mergers Guidance, p. 36.
47) Rab, S., "From Ordered Competition towards a new competitive order? The Role of the UK Competition Commission at the interface between sector regulation and competition law" (2009) 30 ECLR 505, p. 515. See generally, Harker, M., "UK Merger Remedies under Scrutiny" (2007) JBL 620.
48) Final decisions by the Secretary of State in BSkyB/ITV, *op. cit.* (*supra* note 36).
49) Ss 131 and 133 Enterprise Act
50) S. 134(1) Enterprise Act.
51) Competition Commission, Guidelines For Market Investigations, Draft for Comment, April 2011, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/consultations/current/pdf/110427_mi_guidelines_text_v8_black_line, paras 81-83.
52) Reference 4 August 2010, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/terms_of_ref.pdf
53) Competition Commission, Provisional Findings Report, 19 August 2011, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/provisional_findings_report.pdf
54) Competition Commission, Notice of Provisional Findings, 19 August 2011, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/notice_of_provisional_findings.pdf
55) Competition Commission, Notice of Revised Provisional Findings. 23 May 2012, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/notice_of_revised_provisional_findings.pdf . See also Competition Commission, Working Paper 29, 14 March 2012, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/working_paper_29_developments_since_our_provisional_findings_excised.pdf

Specific rules apply to the sale of advertising airtime: a CC investigation resulted in the ITC Rules Regarding Advertising Sales Arrangements (2001),[56] based on the ITC's statutory duty, similar to that of Ofcom, to "ensure fair and effective competition" in the provision of licensed services. When Granada and Carlton merged, concerns arose relating to these two companies' combined market power despite the 2001 rules. The merger was approved only on the basis of certain undertakings to protect media advertising airtime buyers. They included the Contracts Rights Renewal remedy,[57] which gives advertisers and media buyers the right to renew their current contracts with Carlton and Granada on the same terms.[58] Any changes to the way airtime is sold require the consent of the OFT.[59] Ofcom has gradually reduced some of the *ex ante* controls on sales in the light of the increasingly fragmented market for advertising.[60] Ofcom decided, after an initial investigation, not to refer the industry to the CC.[61] The legal threshold for a reference might have been met, but in the absence of evidence of harm and in light of the costs of a reference, such a step would have been disproportionate.

5. Must-offer

Ofcom, exercising its powers under sections 3(4)(b) BA90 and 316(2) CA03, concluded that BSkyB had market power in the wholesale of certain premium sports channels, and that it was exploiting that power by limiting the wholesale distribution of the channels.[62] Ofcom therefore varied BSkyB's licences by imposing conditions in relation to the supply of those services to other undertakings, imposing a "wholesale must offer" (WMO) obligation. BSkyB (and others) appealed to the CAT, challenging both Ofcom's jurisdiction under section 316 and its decision on the substance. The CAT dismissed the appeal as regards jurisdiction and approach but held that Ofcom had erred on the facts. Almost everybody involved in the case has obtained permission to appeal.[63]

The services currently benefiting from the statutory must-carry obligations (see III below) are subject to must-offer conditions in sections 272-3 CA03. These services must be broadcast or distributed by means of every appropriate network so that they are available for reception by as many members of their intended audience as practicable.

6. Services enabling or facilitating use or reception

Ofcom must draw up a code on the provision of electronic programme guides (EPG).[64] The CA03 seems concerned with the positioning of the PSB channels (including the proposed local channels[65]), and the terms of the Code specifically require EPG providers to "ensure that free-to-air services are at least as accessible as pay-TV services". Further, where there is a link between a channel provider and an EPG provider, the EPG provider must refrain from giving undue prominence to that content and ensure that access to all television services in the EPG is "easily available".[66] The terms on which allocation is carried out should therefore be fair and avoid the possibility of distorting competition, a point which

56) ITC, Statement: Revisions to ITC Rules regarding Advertising Sales Arrangements, 17 May 2001.
57) Competition Commission, Notice of acceptance of undertakings from ITV plc varying the undertakings given by Carlton Communications Plc and Granada plc to the Secretary of State for Trade and Industry pursuant to section 88(2) of the Fair Trading Act 1973, 17 September 2010 (hereinafter "Undertakings"), available at: http://webarchive.nationalarchives.gov.uk/+/http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/10_09_17_notice_of_acceptance_of_undertakings_from_itv.PDF
58) Clause 6, Undertakings.
59) See Clause 10(h) Undertakings. For an example see: OFT, ITV Micro Regions (OFT1336dec), September 2011, available at: www.oft.gov.uk/shared_oft/consultations/oft1336dec.pdf
60) Ofcom, Statement: Airtime Sales Rules Review, 28 July 2010, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/asr/statement/statement.pdf
61) Ofcom, Statement: Competition issues in the UK: TV advertising trading mechanism, Decision, 15 December 2011, available at: http://stakeholders.ofcom.org.uk/consultations/tv-advertising-investigation/statement.
62) Ofcom, Decision 31 March 2010.
63) British Sky Broadcasting Limited Virgin Media, Inc. The Football Association Premier League Limited British Telecommunications PLC v. Ofcom, Cases No: 1156-1159/8/3/10), (CAT) Decision 8 August 2012, available at: www.catribunal.org.uk/
64) S. 310 CA03; Ofcom, Code of Practice on Electronic Programme Guides (hereinafter "EPG Code"), available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf
65) Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011.
66) EPG Code paras 15 (c), (f) and 16.

Ofcom has emphasised.[67] Additionally, EPG providers must ensure that agreements with broadcasters are made on fair, reasonable and non-discriminatory (FRAND) terms; use a method of allocating that is "objectively justifiable";[68] publish the method; and carry out periodic reviews of their listing policy and of channel listings in consultation with channel providers.[69] Application of the Code has been the subject of complaints and litigation. In the complaint by EDML against Sky,[70] concerning the repositioning of Teachers' TV from the documentaries genre into the specialist genre, Ofcom concluded that the decision was justified. A significant amount of information had been provided about the listing method and, in Ofcom's view, the method did not favour one television company over another.[71]

II. Platform operators

While telecommunications operators generally are not subject to licensing controls as barriers to entry (see further below III), satellite operators, however, must apply for a licence, though this is not a competitive process. By contrast, the operation of DTT multiplexes, as they use radio spectrum, involves a licensing process in respect of that spectrum. The relevant regime is found in the BA96, except for Multiplex 1, which is operated by the BBC. Multiplex licences were awarded in 1997 and again in 2002.[72] The BA96 set out a list of those matters which the ITC had to take into account in awarding licences.[73] In the first round of awards, the ITC imposed ownership conditions on the licensees.[74] The multiplex licences all contain provisions to ensure that multiplex licensees do not engage in activity that would be prejudicial to fair and effective competition.[75] All the restrictions on ownership in the BA90 initially applied to BA96 licences, although limits on the number of television multiplexes which could be owned by one person were repealed in 2003.[76] As regards the new local television licences, each local TV multiplex operator will be obliged to carry the local TV service at the location it serves.[77]

Ofcom carried out a market review in relation to the wholesale market for transmission services. As a result of this, Ofcom imposed significant market power (SMP) conditions on National Grid Wireless (NGW) and Arquiva in relation to the provision of wholesale broadcasting transmission services relating to DTT (except those covered by the must-carry obligation). The attempt to identify downstream markets for managed transmission services was withdrawn.[78]

Ofcom can set certain specific conditions relating to conditional access.[79] The imposition of such conditions is subject to a test of (a) provision of access services; and (b) dependence of broadcasters on those services to reach potential viewers or listeners.[80] Ofcom imposed these conditions on Sky Subscribers Services Ltd (SSSL),[81] the operator of conditional access services on the digital satellite

67) Statement on Code on Electronic Programme Guides, Statement by Ofcom, 26 July 2004, p.1, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/epg/statement/statement.pdf
68) Ofcom, EPG Code, para. 15(b).
69) Ofcom, EPG Code, para. 15(d).
70) Ofcom, Decision on complaint by EDML against Sky about repositioning of Teachers' TV in Sky's EPG, 10 May 2006, available at: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/decision1.pdf
71) See for a contractual dispute relating to the operation of listings policy: *JML Direct Ltd* v. *Freesat UK Ltd* [2010] EWCA Civ 34 affirming [2009] EWHC 616 (Ch).
72) Note that following the Local Digital Television Programme Services Order 2011, the BA96 and the CA03 were amended so as to allow local television services.
73) Section 8 BA96.
74) Ss 10 and 11 BA96.
75) Multiplex licence, condition 10. Multiplex licences can be found at: http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/multiplex/
76) Contrast the position for radio, which was still controlled.
77) Ofcom, Draft Invitation to Apply for the Local TV Multiplex Licence, 27 January 2012, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/localtv/annexes/Draft_ITA.pdf, para. 1.33
78) Ofcom, Withdrawal of Notification to European Commission regarding Broadcasting Transmission Services, 21 January 2005, available at: http://stakeholders.ofcom.org.uk/consultations/bcast_trans_serv/229049
79) Sections 73 and 75 CA03.
80) This reflects the definition in s. 75 CA03.
81) This is part of the BSkyB Group and there were some suggestions that the BSkyB Group should be regulated rather than SSSL; the condition eventually imposed additionally applied to any SSSL subsidiary or holding company, or any subsidiary of that holding company.

platform which provided conditional access services to a number of broadcasters.[82] These conditions are clarified in the Guidelines on the Provision of Technical Platform Services (TPS).[83] Ofcom emphasised that the transparency of charging methods was a key element of FRAND terms, and that commercial negotiations on their own would not necessarily meet the objectives of the FRAND obligations.[84] Ofcom argued that while a TPS provider in the start-up phase of its business would be seeking content (as it suggested in relation to TUTV[85]) and therefore the position of the parties to a commercial negotiation might be more equal, SSSL (as part of Sky) was in a strong negotiating position. Ofcom was concerned that this might lead to consumer detriment[86] in that discriminatory pricing could stifle the development of new services[87] and that the earlier regime was in this respect not stringent enough.[88] While the Guidelines deal with cost,[89] they also cover, *inter alia*, non-price terms, such as: lead times associated with the provision of a TPS; product information including knowledge of new product development, changes to existing products, pricing packages or investment plans; support levels, availability and performance of the TPS; processes to ensure that requests for new TPS or changes to existing TPS are handled in a consistent, transparent and objective manner; and bundling of TPS services such that TPS customers are forced to purchase a TPS that they do not require in order to gain access to services they do require.[90] Thereafter, Ofcom prepared to carry out a market review on wholesale digital television broadcasting platforms. This was overtaken by the CC's pay-TV market investigation (see above I. 4.2.).

III. Transmission networks and services

In line with the EU telecommunications package, the licensing regime was replaced by a general authorisation regime for those operating electronic communications networks with the General Conditions[91] (which apply to all) and Specific Conditions (which apply to specific individuals). Ofcom has enforcement powers in relation to the conditions and affected third parties may sue for damages (with Ofcom's consent). One of the general conditions contains the must-carry obligation.[92] The provision envisages the drawing-up of a list of services to be carried, and section 64(3) CA03 contains an initial list comprising the PSM together with the public teletext provider. The secretary of state may limit the amount of capacity those services may use.[93] He/She may also set the terms on which a service on the must-carry list is to be broadcast and can include a requirement that no payment is made by the service provider benefitting from the must-carry status or the network provider. The list of services benefitting from must carry must be reviewed from time to time.

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82) Oftel, The Regulation of Conditional Access: Setting of Regulatory Conditions – Explanatory Statement and Formal Notification pursuant to Section 48(1) of the Communications Act 2003, available at: www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf , p. 9.
83) See Ofcom, Provision of Technical Platform Services: Guidelines and Explanatory Statement (hereinafter "Provision of TPS: Guidelines"), 21 September 2006 (replacing the previous Oftel guidelines of 22 October 2002 under the Telecommunications Act regime), available at: http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf
84) Ofcom, Provision of Technical Platform Services: Consultation on draft guidelines and explanatory statement, 21 April 2006 (hereinafter "Provision of TPS: Consultation 2006"), available at: http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/summary/consultation.pdf, para. 2.20
85) Ofcom, The Setting of Access-Related Conditions upon Top Up TV Limited, para. 1.12.
86) Note Ofcom's general duties in this regard: s. 3 Communications Act. See Ofcom's comments: Ofcom, Provision of TPS: Consultation 2006, Section 8.
87) Ofcom, Provision of TPS: Consultation 2006, para. 2.30.
88) See also *Rapture Television v. Ofcom* [2007] CAT 34.
89) See Ofcom, Provision of TPS: Guidelines, Section 3.
90) Ofcom, Provision of TPS: Guidelines.
91) The General Conditions can be found at: http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf as recently amended in relation to General Condition 18.
92) Section 64 CA03. See General Condition 7 and implemented via an Ofcom direction to Arquiva and NGW. See: http://stakeholders.ofcom.org.uk/binaries/consultations/bcast_trans_serv/annexes/must-carry.pdf
93) S. 64(5) CA03.

The media ownership rules in the CA03 do not place any specific limits on the ownership of transmission infrastructure; relevant issues fall to competition law. Thus the acquisition of NGW by Macquarie UK Broadcast Ventures Limited resulted in an investigation by the CC;[94] the merger gave rise to a SLC. The companies were the only integrated terrestrial broadcast transmission companies in the UK. The CC concluded that the loss of rivalry between them could lead to higher prices and lower service quality. The CC's arguments have been described as contentious;[95] certainly Ofcom took the opposite view.[96] The deal was approved, however, subject to acceptable undertakings.[97] Divestment was not an option given that digital switchover (DSO) was taking place at the time. In accepting behavioural remedies, the CC tackled the effects of the SLC rather than the SLC, an approach which has been criticised for substituting regulation for competition.[98] This case, however, is an extreme example of factual specificity both of the industry itself (infrastructure) in which there is little competition to start with,[99] compounded by a one-off and complicated event such as DSO.

The merger of NTL and Telewest gave rise to a merger situation under the Enterprise Act, having an effect in three main areas: the provision of pay-TV; telecommunication services; and Internet access. Following the approach in the previous acquisition by NTL of Cable and Wireless Communications,[100] the CC concluded that, although the merger reduced the number of platform owners in television, NTL and Telewest owned cable systems in different parts of the UK, and therefore the networks did not compete directly. Further, competition was expected to be available via services delivered over DSL. The OFT dismissed the argument that Flextech, a content provider vertically integrated with Telewest, would be foreclosed.[101] As there was no SLC, the OFT did not refer the matter. This merger was not subject to any discussion of plurality. A contemporaneous case concerned BSkyB Broadband Services Limited's acquisition of Easynet, a company offering wholesale and retail broadband Internet access services via DSL, as well as business data communications services. It gave rise to foreclosure concerns, given Sky's market power in content. Ofcom and the OFT noted that these problems arose out of BSkyB's power and not as a result of the merger.[102] Neither referred the matter to the CC. While triple play considerations were argued in the BSkyB/Easynet and NTL/Telewest mergers, the strategy was at too nascent a stage to be factored in.

Ofcom recently set out its views on net neutrality.[103] Ofcom has in general relied on competition in the market of Internet Service Providers (ISPs) to deal with traffic management, although it recognised that there were consumer protection issues relating to transparency of information about individual ISP's practices. Ofcom took the view that a self-regulatory code was sufficient. Nonetheless Ofcom would become concerned were network operators to prioritise managed services in a manner that left insufficient network capacity for "best-efforts" access to the open Internet. In such circumstances it might consider imposing a minimum quality of service on all communications providers to safeguard "best-efforts" access to the open Internet. A self-regulatory mechanism, the Open Internet Code of Practice,[104] was developed by a number of ISPs. Not all ISPs, however, have signed up.

94) Competition Commission, Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group: Completed Acquisition, 11 March 2008.
95) Baker, S., "Sending the Right Signal" (2009) ECLR 277, p. 278.
96) Ofcom, *Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group*: Response to Notice of Possible Remedies dated 30 November 2007 (non-confidential version), para. 15.
97) Undertakings agreed 1 September 2008, available at: www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2007/macquarie/pdf/notice_undertakings.pdf
98) Cave, M., "Does the Competition Commission care enough about Competition?" (2006-7) Utilities Law Review 4.
99) Baker, S., "Sending the Right Signal" (2009) ECLR 277, p. 279.
100) Competition Commission, Report on the proposed acquisition by NTL Incorporated of Cable and Wireless Communications Limited, March 2000.
101) OFT, Anticipated Merger of NTL Incorporated and Telewest Global Inc, decision 30 December 2005 (published 10 January 2006), para. 17, available at: www.oft.gov.uk/OFTwork/mergers/Mergers_home/decisions/2005/ntl , where there is a link to the pdf version of the decision.
102) OFT, Anticipated acquisition by BSkyB Broadband Services Limited of Easynet group plc, decision 30 December 2005 (published on 13 January 2006), available at: www.oft.gov.uk/OFTwork/mergers/Mergers_home/decisions/2005/bskyb – same as above re pdf.)
103) Ofcom, Statement on Approach to Net Neutrality, 24 November 2011, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/statement/statement.pdf
104) Open Internet Code of Practice, available at: www.broadbanduk.org/component/option,com_docman/task,doc_view/gid,1340/Itemid,63/

Acronyms used in the text

ATVOD	Authority for Television On Demand
BA90	Broadcasting Act 1990
BA96	Broadcasting Act 1996
CA03	Communications Act 2003
CAT	Competition Appeals Tribunal
CC	Competition Commission
DCMS	Department for Culture, Media and Sports
DSO	digital switchover
AEC	adverse effect on competition
EPG	electronic programme guide
EPG Code	Code of Practice on Electronic Programme Guides
FRAND	fair, reasonable and non-discriminatory
GBP	British Pound
ISPs	Internet service providers
ITC	Independent Television Commission
NGW	National Grid Wireless
Ofcom	Office of Communications
OFT	Office of Fair Trading
ODPS	on-demand programme service
PSM	public service media
SSSL	Sky Subscribers Services Ltd
SMP	significant market power
SLC	substantial lessening of competition
TPS	Technical Platform Services
TCLS	Television Content Licensable Service
WMO	Wholesale Must Offer

HUNGARY

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I. Audiovisual media services and enabling services

Since Hungary became an EU member state in 2004, EU competition law is directly applicable and enforceable. The Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Competition Act) applies horizontally. After a gradual transposition of the AVMS Directive, the audiovisual sector is today mainly regulated by the Act CLXXXV of 2010 on media services and mass media (Media Act or MA).[1] This Act provides the core rules on entering the audiovisual media market, on ownership and concentration, and on public service broadcasting. The MA modified substantially the legal framework for public service media, the organisation, rights and decision-making process of the media regulatory authority, as well as tender processes. These modifications gave rise to a public debate not just in Hungary, but worldwide.

The Hungarian audiovisual sector is supervised by the converged *Nemzeti Média- és Hírközlési Hatóság* (National Media and Infocommunications Authority – NMHH), more precisely by its Media Council. With regard to competition issues it shares responsibilities (at least partially) with the *Gazdasági Versenyhivatal* (Competition Authority – GVH).

According to the MA's Preamble, the Act aims among other things to promote competition in the media market. The MA applies basically to all media services (linear and on-demand) and press products provided and published by media content providers, as well as to ancillary media services[2] and media service distribution. As a result, all services that are relevant to or connected with audiovisual media services (or the press[3]) are covered by the Act.[4]

Diversity of services forms a key goal of the media regulation, which expressly includes rules against the formation of ownership monopolies and any unjustified restriction of competition.[5]

1) 2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról (Act CLXXXV of 2010 on Media Services and Mass Media, consolidated version), available at: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1000185.TV. An English translation (consolidated version, effective from 3 July 2012) is available at: http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf
2) Ancillary media services are all services – also containing content provision – which are transmitted through a media service distribution system and which qualify neither as media services nor as electronic communications services. For example, electronic programme guides are ancillary media services.
3) Even though the scope of this publication does not cover the press, according to the regulation in Hungary it is nevertheless necessary to mention these rules related to the press because they are relevant for example in the field of cross-ownership regulation. Additionally, platform operators will be subjected to the press regulation if the content of their platform could be seen as a press product.
4) The Act applies to media service providers established in Hungary and media content providers who use a satellite uplink station located on the territory of Hungary or use the transmission capacity of a satellite owned by the Republic of Hungary. It also applies to services which are targeted at, distributed or published on the territory of Hungary (Article 1 and 2 MA).
5) Article 4 MA.

1. Approach to public service media

The MA declares that public service media in Hungary operate independently from both the state and commercial providers and that they are autonomous in their activities. However, they also aim to be a part of the media market, that is, to be – in a reasonable and justified manner – competitive. The Act reflects this dual approach, for example, in granting public service media special or even unique organisational and operating conditions.

Two public service providers operate on the public service television market:[6] Hungarian Television and Duna Television, both appointed by law. The parliament created the Public Service Fund (hereinafter: the Fund) to ensure the provision of the public media service and public news service and to protect their independence. The Fund owns the Hungarian Television Non-Profit Private Limited Company, the Duna Television Non-Profit Private Limited Company, the Hungarian Radio Non-Profit Private Limited Company and the National News Agency Non-Profit Private Limited Company. Public media service providers are required to offer at least one audiovisual linear public media service to the overwhelming majority[7] of the Hungarian population.

Currently, the rules on public service media do not address the market power of public service providers, so that the general rules apply. There is no Public Value Test in place for new services, either. The Media Council decides on the media service facilities used by the individual public service providers – including media services targeted at foreign countries – on the basis of technical, economic, and media policy considerations. It decides after consultation with the CEO of the Fund and while taking into consideration aspects concerning economic and budgetary planning for the next year. For its decision, it also takes account of the fulfilment of the public service objectives set forth in Article 83 MA. The system of public media services is subject to annual reviews, which allows the Media Council to decide whether to maintain the existing media services of public service providers or to change the system.

2. Regulation of market entry

According to the MA anybody can become a media service provider or publisher (natural or legal person or a business association without legal personality) if the criteria of the MA are fulfilled. This position can be acquired either through notification to the Office of the NMHH, or by winning a tender. Some exceptions exist detailing who may not provide media services, covering both personal and organisational criteria.[8] Besides these general rules, some special (personal and organisational) territorial restrictions apply to local linear services.[9]

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6) The third and fourth public service providers, the Hungarian Radio and the National News Agency operate on a different market.

7) Services provided to the overwhelming majority of the population means, for audiovisual media services, media services available to (at least) 90% of the population.

8) In accordance with Article 43 MA the following persons (and in most cases their close relatives) are not allowed to provide linear media services:
- public actors;
- members of sectoral regulation;
- local or county-level municipal representatives, government officials, officials of the national or local organisations of political parties, and persons engaged in any work-related relationship with political parties;
- judges and public prosecutors;
- executive officers of public administration bodies.

The following organisations shall not be entitled to provide linear media services:
- political parties or undertakings established by political parties;
- state and public administrative bodies (with the possibility of statutory exceptions for extraordinary situations or states of emergency);
- undertakings in which the Hungarian state has a qualifying holding;
- undertakings in which any of the persons mentioned above have some direct or indirect ownership interest or have acquired the right to influence their decisions pursuant to a separate agreement or by other means; or
- a person or organisation otherwise subject to acquisition restrictions.

9) Undertakings employing/being represented by certain (local) political/administrative officials are excluded from providing local linear media services in a reception area of which at least 20% falls within the limits of local government jurisdiction or if such officials hold a direct or indirect qualifying stake or are entitled to influence the undertaking's decisions under a separate agreement or otherwise.

2.1. Notification and registration

Linear media service providers established in Hungary may offer their services after having notified[10] and registered them, except if they provide analogue linear media services using state-owned frequencies, for which they would first need to win a tender (to be announced and conducted by the Media Council). On-demand media services and ancillary media services shall be notified to the NMHH for registration within 60 days from their commencement. In these cases the registration is not a precondition for starting such a service or activity. If a service provider offers both linear and on-demand media services it shall notify each of its services or press products separately.

The notification for linear media services shall contain data on the size of direct or indirect ownership stakes held by the provider or by any other person with a qualifying interest[11] in (i) the provider's undertaking and (ii) any other undertaking providing media services, or applying for a permission to do so within Hungary. Moreover, the provider shall state that the envisaged service does not fulfil the criteria for any exclusion provided for in the MA. Should the NMHH identify any non-compliance with the law, it may either refuse the registration or delete the linear media service from the register. According to Article 42(6)c) MA the NMHH will also refuse registration if a registration violates the provisions on the prevention of media market concentration or if the provider or any of its owners owes fees from earlier media service activities.

The notification procedure for on-demand services is partly different from that for linear services. For example, fewer data must be provided to the NMHH[12] and the conflict-of-interest rules are also less complex. The notification shall contain a statement that no conflict of interest exists or would arise as a result of registration of the media service. Should a conflict-of-interest situation occur, the NMHH shall withdraw the registration or the service shall be deleted from the register.

The registration of ancillary media services is subject to the regulations applicable to the registration of on-demand media services.

2.2. Tenders (Articles 48-63 MA)

The right to provide linear media services may also be obtained by winning a tender and entering into a service contract with the NMHH. For analogue linear media services using state-owned limited frequency resources this is the mandatory procedure, except where the MA disposes otherwise.[13]

A licence resulting from a tender is valid for a maximum period of ten years and may be renewed once for a maximum of five years without another tender procedure at the media service provider's request (but the licence will expire on the date set forth in the Act on Digital Switchover).

10) In the notification the future provider informs the NMHH at least 45 days prior to its taking up the media activity, among others, about the provider, the basic characteristics of the planned media service such as kind (radio or audiovisual), type (general or thematic), and character (commercial, community). In addition it supplies basic information on the planned electronic communications service provider likely to perform broadcasting, the envisaged number of subscribers, planned ancillary media services and the envisaged date of launching the media service. Any expansion of the reception area, or connecting to a network shall also be notified while the NMHH's decision is pending. In case of satellite media services, the media service provider notifies the NMHH about the statement of intent from the provider of the satellite capacity (which it intends to use) to lease the capacity, thereby indicating the frequency concerned and the technical specifications.

11) Qualifying holding according to Article 203 point 3. MA means direct and indirect ownership in an undertaking, which – in aggregate – provides control in excess of 25% over the undertaking's assets or voting rights.

12) As in the case of linear services, the provider shall provide basic information about its planned operation and services, the notification shall include:
- information about the provider (name, address, etc.);
- basic characteristics of the planned media service such as kind (radio or audiovisual), type (general or thematic), character (commercial, community);
- planned date of launching the media service.

13) The Media Council can authorise, without a tender, an undertaking to provide media services for the sake of carrying out public duties for a specified period not exceeding three years (Art. 48. (4) MA).

The NMHH determines the principles and detailed rules of the tender procedure.[14] Article 55(1) MA limits participation in the tender procedure to those persons and undertakings who/which have not failed on payments due to tax, customs, and social security authorities or the Media Council, are not bankrupt or under similar financial constraints, and did not seriously breach the terms of previous licensing agreements resulting from a tender won within the past five years.

Even if the tenderer already holds a media service licence or is already in the market (which in general would be a reason for exclusion from the invitation to a tender), he may participate in the tender, provided that he makes the legally binding declaration that, in case he wins the tender, he shall either relinquish his other right or any claim to provide a media service as from the date of the conclusion of the service contract, or undertake to terminate the situation violating the restrictive provisions in any other manner, as of that same date.

Where applicant undertakings mutually hold qualifying shares, or where one applicant is holding a qualifying share in another applicant or where a parent company is holding a qualifying share in two or more applicant undertakings, the undertakings concerned are not permitted to participate in the same tender procedure (Article 55(5) MA). This rule aims to avoid the building up of concentration of power in the media market and to secure diversity.

The NMHH examines whether applications comply with the formal and content requirements.[15] Among other things, it evaluates whether the tenderer meets the personal and participation criteria and complies with the conflict-of-interest requirements, and whether the related information is fully included.

3. Media-specific anti-concentration rules

3.1. General rules on the prevention of market concentration

The principle of diversity of the media market as well as the existing market concentration requirements establish the key limitations on ownership. They serve to maintain the diversity of the media market and to prevent the formation of information monopolies. These rules are applicable for linear media services. In relation to other services (on-demand, or ancillary) general competition rules apply. Market concentration of providers of linear media services may be limited within the framework of the MA for the abovementioned purposes and such control is carried out by the Media Council, without prejudice to general competition law (merger control), which remains the domain of the GVH and will be discussed in detail below under point I.4.

According to Article 68(1) MA,

- providers who offer linear audiovisual media services or linear radio services and have an average annual audience share[16] of at least 35% and
- linear audiovisual and linear radio media service providers with a joint average annual audience share of at least 40%,

may not launch new media services, and may not acquire shares in undertakings providing media services. The same rule applies to any owner of the media service provider and any person or undertaking having a qualifying share in the undertaking of the owner of the media service provider.

14) The NMHH also determines the principles of the tender procedure of the small community media service facilities with regard to their unique characteristics deriving from the nature of these media service facilities. Generally small community media service facilities may not be subject to tendering and may not be operated commercially.

15) The offer has to contain information about the tenderer (name, address, etc.) and all his undertakings. This includes detailed information on his ownership shares, either direct or indirect, or the ownership share of another undertaking in the tenderer.

16) The average annual audience share jointly reached on the linear audiovisual and linear radio market shall be determined by adding the individual average annual audience shares, expressed as a percentage, attained separately on the linear audiovisual and linear radio markets.

These providers shall also take measures in order to increase the diversity of the media market by "modifying their programme-flow structure" with the approval of the NMHH. This modification can be done, for example by increasing the proportion of Hungarian works and programmes prepared by independent producers, or in any other way. In order to determine the measures to increase diversity, the Media Council may conclude a public contract – for a term of at least one year – with the media service provider, at the media service provider's request, and under such procedure the Media Council is entitled to assess whether it accepts the obligations the media service provider wishes to undertake.

If no public contract is concluded, the media service provider shall request within six months of the communication of the Media Council's decision identifying the provider as being affected by by the rules restricting media market concentration as per Article 68 MA or the media service provider with significant market power as per Article 69 MA the approval of its proposed measures aimed at increasing media market diversity. This triggers a procedure, in which the Media Council assesses whether the proposed measures are suitable for decreasing the former information monopoly and for increasing media market diversity and information pluralism.

3.2. Media service providers with significant influence power

In addition to the general media concentration rules the MA introduced the concept of significant influence power.[17] According to Article 69(1) MA, linear audiovisual media service providers are considered to hold significant influence power if they have an average annual audience share of at least 15%, provided that at least one of their media services reaches 3% of the average annual audience share.

3.3. Procedures to prevent market concentration and to identify media service providers with significant influence power

The Media Council, backed by the NMHH Office, is competent to monitor and analyse the media market, and if necessary, to apply and enforce the anti-concentration rules of the MA. In order to prevent media market concentration and identify media service providers with significant influence power, the Media Council examines market facts and circumstances relevant for assessing the level of concentration. The Media Concil considers first of all whether the thresholds mentioned above at I.3.1 in respect of the average annual audience share have been reached. When determining the audience share of a media service provider, the NMHH shall take into account and add to the audience share of the provider the audience share of all linear media services distributed in the territory of Hungary

- by the provider itself;
- by other media service providers in which it has a qualifying holding; and
- by a media service provider in which any owner of the affected media service provider, or the owner of the owner thereof has a qualifying holding.

The Media Council may order the media service providers to supply related information.[18] If the provider fails to oblige or obliges only in part, the Media Council may impose a procedural fine and in case of repeated breach is additionally entitled to (and for a repeated breach of law is obliged to) impose a fine on the officer or registered representative of the provider.

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17) Please note that the term "significant market power" as used in the official English translation of the Media Act does not correspond to its Hungarian original, which is properly formulated as "media providers with significant influence power". The term used in the English translation of the Media Act is by no means identical to the term "significant market power" used by the EC electronic communications framework. Although both describe similar concepts with regard to their *ex ante* nature, the concept of significant influence of the Media Act, unlike the SMP regime, is not based on market power and competition analysis and an examination of a handful of additional sector-specific criteria, but on annual audience-share thresholds and no competition analysis will be carried out.

18) An order to provide information may not be challenged as such but only in a legal procedure against the merits of the decision that might result from the regulatory inspection.

Linear audiovisual media service providers with significant influence power are subject to a set of qualitative and content requirements imposed by the Media Council.[19] The Media Council has already carried out the first round of procedures for identifying media providers with significant influence power, and it has to repeat the procedure each year, and reach a decision by 30 September. The obligations imposed are effective from 1 January following the year of the NMHH's decision.

The Media Council has the power to impose sanctions for infringements on media service providers with significant influence power. It may impose fines on them of an amount up to HUF 200 million.

When the price changes or other market circumstances suggest that competition in the media service market is being distorted or is restricted, the Media Council, in order to gather information on market trends and to asses such trends, can institute a regulatory inspection (sector inquiry) by its order. At the same time, Article 169(2) MA stipulates that these rights of the Media Council are without prejudice to the rights of the GVH in competition issues. Article 170(1) MA determines that, if competition in the audiovisual market is distorted or could be limited because of market conditions, and provided that the Media Council's controlling powers are not adequate to put an end to this process, then the Media Council is obliged to initiate proceedings at the GVH.

4. Merger control in communications and media

Merger control in the communications and media domain is carried out by the GVH, with the involvement of the Media Council as special authority. The rules concerning merger control contained in Chapter VI of the Competition Act aim to keep under surveillance all mergers and acquisitions which might be essential from the point of view of the national economy.

Article 24 of the Competition Act defines the thresholds above which the authorisation for a concentration has to be obtained from the GVH. Since May 2004, according to the Merger Regulation of the European Community (ECMR), transactions meeting the turnover thresholds stipulated therein (i.e. transactions having a Community dimension) have to be notified to the European Commission. These concentrations are therefore assessed by the European Commission and not by the GVH.

The criteria for the GVH's assessment of concentrations changed in 2009 and put stronger emphasis on a more thorough analysis of the competition effects of the concentration. Until 1 June 2009, the GVH could not refuse to grant authorisation for a given concentration, if it did not create or strengthen a dominant position, which would have impeded the formation, development or continuation of effective competition (dominance test). Since this date the GVH cannot refuse authorisation for a concentration unless it significantly reduces competition on the relevant market, in particular as a

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19) Among others they shall ensure that:
- they broadcast without interruption one news programme or general information programme in their media service which has the highest annual average audience share of at least 15 minutes on each working day between 7:00 a.m. and 8:30 a.m., and a separate uninterrupted news programme of at least 20 minutes on each working day between 6:00 p.m. and 9:00 p.m.
- in all of their digitally transmitted media services at least one quarter of the cinematographic works and film series originally produced in a language other than Hungarian, broadcast between 7:00 p.m. and 11:00 p.m., are available in their original language, with Hungarian subtitles, including programmes starting before 11:00 p.m. but ending later.
- all public service announcements, political advertisements, news programmes (including traffic news, sports news and weather forecasts) and political programmes, as well as programmes about people with disabilities or equal opportunities, are also accessible with Hungarian subtitles – for example through teletext – or with sign language.
- cinematographic works, games and programmes serving public service objectives during the transmission time between 06.00 a.m. and 12.00 p.m., are also accessible with Hungarian subtitles – for example through teletext – or with sign language, a) for at least six hours on each calendar day in 2012; b) for at least eight hours on each calendar day in 2013; c) for at least ten hours on each calendar day in 2014.
- they trasmit the public service announcements of the professional disaster management agency if it provides information on the potential occurrence of danger to safety of life or property, on the mitigation of the consequences of an event that has already occurred or on the tasks to be carried out. The duration of the public service announcement may not exceed one minute.

Audiovisual media service providers with significant influence power are obliged to contract in respect of all their linear media services separately, according to the fair and reasonable contract offers of the media service distributor, which can be modified only once a year in terms of price. No tying is allowed and they have to respect equal treatment, by setting an affordable price level and by taking into account the principles of technological neutrality, economies of scale and non-discrimination (Article 78 (2)-(4) MA).

result of the creation or strengthening of a dominant position on the relevant market (substantial-lessening-of-competition test). Otherwise, the GVH may block the transaction if the related efficiency advantages are outweighed by its disadvantages on competition. The GVH may attach conditions to its decision, to be fulfilled before and/or after the conclusion of the merger, to remedy the adverse effects of the concentration on competition.

For the assessment of anti-competitive effects the horizontal or vertical nature of the transaction is of particular importance (horizontal meaning any concentration between competitors and vertical any deal between parties having a seller-buyer business relationship). In general, horizontal transactions directly lead to a change in the market structure, while vertical concentrations may have negative effects on the related markets. Certain transactions cannot clearly be categorised due to the fact that they have both horizontal and vertical features. It may also happen that there is no market on which both undertakings are active. Nevertheless, such concentrations may also have harmful effects on competition. Portfolio effects occur when producers or distributors of complementary products (players on adjacent markets) become members of the same group of undertakings. If one undertaking of a group has a high market share on the market of a given product, concentration may enable the post-merger entity to follow strategies restricting competition on the market of other product(s) (e.g. by tying). Conglomerate effects occur when the entire position of the undertaking improves considerably concerning its economic, financial or income conditions (which are decisive factors of economic power and afford the possibility to use restrictive strategies such as predatory pricing), despite the fact that no dominant position would be created or strengthened in any market if the effects were analysed separately.

In the first half of 2011, the GVH began to revise its merger control regime. The basic aim of this revision was to increase the transparency of merger control proceedings, speed up the process and ease the administrative burdens of the procedure. As a result of the review the notification form has been substantially modified.[20] Subsequently, the President of the GVH and the Chair of the GVH Competition Council issued Notice No. 2/2012 in May 2012, which modified the best practice of GVH in merger cases.[21]

In merger cases the GVH has to obtain the position statement of the Media Council for the approval of concentrations between enterprises, or the affiliates of at least two groups of companies as defined in Article 15 of the Competition Act, which bear editorial responsibility and the primary objective of which is to distribute media content to the general public via an electronic communications network or a printed press product. If the GVH assumes competence, the Media Council has expert or adviser rights, although the GVH is obliged to seek its opinion. The Media Council must give positive advice if the level of independent opinion sources following the merger would still ensure the right for diversity of information within the particular market segment of media content service. One exception applies to this rule: should linear audiovisual media service providers with an average annual audience share of at least 35% and linear audiovisual and linear radio media service providers with a joint average annual audience share of at least 40%, wish to acquire a share in a company providing media services or should they wish to launch new media services, the Media Council – acting according to a special authority approval procedure – is obliged to refuse its approval. In principle, the statement of the Media Council on the permissibility of an envisaged concentration is binding for the GVH, but the latter may still prohibit a merger that has already been approved officially by the Media Council as special authority, irrespective of any condition the Media Council may have set, or impose a condition or an obligation as defined in Article 30(3) of the Competition Act that the Media Council has failed to set (Article 171(4) MA).

4.1. GVH practice in media mergers

Media concentration cases are not very frequent in the GVH's practice. With the changes in the criteria for the assessment of concentrations in 2009, the methodologies changed significantly. This limits the usefulness of an analysis of the practice in previous years. Under the new regime, only a few cases have been investigated by the GVH.

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20) The new form is applicable for transactions notified on 1 February 2012 or thereafter.
21) To date, the notice has not yet been applied in practice in media mergers.

In the case *RTL Group Central and Eastern Europe (RTL CEE) and IKO Média Holding Zrt. (Vj/065-016/2011.)* the GVH authorised RTL CEE – that belongs to an international group engaged in operating television and radio channels in several European countries – to acquire sole control over IKO Média Holding Zrt. (IMH) that has ownership rights in Magyar RTL Televízió Zrt. (M-RTL). In addition to imposing obligations for the merchandising TV advertisements, after obtaining the position statement of the Media Council for the approval of the concentration, the GVH additionally cleared the transaction through which M-RTL acquired sole control over IKO Televisions Kft. (IKOT), and its seven thematically programmed channels Cool, Sorozat+, Prizma, Muzsika, Reflektor, Film+ and Film+2, and accepted at the same time commitments from the parties (Vj-66/2011).

Therefore, M-RTL is obliged to make possible the independent purchase of advertising time on RTL Klub and IKOT channels for a period of two years after the conclusion of the contract (regarding the agreements implemented until 13 December 2013). The purchases must be made possible at reasonable, fair and non-discriminatory price conditions and be economically reasonable for the advertisers/agencies acting on their own, or together with other channels outside of M-RTL. M-RTL is obliged to inform advertisers/agencies about the prices and other conditions within the framework of its general terms and conditions and, in addition, M-RTL should justify the specified prices and conditions to the GVH.

The RTL Group had already been present on the Hungarian market as one of the main shareholders of RTL Klub (a commercial channel with a nationwide audience and a significant role in advertising). Due to the acquisition of RTL CEE IMH, the RTL Group continued to increase its shares in M-RTL. Contrary to the M-RTL-IKOT deal, this transaction was authorised by the GVH without the imposition of conditions or acceptance of commitments on the parties concerned. Even though several television channels of the RTL Group can be received in Hungary (for example the German RTL, VOX, RTL II, and Super RTL) and therefore the parties to the transaction operate several television channels in Hungary, the GVH came to the conclusion that the transaction would not have harmful effects on competition as these channels are not from any viewpoint (viewers, advertisers) substitutes for the M-RTL's channel, RTL Klub. They are – in contrast to RTL Klub – not Hungarian channels and do not target primarily Hungary, thus they all have a marginal significance from a Hungarian market perspective.

The other transaction (the acquisition of sole control over IKOT by M-RTL) concerned Hungarian channels broadcasting their programmes in Hungarian and, therefore, required detailed analysis. When investigating the transaction, the GVH evaluated – from the perspective of viewers, broadcasters and advertisers – markets that could possibly be relevant, the relationship of the parties involved in the transaction with Hungarian television channels and the envisaged changes that could take place on the market due to the transaction. Thereby the GVH took into account the two-sided market feature of television (and generally media) services.

The GVH established that RTL Klub and the seven target channels were not substitutes for each other on the broadcasting or the advertising market; instead they were complementary to each other. This is the consequence of the fact that distributors need the nationwide known channels (RTL Klub, TV2, Cool, Film+) in order to provide their subscribers with appealing programmes. Therefore, the very popular, major channels substitute each other, while the channels with less popularity do not due to their low popularity.

From the perspective of advertisers, the market of television channels can be divided into two main groups which fulfil different advertising functions and which, therefore, can command different price levels. The first group contains RTL Klub and TV2 (and occasionally channel m1), which are able to attract a lot of advertising in a short period of time due to the fact that they possess a broad coverage and a high number of viewers. As a result, these channels are able to demand higher advertising prices. The other, generally not so well known channels (that can significantly differ in popularity) can nevertheless facilitate the frequency of the advertisements and are sufficient for reaching special consumer groups with a cost-saving method. By using this dual approach, the advertisers and the advertising agencies that aim to support their work, generally advertise on both types of channels. This is underlined by the fact that the channels belonging to the two groups are in a complementary relationship rather than being substitutes for each other.

Based on the delineation of two television markets, GVH examined whether the merging of RTL Klub and IKOT would lead to portfolio effects, thus whether it would be possible to leverage the strong market power from one market to the other or to apply restrictive practices (mainly by tying). In the present case, it would mean using RTL Klub's market power to influence the market power of IKOT channels.

Some broadcasters expressed their concern that the merger would make it possible to mutually advertise the programmes of RTL Klub and IKOT channels. Also, they were concerned that the parties would shift obligatory programmes to channels with small audiences, or that they would be induced to jointly sell advertising time on different channels by tying them to each other. However, the GVH did not share these concerns; instead it found that the problems raised by the stakeholders were not merger specific (and thus probably also existed before the intended transaction) and could easily be remedied by the media regulator. Moreover, as a result of the characteristics of the market concerned (i.e. the forthcoming digital era, the "must-have" feature of the nationwide-viewed channels and the relative ease with which smaller channels can enter into the market), the GVH found it unlikely that the group would exclude others from the market. In addition to this, the GVH was of the opinion that the possible impact of an exclusion from the market could also be questioned. For the advertising market, however, the available data was insufficient for the GVH to exclude *a priori* the possibility that harmful effects might occur. As a result of the merger, two channels with significant advertising positions on the market and a complementary relationship towards each other would belong to one and the same group of undertakings, which could jointly satisfy a significant part of the requests of advertisers and agencies. A similar competing "television mix" would be very difficult to create and might require the joining of forces of all other competitors. It would also be a more costly solution than the "one stop shop" of the merged undertaking due to the transactional costs that would arise. All the abovementioned facts could result in strengthening the advertising potential of RTL Klub and IKOT channels, which could not be balanced either by actual nor by potential competitors and countervailing buying power. Therefore, a significant impediment to effective competition could not "automatically" be excluded; however, the additional commitments offered by M-RTL (see above) were eventually sufficient to remedy these concerns.

4.2. NMHH practice in a merger case pertaining to the wider media sector

In the case *Axel Springer and Ringier (Vj-42-307/2010.)* the two companies aimed to establish a joint holding company (JV HoldCo) by merging Axel Springer's Polish, Czech and Hungarian and Ringier's Serbian, Bosnia-Herzegovina, Slovakian, Czech and Hungarian companies. The GVH, following the negative position statement of the Media Council, notified the applicants of its possible negative stance, and subsequently the application was withdrawn.

Even though this case was based mostly upon the "old" Media Act and is about a merger in the field of the press, it has nevertheless significance for media mergers in general – not least because the MA contains almost the same specific concentration rules. The case was one of the first where the Media Council gave an advising decision under the new MA and, most importantly, this decision sheds light on important differences in the processes and approaches followed by the two authorities competent for competition matters in the media market.

The first difference between the Media Council's and the GVH's approach is the way in which they define the relevant market. Diverging from the competition-law definition, the Media Council's starting point was the pluralism of opinions. Instead of the market provider's ability to increase prices, the Media Council based its inquiry on the "provider's" ability to influence opinions. Similar media contents can influence the public opinion in the same way, independently of the difference in pricing of the broadcasted media content, and a possible increase in price would not result in the substitutability of such content. Moreover, from the point of view of pluralism, consumers use information acquired from diverse sources, they compare it and then they make considerations about its credibility. They might consider opinions more credible if they are verified by a multitude of information sources used in parallel. In other words, the complementary and simultaneously consumed media contents constitute a circle of opinion-influencing products/services, so they could be considered the relevant market of opinions. Considering all this, the Media Council defined the relevant market of opinions along three dimensions:

- thematic dimension: the relevant market includes those sources of opinions and media contents, which could define and influence the opinion-making of consumers on a specific theme/topic;
- the dimension of the complementary channel: the way a content is delivered to consumers (i.e. TV, radio, Internet), the availability of that channel, the way and habits of usage, the credibility and opinion influencing power of the content;

- geographic dimension: analysing nationwide, regional and local sources of information distinctly and individually, where sources of content are available.

According to the Media Council's definition of the audiovisual content market, it is comprised of those media contents, which focus on a similar topic, which consumers can access on a well-defined territory and channel and most importantly which are characterised by their opinion-influencing powers and information pluralism.

The Media Council examined how, as a result of the merger, content diversity would evolve on the market, thus whether sufficiently diverse media content would be available to the public (external pluralism). On the other hand, it assessed how the quantity of information sources and the quality and diversity of information in those media contents would be affected (internal pluralism).

The Media Council also investigated whether the need to preserve diversity of content (in connection with the enforcement of pluralism of opinions) is relevant in the context of the concentration of media. According to the Media Council there is a significant correlation between the degree of media concentration and media pluralism, namely a high level of media concentration decreases the diversity of content and pluralism of opinions. Moreover, it increases the risk of one-sided public-opinion forming; thereby it can exclude or mitigate the importance of certain diverse aspects. The concentration of the media could also have further harmful effects in other fields of the audiovisual sector (spillover effects), like the monopolisation of the advertising market or other markets, the limitation of new market entries, the loss of creativity due to the unification of the content, etc.

The NMHH pointed out that the diversity of ownership is a necessary, but not sufficient criterion when it comes to assessing whether public information pluralism exists. Therefore, the Media Council also examined pluralism from the perspective of the citizens' access to information, namely access to diverse sources and the availability of different opinions. In this context, the Media Council also examined how the members of the public could establish their opinion independently from the market players with high influence powers. This is not just a question relevant to the media market, but is a fundamental constitutional issue: the task of pluralism is to ensure, on the one hand, the market entry of independent content providers as widely as possible, and, on the other hand, the right of the consumers to make a real choice.

The Media Council did not approve the merger because television and Internet sources were not found to be complementary solutions for the consumers in this case. Moreover, the companies affected by the merger were already providers with significant market power, so their merger would have significantly increased the imbalance in the market. Furthermore, the merger would probably have had spillover effects on the advertising, the distribution and the editorial markets as well, and would thus have posed a potential threat to pluralism and diversity of opinions.

5. Must-offer obligations and access to archives

Must-offer obligations are connected either to events of major importance to society or to the provider's status as a public service provider or a provider of significant influence power. Moreover, there is a general must-offer obligation on audiovisual media providers with significant influence power and media service providers in which or in the owner of which an influential media service distributor or the owner thereof has a qualifying stake, according to which they have an obligation to contract with the other media service distributors. Providers may not exercise exclusive broadcasting rights so as to deprive a substantial part – more than 20% – of the Hungarian audience having access to audiovisual media services of the possibility to follow through an audiovisual media service accessible without payable subscription the events – live or in a subsequent broadcast – regarded to be events of major importance to society.[22]

22) Events of major importance to society are defined by the Media Council in a regulatory decision, subsequent to a public hearing, where it also establishes whether the events of major importance to society should be broadcasted live or subsequently. In its decision to classify an event as one of major importance, the Media Council also has to pay attention to the request that a wide range of viewers should show interest in the event, that the event should be a world- or Europe-wide event, and be aired in a significant number of European countries. Alternatively the event could be one with Hungarian significance of interest to a wide range of viewers.

If the exercise of an exclusive broadcasting right would deprive at least 20% of the Hungarian audience of the possibility of following the events as per Article 18(1) MA via an audiovisual media service, the audiovisual media service provider is obliged to make a contract proposal – subject to reasonable terms and conditions and in exchange for consideration appropriate under the prevailing market conditions – to a linear audiovisual media service provider, who provides services accessible (without payable subscription) to at least 80% of the Hungarian citizens and wants to provide live or time-shifted broadcasting of the event. Under such circumstances, the media service provider, which has obtained the exclusive rights, may not resort to the argument that it is not entitled to transfer the exclusive right.

Another must-offer obligation concerns all linear media services of audiovisual media providers with significant influence power and media service providers in which or in the owner of which an influential media service distributor or the owner thereof has a qualifying holding (Articles 78-81 MA): these providers are obliged to contract in respect of all their linear media services separately, according to a fair and reasonable contract offer to the media service distributor. Tying is prohibited, which means that the media service provider subject to the must-offer obligation cannot set preconditions to the conclusion of an agreement that would cover any of its other media services. Such preconditions could relate, for example, to the provision of services by the provider which are not essential for the distribution of the given media service, or the purchase or use of other services or products.

Besides these rules, the media service provider subject to must-offer and the media service distributor should jointly determine the terms of the agreement – in particular, but not exclusively, the amount of the fee – in line with the principle of equal treatment. They shall set an affordable price level and take into account the principles of technological neutrality and economies of scale. Article 78(5) MA defines some equal treatment principles. For example, if the media service provider, which is under a must-offer obligation, unreasonably subjects the distribution to technical conditions which a decisive proportion of media service distributors are unable to meet, or if it determines pricing terms and tariffs so that the most advantageous terms would become available only to a few media service distributors, then that behaviour could be seen as a violation of the equal treatment principle.

Media service providers may refuse to fulfil their obligations under must-offer (like in the case of must-carry) only if the performance of the commitments contained in the offer is impossible due to objective technical or economic reasons, and the parties cannot come to an agreement regarding these terms.

Concerning the access to archives, specific rules exist for public service media. On the one hand, all ownership rights and obligations associated with public service media archives rest with *Médiaszolgáltatás-támogató és Vagyonkezelő Alap* (the Media Services Supporting and Trustee Fund). The Fund is responsible for the storage, safekeeping and utilisation of public service media assets, as well as of physical data carriers containing works and other subject matter subject to copyright law and acquired by the public media service providers and the Fund, but not falling within the scope of public service media assets. The Fund cannot alienate, transfer or encumber public service media assets in any way. This prohibition does not exclude the exploitation of copyright and neighbouring rights existing with respect to certain items of the public service media assets.

The Fund can use the works in the Archive in accordance with the provisions of the Copyright Act and in accordance with the terms and conditions of the agreement concluded with the copyright owners and holders of related rights. The Fund executes an asset management agreement with the public media service providers for the utilisation of public service media assets. This agreement grants the right to the public service providers to use those items of the public service media assets free of charge, including the right of communication to the public. Copyrighted works and other intellectual property located in the Archive but falling outside the scope of public service media assets may be used by public media service providers within the framework of the Copyright Act as well as the terms and conditions of agreements concluded with copyright owners and holders of related rights. Therefore the Fund has the right to transfer works (works forming part of public service media assets, along with copyrighted works and other intellectual property which fall outside the scope of public service media assets) to the public media service providers if the Fund has a usage right. Public service media have a significant advantage because of the privileged access to works for which the Fund holds copyright, while the commercial competitors don't have such a privilege.

II. The MA on media service distribution

As mentioned before the scope of the MA also covers (at least in some cases) the distribution of media services, (Articles 72-81 MA). It is important to note that the general principle of diversity also prevails here, but in this case it is applied to vertical concentration issues.

The MA stipulates rules on the quotas (in a qualitative and quantitative manner) of content distribution, as well as on ownership issues. For example Article 72(2) MA generally states that the number of media services offered by providers, which are at the same time distributors, or in which the same distributor undertaking has a qualifying interest, shall not exceed one quarter of the audiovisual media services distributed on the given transmission system. The same ratio applies to the programme package offered to viewers or listeners by the distributor, which had the highest number of subscribers at the end of the previous calendar year in the given transmission system. These rules are not applicable to media service distribution activities carried out by public media service providers.

III. Must-carry obligations

According to the European rules and in order to preserve, protect and further develop Hungarian and European culture and the culture of national or ethnic minorities, and support and sustain national or ethnic minority languages, and foremost to satisfy the information needs of citizens and facilitate their participation in democratic public affairs and preserve diversity of opinions, media service distributors are subject to “must-carry” obligations. Distributors conveying media services on a transmission system or network used for broadcasting radio and audiovisual media services to the public such as cable television networks, satellite broadcasting networks and terrestrial media service distribution networks are subject to this obligation. The obligation also applies to transmission systems allowing for transmission of media services by use of Internet Protocol, if the nature and conditions of the service are identical to those of media service distribution, or if this substitutes the media service distribution carried out by any other means.

Additionally (and in compliance with the principles of technology-neutral regulation) “must-carry” obligations are also extended to service providers and operators distributing media services on other transmission systems or networks, if the transmission system or network is widely used by subscribers and users as the main instrument for receiving radio and audiovisual media services. These kinds of transmission systems or networks are regularly monitored by the NMHH and their performance is analysed as far as compliance with the “must-carry” obligation is concerned. The NMHH also examines whether it is opportune to establish or maintain a “must-carry” obligation.

In the context of regulating market concentration, Article 73(6) MA specifies that if a media service distributor simultaneously provides media service distribution on several transmission systems and media service distribution networks, the “must-carry” obligation applies to the distributor for each transmission system or media service distribution network separately. Moreover, the so-called influential media service distributors[23] are under additional specific obligations.[24]

Generally, media service distributors are obliged to transmit a total of four linear audiovisual media services and three linear radio media services of the public media service providers free of charge, with the exception of media service distribution performed by means of broadcasting transmission. Besides this the media service distributor (except if it is a satellite broadcaster) is obliged to contract in case of technically and economically founded contract offers made by the media service providers regarding

23) A media service distributor shall qualify as influential from a media market perspective if the number of subscribers to its media service distribution network/platform, irrespective of the media service distribution platform or network used, exceeds 100 000, or in case of publicly accessible media service distribution available without payment of a subscription fee, the reception area of the media service distributor covers more than one-third of the population of the Republic of Hungary, and the sales revenue of the media service distributor or any undertaking having a qualifying holding in it or in its owner, or of any other undertaking operating under the qualifying holding of the media service distributor or its owner, arising from media service distribution or related services, with the exception of analogue broadcasting transmission, performed in the territory of the Republic of Hungary, exceeds HUF one billion annually.

24) They have a must-carry obligation for another three channels.

the provision of their regional or local audiovisual community media services. This obligation is limited, however, to up to 10% of a distributor's total capacity, and to at most three media services. Moreover, the distributor has – in respect of no more than two further media services – an obligation to contract according to technically and economically founded contract offers made by the media service provider with a local reception area, if the reception area of the given media service provider falls within the given media service distributor's service area or within a separate service area in which it provides its media service specifically for the given area's population. Beyond these obligations the Media Council (in order to serve the media policy objectives of public interest) is entitled to define no more than two additional linear public media services or one linear community media service for which the distributor has to conclude a distribution contract. If the transmission system of the distributor comprises parts serving several areas that can be technically distinguished from each other, the distributor shall be subject to the obligations in respect of each technically distinguishable area separately.

ITALY

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I. Audiovisual media services and enabling services

1. Approach to public service media

Italian law does not deal with the market power of Public Service Media (PSM) in a way different from that in which it deals with the market power of commercial audiovisual media services.

It is true that, as far as television advertising is concerned, the PSM operator is subject to more stringent requirements relative to its commercial counterparts. For instance, the PSM operator can schedule advertising for no more than 4% of its weekly airtime and up to 12% of its hourly airtime,[1] while commercial free-to-air broadcasters are subject to an 18% hourly advertising limit and to a 15% daily advertising limit that can be extended to 20% if broadcasters schedule types of advertising other than spots (e.g. telepromotion).[2]

However, in a recent ruling the Regional Administrative Court for Latium (*TAR Lazio*)[3] clarified that the stricter limits applicable to the PSM operator seek to preserve the latter's non-commercial connotation and its nature as a service of general economic interest within the meaning of Protocol no. 29 attached to the Treaty of Lisbon.[4] It would thus be unwarranted to construe the special rules applicable to the PSM operator as an asymmetric obligation based on that operator's market power.

2. Regulation of market entry

As far as entry to the analogue broadcasting market is concerned, in view of the trend towards the switchover to the digital standard, analogue broadcasting can only be exercised on the basis of concessions issued under the past regulatory framework. The validity of those concessions is extended until the completion of the switchover process (end of 2012).[5] Moreover, operators engaging in analogue broadcasting without a broadcasting concession but in line with certain legal requirements may continue to do so until the completion of the transition to the digital standard.[6]

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* This document is the result of the joint research of both authors. Professor Mastroianni wrote paragraph 2 of Section I as well as Sections II and III; Dr Arena wrote Section I, except for paragraph 2.

1) Article 38, para. 1 Consolidated Law on Audiovisual and Radio Media Services (CLARMS).
2) Article 38, paras 2 and 3 CLARMS.
3) The *TAR Lazio* is the administrative court of first instance before which decisions by independent authorities, such as the Italian Media Regulator (AGCOM) and the Italian Antitrust Authority (AGCM), can be challenged. *TAR Lazio* rulings, usually in the form of judgments or orders, can be appealed to the Council of State (*Consiglio di Stato*).
4) Regional Administrative Court of Latium (Second Chamber) Order of 7 March 2012, application no. 9422/2011.
5) Article 23, para. 1 CLARMS.
6) Article 23, para. 2 CLARMS.

Turning to access to the digital broadcasting market, the Consolidated Law on Audiovisual and Radio Media Services (CLARMS)[7] provides for different authorisation schemes. The activity of linear audiovisual content providers on terrestrial frequencies is conditional upon a prior authorisation issued by the Ministry for Economic Development,[8] on the basis of the rules set out in the Digital Broadcasting Regulation of the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM), the Italian Media Regulator.[9]

To be eligible, applicants must: i) be undertakings established in the European Economic Area or in a state ensuring full reciprocity;[10] ii) have as their object the exercise of television broadcasting, the provision of information, or related activities; iii) have a share capital and a number of employees higher than the minimum requirements set out in the Digital Broadcasting Regulation;[11] iv) ensure the broadcasting of programmes bearing the same trademark (i.e. the logo indicating the broadcaster) for at least 24 hours every week. Public entities, state-controlled companies and credit institutions can neither directly nor indirectly hold the authorisation concerned.[12]

The provision of linear audiovisual media or radio services through other electronic communication networks (e.g. live streaming, IPTV, web-TV etc.) is subject to an authorisation granted by AGCOM in accordance with the rules set out in its Decision no. 606/10/CONS.[13] To be eligible, applicants must: i) be companies, foundations, or associations established in the European Economic Area or in a state ensuring full reciprocity;[14] ii) have as their object the exercise of broadcasting, the provision of information, or related activities;[15] iii) not be represented or administered by persons convicted for crimes punishable by imprisonment of more than six months.[16] Public entities, state-controlled companies and credit institutions can neither directly nor indirectly hold the authorisation concerned.[17] Applicants must pay a fee for the processing of their application.[18]

On-demand service providers are also subject to the general authorisation scheme.[19] The undertakings concerned must notify AGCOM of the start of their activities, which they can then carry on, unless AGCOM resolves, within 30 days, to enjoin them to stop.[20] To be eligible, applicants must: i) be companies, foundations, and associations established in the European Economic Area or in a state ensuring full reciprocity;[21] ii) have as their object the exercise of broadcasting, the provision of information, or related activities;[22] iii) not be represented or administered by persons convicted for intentional crimes punishable by imprisonment of more than six months.[23] Applicants must pay a fee for the processing of their application.[24]

Article 49, paragraph 1, CLARMS[25] entrusts the operation of PSM to RAI-Radiotelevisione Italiana S.p.A. (hereafter: RAI) until 6 May 2016. The entrustment of PSM to RAI was not carried out, as

7) Consolidated Law on Audiovisual and Radio Media Services (Legislative Decree no. 2005/177 as amended by Legislative Decree no. 44/2010).
8) Article 16, para. 1 CLARMS.
9) See AGCOM Decision 353/11/CONS, OJIR 6 July 2011, no.155 (AGCOM Digital Broadcasting Regulation).
10) Ibid., Article 3, para. 2.
11) Ibid., Article 3, paras 4 and 5 (requiring a share capital of EUR 6.2 million and at least 20 employees for nationwide broadcasting and a share capital of EUR 155 000 and at least four employees for local broadcasting).
12) Ibid., Article 3, para. 3.
13) See Attachment A to AGCOM Decision no. 606/10/CONS.
14) Ibid., Article 3, para. 2.
15) Ibid., Article 3, para. 4.
16) Ibid., Article 3, para. 3.
17) Ibid., Article 3, para. 4.
18) Ibid., Article 6.
19) Article 22-bis, para. 1 CLARMS.
20) Article 3, para. 2, of Attachment A to AGCOM Decision no. 607/10/CONS, OJIR 3 January 2011, no. 1.
21) Ibid., Article 3, para. 3.
22) Ibid., Article 3, para. 4.
23) Ibid., Article 3, para. 5.
24) Ibid., Article 6.
25) Consolidated Law on Audiovisual and Radio Media Services (Legislative Decree no. 2005/177 as amended by Legislative Decree no. 44/2010).

generally required by the EU regulations on public procurement, through a public tender,[26] but rather through a direct conferral of the PSM tasks to Italy's former broadcasting monopolist, RAI.

As requirements for the PSM remit, CLARMS includes: the transmission of programmes of general interest on the whole national territory; an appropriate number of hours, also during prime time, devoted to education, information, cultural promotion through cinema, theatre and musical works; access to programming for political parties, trade unions, religious groups and other associations of social interest; programming destined to be broadcast abroad to promote the knowledge of Italian language and culture; protection of historical archives of radio and television programmes; broadcasting in minority languages; measures to protect disabled people; long-distance teaching; interactive digital services.

Italian media legislation comprehensively regulates market entry, but does not appear to take market power into account, except for the media-specific anti-concentration rules illustrated in the next paragraph. At this juncture, it must be noted that, in spite of those rules, the *de facto* exercise of broadcasting activities and the occupation of broadcasting frequencies by broadcasters operating without a valid licence has been consistently tolerated by Italian broadcasting legislation in the past.[27]

Notably, in 2008 the Court of Justice of the European Union (hereinafter "ECJ") established that failure by the Italian Government to free up broadcasting frequencies and to allocate them to the legitimate right holder, the company Centro Europa 7, on the basis of objective, transparent, non-discriminatory and proportionate criteria was at odds with the freedom to provide services and the EU electronic communications directives. [28]

Most recently, also the European Court of Human Rights (ECtHR) held that failure by the Italian Government to allocate broadcasting frequencies to the holder of a broadcasting licence obtained following a public tender constituted a breach of that company's freedom of expression and information (Article 10 ECHR) and right of property (Article 1 of Protocol n. 1 to the ECHR). In particular, the ECtHR found that the relevant Italian broadcasting legislation lacked clarity and precision, in that it frustrated Centro Europa 7's legitimate expectations, and that the Italian authorities had failed to put in place an appropriate legislative and administrative framework guaranteeing effective media pluralism and protecting Centro Europa 7 against arbitrariness.[29]

3. Media-specific anti-concentration rules (ownership rules)

3.1. Introduction: media monopolisation in Italy according to the Council of Europe

The concentration of media ownership in Italy has traditionally been a sensitive issue, as summarised by the Council of Europe Parliamentary Assembly in its Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy:

> "Through Mediaset, Italy's main commercial communications and broadcasting group, and one of the largest in the world, Mr Berlusconi owns approximately half of the nationwide broadcasting in

26) But see Judgment of the Court of First Instance of 26 June 2008, *SIC – Sociedade Independente de Comunicação, SA v. Commission of the European Communities* Case T-442/03 [2008] ECR II-01161 (holding that the Portuguese Republic was "in no way" required to organise a competitive tender prior to entrusting PSM tasks to RTP). On the necessity of awarding PSM obligations on the basis of competitive tendering, see R. Mastroianni, "Public Service Media and Market Integration: A Differential Application of Free Movement and State Aid Rules?" in M. Cremona (ed.), *Market Integration and Public Services within the EU* (Oxford: Oxford University Press, 2011) 167-169.

27) For instance, the Maccanico Law (Law of 31 July 1997, no. 249, OJIR of 31 July 1997, no. 177) enabled the "*de facto* users" of radio frequencies, authorised to carry on their activity under the earlier system, to continue broadcasting on a transitional basis; Decree Law 24 December 2003, no. 352 (OJIR 29 December 2003, no. 29, p. 4) authorised the channels in breach of the concentration thresholds to continue their broadcasts pending the completion of an inquiry into the development of digital television channels; the Gasparri Law (Law of 3 May 2004, no. 112, OJ 5 May 2004, no. 82, s.o. no. 104) extended, by a general authorisation mechanism, the possibility for the channels in breach of the threshold to continue to broadcast on the terrestrial radio frequencies until the national allocation plan for radio frequencies for digital television was implemented.

28) ECJ, Judgment of 31 January 2008, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni,* Case C-380/05, ECR 2008 Page I-00349.

29) ECtHR, case *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (application no. 38433/09).

the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main competitor. As Mediaset and RAI command together about 90% of the television audience and over three quarters of the resources in this sector, Mr Berlusconi exercises unprecedented control over the most powerful media in Italy.

This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising.[30]"

3.2. The so-called "technical" anti-concentration limits

At the moment, the Consolidated Law on Audiovisual and Radio Media Services[31] (CLARMS) lays down both "technical" and "economic" anti-concentration limits for the media sector. The former set a cap on the number of channels broadcast by the same audiovisual media services provider. In particular, the CLARMS provides that, once the digital switchover process is complete, no content provider will be allowed to broadcast more than 20% of the total television channels and more than 20% of the total radio channels.[32] Pending the completion of that process, content providers cannot broadcast more than 20% of television broadcasts conveyed on analogue or digital networks, excluding simulcasts of analogue programmes and digital broadcasts accessible to less than 50% of Italian viewers.[33]

Both institutional actors and academic commentators have expressed concerns about the technical limit applicable prior to the completion of the digital switchover, in that it replaced an earlier limit of 20% applicable to analogue broadcasting only. By taking into account both analogue and digital broadcasting, the technical limit set out in the CLARMS, in fact, allows existing dominant operators in the analogue sector to consolidate their dominance also in the digital sector.[34] The Council of Europe's Venice Commission, in particular, considered that the number of channels broadcast by a given operator is "not a clear indicator of market share" and argued that it should be combined "with an audience share indicator".[35]

3.3. The Integrated Communications System (ICS) and "economic" anti-concentration limits

Turning to "economic" anti-concentration limits applicable to the media sector, regard must be had, first and foremost, to the notion of Integrated Communications System (hereafter: ICS) laid down in Article 43 CLARMS. The ICS is a statutorily defined relevant market encompassing the following activities: newspapers and periodicals, annual publications, electronic publishing, radio and audiovisual media services, cinema, outdoor advertising, communication initiatives for products and services, and sponsorships.[36]

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30) Parliamentary Assembly of the Council of Europe, Resolution 1387 (2004), Monopolisation of the electronic media and possible abuse of power in Italy.
31) Legislative Decree no. 177/2005, as amended in 2010.
32) Article 43, para. 7 CLARMS.
33) Article 43, para. 8 CLARMS.
34) See Council of Europe, Parliamentary Assembly Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy, para. 6: "The Assembly believes that the newly-adopted 'Gasparri Law' on the reform of the broadcasting sector may not effectively guarantee greater pluralism simply through the multiplication of television channels in the course of digitalisation. At the same time, it manifestly allows Mediaset to expand even further, as it gives the market players the possibility to have a monopoly in a given sector without ever reaching the antitrust limit in the overall integrated system of communications (SIC)." R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 558-559.
35) Opinion of the Venice Commission, adopted at its 63rd Plenary Session (10-11 June 2005), on the compatibility of the "Gasparri" and "Frattini" laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media.
36) Article 2 para. 1, lit. l) of Legislative Decree no. 177 of 31 July 2005, in GURI n. 208 of 7 September 2005, Supplemento ordinario n. 150.

The CLARMS prohibits holding a dominant position in the ICS and in its constituent submarkets.[37] Moreover, the CLARMS stipulates that no communication operator may, either directly or through controlled or connected companies, achieve revenues in excess of 20% of the total ICS revenues.[38] Such revenues include, *inter alia*, those derived from the sale of daily newspapers and periodicals, from online publishing, from advertising, teleshopping, sponsorships etc.[39] The 20% limit is reduced to 10% for companies achieving more than 40% of the overall revenues of the electronic communications sector.[40]

The enforcement of the above anti-concentration limits is entrusted to AGCOM.[41] AGCOM adopts every year a decision setting out an estimate of the overall ICS revenues.[42] If AGCOM establishes a breach, it must take appropriate measures to ensure that those breaches are remedied in a timely fashion.[43]

Several scholarly commentators have criticized the ICS as being too broad and as comprising heterogeneous, unrelated and non-substitutable services, thus undermining the effectiveness of the 20% cap.[44] The Venice Commission, in this respect, took the view that the ICS "certainly reflects a modern trend but should not, at least in this very broad definition, be used already at this stage instead of the 'relevant market' criterion, as its effect is to dilute the effectiveness of the instruments aimed at protecting pluralism. Indeed, it may allow an individual company to enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20% threshold for the whole sector."[45]

3.4. Television advertising: asymmetric obligations for pay-tv operators

As far as television advertising is concerned, Article 38, para. 5 CLARMS provides that pay-tv operators must comply with an hourly advertising limit of 16% in 2010, 14% in 2011, and 12% from 2012 onwards. According to AGCOM, the goal of that provision is to safeguard the interests of pay-tv users, who are subject to a double burden: the payment of a fee to the pay-tv operator and the exposure to advertising.

In a recent ruling, the Regional Administrative Court for Latium (*TAR Lazio*) took the view that the real aim of that provision is, in fact, to increase the advertising revenues of free-to-air operators by limiting the sale of advertising space by pay-tv operators.[46] The *TAR Lazio* further noted that that aim is not envisaged by the AVMS Directive: unlike local broadcasters, whose particular situation is expressly acknowledged by the Directive, free-to-air broadcasters are not at a comparative disadvantage relative to pay-tv operators, thus no asymmetric regulatory measures are required under the AVMS Directive.

The *TAR Lazio*, accordingly, fears that the more stringent rules for pay-tv operators may distort competition by fostering the strengthening of existing dominant positions in the "television advertising" market. For that and other reasons, the *TAR Lazio* resolved to refer the matter to the ECJ for a preliminary ruling as to the consistency of the asymmetric obligations for pay-tv operators with the AVMS Directive, the principle of equality, the principle of freedom of expression, and the internal market fundamental freedoms.[47]

37) Article 43, paras 2 and 9 CLARMS.
38) Article 43, para. 9 CLARMS.
39) Article 43, para. 11 of Legislative Decree no. 177 of 31 July 2005, in GURI n. 208 of 7 September 2005, Supplemento ordinario n. 150.
40) Article 43, para. 11 CLARMS.
41) Article 43, para. 5 of Legislative Decree no. 177 of 2005.
42) See AGCOM Decision no. 126/11/CONS (stating that the overall value of ICS revenues in 2009 was EUR 23 billion).
43) Article 43, para. 5 CLARMS.
44) See R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 560; R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo* (Turin: Giappichelli 2004) 63.
45) Opinion of the Venice Commission, adopted at its 63rd Plenary Session (10-11 June 2005), on the compatibility of the "Gasparri" and "Frattini" laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media
46) Regional Administrative Court of Latium (Second Chamber) Order of 7 March 2012, application no. 9422/2011.
47) Case C-234/12: Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 14 May 2012 — *Sky Italia s.r.l. v. AGCOM*, OJ C 217, 21 July 2012, p. 11. For a summary of the order of reference to the ECJ, see Amedeo Arena, Italy: ECJ to Vet the Italian stricter hourly Advertising Limits for Pay-TV, IRIS 2012-7:1/29.

3.5. Cross-ownership (diagonal) anti-concentration limits

The CLARMS also precludes companies engaging in nationwide broadcasting or electronic communications exceeding certain revenue thresholds from acquiring stakes or participating in the establishment of publishers of daily newspapers (with the exception of daily newspapers issued only in electronic form) before 31 December 2012.[48] The relevant revenue thresholds are 8% of the overall ICS for broadcasting companies and 40% of the revenues in the electronic communications sector for electronic communications companies.[49]

4. Interactions with competition law

4.1. The relationship between antitrust and media sectoral regulation

Undertakings operating in the audiovisual media services sector are simultaneously subject to general (EU and national) competition law and to the relevant sectoral regulation. While in the past Article 20(1) Italian Antitrust Statute (Law no. 287 of 1990) clearly provided that the sectoral regulator was responsible for the application of competition rules to undertakings operating in the publishing and broadcasting markets, that provision was repealed by Law no. 249 of 1997 establishing AGCOM. Hence, the Council of State (Italy's supreme administrative court) inferred that undertakings active in the publishing and broadcasting markets are currently also subject to competition rules and, accordingly, to the enforcement powers of the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the Italian Antitrust Authority.[50]

4.2. Competence overlaps between the Italian antitrust authority and the Italian media regulation authority

The competence overlap between AGCOM and AGCM calls for rules to co-ordinate the work of those two authorities. In principle, those authorities pursue different aims: AGCOM is responsible for the protection of media pluralism while AGCM should safeguard workable competition in the media markets.[51] In fact, however, scholarly commentators have argued that the exact boundaries of the two authorities' tasks and powers are fluid and unstable.[52] In order to promote consistency in the action of those two authorities, Law no. 249/1997 requires AGCM to seek an opinion from AGCOM before exercising its powers vis-à-vis undertakings operating in the communications sector.[53] The Council of State has clarified that while AGCM is required to request such an opinion, the latter is not binding on AGCM, which may depart from AGCOM's findings but must give clear and sufficient reasons for doing so.[54] The Council of State has also stated that a decision by AGCOM establishing that certain contract clauses are in line with sectoral regulation is no bar to a subsequent decision by AGCM that those clauses are incompatible with antitrust law, but does prevent AGCM for imposing a sanction.[55] Moreover, AGCOM and AGCM have entered into a co-operation agreement for the exchange of information and the co-ordination of their respective tasks in the field of electronic communications.[56]

48) Article 43, para. 12 CLARMS.
49) Ibid.
50) Council of State (*Consiglio di Stato*), Judgment no. 2869 of 24 May 2002.
51) Ibid. Accordingly, AGCOM monitors the creation of dominant positions in the media markets, as the very existence of such positions can harm the pluralism of information and media. In contrast, AGCM should only take action when undertakings abuse of their dominant positions to distort competition through agreements or concerted practices. See R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: CEDAM, 2010) 533-534 and 554-555.
52) See F. Donati, "Funzioni di regolazione e impegni nel settore delle comunicazioni elettroniche", in F. Cintioli and F. Donati (eds) *Recenti innovazioni in materia di sanzioni antitrust*, pp. 103-113 (Turin: Giappichelli, 2008).
53) Law no. 249/97, Article 1, para. 6, letter c), no. 11.
54) Council of State, Judgment of 10 March 2006, no. 1271.
55) Ibid.
56) Co-operation Agreement between AGCOM and AGCM in the field of electronic communications (2004), available at: http://www2.agcom.it/provv/agcom-agcm_accordo.htm

4.3. Special rules governing concentrations between undertakings in the media sector

Concentrations between undertakings operating in the field of media are subject to rules that are in part different from those applying to other economic sectors. First, specific notification thresholds apply in the case of concentrations involving cinema distribution.[57] Second, companies operating in the ICS are required to notify concentrations simultaneously to AGCOM and to AGCM:[58] all contracts, mergers and agreements at variance with the sectoral anti-concentration limits set out in Article 43 CLARMS are null and void *per se*.[59] Such a simultaneous review mechanism[60] entails the risk of conflicting outcomes: in the *SEAT/Cecchi Gori* case, for instance, AGCOM opposed the deal[61] while AGCM subsequently authorised it subject to the imposition of commitments.[62] In other cases, such as the establishment, by the three Italian main free-to-air television operators, of a joint venture (named TIVÚ S.r.l.) entrusted with the retransmission of its parent companies' broadcasts on DTT and satellite networks, AGCOM took the view that the deal did not constitute a concentration between independent undertakings and resolved not to open an investigation.[63]

4.4. Competing narratives about market definition in the media sector

The competence overlaps between AGCOM and AGCM have also resulted in dissonant findings as to market definition in relation to the advertising market. AGCM found that the "television advertising market" is a two-sided market, where broadcasters, on the one hand, provide – either for free or on a fee basis – audiovisual contents to the audience, and, on the other hand, sell, through their advertising agencies, advertising space to advertisers. According to AGCM, the "television advertising market" is distinct from the "pay-tv" market,[64] which is a typical one-sided market characterised by a direct economic link between content providers and their users.[65] AGCOM at first shared this view,[66] but in its subsequent decisions took the view that the "television advertising market" does not amount to an autonomous relevant market and that revenues from "pay-tv" (including both advertising revenues and users' fees) and from "free-TV" (including mainly advertising revenues) constitute distinct relevant markets.[67]

5. Must-offer obligations

As far as must-offer obligations are concerned, regard must be had to AGCM's 2006 decision in the *A362 – Diritti Calcistici* case.[68] According to AGCM, the Mediaset Group had abused its dominant position in the "television advertising market" by entering into a number of agreements with soccer clubs for the acquisition of broadcasting rights. Those agreements, stipulated with Juventus, Inter, Livorno, Roma, Milan, Lazio and Sampdoria, contained long-term exclusive dealing clauses, pre-

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57) In general, as per Article 16, para. 1, of Law 10 October 1990, no. 287, only concentrations involving undertakings whose overall turnover exceeds EUR 468 million and the acquisition of assets whose turnover overall exceeds EUR 47 million are subject to a prior notification requirement (the relevant turnover thresholds are updated every year by AGCM). However, Article 13(1) of Law 1 March 1994, no. 153 requires notification to AGCM also of concentrations which – irrespective of the turnover generated by the undertakings concerned – may directly or indirectly lead to the acquisition, even in only one of the 12 reference areas for cinema distribution, of a market share exceeding 25% i) of the turnover of the cinema distribution sector and ii) of the total number of cinema theaters operating in that area.

58) Article 43, para. 1 CLARMS. See also Regional Administrative Court for Latium, Judgment of 7 September 2001, no. 7286 (holding that undertakings are not required to obtain clearance from AGCOM prior to notifying concentrations to AGCM).

59) Article 43, para. 4 of Legislative Decree no. 177 of 2005.

60) See AGCOM, Regulation governing the procedures for authorising the transfer of ownership of broadcasting companies, the procedures concerning dominant positions and the review of concentrations and agreements in the context of the Integrated Communications System, Annex I to AGCOM Decision of 9 November 2006, no. 646/06/CONS.

61) AGCOM, *Trasferimento di proprietà della Cecchi Gori Communications S.p.A. a Seat Pagine Gialle S.p.A.*, Decision of 17 January 2001, no. 51/01/CONS.

62) AGCM, Case *C4158 - SEAT Pagine Gialle/Cecchi Gori Communications,* Decision of 23 January 2001, no. 9142.

63) See AGCOM Decision of 14 September 2009, no. 519/09/CONS.

64) See, e.g., AGCM, case *A274 - Stream/Telepiù*, Decision of 14 June 2000, no. 8386; AGCM, case *C5109 - Groupe Canal+/Stream*, Decision of 13 May 2002, no. 10716.

65) See AGCM, Case *A362 - Diritti calcistici*, Decision of 28 June 2006, no. 15632, para 103.

66) See AGCOM, Decision of 2 March 2005, no. 136/05/CONS (analysing the following two relevant markets: "the sale of television advertising" and "the sale of audiovisual contents").

67) See, e.g., AGCOM, Decision of 23 March 2011, no. 126/11/CONS (analysing the market for "audiovisual media services" and its two sub-markets "pay-tv" and "free-tv"); AGCOM's Annual Report (2011), p. 119 *et seq.*

68) AGCM, case *A362 - Diritti calcistici*, Decision of 28 June 2006, no. 15632.

emptive rights and rights of first refusal covering all types of broadcasting platforms. In AGCM's view, such agreements would have deprived Mediaset's competitors of a necessary input for setting up an appealing commercial offer, thus leading to their exclusion from the "television advertising" market. In this respect, AGCM expressly acknowledged that, given the overwhelming interest in the game of football in Europe, the broacasting of football matches is able to obtain a large number of viewers and to reach on a regular basis an identifieable audience, which constitutes a specific target for advertisers.

However, during the investigation, Mediaset undertook, with respect to all the soccer teams concerned, to maintain the exclusive rights, as from 2007, only for transmissions via the DTT platform and to sell the rights to broadcast via other platforms in an equitable, transparent and non-discriminatory fashion. In doing so, Mediaset gave its competitors the opportunity to attract a significant audience share through appealing commercial offers. Mediaset also gave its express assurance that, beginning with the 2007-2008 football season, it would not seek to include any further clauses regarding right of first refusal or right of pre-emption in contracts for television broadcasting rights.

AGCM therefore ruled that Mediaset had abused its dominant position contrary to Article 102 TFEU and enjoined it to abstain from engaging in the offending conduct. However, AGCM conceded that Mediaset's conduct in the course of the investigation had substantially reduced the risk of exclusion of its competitors. As a consequence, no sanction was imposed upon Mediaset.

6. Specific rules for services enabling or facilitating use or reception (e.g. decoders, EPGs) addressing market power

Turning to the role of market power (and market definition) in the context of specific rules designed to promote the purchase of reception enabling devices, regard must be had to the Digital decoders case.

Article 4(1) of the 2004 Finance Law[69] granted a EUR 150 state subsidy for the purchase of equipment for the reception of television signals transmitted using DTT technology (T-DVB/C-DVB) and the associated interactive services. Article 1(211) of the 2005 Finance Law refinanced the measure in question, but reduced the subsidy per decoder to EUR 70.[70] Following complaints lodged by some broadcasters, the measure was vetted i) by the European Commission for an alleged breach of the TFEU rules on state aids and ii) by AGCM for an alleged breach of the Italian rules governing the conflict of interest (Law no. 215 of 2004).

As to the conflict of interest charge, AGCM had to establish whether the granting of these subsidies, based on a specific government act for which the prime minister was directly responsible, was such as to convey a selective advantage to a number of companies indirectly controlled by the prime minister, to the detriment of the public interest. AGCM ruled that no link could be established between the potential increase in the number of decoders resulting from the public subsidy and the possible increase in users of pay-TV, since at least a proportion of the new owners of decoders could use the equipment just for the free viewing, using digital technology, of unencrypted television programmes. AGCM further noted that, assuming for the sake of argument that such link could be established, no specific preferential benefit to the companies owned by the prime minister could be shown, in view of the overwhelming market share (over 90%) in the pay-TV market held by Sky Italia, relative to the share held by other companies – including those controlled by the prime minister (Mediaset and RTI) – that could potentially benefit from the effects of the state subsidy. Accordingly, in its decision of 10 May 2006, AGCM ruled that, although the state subsidy at issue was attributable to the prime minister, a charge of conflict of interest under Article 3 of Law no. 215 of 2004 could not be be leveled against the prime minister in view of the lack of a specific, preferential financial benefit and of harm to the public interest.[71]

69) Law of 24 December 2003, no. 350 (Finance Law 2004), relating to the provisions for drawing up the annual and pluriannual budget of the State, OJIR 27 December 2003, no. 299. The Finance Law (*Legge finanziaria*), also referred to as the Stability Law (*Legge di stabilità*), is the bill that the government submits by September 30th every year to the parliament setting out revenues and expenses.

70) Law of 30 December 2004, no. 311 (Finance Law 2005), relating to the provisions for drawing up the annual and pluriannual budget of the State, OJIR 31 December 2004, no. 306.

71) AGCM, Case *CI2 - Presidente del Consiglio dei Ministri-Contributi Decoder Tv,* Decision no. 15389 of 10 May 2006.

The European Commission ruled on the consistency of the Italian subsidy for digital decoders with the TFEU rules on state aids in its decision of 24 January 2007.[72] First, the Commission stated that, insofar as it provided for the grant by the Italian Republic of a subsidy for the purchase of certain digital terrestrial decoders, the measure at issue constituted state aid to digital terrestrial broadcasters offering pay-TV services, in particular pay-per-view services, and digital cable pay-TV operators. Second, the Commission found that the measure could not be justified under any of the available derogations. While the Commission acknowledged that the transition from analogue television to DTT was a legitimate public interest objective, it noted that the measure at issue was disproportionate relative to the aim pursued and liable to cause unnecessary distortions of competition. That finding was primarily based on the fact that the measure at issue was not technologically neutral, since it did not apply to digital satellite decoders. Consequently, the Commission ordered the recovery of the state aid paid pursuant to the measure at issue, which had been declared incompatible with the common market and granted unlawfully. The Commission's decision was upheld both by the EU General Court in 2010[73] and, on appeal, by the Court of Justice in 2011.[74]

Interestingly, in the proceedings before the Commission, the Italian Government had argued that the state aid had no selective nature insofar as its beneficiaries (DTT operators) and the companies that did not benefit from the aid (satellite operators) were active in distinct relevant markets, i.e. those of free-to-air and pay-TV. Recalling, *inter alia*, AGCM's decision on the conflict of interest charge, as well as other Italian and EU precedents, the Commission, instead, took the view that both satellite operators and – albeit with significantly lower market shares – DTT operators were competitors in the pay-TV market and that, accordingly, a state subsidy from which only DTT operators could benefit had a selective character. Thus, while satellite operators' market power in the pay-TV market was a key factor contributing to the dismissal by AGCM of the conflict of interest charge brought against the prime minister, the market definition adopted in that decision by AGCM allowed the Commission to establish the selective nature of the aid.

II. Platform operators and converged services

Providers of interactive and conditional access services are also subject to the general authorisation scheme laid down in Article 25 of the Electronic Communications Code.[75] Those providers must comply with the technical standards set by AGCOM and in particular those designed to prevent minors from viewing inappropriate contents (e.g. filtering systems and personal identification numbers).

Reception equipment and viewers' ability to switch between different platforms played an important role in the Digital Decoders case.

The facts of the Digital Decoders case have been outlined in the previous section. As noted above, the Commission, in its decision of 24 January 2007, objected to the Italian support measure because it was not technologically neutral, since it did not apply to digital satellite decoders.[76] The Commission, in particular, took into account that the subsidies came at a critical point in time, i.e. when many analogue terrestrial TV viewers had to face the transition to digital TV and to choose between investing in the equipment for receiving satellite or terrestrial transmissions.[77] In this respect, the Commission observed that, by lowering the cost of the investment in the equipment for terrestrial TV (the decoder),

72) Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (notified under document number C(2006) 6634), OJ L 147, 8 June 2007, p. 1-28.
73) Judgment of the General Court of 15 June 2010, *Mediaset SpA v. European Commission*, Case T-177/07, 2010 ECR p. II-02341.
74) Judgment of the Court of Justice of the European Union of 28 July 2011, *Mediaset SpA v. European Commission*, Case C-403/10 P, nyr.
75) Legislative Decree no. 259 of 1 August 2003, Electronic Communications Code (*Codice delle Comunicazioni Elettroniche*), OJIR no. 214 of 15 September 2003.
76) Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (document number C(2006) 6634), OJ L 147, 8 June 2007, p. 1-28.
77) Ibid., para. 108.

the subsidies had a clear impact on this choice. The Commission also noted that, in view of the costs of switching between platforms once the choice was made, the subsidies might also have a rather prolonged distortion effect.

In this connection, it must be added that, on the same day, the Commission adopted another decision whereby it declared compatible with the common market principles the Italian aid for the purchase of digital decoders with an open Application Programming Interface (API).[78] Interestingly, in contrast to the decision above, the subsidies at issue were found to be "technologically neutral" insofar as they were granted for decoders of all digital platforms (terrestrial, cable and satellite), provided that they were interactive and interoperable, that is to say, on condition that they were "open" decoders as opposed to "proprietary" decoders.

III. Distribution (network operators)

1. Must-carry obligations

One of the aims of local broadcasting legislation is the protection and promotion of local and regional cultural heritage. This is ensured, *inter alia*, by reserving one third of the overall transmission capacity to local broadcasters.[79]

Moreover, local network operators wishing to provide transmission and distribution services to nationwide audiovisual media service providers must comply with the following restrictions: i) the transmission capacity offered to nationwide providers must not exceed what is necessary to convey two nationwide programmes for each multiplex; ii) transmission capacity cannot be offered to nationwide content providers controlled by or connected to nationwide network providers; iii) the transmission capacity used to convey nationwide contents must ensure a coverage of at least 50% of the national population (80% after the completion of the digital switchover).[80]

The relationship between network operators and providers of audiovisual media services is comprehensively regulated under AGCOM Digital Broadcasting Regulation.[81] National network operators holding rights for at least five multiplexes, must offer 40% of the transmission capacity of the fifth multiplex to independent content providers.[82] Local network operators must offer a share of their transmission capacity equal to at least two programmes to local broadcasters to which no rights for the use of broadcasting frequencies have been granted.[83] Except for the above requirements, the provision by network operators of transmission capacity to content providers takes place through commercial agreements, which must be notified to AGCOM for prior approval.[84]

Recently, Decree Law no. 34 of 2011, converted into Law no. 75 of 2011, required holders of the right to use broadcasting frequencies to make available part of their transmission capacity, and in any case no less than two channels, to local broadcasters who were not granted those rights of use.[85] Article 27 of AGCOM Digital Broadcasting Regulation implemented that provision, specifying that the minimum amount of transmission capacity to be provided is six megabits and that the leasing price must be in the range of 10-16 eurocents per megabit. Holders of broadcasting frequencies in every Italian region must submit to AGCOM their price lists for the lease of transmission capacity. Those price

78) Commission Decision of 24 January 2007 on State aid N 270/2006 implemented by the Italian Republic for the subsidised purchase of digital decoders with open API (document number C (2006) 6630), available at: http://ec.europa.eu/competition/state_aid/cases/214952/214952_649641_10_1.pdf
79) Article 8, para. 2 CLARMS.
80) AGCOM Decision 353/11/CONS, OJIR 6 July 2011, no.155 (hereafter: AGCOM Digital Broadcasting Regulation), Article 18, para. 3.
81) See Article 26 of AGCOM Digital Broadcasting Regulation.
82) Ibid., Article 26, para. 1.
83) Ibid., Article 26, para. 2.
84) Ibid., Article 26, paras 3 and 4.
85) See Article 4 of Decree Law 31 March 2011, no. 34, OJIR 31 March 2011, no. 74, converted with amendments into Law 26 May 2011, no. 75, OJIR 27 May 2011, no. 122. That provision was further amended by Article 25, para. 2, of Decree Law 6 July 2011, no. 98, OJIR 6 July 2011, no. 155, converted with amendments into Law 15 July 2011, no. 111, OJIR 16 July 2011, no. 164.

lists are published on AGCOM's website.[86] Local broadcasters wishing to lease that transmission capacity must notify AGCOM of their intention to do so.

2. Other access obligations for network operators

In its decision of 20 January 2011[87] AGCOM carried out an assessment of the so-called "Market 18", i.e. broadcasting transmission services to deliver broadcast content to end users.[88] On that occasion, AGCOM identified seven relevant markets: a) National market for television broadcasting transmission services on terrestrial networks; b) National market for television broadcasting transmission services on terrestrial networks according to the DVB-H standard; c) National market for radio broadcasting transmission services on terrestrial networks; d) National market for broadcasting transmission services on fixed telecommunications networks; e) Transnational market for broadcasting transmission services on satellite networks; f) Local market for television broadcasting transmission services on terrestrial networks; g) Local market for radio broadcasting transmission services on terrestrial networks.

Since AGCOM identified markets other than those set out in the Annex to Commission Recommendation 2007/879/EC, it checked whether those markets were characterised by i) the presence of high and non-transitory barriers to entry – these may be of a structural (e.g. due to significant sunk costs) or of a legal/regulatory nature (e.g. due to exclusive rights or administrative burdens); ii) a market structure which does not tend towards effective competition within the relevant time horizon; iii) the insufficiency of competition law alone to adequately address the market failure(s) concerned. As those three criteria were cumulatively met in none of the seven relevant markets above, AGCOM resolved not to impose any new *ex ante* regulatory obligations.

However, in order to ensure the protection of new entrants and smaller competitors and to prevent dominant firms in the analogue broadcasting market from acquiring similar market power in the digital broadcasting market, AGCOM resolved to maintain the regulatory obligations imposed on RAI and RTI in AGCOM Decision no. 159/08/CONS (as to analogue broadcasting)[89] and AGCOM Decision no. 181/09/CONS (as to digital broadcasting)[90] until the completion of the digital switchover process.

AGCOM Decision no. 159/08/CONS, in particular, requires RAI and RTI to grant national analogue broadcasters access to their broadcasting transmission infrastructures on a transparent and non-discriminatory basis. RAI and RTI must provide a disaggregated offer of the economic and technical conditions for access to their infrastructures. RAI and RTI are also required to adopt a system of separate accounting for their analogue television broadcasting transmission services.

AGCOM Decision no. 181/09/CONS, in turn, seeks to promote and expedite access by new entrants to digital terrestrial broadcasting networks. Accordingly, that decision envisages an obligation for incumbent operators to provide transmission services at a cost-oriented price for a period of five years.

86) See www.agcom.it/Default.aspx?message=contenuto&DCId=384
87) AGCOM Decision 24/11/CONS, OJIR 19 February 2011, no. 41.
88) See the Annex to Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJEU L 114 8 May 2003, p. 45-49, para. 18.
89) AGCOM Decision no. 159/08/CONS, OJIR 3 May 2008, no. 103.
90) See Attachment A to AGCOM Decision no. 181/09/CONS, OJIR 30 April 2009, no. 99.

LUXEMBOURG

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I. Audiovisual media services and enabling services

1. Approach to public service media

The cornerstone of the legal framework for audiovisual media services is the *Loi du 27 juillet 1991 sur les médias électroniques*[1] (Law of 27 July 1991 on Electronic Media, hereinafter Law of 1991[2]) as last modified by the Law of 8 April 2011. Due to the wide variety of content available in different languages from incoming media services and its multilingual population as well as the large number of foreigners in Luxembourg, the demand for the production of "real" Luxembourgish content and thus incentives for service providers to be active in this sense are rather limited. In principle, the concept of public service television[3] broadcasting is non-existent in the Law on Electronic Media for the audiovisual sector, although in practice arrangements have been made to ensure public service content. For the television sector the Law on Electronic Media stipulates that public service is guaranteed under the umbrella of commercial media services: according to Article 10(1) lit. c) - e) Law of 1991 (or respectively Article 12(2) lit. b), lit. c), lit. e) Law of 1991) commercial media services should further the promotion of culture and artistic creativity or the transmission of programmes of socio-cultural nature. Above all, Article 10(2) Law of 1991 provides that a *cahier des charges* (hereinafter "book of obligations") may contain an obligation "either to transmit short daily broadcasts in the Luxembourgish language ... or to make the transmitter available for the transmission of such programmes". In brief, national legislation does not differentiate between public and commercial audiovisual media services.

The RTL group (CLT-UFA) which is the main holder of television licences in Luxembourg, has committed to providing a specific "Luxembourg" content in its programmes, thereby taking a "quasi-public service broadcasting" role aimed to ensure plurality and diversity of information. The broadcaster

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More information is available at: www.medialaw.lu

1) Loi du 27 juillet 1991 sur les médias électroniques, Mém. A – 47 du 30 juillet 1991, p. 972, as amended by Loi du 2 février 2001, Mém. A – 42 du 17 avril 2001, p. 924, Loi du 19 décembre 2003, Mém. A – 189 du 31 décembre 2003, p. 3990, Loi du 8 juin 2004, Mém. A – 85 du 8 juin 2004, p. 1202, Loi du 23 avril 2008, Mém. A – 55 du 29 avril 2008, p. 760, Loi du 17 décembre 2010, Mém. A – 241 du 24 décembre 2010 and Loi du 8 avril 2011, Mém. A – 69 du 12 avril 2011; consolidated version of 2012. www.legilux.public.lu/leg/textescoordonnes/compilation/code_administratif/VOL_5/PRESSE.pdf

2) For an English translation of the co-ordinated Law on Electronic Media as well as a number of further relevant laws see: www.medialaw.lu in the section "Texts".

3) In contrast to the Luxembourg television landscape, there is, however, a genuine public radio service institution created by Article 14 Law of 1991. It is known today as "Radio 100.7" and aims at promoting cultural and artistic programmes in view of strengthening the cultural identity of Luxembourg, its language and history. See: www.100komma7.lu

has concluded a framework agreement[4] (last prolonged in 2007 covering the period until 2020) with the government to screen a minimum of one daily television programme focusing on general news and the transmission of information considered important for society.[5] It has to be broadcast in the early evening in Luxembourgish language and currently covers a youth programme, a daily news programme and a magazine.[6] These contents are rebroadcast later in the evening with French subtitles. The programme currently lasts two hours which exceeds the half hour obligation indicated in the agreement.[7] In addition, RTL commits to cover other aspects of Luxembourg life (culture, sports, or information concerning other language communities like the Portuguese) as well as events listed as important for society.[8] In return for its engagement, RTL profits from an advantageous framework established by the government which allows for sufficient income and includes the issuing of a number of licences for television and radio programmes. The structure of the Luxembourg market and the lack of any competitor of even noteworthy size results in RTL's monopoly status as "national" commercial broadcaster. RTL finds itself, however, in competition with a great number of foreign programmes that reach large audience shares in Luxembourg. As a result, the advertising revenue which may be derived from the Luxembourg market for television broadcasting and is not invested on an international level is typically directed to RTL. By contrast, RTL does not receive special funding (such as, for instance, in the form of a licence fee).

The Luxembourg approach demonstrates that relevant market players, like RTL, have a specific responsibility (in fulfilling the general public service mission) in markets with particular conditions; however, similar though less extensive obligations could be imposed on other service providers. It is to this end, that the Law on Electronic Media empowers the government to fix certain conditions in the book of obligations which accompany every licence (see under point 2 below for more on the Luxembourg licensing system).

2. Regulation of market entry

The Law on Electronic Media prescribes licensing procedures for different types of broadcasting services and a notification procedure for non-linear services and purely Internet-based television services respectively. Article 3(1) Law of 1991 requires that all broadcasting services operate under a licence.[9] It generally distinguishes between television services with an international impact/reach (cf. Articles 8-10 Law of 1991) and television services aimed at a Luxembourg audience (Article 12 Law of 1991). It further differentiates between different modes of transmission, i.e. by satellite (Articles 20, 21 Law of 1991), cable (Articles 22, 23 Law of 1991), digital multiplex (Article 19bis Law of 1991) or other means (Article 23bis Law of 1991).

Broadcasting licences are issued as ministerial decisions by the minister responsible for the media. The minister is obliged to consult the Commission Indépendante de la Radiodiffusion (Independent Commission for Broadcasting – CIR), which advises the government in the allocation of licences for all kinds of audiovisual media services (cf. Article 12(1) Law of 1991). The opinion of the CIR is non-binding. The licences of audiovisual media services are subsequently monitored by other competent regulatory bodies, most importantly the Service des médias et des communications (Media and Communications Service – SMC) and the Conseil national des programmes (National Programme Council).

According to Article 3(2) Law of 1991, licences are issued following a public tender. Each licence is accompanied by a book of obligations imposing special requirements on the licensee (cf. Article 3(3)

4) See the framework agreement between CLT-UFA and the Luxembourg Government, *Règles de base concernant le service public*, available at:
www.mediacom.public.lu/medias/television/concessions_programmes/concession_2007/ReglesdebaseSP.pdf
5) See the framework agreement, 3 (a), p. 4.
6) See also: www.cna.public.lu/film/television/index.html
7) See the framework agreement, 3 (a), p. 4.
8) See the framework agreement, 3 (a), p. 4.
9) In derogation of the actual text of the Law of 1991 which uses the terms licence, permit and concession, the editors have introduced the term "licence" for the sake of readibility and simplicity.

Law of 1991).[10] In this context the Law on Electronic Media does not expressly contain the obligation to consider the market power of an applicant. It foresees, however, the possibility to use the book of obligations to request ownership information and to detail conditions for expanding the licence to all forms of audiovisual media services for which providers need a licence. The government may actively determine the structure of a company holding a dominant position by setting limits to the association of other companies and/or by reviewing the articles of association.

The following factors that can be addressed in the book of obligations are outlined by provisions of the Law on Electronic Media:

- conditions of access to the licensee's facilities to the benefit of competitors (Article 10(1) lit. f); Article 12(2) lit. f) Law of 1991);
- the government's right to information about the company of the licensee including shareholders (Article 10(1) lit. i); Article 12(2) lit. h); Article 20(7) lit. c); Article 21(5) lit. f) Law of 1991);
- monitoring rights (Article 10(1) lit. j); Article 12(2) lit. i); Article 20(7) lit. d); Article 21(5) lit. g) Law of 1991) and
- the conditions under which the licensee may associate other companies in the operation of the licence (Article 10(1) lit. l); Article 12(2) lit. l); Article 20(7) lit. g); Article 21(5) lit. i) Law of 1991).

The government thus may execute an *ex ante* assessment based upon some aspects taken from competition law when deciding about the application for a licence for linear media services.[11]

Some electronic media services – namely purely Internet-based television services which are not disseminated by other means (Article 23bis Law of 1991) and on-demand audiovisual media services (Article 23ter Law of 1991) – must only be notified. Notification is also required of audiovisual media services from third countries (i.e. outside the European Economic Area) that use a satellite uplink in Luxembourg or (under certain conditions) a Luxembourgish satellite capacity (Article 23quater Law of 1991). In order to notify, the service provider must supply information such as the name and a description of the service as well as the expected date of its launch. In contrast to television broadcasting, no book of obligations is imposed because the notification is a one-way process and does not presuppose any government response.

3. Media-specific anti-concentration rules (ownership rules)

Relying on the criteria retrieved from Article 1(1) lit. a) (i) of the Audiovisual Media Services Directive (hereinafter AVMSD),[12] Article 2(14) of the Law on Electronic Media of 1991 defines audiovisual media service as a "service under the editorial responsibility of a media service provider and whose main aim is to supply audiovisual programmes with the aim of informing, entertaining or educating the general public or of providing commercial communication through an electronic communications network".

10) See also the relevant regulations: Règlement grand-ducal du 17 mars 1993 déterminant les modalités d'attribution des permissions pour les programmes de télévision et de télétexte diffusé et programmes y assimilés, ainsi que les règles générales gouvernant ces permissions et les cahiers de charges qui leur sont assortis, Mém. A – 28 du 13 avril 1993, page 482, www.legilux.public.lu/leg/a/archives/1993/0028/a028.pdf#page=4 as amended by Règlement grand-ducal du 17 décembre 2010, Mém. A – 241 du 24 décembre 2010, page 4035, www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=13 ; Règlement grand-ducal du 21 janvier 1993 fixant les modalités selon lesquelles le Gouvernement accorde les concessions pour les programmes luxembourgeois par satellite, ainsi que les règles générales gouvernant ces concessions et les cahiers des charges qui leur sont assortis, Mém. A – 8 du 10 février 1993, page 153, www.legilux.public.lu/leg/a/archives/1993/0008/a008.pdf#page=5 as amended by Règlement grand-ducal du 17 décembre 2010, Mém. A – 241 du 24 décembre 2010, page 4036, www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=14 ;
Règlement grand-ducal du 17 mars 1993 fixant les modalités selon lesquelles le Gouvernement accorde les concessions pour programmes luxembourgeois par câble, ainsi que les règles générales gouvernant ces concessions et les cahiers de charges qui leur sont assortis, Mém. A – 28 du 13 avril 1993, page 482, www.legilux.public.lu/leg/a/archives/1993/0028/a028.pdf#page=4 as amended by Règlement grand-ducal du 17 décembre 2010, Mém. A – 241 du 24 décembre 2010, page 4037, www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=15

11) According to Article 29(1) lit. c) Law of 1991, government commissioners monitor the activities of certain licensees. The government commissioner is thus informed about changes within the undertaking (e.g. planned mergers) or changes on the relevant market during the entire time of the licence.

12) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, codified version, OJ of 15 April 2010, L 95, p. 1.

Several of these criteria like programme (Article 2(10) Law of 1991) and editorial responsibility (Article 2(13) Law of 1991) are further defined. Article 2(14), last sentence, Law of 1991 emphasises that an audiovisual media service, apart from commercial communication, may take the form of a television service or an on-demand audiovisual media service, i.e. linear and non-linear services according to the AVMSD. Both terms are further explained in Article 2(15) and (20) Law of 1991. Since the primary purpose of this law was the transposition of the AVMSD (and previously the Television without Frontiers Directive), it does not include specific rules on the control of market power. The Law of 1991 sheds also no light on the question of how to define relevant markets for the application of general competition law.

Even if no direct reference to market power is made, two points may nonetheless be raised: Firstly, several definitions of Article 2 Law of 1991 as well as other provisions (for instance Article 9(3) with respect to Luxembourgish international broadcast services or Article 21(4) on Luxembourgish satellite services) clarify that in order to obtain a licence to provide a television service, the operator of the service must be incorporated under Luxembourgish law. This requirement for undertakings to be established in Luxembourg excludes *per se* any other transnational ownership restriction. Secondly, a rule concerning the restriction of horizontal ownership in television services was never contained in the Law of 1991, whereas the original version of 1991 of the Law on Electronic Media restricted ownership rights for *radio* programmes disseminated via a network. For radio, Article 18(2) Law of 1991 (in the original version) prohibited ownership of more than one licence per holder as well as ownership of more than 25% shares including direct and indirect voting rights. This provision was subsequently abrogated.

4. The relationship between the media-specific rules and application of competition law

The Luxembourg competition law does not regulate mergers. Instead, mergers are sanctioned or prohibited by direct application of the EU merger law. The general rules on competition are laid down in the *Loi du 23 octobre 2011 relative à la concurrence*[13] (Law on competition, hereinafter Law of October 2011), which does, however, not specifically address the media sector. According to Article 1 Law of October 2011, it applies to all activities of production and distribution of products and the provision of services including the activities of public entities. Since the distribution and transmission of media services evidently falls under the scope of the provision of services, the Law of October 2011 is applicable to this market.

The first chapter of this law sets out the substantive provisions on how to ensure effective competition. The Law of October 2011 prohibits concerted practices (Article 3 except for practices listed in Article 4) and the abuse of a dominant position (Article 5). Abusive practices within the meaning of Article 5 Law of October 2011 are, above all, the imposition of unfair purchase or selling prices, the limitation of production, markets or technical development, the application of dissimilar conditions to equivalent transactions and the conditioning of the conclusion of a contract on the acceptance by the other party of supplementary obligations that lack connection with the subject of the contract. This provision of the Luxembourg law on competition starkly resembles Article 102 TFEU (Treaty on the Functioning of the European Union).

Because there is no media-specific regulation of market power, the Law of October 2011 serves as the primary tool to restrict the market conduct of dominant undertakings. Any assessment of market power of media service providers will be conducted under its general framework.

13) Loi du 23 octobre 2011 relative à la concurrence, Mém. A – 218 du 28 octobre 2011, p. 3756, www.legilux.public.lu/leg/a/archives/2011/0218/a218.pdf#page=2

Audiovisual commercial communication is regulated by Articles 27bis and 28 Law of 1991 and an executive regulation.[14] Neither the provisions of the law, nor the regulation give indications of how to define the market for advertising. The majority of advertising revenue is collected by RTL because it has a dominant position for the purely internal market of Luxembourg and also accepted to broadcast public service media content. In its function of provider of public service media content, RTL is allowed to broadcast – within certain limits and under exclusion of some advertising sectors – advertising which directly targets the resident public.[15] This reinforces the unique position that RTL has in Luxembourg due to the structure of the market. In addition, Article 34(4) Law of 1991 established the *Commission chargée de surveiller l'évolution du marché publicitaire*, a committee which is to evaluate the impact of new radio and television services on the advertising resources of the printed press. In order to allow the Committee to carry out its task, the SMC monitors the advertising market and gathers data.[16] Television advertising amounts to approximately 9% of the total volume of (gross investment in) the advertising market which encompasses advertising in daily and weekly newspapers and (periodic) journals, television and radio services, postings and cinemas. Roughly two thirds of the investments in advertising are directed to different forms of the printed press. To safeguard the development of the press sector, the framework agreement between the government and RTL encourages the broadcaster to collaborate with the printed press.[17]

5. Must-offer obligations and obligations to open archives to competitors

The Law of 1991 does not expressly mention must-offer obligations or obligations to open archives to competitors. Yet, the book of obligations of each licensee may refer to obligations relevant in this context:

- Article 10(1) lit. f) and Article 12(2) lit. f) Law of 1991 empower the competent regulatory authority to stipulate in the book of obligations under which conditions the "licensee may put its *facilities* at the disposal of [other] television … services". This may be interpreted to include not only the use of transmission capacity but also the making accessible of archives.
- Concerning satellite broadcasting, Article 20(7) lit. e) Law of 1991 even stipulates that the book of obligations may refer to "constraints relating to the *content* of audiovisual media … broadcast"
- Similarly, Article 10(1) lit. e) Law of 1991, which concerns Luxembourgish international broadcast services, refers to "conditions under which … Luxembourgish socio-cultural programmes" are diffused.

Licensing authorities may use these provisions to impose content requirements within the meaning of must-offer or must-carry obligations on broadcasters enjoying significant market power. The content requirements need to be specified in each case for any relevant media service provider given that the provisions don't constitute general obligations.

According to Article 1(h) of the framework agreement anybody demonstrating a legitimate interest has the right to access the CLT-UFA archives which are maintained by the *Centre National de l'Audiovisuel* (National Audiovisual Centre – CNA). The CNA is generally entitled to archive the cultural heritage encompassing audio, audiovisual, cinematographic or photographic content pursuant to Article 18 of the *Loi du 25 juin 2004 portant réorganisation des instituts culturels de l'Etat*[18] (Law of 25 June 2004 on the Reorganisation of the National Cultural Institutes). As far as television broadcasts are concerned, the CNA has registered 16 000 films in a database which also includes the Luxembourgish

14) Règlement grand-ducal du 5 avril 2001 fixant les règles applicables en matière de publicité, de parrainage, de télé-achat et d'autopromotion dans les programmes de télévision réputés relever de la compétence du Luxembourg conformément à la directive européenne modifiée « Télévision sans frontières », Mém A – 42 du 17 avril 2001, p. 936, www.legilux.public.lu/leg/a/archives/2001/0042/a042.pdf#page=14 , as amended by Règlement grand-ducal du 17 décembre 2010, Mém A – 241 du 24 décembre 2010, p. 4039, www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=2 . An English translation of the amending regulation is available at: www.medialaw.lu where also a consolidated version of the regulation can be found.

15) See the framework agreement between CLT-UFA and the Luxembourg Government, Règles de base concernant le service public, available at: www.mediacom.public.lu/medias/television/concessions_programmes/concession_2007/ReglesdebaseSP.pdf , 3 (b), p. 5.

16) See for the tables of 2010 www.mediacom.public.lu/medias/marche_publicitaire/index.html

17) See the framework agreement, 1 (d), p. 2.

18) Loi du 25 juin 2004 portant réorganisation des instituts culturels de l'Etat, Mém A – 120 du 15 juillet 2004, p. 1797, available at: www.cna.public.lu/legislation/base-legale/Loi_2004_06_25.pdf

programmes.[19] In sum, the Law on Electronic Media does not contain general must-offer obligations applicable to all media service providers. Instead, such obligations may arise during the licensing process for linear media services.

6. Specific rules for services enabling or facilitating use or reception addressing market power

The Law of 1991 contains no explicit rules addressing enabling services. Article 2(32) Law of February 2011 defines such services that are associated with an electronic communications network or service, whose provision they enable or support (associated services). In this context, the *Institut Luxembourgeois de Régulation* (Luxembourg Institute of Regulation – ILR), the Luxembourgish regulator competent for telecommunications, may impose obligations on companies with significant market power to ensure end-to-end connectivity, interoperability of networks and services and accessibility for end-users to digital radio and television broadcasting services including access to application program interfaces and electronic programme guides (hereinafter EPGs) (Article 24 Law of February 2011). More in particular, Article 24 lit. c) Law of February 2011 stipulates that the ILR may require dominant undertakings to grant access to EPGs on fair, reasonable and non-discriminatory terms.

In a similar vein, operators of conditional access systems to digital television have to offer all broadcasters, on fair, reasonable and non-discriminatory terms, access to technical services (like decoders) which in their turn enable viewers to receive digital television. More specifically, the ILR may require operators to:

- offer technical services on a fair, reasonable and non-discriminatory basis so that authorised viewers are enabled to access the service by means of decoders (Article 26(2) lit. a) Law of February 2011);
- keep separate financial accounts regarding their activity as conditional access providers (Article 26(2) lit. b) Law of February 2011);
- grant licences to manufacturers of consumer equipment (like decoders) without prohibiting, deterring or discouraging the inclusion of a common interface (allowing connection with other access systems or means specific to another access system).

In conclusion, market power is addressed in several rules on services which enable or facilitate the transmission of audiovisual media services. These are, however, optional for the regulatory authority which, taking the market into consideration, may impose access obligations on dominant undertakings.

II. Platform operators and converged services

The Law of 1991 regulates the operation of platforms distributing electronic media content. A licensed operator of a satellite system has the right to make its capacities available and assign them accordingly. The licensee must inform the government about the users of the capacity, that is, the package of media services transmitted and offered (Article 20(5) Law of 1991). The government may oppose specific contracts in view of the identity and suitability of the users of the capacity. Moreover, a satellite licensee is bound by a book of obligations which the government may impose (Article 20(7) Law of 1991).

With regard to cable networks, which are generally regulated by the Law of February 2011, the Law of 1991 further details specific provisions. According to Article 22(4) and (5) Law of 1991, the network may carry only television or radio services that either have a licence from Luxembourg or, in the case of foreign services, are not explicitly prohibited. In addition, the regulators could pass a regulation requesting that the transmission of certain Luxembourgish services be prioritised. Currently no such regulation exists, but an executing regulation for cable services stipulates conditions that can be adopted in the book of obligations accompanying the licence agreement and that could be used to the same end.[20]

19) See the webpage of the Centre National de l'Audiovisuel at: www.cna.public.lu/film/fonds-archives-film/archives-films-videos/index.html

20) Règlement grand-ducal du 17 mars 1993 as amended by Règlement grand-ducal du 17 décembre 2010.

Furthermore, the Law of February 2011 stipulates measures to counter the bundling of services by operators having significant market power. According to Article 29 Law of February 2011 the ILR may require dominant undertakings to publish the terms and conditions of (elements of) the unbundled access to their services (so-called "reference offer"). Operators must offer their services in such a way as to guarantee that third parties must not pay for services or resources which are unnecessary or irrelevant for the original service. They must indicate the conditions and prices for different components of their services. Article 29(2) Law of February 2011 enumerates elements which the reference offer must entail including unbundled access to the local loop and information on the selection of carriers and other relevant technical modalities. The ILR has, for example, published several measures which identify the *Entreprise des Postes et Télécommunications* of Luxembourg (hereinafter P&T) as the incumbent operator and further detail the content and form of reference offers concerning especially unbundled access, co-location or DSL.[21]

Similarly, according to Article 32 lit. a) Law of February 2011 the ILR may oblige dominant companies to open access to the local loop and allow the use of specific network facilities, including unbundled elements. This obligation may entail the granting of access to technical interfaces, protocols or other key technologies important for the interoperability of the services or networks (cf. Article 32 lit. e) Law of February 2011). In the interest of end-users interoperability of services shall be ensured (Article 32 lit. g) Law of February 2011) and end-to-end connectivity achieved. In brief, the ILR has a well defined discretion to restrict the business choices of providers of bundled products based on market realities.

III. Distribution (network operators)

The Luxembourg market for telecommunications is structured similarly to the sector of audiovisual media services. It displays few actors, some of which enjoy significant market power. The major player is P&T, which is a wholly state owned privately organised entity. P&T provides postal as well as telecommunications services. Since 2008, it offers a video-on-demand service online and as an associated service an EPG. In addition, it provides several packages of television services and pay-TV channels like Sky (including 3-D broadcasts).[22] P&T's penetration into the market for audiovisual media services is especially significant in light of the rules on vertical integration.

The Law of February 2011 contains the relevant rules for network operators and implements different aspects of the EU telecoms package of 2002 as amended in 2009.[23] It aims to establish a competitive environment for the telecommunications sector by regulating access to services and interconnections between networks to the benefit of the end-consumer (cf. Article 1 Law of February 2011). Electronic communications services must be notified (Article 8 Law of February 2011) and the notifications are published on the website of the competent regulatory authority, the ILR (cf. Articles 8, 9 Law of February 2011).

A company with significant market power (*entreprise puissante sur le marché*) is equivalent to an undertaking having a dominant position (Article 2(13) Law of February 2011). The notion of dominant position implies that this undertaking can conduct its business independently of competitors, clients and consumers. Additionally, Article 2 (13) Law of February 2011 acknowledges the possibility for the company to lever its market power from the primary market to a secondary market and thereby further strengthen its overall position.

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21) See: Règlement 08/128/ILR du 11 avril 2008 (Reference Unbundling Offer and Reference Colocation Offer of P&T for 2007 and 2008), Mém A – 171 du 5 août 2008, p. 1798, available at: www.legilux.public.lu/leg/a/archives/2008/0117/a117.pdf#page=2; Règlement 08/133/ILR du 18 juillet 2008, available at: www.legilux.public.lu/leg/a/archives/2008/0121/a121.pdf#page=2; Règlement 09/143/ILR du 23 juillet 2009 (Reference Interconnection Offer of P&T for 2007), Mém. A – 178 du 10 août 2009, p. 2577, available at: www.legilux.public.lu/leg/a/archives/2009/0178/a178.pdf#page=3 . See also Décision 11/156/ILR du 29 juillet 2011 (Reference DSL Offer), available at: www.ilr.public.lu/communications_electroniques/decisions/2011/E11156ILR.pdf

22) For the video-on-demand service offer see: www.tele.lu/eng/Catalog , for the EPG "TV Guide" see: www.tele.lu/eng/EPG/German-I/(day)/0) or for several Sky packages see: www.tele.lu/eng/Service

23) For an overview of the legal instruments adopted at European Union level see: http://europa.eu/legislation_summaries/information_society/legislative_framework/index_en.htm

In line with the 2007 Recommendation of the European Commission,[24] the ILR conducts market assessments to identify operators susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC[25] (cf. Article 17 Law of February 2011).[26] In order to assess whether a market is characterised by effective competition and whether a company or several companies (joint dominance) enjoy significant market power, the ILR takes into account, *inter alia*, the following criteria set out in Article 19(2) Law of February 2011:

- low elasticity of demand;
- similar market shares of the companies concerned;
- high legal or economic barriers to entry;
- vertical integration including collective refusal to supply;
- lack of countervailing buyer power and
- lack of potential competition.

If the ILR finds that a company is dominant on the relevant market, it may, acting under Article 20 Law of February 2011, impose obligations on the undertaking or maintain or modify existing obligations which it formulated pursuant to earlier market studies.

The ILR, in its decision of 1999, set out criteria for evaluating the importance of a market player on a given market.[27] At the time, the basis for this decision had been Article 21 Law of 21 March 1997 on Telecommunications (*Loi du 21 mars 1997 sur les telecommunications)* which meanwhile has been replaced by *Loi du 27 février 2011 sur les réseaux et les services de communications électroniques*[28] (Law on electronic communications networks and services, hereinafter Law of February 2011) but it appears that the criteria continue to be valid. A company is assumed to have significant market power if it holds at least a 25% market share in the relevant market. The percentage is calculated on the basis of the turnover of the operator concerned, which is judged against the total turnover of the relevant market. The ILR made clear that the use of the criterion is not absolute but allows for some margin of appreciation. In its decision, the ILR also identified four relevant markets of the market for telecommunications: the market for fixed public telecommunications networks and/or voice telephony services, the market for fixed connections (leased lines), the market for mobile telephony networks and services, and the market for interconnection.

In 2002, Tele2 challenged the prices for the interconnection services offered by P&T. The ILR found that the prices charged by P&T were too high in comparison with the "unreasonably and irrationally low prices" end-users had to pay.[29] The ILR thus ordered P&T to terminate the practice of predatory pricing and lower the prices for its interconnection services.

In order to guarantee compliance with the obligations of transparency and non-discrimination, the ILR may impose additional obligations on vertically integrated companies. Firstly, it may oblige the company to make transparent its wholesale prices and its internal transfer prices, which implies the separation of accounts with a view to preventing cross-subsidising (Article 28(1) lit. c), 31 Law of February 2011). Secondly, and as a last resort, the ILR may ask the company to place activities related to the wholesale provision of relevant access products in an independently operating business

24) Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ of 28 December 2007, L 344, p. 65.

25) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ of 24 April 2002, L 108, p. 33, now amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ of 18 December 2009, L 337, p.37.

26) For current market studies of the ILR in the field of electronic communications see: www.ilr.public.lu/communications_electroniques/analysedesmarches/index.html

27) See Décision 99/32/ILT du 17 décembre 1999, Critères permettant d'apprécier l'importance sur le marché d'un opérateur déterminé. The decision is available at: www.ilr.public.lu/communications_electroniques/decisions/1999/9932.pdf

28) Loi du 27 février 2011 sur les réseaux et les services de communications électroniques, Mém. A – 43 du 8 mars 2011, p. 610, www.legilux.public.lu/leg/a/archives/2011/0043/a043.pdf#page=2

29) See Décision 02/56/ILR du 27 septembre 2002, Règlement des différends entre TELE2 S.A. et l'Entreprise des postes et télécommunications, available at: www.ilr.public.lu/communications_electroniques/decisions/2002/0256.pdf , p.6.

entity if it judges that effective competition can only be brought about by this type of functional separation. That business entity shall supply to all companies, under the same terms and conditions, access products and services.

If a Luxembourg media service provider were also to operate an electronic communications network, the ILR might request (under the Law of February 2011) transparency of its accounts. This measure shall help to avoid transfers of subsidies from the audiovisual media services activity to the network operation activity. As an exceptional measure, a vertically integrated market player with significant market power may even be asked to "outsource" the operation of the network. The Law of February 2011 thus applies to media service providers through the prolonged arm of vertical integration.

Although the principle of net neutrality has not yet been inscribed in the Luxembourg legislation, at the end of 2011 a debate sparked in the *Chambre des Députés* (the Luxembourg Parliament)[30] over the question of whether and how this could be done and discussions continue. So far Parliament generally seems to favour the preservation of net neutrality, which implies the prohibition of discrimination towards the source, the destination and the content of data packages on the transmission level.[31] Parliament is of the opinion that net neutrality offers various opportunities such as the guarantee of economic innovation and of participation of the individual in social life, as well as of pluralism of information, and that it thereby reinforces the right to information.[32] Parliament also notes that the principle of net neutrality is not absolute but that exceptions should be clearly defined in the law and controlled by the regulator.[33] The initiative of the Parliament concerning the legal status of net neutrality takes into account the Communication of the European Commission of January 2012.[34] Parliament invites the government to draft a report (for which it proposed and published the structure)[35] on the current state of the law and the feasibility of including net neutrality in national legislation. This suggests that Luxembourg is aware of the significance of the principle of net neutrality while awaiting the guidelines of the European Commission (which has expressly discouraged member states from taking unilateral action).

Finally, the following additional regulatory aspects may be worth pinpointing. As mentioned above, the ILR is in charge of regulating electronic communications services and networks independently. To this end, it collaborates, among others, with the national regulatory authority responsible for competition law issues (*Conseil de la concurrence*, Council for competition) and the relevant regulatory body in charge of consumer protection[36] (cf. Article 76(1) Law of February 2011). Before the ILR may adopt measures under title IV of the Law of February 2011, which essentially affect the relevant market, it must seek the agreement of the Council for competition (cf. Article 76(2) Law of February 2011). In addition, the operator concerned may submit its opinion on the measure proposed by the ILR (Article 78 Law of February 2011). Should the Council for competition oppose the envisaged measure on competition law grounds, the ILR must renounce it (cf. third sentence of Article 76(2) Law of February 2011). Should the ILR proceed to adopt the measure, the operator may initiate an action for annulment before the *tribunal administratif* (administrative tribunal/court) (cf. Articles 6 and 81(5) Law of February 2011). These aspects underline the interconnections between the regulatory framework for electronic communications networks and services and the application of competition law.

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30) See Débat d'orientation sur la neutralité d'Internet (6380), Rapporteur: Eugène Berger, 16 février 2012, available at: www.chd.lu/wps/PA_1_084AIVIMRA06I432D010000000/FTSShowAttachment?mime=application%2fpdf&id=1132660&fn=1132660.pdf

31) See Motion du 17 novembre 2011, Garantir le principe de la neutralité de l'Internet par la loi, Interpellation principe de neutralité de réseau internet. Déposé par Claude Adam, available at: www.chd.lu/wps/PA_1_084AIVIMRA06I432D010000000/FTSShowAttachment?mime=application%2fpdf&id=1114557&fn=1114557.pdf

32) See Motion of Claude Adam of 17 November 2011.

33) See Motion of Claude Adam of 17 November 2011.

34) Commission Communication of 11 January 2012 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A coherent framework for building trust in the Digital Single Market for e-commerce and online services, COM(2011) 942 final, available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF

35) See the Annex to the Debate of 16 February 2012, p. 6 et seq.

36) For the relevant national authority responsible for the protection of consumers see: Loi du 23 avril 2008 relative à la recherche et à la sanction des violations des droits des consommateurs, Mém A – 55 du 29 avril 2008, p. 759, available at: www.legilux.public.lu/leg/a/archives/2008/0055/a055.pdf#page=2

NL THE NETHERLANDS

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I. Audiovisual media services and enabling services

1. Approach to public service media

The Dutch Media Act 2008 entered into force on 1 September 2009 (thereby replacing the Media Act of 1987).[2] The Media Act 2008 regulates the organisation, funding and tasks of public broadcasters in the Netherlands. It also sets basic requirements for commercial broadcasters. It is supplemented by the Media Decree.[3] The Decree lays down more detailed rules on topics such as the tasks of the public broadcasters, restrictions on advertising/sponsoring, subtitling and the broadcasting of special events.

The Dutch national public broadcasting system is based on an exclusive concession granted to the *Nederlandse Publieke Omroep* (Netherlands Public Broadcasting – NPO). Individual (private but non-profit) membership organisations (called "*omroepverenigingen*", hereinafter: "membership organisations" or "membership broadcasting organisations"), representing specific groups in society, have been granted broadcasting time within this concession. Two other large organisations – not membership based, but created by the Media Act – that are responsible for national public broadcasting are the *Nederlandse Omroep Stichting* (NOS, news and sports) and the NTR (specializing in information, education and culture).[4]

In addition, broadcasting time is also allocated to public regional and local broadcasters. The Netherlands has a well-established system of regional and local public broadcasting organisations (regional broadcasting operates at a provincial level, while local broadcasting is conducted at the level of municipalities). On request, the *Commissariaat voor de Media* (Dutch Media Authority) can allocate regional or local broadcasting time for a period of five years.

The Dutch Media Authority is the independent supervisor of the Media Act. Based on Chapter 7 of the Media Act, the Media Authority is, *inter alia*, responsible for the distribution of funds, safeguarding a competitive media environment (media diversity) and enforcing specific regulation, for example on advertising, sponsoring, teleshopping and product placement.

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2) Mediawet 2008, Stb. 2008, 583, latest change Stb. 2012, 319.
3) Mediabesluit 2008, Stcrt. 2008, 584, latest change Stb. 2010, 742.
4) The NTR resulted from a merger between three public service broadcasters: NPS, Teleac and RVU.

Funding

Funding of the national Dutch public broadcasting sector depends on various types of financing. The main source of funding are annual state payments, the *Rijksmediabijdrage*. This contribution mainly consists of two components: a fixed amount from the general budget defined in the Media Act and the revenues from advertising on the public channels (bound by stricter rules than advertising and sponsorship rules for commercial broadcasters). In addition to the annual payments, the public broadcasters receive payments from the Mediafonds (an independent fund promoting the development and production of high-quality artistic programmes).[5] The funds granted by the Mediafonds qualify as a state aid measure, but this measure has been approved by the European Commission.[6] In addition, the public service broadcasters have received *ad hoc* payments since 1994. However, these payments were qualified as incompatible state aid by the European Commission in its Decision of 22 June 2006 on the *ad hoc* financing of Dutch public service broadcasters.[7] The European Court of Justice upheld the state aid decisions of the European Commission and as a result the practices were ended by the Dutch Government.[8] Another source of income for public service broadcasters is self-generated financing. Such means of financing include membership income, permitted forms of sponsorship, the publication of a programme guide and intellectual property rights.

As far as public regional broadcasting is concerned, the relevant province has to fund at least one regional broadcaster by underwriting the costs that are directly connected to its tasks (Article 2.170 Media Act). The provinces receive a contribution from the national general budget for this. The minimum funding for local broadcasting is based on yearly contributions to the general budget of the individual municipalities, which in turn is based on the number of households in the individual municipalities. Also, regional and local broadcasting organisations are allowed to carry advertising (although strict rules on advertising apply to the whole public broadcasting sector) and have access to the same type of self-generated financing as the national public broadcasters.

2. Regulation of market entry

The main tool for regulation of market entry lies in the granting of the public broadcasting concession and public/commercial licences laid down in the Media Act 2008.

The National Public Broadcasting organisation operates under a concession valid for ten years granted by the Dutch Government (Chapter 2, Media Act). All others – the membership organisations – are licensed for five years. Entry, renewal and prolongation are subject to a strict application system. The concession and licences are granted by the government. Part of this process includes an assessment of the envisaged activities, such as Internet-related activities, thematic channels and catch-up television. The choices put forward during the last allocation of the concession, agreed to by the minister, were challenged in court by commercial publishers and broadcasters. The court upheld the choices made, in particular on the number and type of thematic channels.

Licences for the regional and local public broadcasting organisations are awarded by the Media Authority.

Commercial broadcasters operate under a five-year licence regime (Chapter 3, Media Act). It is a much more lightweight system (primarily following the minimum standards of the European Audiovisual Media Services Directive). The Media Authority is responsible for licensing commercial broadcasters. No limitations exist. It does not matter whether an applicant organisation owns other media (with the exception of FM radio, see below); nor are aspects such as the market share relevant. Furthermore, the licensing regime only applies to traditional linear television. Non-linear services are only subject to a registration system, managed by the Media Authority.[9]

5) www.mediafonds.nl/english
6) European Commission Decision NN 32/91.
7) European Commission Decision C 2/2004.
8) Judgment of the General Court (First Chamber, extended composition) of 16 December 2010, Kingdom of the Netherlands (T-231/06) and Nederlandse Omroep Stichting (NOS) (T-237/06) v. European Commission;
Appeal Case before the Court of Justice C-104/11 P.
9) See: www.cvdm.nl/content.jsp?objectid=7264

The Media Act does contain special provisions on the ownership of FM radio stations. Article 6.24 states that no more frequency space than one FM frequency or combination of FM frequencies shall be used to transmit the radio programme services of one and the same establishment. Exceptions are allowed if deemed desirable in connection with an efficient use of frequency space and may relate to categories of frequency space, consisting of FM frequencies or combinations of FM frequencies.

However, access distribution is a more complex matter. Licence holders (linear) or registered service providers (non-linear) have, based on their licence, no automatic right to distribution. This will be discussed in Part III.

3. Media-specific anti-concentration rules

Until 2010, the Temporary Media Concentration Act regulated ownership of the media.[10] Three markets were defined (newspapers, radio and television). This temporary Act limited cross-media ownership by introducing specific thresholds. A company could own a maximum of 90% (of the total 300%), with some specific restrictions including a maximum market share of 35% for national newspapers. Public broadcasting was not covered by this law because it is not allowed to engage in commercial activity. The Temporary Media Concentration Act was initially extended to January 2012, but was repealed in January 2011, because general competition law was considered to suffice.[11]

At the request of the Dutch Government, the Media Authority assesses media diversity. In 2001 the Dutch Media Authority established the Mediamonitor system in order to closely monitor developments with respect to the possible consequences of media concentration. Annual reports are published and made accessible on the Internet.[12]

4. Competition law

The control of media ownership in the Netherlands therefore does not focus on imposing entrance barriers to the television and radio sectors by means of licences or specific *ex-ante* regulation.

Nevertheless, the general rules laid down in the *Mededingingswet* (Competition Act)[13] apply to the media sector. The supervision of these rules is the sole responsibility of the *Nederlandse Mededinginsautoriteit* (Dutch Competition Authority – NMa). The NMa investigates whether a company has abused a dominant position or is involved in an anti-competitive agreement. It also investigates whether a merger leads to a dominant position.

Although interventions by the Competition Authority in the media sector are rare and the few cases mainly concern mergers solely involving newspapers, a recent landmark[14] case involved the sale of the third largest broadcasting company, the Dutch division of SBS Broadcasting, to publishing house Sanoma and media company Talpa. The Competition Authority only conditionally approved the acquisition and set as a condition that Talpa be obliged to sell its minority interest in broadcaster RTL Netherlands within three years, and that, until then, it transfer its shares in RTL Netherlands to an independent trust foundation. This way, the Competition Authority aimed to prevent Talpa from exerting substantial influence over both SBS and RTL's strategies, and thus from potentially gaining a competitive advantage.[15]

Talpa sold its interest in RTL back to the shareholders of RTL and acquired in exchange the most popular commercial radio station, Radio 538.

10) Tijdelijke Wet Mediaconcentraties, Stb 2007, 204. It was deemed “temporary” because review and further political debate had to determine if and what kind of more permanent solution was needed.
11) Stb. 2010, 835.
12) See www.mediamonitor.nl . The 2010 report is available in English.
13) Stb. 1997, 242, latest change Stb. 2011, 162.
14) Actually the only significant case in the last ten years.
15) NMa, press bulletin 21 July 2011 (English). Case nr: 7185, decision (in Dutch): www.nma.nl/images/7185BCM22-191784.pdf

5. Must-offer obligations

Article 2.1 of the Media Act defines the mission of the public broadcasters. It includes the obligation to broadcast the public national, regional and local services via transmitters to all households in their service area without any additional charge but the costs linked to the necessary reception equipment. Only this first transmission is regulated. As such, public broadcasters have no must-offer obligations for cable or satellite. The number of channels available for public broadcasting is also regulated in the Media Act (for example including a minimum of three television and five radio channels on the national level).

The national public broadcasters are responsible for acquiring sufficient user rights in order to make their content available for distribution, reuse and availability on the various channels (Article 2.55 Media Act). The rule is supervised by the executive board of the NPO.

The archives of the public broadcasters are stored at the *Nederlands Instituut voor Beeld en Geluid* (Netherlands Institute for Sound and Vision). Based on contractual agreements the Institute can make certain content available to third parties.[16]

Commercial broadcasters are under no obligation regarding must-offer or the provision of access to their archives.

6. Services enabling or facilitation use or reception

The Netherlands has implemented the European regulation on electronic programme guides (EPGs), application programming interfaces (API's) and conditional access (CA).[17] These rules can be found in Chapter 8 of the *Telecommunicatiewet* (Telecommunications Act).[18] All of these provisions – offering the possibility of regulated access – have had until now a "dormant" status: no specific guidelines regarding enforceability exist and no disputes have been brought before the responsible regulator, the *Onafhankelijke Post en Telecommunicatie Autoriteit* (Independent Post and Telecommunications Authority – OPTA).

II. Platform operators and converged services

Under the present Media Act the position of converged services vis-à-vis platform providers is not entirely clear. The Act has no provisions that deal specifically with converged services, as such. For example, interactivity is primarily seen as a topic that needs to be dealt with under the Telecommunications Act. Therefore, it is not clear whether platform providers such as cable operators are under the obligation to offer the possibility of "red button" facilities[19] to programme providers that are part of the current must-carry obligations (see Part III). No guidelines exist and no relevant cases have led to decisions by either the Media Authority or the telecommunications regulator.

As part of the recently amended Telecommunications Act, a new provision (Article 7.4a) has been put in place with respect to net neutrality. Internet access providers have to distribute services in a non-discriminatory way; they can neither block services nor make distributions depending on financial compensation from the service provider in question (i.e. Skype or WhatsApp). [20]

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16) For more info, including the licence conditions: www.dutchfootage.com/

17) European Parliament and Council of the European Union (2002a) "Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)," in Official Journal of the European Communities, L 108, 24 April 2002; revised by: European Parliament and Council of the European Union (2009a) "Directive 2009/140/EC of 25 November 2009" (Better Regulation Directive), in Official Journal of the European Union, L 337, 18 December 2009.

18) Stb. 1998, 318, latest change Stb. 2012, 235.

19) These types of services offer the possibility to the viewer to directly react to a programme, for example to buy services or products mentioned in a broadcast or to get access to background information.

20) See: N.A.N.M. van Eijk, *Net Neutrality and Audiovisual Services*, in: IRIS *plus*, 2011-5, Why Discuss Network Neutrality? (Suzanne Nikoltchev (Ed.); European Audiovisual Observatory, Strasbourg 2011), point 4.1.

III. Distribution

Terrestrial broadcasting: analogue

Analogue terrestrial broadcasting for television no longer exists in the Netherlands since the analogue/digital switch off on 11 December 2006. However, analogue is still very important for radio (in particular FM).

Public broadcasters (national, regional and local) have a preferential right to frequencies. This is regulated in the Telecommunications Act (Article 3.3) and is directly linked to the obligations defined in the Media Act (see I. 2). So, frequencies are set aside for these services before remaining frequencies are allocated for commercial broadcasting.

On the other hand, commercial providers that are licensed by the Media Authority are only granted an authorisation to operate a radio station as such. They have to secure their own means of distribution. In order to get traditional terrestrial FM frequencies, the *Frequentiebesluit* (Frequency Decree),[21] based on the Telecommunications Act, stipulates that frequencies for commercial broadcasting are allocated on the basis of a beauty contest, but applicants can, in addition, offer money (make a so-called financial bid). The rules also specify that only the combination of one general national FM station (no restrictions on the format) and one thematic national FM station (e.g., music in the Dutch language, news, golden oldies, jazz/classical music) is allowed. Restrictions on the accumulation of regional and local commercial broadcasting frequencies are also part of the rules (including not allowing the combination of national and non-national FM licences and an ownership cap based on the accumulated audience reach). It should be noted that due to the chosen model of frequency planning, the national commercial FM licences are dominant, whereas regional and local commercial radio does not play a significant role.

Terrestrial broadcasting: digital

In line with its general priority right defined in the Telecommunications Act, the national public broadcasting system has specific licences for the distribution of terrestrial digital broadcasts (T-DAB for radio and T-DVB for television). For the commercial market T-DAB licences have been granted to the same radio stations that hold FM licences with the requirement to simulcast in order to ensure that services are available on the digital channels.

One national T-DVB licence was granted to a company that today operates under the name of Digitenne (owned by the former telco-monopolist, KPN). Based on a contractual agreement, Digitenne also operates the T-DVB channels of the public broadcasters, but is free to decide which channels to offer based on commercial negotiations with the content providers. This means that the commercial channels carried on this T-DVB platform are the result of commercial negotiations.

Cable networks

Cable television is still the most important way Dutch people watch television, although IPTV is growing. However, neither cable television nor IPTV is considered to have a dominant position, as defined in the European Framework for the communications sector.[22] Because of this lack of dominance, restrictions – such as access obligations or price regulation – based on the European Framework do not exist. In the past cable operators did have a dominant position and were obliged to offer access to programme providers on a non-discriminatory basis and against regulated

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21) Stb. 1998, 638, latest change Stb. 2012, 352.

22) European Parliament and Council of the European Union (2002d) "Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)," in Official Journal of the European Communities, L 108, 24 April 2002 and European Parliament and Council of the European Union (2002a) "Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)," in Official Journal of the European Communities, L 108, 24 April 2002. Both are amended by: European Parliament and Council of the European Union (2009a) "Directive 2009/140/EC of 25 November 2009" (Better Regulation Directive), in Official Journal of the European Union, L 337, 18 December 2009.

cost models.[23] Changes to the Telecommunications and Media Act adopted in 2012 are aimed at introducing a wholesale obligation for the resale of the basic analogue package (consisting of approximately 20-30 analogue television and radio signals. This package is losing importance due to large take-up of digital television).[24]

The Dutch system on must-carry regulation is therefore dominated by Article 82i and Article 82k of the Media Act. In the former article, it is stipulated that the provider of a broadcasting network should broadcast at least 15 television channels and at least 25 radio channels unabridged, unchanged and simultaneously to all households connected to the distribution network. These programmes should at least include the public television and radio programmes at a national level, the public regional television and radio programmes and two radio programmes of the national Belgian broadcasting service in Dutch. According to Article 82k, the city council of each municipality with a broadcasting network is to set up a programme council that advises the broadcasting network provider which 15 public broadcasting television programmes and which 25 public broadcasting radio programmes it should at least broadcast to all households connected to the network pursuant to Article 82i.

In 2006, the European Commission initiated infringement proceedings as the Dutch must-carry obligation, that is the regulation of the basic package of 15 television and 25 radio programmes, was said not to comply with Article 31 of the Universal Service Directive. Initially, the European Commission believed that the discretionary authority granted to the Programme Councils was too wide and that the legal transparency and certainty within this model was insufficient.[25] In discussions with the European Commission, the Netherlands specified that the model only concerned the analogue package. Eventually, the proceedings ended in 2009 after the Dutch Government indicated that it would change the rules.[26]

Additionally, the case law of the European Court of Justice, particularly the Kabel Deutschland case,[27] has played a role in a dispute between Ziggo, the largest cable television provider in the Netherlands, and the regulatory authority in this field, the Dutch Media Authority, concerning Ziggo's refusal to include a channel in the analogue package in one of its service areas because of the costs involved. The *Raad van State* (Council of State), the highest national court in this field in the Netherlands, regarded the Dutch must-carry obligation laid down in Articles 82i and 82k of the Media Act as the implementation of Article 31 Universal Service Directive.[28] The Council of State did not address the question of whether this implementation was correct, but only stated that both articles met the transparency requirement of Article 31. Ziggo argued that imposing a must-carry obligation, including the obligation that the cable operator must bear the costs of must-carry, was unreasonable and disproportionate and therefore in contravention of Article 31 Universal Service Directive. The Council of State limited its focus to this cost aspect and referred to the Kabel Deutschland case, where must-carry obligations were said to have no unreasonable economic consequences for the cable operator. In this case, according to the Council of State, the Dutch Media Authority had insufficiently taken Ziggo's interest into account by merely looking at the situation in one particular service area rather than at the possible impact on the activities in the entire operating area of Ziggo.

The Dutch Government has announced that it will put forward proposals for a new mechanism to select must-carry channels.[29] These proposals should also have a more technology-neutral approach.

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23) See for example: http://merlin.obs.coe.int/iris/2010/5/article31.en.html and http://merlin.obs.coe.int/iris/2010/8/article38.en.html
24) About 70% of households have digital reception (OPTA, market report 1st quarter 2012, www.opta.nl). It is uncertain whether these new provisions are in compliance with EU regulations. This is still under debate.
25) European Commission, IP/06/948.
26) European Commission, IP/09/ 1491.
27) European Court of Justice (Judgment C-336/07 Kabel Deutschland Vertrieb und Service), 22 December 2008.
28) Raad van State, 12 May 2010, case no. 200906186/1/H3, LJN: BM4162.
29) *Kamerstukken II*, 2011-2012, 32033, no. 10.

NO NORWAY

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I. Audiovisual media services and enabling services

1. Players and issues related to market power

Four players in Norway possess substantial market shares in the market for audiovisual media services:

- the public service operator *Norsk rikskringkasting AS* (the Norwegian Broadcasting Corporation, NRK);
- the privately owned corporation TV 2 Gruppen AS (TV 2 Group);
- the privately owned corporation Modern Times Group (MTG);
- the privately owned corporation SBS Broadcasting Group (SBS).

NRK is state owned and financed by a TV licence fee. It is Norway's largest media corporation and in 2011 reached 87% of the Norwegian public on an average day (all platforms included).[1] In addition to its traditional linear television services, NRK offers its broadcasting services in real time on the Internet, and many of its (television) programmes also on-demand (free of charge). One of NRK's greatest successes on the Internet is the weather site yr.no. Yr.no was launched in 2007 and has up to 3.9 million (unique) visitors each week. Earlier, NRK's website was partly financed by advertising, but after NRK's Articles of Association[2] (hereafter Statutes) were amended in 2009 and the Internet became a part of NRK's public service remit, NRK decided to change this practice. NRK's website is now free from commercials.

TV 2 Group's main channel TV 2 has the status of a commercially financed public service broadcaster with must-carry privileges. Since TV 2 Group was sold from A-pressen to Egmont, NRK is the only Norwegian-owned broadcaster with national coverage.

Like TV 2 Group, MTG and SBS finance their TV channels by advertising and/or pay-TV.

In 2011, the audience shares of these four players (linear services only) were as follows: NRK 41.0%, TV 2 25.6%, MTG 8.2% and SBS 12.1%. Since the beginning of the 2000s, the smaller players have increased their shares at the expense of the bigger ones. Digitisation has led to extended distribution possibilities and establishment of a range of new TV channels, and less concentration as a consequence of this.

1) www.nrk.no/aarsrapport/2011/mediehuset-nrk
2) 30 April 1996; www.nrk.no/informasjon/about_the_nrk/1.4029867

NRK's unique market position and the figures above reveal that NRK is rather dominant compared to the commercial broadcasters. For NRK's commercial competitors, this is important with regard to regulation of ownership in the market for TV broadcasting and more specifically for certain thresholds (described below) that apply to ownership positions in linear services. Since NRK's position in linear services is taken into account when ownership positions in the television market are calculated, the commercial players are rarely affected by media-specific ownership restrictions in this market.

In the expanding market for on-demand TV services the traditional broadcasters have an important position, and among them especially NRK. However, another Internet TV service with a daily average reach at a comparable level to NRK belongs to a newspaper. Verdens Gang (VG) is the second largest newspaper on print and the largest on the Internet, and is owned by Schibsted, the newspaper corporation with the most dominant position in Norway. One reason for VGTV's popularity is that it has showed a range of series made especially for this channel, e.g. animated humoristic series based on Norwegian celebrities and reality series. Schibsted also used to have ownership interests in the TV market through minority shares in TV 2 Group and Swedish TV4, but these shares were sold in 2006. In recent years, Schibsted has increasingly concentrated its activities around the core business of newspaper publishing (printed and online).

Another important player is Telenor, traditionally a state-owned telecom operator and now a publicly listed corporation in which the state holds a majority. It owns a range of media-related companies and is a vertically integrated player in the television market with interests in several of the segments in the value chain. In 2010 Telenor bought a 35% share of C More Entertainment, the owner of Nordic Canal+ (pay-TV channels for sports, films and TV series), from Swedish TV4. Until last year, Telenor had interests in the commercial public service broadcaster TV 2 through its stake in the Norwegian newspaper corporation A-pressen. In January 2012 A-pressen sold its 50% share in TV 2 to the Danish media corporation Egmont, which now holds 100% of the shares in TV 2.

For a long time there has been a controversy between TV 2 Group, on the one hand, and cable operators, especially Telenor-owned Canal Digital, on the other, concerning the price for the retransmission of TV 2 (see below).

2. Legal framework

2.1. Approach to public service media

NRK is organised as a state-owned corporation where the ministry of culture exercises the owner's rights and convenes the NRK's General Meeting. The Statutes[3] describe the overall aims and define the scope of NRK's activities. Norwegian media-specific anti-concentration rules (see below) apply to NRK in the same way as to privately owned media (public service and others). NRK has must-carry privileges, cf. *kringkastingsforskriften* (Broadcasting Regulations)[4] section 4-2.

NRK is entitled to commercialise its programmes to some extent (by selling spin off products and the programmes as DVD versions),[5] and NRK has obligations to make its archives accessible for free. According to the Statutes (Articles 14h and 17b) and the NRK Manifesto (Article 3h), NRK shall make efforts to digitise its archives and make them available free-of-charge to the public. As many as possible of the television programmes shall be made available on the Internet, both for simultaneous distribution and as an archive service for download and/or individual playback.

In 1992, TV 2 was licensed as a public service channel with exclusive rights as national commercial broadcaster. When the licence expired in 2002, only TV 2 applied and was awarded the licence for another seven years. However, in 2009 the DTT network in Norway was completed and the privileges in the licence regarding exclusive 100% coverage were no longer relevant, as all channels broadcasting

3) www.regjeringen.no/upload/KUD/Medier/NRK/NRK-plakaten_per_18juni2012.pdf . The Statutes also include the so-called NRK Manifesto.
4) Act No. 153 of 28 February 1997.
5) NRKs Statutes presuppose a clear distinction regarding accounts and operations between the NRK's commercial activities and public service broadcasting activities.

in the DTT network would achieve equal coverage. Instead, in 2011 TV 2 entered into an Agreement[6] with the Ministry of Culture to serve as a public service broadcaster with must-carry privileges (section 1-2, cf. Broadcasting Regulations section 4-2). The Agreement states that cable owners are obliged to retransmit the television broadcasts of TV 2 at a cost in accordance with the level set by market conditions, cf. section 1-2, second paragraph, cf. Broadcasting Regulations section 4-2. In return, TV 2 is obliged to pay NOK 10 million each year[7] to the support schemes for audiovisual productions managed by *Norsk Filminstitutt* (the Norwegian Film Institute), cf. Agreement section 2-1.

2.2. Media-specific anti-concentration rules

In 1995 the Media Ownership Committee[8] investigated what consequences a concentration of ownership might have for the freedom of expression. On the basis of the committee's recommendations, the government proposed[9] to introduce legislation regarding ownership of the media. *Lov om tilsyn med erverv i dagspresse og kringkasting* (the Act Relating to Supervision of the Acquisition of Newspaper and Broadcasting Enterprises)[10] laying down media-specific anti-concentration rules was adopted by the Norwegian *Storting* (the Norwegian Parliament) in 1997 and entered into force on 1 January 1999. Since, the Act has been amended on two occasions.[11] When the Act came into force, the ownership thresholds (see below) were not fixed in the wording of the Act. Along with the first and most wide-ranging amendments in 2004, where among other factors the thresholds were fixed at 40% of the audience share, the official name of the Act was also changed to *Lov om eierskap i media* (Act Relating to Media Ownership, hereinafter "Media Ownership Act"). In 2006, the limits were lowered to 1/3 of the audience share.[12]

The Media Ownership Act is enforced by *Medietilsynet* (the Norwegian Media Authority, hereafter called "the Media Authority"), cf. section 5 of the Act.[13] *Kulturdepartementet* (the Ministry of Culture) provides the framework for the Media Authority's activities. However, section 6 of the Media Ownership Act states that the Media Authority is acting independently of the ministry of culture when handling cases pursuant to the Media Ownership Act. *Klagenemnda for mediesaker* (the Media Appeals Board) is an independent board for appeals against decisions by the Media Authority, cf. section 8 of the Act.

The purpose of the Media Ownership Act is to promote freedom of expression, genuine opportunities to express one's opinion and a comprehensive range of media (cf. section 1). Section 2 defines "acquisition of an ownership interest" as "[a]ny form of assumption of an ownership interest, including purchase, exchange, gift, lease, acquisition by inheritance or distribution of an estate, coercive sale and expropriation, and also subscription for an ownership interest in an enterprise. An acquisition of assets which entails the full or partial acquisition of a business shall also be regarded as acquisition of an ownership interest."[14]

Further, the scope of the Media Ownership Act follows from sections 3 and 4 of the Act. According to section 3, the Act applies to enterprises which operate daily newspapers, television, radio or electronic media, and enterprises which as owners exercise an influence on such enterprises. Section 4 stipulates that the Act shall apply to acquisitions of ownership interests or co-operation agreements which have an effect or are liable to have an effect in "the realm". What matters is whether the acquisition in question has or is liable to have an effect with regard to the purpose of the Media Ownership Act in

6) http://www.medietilsynet.no/Documents/Tema/Allmennkringkasting/2011/101203_TV2-avtalen.pdf
7) According to the Agreement, the compensation shall be adjusted annually due to changes in the consumer price index.
8) Norsk Offentlig Utredning, Official Norwegian Report (NOU) 1995: 3.
9) Odelsting Proposition No. 30 (1996-97).
10) Act No. 53 of 13 June 1997; http://www.medietilsynet.no/Documents/Englishtxtpages/120201_Eng_Eierskapslov.pdf
11) In Storting White Paper No. 57 (2000-2001) I ytringsfrihetens tjeneste. Mål og virkemidler i mediepolitikken the government initiated a review of the Media Ownership Act. The final proposal for amendments was presented in Odelsting Proposition No. 81 (2003-2004), and the Amended Act was adopted by the Storting in 2004. With the exception of section 11, the law entered into force on 1 January 2005. The new section 11 entered into force on 1 July 2005.
12) As presented in Odelsting Proposition No. 46 (2005-2006) and adopted by the Storting in 2006.
13) Through the adoption of the Media Ownership Act in 1997, the Media Ownership Authority was established as an independent body and was operative from 1 January 1999. With effect from 1 January 2005, the Media Ownership Authority merged with the Mass Media Authority and the Norwegian Board of Film Classification to become the Norwegian Media Authority.
14) In cases where no one holds more than 50% of the shares in an enterprise, the Media Authority will also consider a minority acquisition as an "acquisition of an ownership interest", unless the acquirer achieves less than 5% of the total shares in the particular media enterprise.

the Norwegian media markets. According to the preparatory works[15] of the Media Ownership Act, a significant ownership position (described below) normally indicates that the position is in conflict with the purpose of the Act. The Act applies to Norwegian as well as foreign enterprises. Firstly, the law will apply if foreign enterprises make acquisitions in Norwegian media enterprises. Secondly, acquisitions of foreign companies may be subject to the Act if these foreign companies have ownership interests that involve control of daily newspaper, radio or television enterprises in Norway.

Section 9, first subsection of the Media Ownership Act authorises the Media Authority to intervene against acquisitions in enterprises that operate daily newspapers, radio or television. The provision contains the two main conditions for such interventions. The first condition is that the acquirer alone or in co-operation with others has or is about to gain a significant ownership position in the national or regional media market. The other condition is that the ownership position is in conflict with the purpose set out in section 1 of the Act. A decision to intervene may entail prohibiting the acquisition, ordering the divestment of ownership interests that have been acquired, or allowing the acquisition on conditions necessary to prevent the acquisition from being in conflict with the purpose set out in section 1 of the Act.

Although the scope of the Media Ownership Acts also applies to electronic media, at present section 9 of the Media Ownership Act does not permit the Media Authority to intervene against acquisitions in electronic media. The Media Authority's task is therefore only to monitor the ownership of such media. According to the Guidelines for Intervention Pursuant to the Media Ownership Act[16] it is mainly Internet versions of newspapers, broadcasting enterprises, and pure electronic newspapers that are relevant electronic media in terms of the purposes of the Media Ownership Act. However, the Guidelines state that other types of electronic contents communication may also be developing into important channels of expression and arenas for the Norwegian public. Until now, this has not been a factor when the Media Authority has considered acquisitions in audiovisual media services.

Regulation of ownership in audiovisual media services only applies on a national level. *Horizontal ownership positions* in audiovisual media services are regulated in section 10 lit. b) and lit. f) of the Media Ownership Act. According to litera b), a significant ownership position in the national market shall normally be considered to exist in the case of control through a share of 1/3 or more of the total audience share for television. The so-called "cross-ownership rule" (litera f) prohibits an enterprise controlling 10% or more in one media market (daily press, television or radio), to become owner or part-owner of an enterprise forming part of another grouping controlling more than 10% or more within the same media market.

Although the newspaper and radio markets are not in themselves relevant for the scope of this report, regulation of these markets is relevant for the audiovisual sector due to rules on *diagonal ownership positions*. Section 10 lit. d) stipulates that a significant ownership position in the market nationally shall normally be considered to apply if an actor has a market share of 30% or more in one of the media markets (daily press, television or radio) and gains a market share of 20% or more in one of the other media markets after an acquisition. According to litra e), a significant ownership position normally applies if an actor has a market share of 20% or more in two of the media markets and gains a market share of 20% or more in the third market after an acquisition.

2.3. Competition law

Lov om konkurranse mellom foretak og kontroll med foretakssammenslutninger (the Competition Act)[17] is enforced by *Konkurransetilsynet* (the Norwegian Competition Authority). The purpose of the Competition Act is to further competition and thereby contribute to the efficient utilisation of society's resources. When applying the Act, special consideration shall be given to the interests of consumers, cf. section 1.

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15) Odelsting Proposition No. 81 (2003-2004) pp. 43-44.

16) 1 July 2006; www.medietilsynet.no/Documents/Englishtxtpages/100309_MediaOwnershipAct_guidelines.pdf . The Guidelines are written by the Media Authority, and aim to provide an overview and summary of the regulations, in order to ensure predictability and equal treatment for all actors. An important purpose of the Guidelines is to explain the Media Authority's practice.

17) Act No. 12 of 5 March 2004; www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-2004/

The Act is partly harmonised with EU competition rules and includes prohibitions against cartels and abuse of dominant positions. A pre-merger notification system exists. The criterion for prohibiting concentrations is "the creation or strengthening of a significant restriction of competition". The Act was amended in 2005 and 2008.

The Competition Authority supervises competition in the various markets (section 9 Competition Act), among other things by ensuring adherence to the prohibitions and orders of the Competition Act (section 9a) and by intervening where necessary against concentrations (section 9b). The Competition Authority acts if it finds that a specific development will create or strengthen a significant restriction of competition, contrary to the purpose of the Competition Act (section 16).

The scope of the Competition Act will in many cases overlap with the Media Ownership Act, but both acts apply in parallel and independently of each other. While the purpose of the Media Ownership Act is to promote democratic objectives like freedom of speech and media pluralism, the Competition Act promotes common goods like competition, effectiveness, socially justifiable prices and innovation. To some extent, the two laws could be said to have overlapping effects, but mainly they are complementary. Control of mergers under the Competition Act (section 16), which will be more closely described later, includes vertical integration. This represents an area where competition law takes over functions of the media specific regulation. Also, the advertising markets are not regulated in the Media Ownership Act, but are covered by the Competition Act.

2.4. Copyright law

Lov om opphavsrett til åndsverk m.v. (the Copyright Act)[18] contains special provisions on the simultaneous and unchanged retransmission of the original wireless broadcasting, cf. sections 34 and 45a, cf. section 36. These provisions regulate cable TV distributors' use of the original wireless broadcasting signal (through extended collective licences), and furthermore compensation to the rights holders for the use of its content.

2.5. Specific rules for services enabling or facilitating use or reception

As the result of a tender, *Norges televisjon AS* (NTV) was awarded a licence[19] to build and operate a DTT network in Norway in 2006.[20] According to section 3.6.1 of the licence, NTV is obliged to offer an EPG accessible to all content suppliers. Section 4.7 states that NTV must develop a specification for digital television receivers that are based on open and recognised standards, and further that NTV shall comply with requests from manufacturers of receivers for access and use of the specification.

3. Main policies and relevant court/administrative decisions

As mentioned in the introduction, there is an ongoing controversy between cable operator Canal Digital (owned by Telenor) and TV 2 Group, the owner of the commercial public service broadcaster TV 2. The conflict results from a disagreement dating back to 2007 on the price Canal Digital has to pay for retransmitting TV 2. Through its Agreement with the Norwegian State, dating back to 2010, TV 2 enjoys must-carry privileges. The Agreement states that the price for retransmission is to be determined in accordance with market conditions. Until 2010, the decisions of *Kabeltvistnemnda* (the Commission of Cable TV Disputes)[21] were in favour of the cable operators' suggestions on the price for retransmission of the TV channel. However, on 8 December 2011 the Board decided[22] to adjust the monthly price per subscriber for TV 2 from NOK 0.57 to NOK 5.00. Appeals against decisions made by the Commission must be tried in court, and in June 2012 news

18) Act No. 2 of 12 May 1961.
19) www.medietilsynet.no/Documents/Tema/TV/Konsesjon/Konsesjon_NTV_2006-21.pdf
20) The DTT network was completed in 2009.
21) The Commission is appointed by the ministry of culture and determines disputes concerning retransmission of television broadcasts. A chairman and two members constitute the Commission; www.regjeringen.no/nb/dep/kud/tema/medier/kringkasting/kabeltvistnemnda.html?id=498741
22) Kabeltvistnemnda 2011 sak nr 3/2010; www.regjeringen.no/upload/KUD/Medier/Avgjorelse-3-2010.pdf

channels reported that Canal Digital is considering legal action against TV 2 and the ministry of culture.[23]

As mentioned earlier, the Media Ownership Act does not provide a legal basis to intervene against acquisitions in electronic media. In 2007, the government stated the need for a new review of the Media Ownership Act,[24] where regulation of ownership positions in electronic media is one of the main questions. On 11 May 2011 the ministry of culture appointed an Expert Group to consider a number of issues related to the media-specific ownership regulations.[25] The purpose is to amend the Act in order to adjust the regulation to technology changes and changing media markets. The Expert Group was mandated to conduct a full review of the regulation of media ownership, including the regulatory model, distinction of markets and ownership restrictions on the regional and national level. The Group was also asked to consider how electronic media should be regulated in the Media Ownership Act, and whether the Media Ownership Act should be expanded to cover vertical integration. Whether or not the Media Ownership Act should be abolished was not a question covered by the mandate of the Expert Group. According to the mandate, the purpose of the existing Media Ownership Act should form the basis for the Group's work.

The Expert Group delivered its report *Medieeierskapsutredningen* 2012 (Media Ownership Report 2012)[26] to the ministry of culture on 24 April 2012. The Group suggests some changes in today's regulatory system. First, the Group proposes amending the Act's concept of acquisitions to apply a competition-law control concept in the assessments. If this proposal is approved, an enterprise will only be viewed as holding an ownership position in another enterprise if it exercises actual or legal control over it, and certain minority ownership positions in a company will not be included when ownership positions are calculated.

Further, the Group proposes to delete the Act's predefined markets, in order to make the regulatory model more robust to ongoing technological shifts and changes in media use. Instead, the Expert Group proposes that the Norwegian Media Authority be given the power to lay down relevant media markets by regulations, supposedly every third year. In connection with a possible intervention by the Norwegian Media Authority, the concentration in the market in general should be considered.

Concerning national restrictions on *horizontal ownership positions*, the Group proposes that these be partly upheld, by keeping the national threshold of 1/3 as a basis. At the same time, the Group recommends to introduce a "safe harbour" in the form of a lower intervention threshold of 1/4.[27] Further, the Group proposes to abolish the special provisions relating to intervention in section 10 f) of the Media Ownership Act, referred to above as the "cross-ownership rule". With regard to rules on *diagonal ownership positions*, the Group suggests upholding a special rule concerning intervention in connection with multimedia ownership in two separate markets. The Group proposes to introduce a presumption that acquisitions are in violation of the Act if a player has an ownership interest of 1/3 or more in one market and an acquisition in a different market gives it an ownership interest of more than 1/4 in that second market.

Regarding electronic media, the Expert Group concludes that it is currently not necessary to define electronic media as a separate market in the sense intended by the Media Ownership Act. The Group proposes not to set special ownership limitations for electronic media. At the same time, the Group acknowledges that this position may change over time and suggests that new markets could be delineated through regulations.

23) http://e24.no/media/telenor-truer-med-soeksmaal-mot-staten/20244794
24) Storting White Paper No. 30 (2006-2007) Kringkasting i en digital fremtid (Broadcasting in a Digital Future).
25) The Expert Group consisted of Lawyer Mona Søyland (leader), Professor in Media and Communications Tanja Storsul and Professor in Economics Øystein Foros. According to the mandate the Group had to hold meetings with media players and relevant regulatory authorities during the process. For the mandate (in Norwegian only), see: www.regjeringen.no/upload/KUD/Styrer_raad_utvalg/Medieavdelingen/Eierskapslov-mandat.pdf
26) www.regjeringen.no/upload/KUD/Styrer_raad_utvalg/Medieavdelingen/Medieeierskapsutredningen_2012.pdf
27) This implies that if the total ownership interest after the acquisition is lower than 1/4, the Media Authority cannot intervene against the acquisition. Further, if the ownership interest after the acquisition is between 1/4 and 1/3, the Media Authority can intervene following a specific assessment.

As of today, the Expert Group suggests that electronic media should be considered as integrated parts of traditional markets, i.e. daily press, television and radio markets. The argument is that electronic media are primarily considered to be extensions of the traditional businesses of the media. As a consequence of this proposal, the television and the Internet services of the television channels will form a common television market. The Group proposes that electronic media should be given a different weighting than traditional media. User surveys could be used to reveal appropriate weighting levels.

On 22 June 2012 the ministry of culture submitted the report and a proposal for an amended Act to a public consultation. Since the announcement of the submission took place right before this contribution was completed, the ministry's proposals are not thoroughly discussed here. However, the ministry has principally endorsed the proposals from the Expert Group. The deadline for the consultation is set at 31 August 2012.

II. Platform operators and converged services

1. Players and issues related to market power

The market of platform operators and converged services is still at an early stage of development in Norway and, as far as the Media Authority is aware, not fully mapped.

There are a range of Internet services offering films and TV series to rent on-demand, e.g. Film2home.no, Sfanytime.com and Filmarkivet.no. Some Norwegian users connect to Apple TV and Netflix by way of a so-called VPN service in order to get access to American TV series at the time they are screened in the US. Comoyo, an Over-the-top-TV service owned by the Norwegian telecom corporation Telenor, is already operational and offers TV series, films, football games (Norwegian Premier League) and the 13 TV channels.[28] Further, international players are about to launch services in the Norwegian market. One player which is building a smart TV service with Norwegian content is Samsung Smart TV. News channels have reported that Netflix is going to establish itself in the Norwegian market by the end of 2012 and that HBO will launch HBO Nordic in Norway, Sweden, Denmark and Finland during the fall of 2012.[29]

2. Legal framework

The specialised media concentration rules in the Media Ownership Act are not applicable to this market at the moment. Vertically integrated players with ownership interests in the distribution market will be affected by electronic communications law (described in the next section). General competition law in the Competition Act (described in the first and last section) applies likewise to these markets as it does to other markets. As far as the Media Authority is aware, the Competition Authority has not handled any cases concerning players in these markets.

The special provisions in the Copyright Act on simultaneous and unchanged retransmission (described above), are also applicable to distribution of TV broadcasts on the Internet as long as the distribution is carried out by a third party to a closed group of customers.

3. Main policies and relevant court/administrative decisions

The Expert Group that considered amendments to the Media Ownership Act, proposed that the scope of the Act should be somewhat extended compared to today. Regarding the definition of electronic mass media, the Group proposed that on-demand services which could be said to have a similar function to broadcasters, should be included. The Expert Group stresses that certain on-demand services, like film rental services, do not seem relevant in light of the objectives the Media Ownership Act pursues.

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28) www.comoyo.com/no

29) www.kampanje.com/medier/article6189496.ece , www.kampanje.com/medier/article6191060.ece. According to the article, it is uncertain whether HBO Nordic will be a streaming service or if it will be distributed over a cable network.

Post- og teletilsynet (the Post and Telecommunications Authority) has recently delivered a report on so-called Content Delivery Networks (CDNs).[30] CDNs make it possible for content deliverers to distribute video and TV services, applications and software with high quality and in large quantities over the Internet. The Authority has assessed the need for regulation of the market for CDNs and assumes that CDN services as such do not initially appear to meet the definitions of electronic communications networks or services as laid down in section 1-5 no. 2 and 4 of *Lov om elektronisk kommunikasjon* (the Electronic Communications Act):[31]

- Electronic communications network: electronic communications system that includes radio equipment, switches, other connection and routing equipment, associated equipment or functions
- Electronic communications service: service that wholly or primarily comprises conveyance of electronic communications and that is normally provided for a fee.

When it comes to infrastructure-based CDN services, the transmission part could be in compliance with the definitions. However, according to the Authority the conclusions are uncertain and can be changed, given the proposals for new definitions that the ministry of transport and communications sent out for general consultation in June 2010.[32] Among other things, the ministry proposed a new definition of an electronic communications service: "service that wholly or primarily comprises conveyance or facilitation of communication over an electronic communications network and that is normally provided for a fee". The Post and Telecommunications Authority assumes that if this proposal is adopted, this might result in all types of CDNs being covered by the definition of an electronic communications service.

III. Distribution (network operators)

1. Players and issues related to market power

Examples of network operators are Canal Digital, Get, Viasat and Altibox. These operate on digital and/or analogue cable, and/or satellite or IPTV. NTV is the only operator and RiksTV the sole provider of pay-TV in the DTT. In addition to offering channel packages of Norwegian and foreign TV channels, operators on digital platforms offer their users films and TV series for rent.

Telenor is a large player in the distribution market through its ownership in Norkring,[33] Canal Digital (analogue/digital cable and satellite platforms) and 1/3 of the shares in NTV/RiksTV[34] (DTT network). Among other things, Telenor also is the owner of Conax, a technology company that provides conditional access solutions for digital television. In the content market Telenor is involved through its 35% share in C More Entertainment/Nordic Canal+.

As mentioned earlier there has been a controversy for some years between network operators like Canal Digital and Get, on the one hand, and TV 2 Group, on the other, on the price for retransmission of public service channel TV 2. Recently, this conflict has escalated between Canal Digital and TV 2 Group. As a result of this controversy, Canal Digital has taken certain steps like changing the EPG position of some of TV 2 Group's niche channels and notifying termination of the contract for broadcasting some of its sports channels. On 20 June 2012, Canal Digital took matters a step further and sent a notification that it is considering legal action against TV 2 and the ministry of culture.

30) *Content Delivery Networks*. PT-rapport nr. 3 2012.
31) Act. No. 83 of 4 July 2003; www.npt.no/ikbViewer/Content/ekom_eng.pdf?documentID=7922
32) www.regjeringen.no/nb/dep/sd/dok/hoeringer/hoeringsdok/2010/horing-om-endring-i-lov-om-elektronisk-k.html?id=610269
33) Norkring has developed and owns the infrastructure for radio and digital TV.
34) In addition to Telenor, NTV and RiksTV are both owned by NRK and TV 2 Group by 1/3 each.

Disagreements also arose between RiksTV and local TV stations on the conditions for local broadcasting in the DTT network, e.g. placement of local TV in the EPG.[35]

One player is somewhat difficult to define as a distributor, but should still be mentioned. In 2008 NRK, TV 2 Group and MTG established the joint venture company Norges mobil-TV (Norwegian Mobile TV Corporation, NMTV). NMTV received a temporary permission to broadcast DMB signals in VHF Band III on 14 January 2009. Six TV channels have been launched under the name MiniTV, and the goal is, according to NMTV,[36] to find out how MiniTV can be run best in Norway. For the time being the transmissions can only be received via DMB ready receivers in the Greater Oslo area.

2. Legal framework

2.1. Media-specific anti-concentration rules

The substantive scope of the media-specific anti-concentration rules (section 3 Media Ownership Act) entails that some enterprises which in general speech are described as media enterprises, are not subject to the Act. Examples are enterprises that operate distribution networks, be it satellite or cable networks. This implies that the regulatory authority (the Media Authority) cannot intervene against acquisitions in enterprises that operate in the distribution market. However, the preparatory works[37] of the Media Ownership Act state that the Media Authority may assign ownership in other value chains in the media market weight, in connection with an assessment of a horizontal acquisition.

2.2. Competition law

The control of concentrations under the Competition Act includes vertical integration. Pursuant to section 16 of the Competition Act, the Competition Authority shall intervene against a concentration if the Authority finds that it will create or strengthen a significant restriction of competition, contrary to the purpose of the Act. In addition to assessing vertical transactions directly in merger controls, the Competition Authority will also consider vertical effects of horizontal mergers.

A refusal to strike a deal may constitute an abuse of dominant position under the Competition Act, section 11. In such a case, the Competition Authority may oblige a provider to give other operators access to its facilities. Two conditions must be fulfilled before such an obligation may be imposed: the provider must be dominant, and it must constitute an abuse of this dominant position not to provide access. As a starting point there is a high threshold for determining such abuse.

According to section 14 of the Competition Act, *Fornyings-, administrasjons- og kirkedepartementet* (the Ministry of Government Administration, Reform and Church Affairs) can intervene by passing regulation against behaviour that restricts or is liable to restrict competition contrary to the purpose of the Act. Intervention might be considered in cases where the prohibitions under the Competition Act are not applicable, but there is a perceived need for a general regulation of the market. The provision may also be applied in markets where a company violates section 11 of the Competition Act and several other players use the same anti-competitive business practices without being affected by the bans, because they do not have a dominant market position.

2.3. Copyright law

As mentioned earlier, the Copyright Act contains special provisions on the simultaneous and unchanged retransmission of the original wireless broadcasting, cf. sections 34 and 45a, cf. section 36. The provisions regulate cable TV distributors' use of the original wireless broadcasting signal (through extended collective licences), and furthermore compensation to the rights holders for the use of its content.

35) In 2010 RiksTV moved local TV from position 19 to 52/53 in the EPG, which led to protests from the Norwegian Media Businesses' Association.
36) www.nrk.no/contentfile/file/1.6623793!factsheet.pdf
37) Odelsting Proposition No. 30 (1996-97).

2.4. Electronic communications law

The Electronic Communications Act is enforced by the Norwegian Post and Telecommunications Authority. The purpose of the Act is to secure good, reasonably priced and future-oriented electronic communications services for users throughout the country through efficient use of society's resources by facilitating sustainable competition, as well as by fostering industrial development and innovation, cf. section 1-1. Pursuant to section 1-2, the Act applies to activities connected with the transmission of electronic communications and the associated infrastructure, services, equipment and installations. In addition to facilitating the transition from a previously regulated monopoly market to a competitive market, the purpose of the framework for electronic communications is to promote consistent and technology-neutral regulation of electronic communications networks and services across different sectors.

Before the application of sector-specific measures, the Authority must undertake a detailed analysis of the predefined product and service markets in the area, to determine whether any of the players can be said to be a provider with significant market power. If the analysis shows the presence of a provider with significant market power, the provider shall be subject to one or more sector-specific obligations that may contribute to the development of competition in that market, cf. section 3-4. The Authority has a range of possible obligations that it can impose on providers, e.g. obligations to give other providers access to electronic communications networks, co-location and information and support systems, or pricing obligations for access.

Section 4-3 of the Act also contains a general provision that obliges providers of conditional access services for digital radio and television to meet any reasonable request for access from content suppliers. The provision covers all providers of access services, regardless of whether the provider has a significant market position or not. Furthermore, according to this provision the same requirements may be imposed on providers of other features that can restrict access to digital radio and television, e.g. application programming interfaces (APIs) and electronic programme guides (EPGs).

2.5. Principles for net neutrality

The Norwegian Post and Telecommunications Authority and different players in the Internet market (both network operators and content deliverers) have co-operated on developing a range of principles for net neutrality. Briefly, these principles can be summarised as follows:

- Users have the right to an Internet connection of specified capacity and quality.
- Users have the right to an Internet connection that provides the possibility to:
  - collect and deliver content as desired;
  - use services and applications as desired;
  - connect to equipment and use software, which is not harmful to the network, as desired.
- Users have the right to an Internet connection which is not discriminated due to the type of application, service or content, and to who is the sender and receiver.[38]

According to the last principle, traffic from users and suppliers shall be handled in a non-discriminatory way if bottlenecks occur on the Internet. In some cases there may be exceptions to these principles, as when ISPs offer Quality of Service on selected services.

2.6. Must-carry rules

Section 4-2 of the Broadcasting Regulations states that all cable network operators are obliged to retransmit the two public service broadcasters, NRK and TV 2. In addition, cable operators shall retransmit the non-profit free-to-air broadcaster Frikanalen (The Free Channel).[39] The regulations state that the price for retransmission of TV 2 is to be determined in accordance with market conditions.

38) www.npt.no/ikbViewer/Content/110157/Om_nettnoytralitet_v2.pdf
39) www.frikanalen.no/. The channel has been broadcasting regularly since January 2009 and is run by Norwegian NGOs.

The pay-TV provider for the DTT network, RiksTV, is obliged to provide capacity for NRK and other public service channels (currently TV 2), and one non-profit open broadcaster (currently Frikanalen), cf. NTV licence section 3.4, cf. Broadcasting Regulations section 4-2.

2.7. General provisions in the NTV licence

A key goal behind the development of the DTT network has been to ensure the Norwegian population a wide variety of television programming. As mentioned earlier, the NTV licence of 2 June 2006 includes several general provisions pertaining to this goal, including that all broadcasters should be given access by RiksTV on non-discriminatory terms, cf. section 4.8. RiksTV is also obliged to offer NRK's core services to its customers without charging any costs (customers have to cover expenses related to purchases of reception equipment), cf. section 3.5, second paragraph. Section 3.4 of the licence also states that RiksTV shall provide capacity for one local TV station in each region, and further that local TV should be ensured satisfactory conditions regarding coverage. However, the provisions regarding local broadcasting are not included in the Broadcasting Regulations.[40]

RiksTV is obliged to offer an EPG accessible to all content suppliers, cf. section 3.6.1. Section 4.7 states that RiksTV must develop a specification for digital television receivers that are based on open and proven standards, and further that RiksTV shall comply with requests from manufacturers of receivers for access and use of the specification.

3. Main policies and relevant court/administrative decisions

The Norwegian Post and Telecommunications Authority assessed in 2006 whether there were grounds for imposing sector-specific competition regulation in the Norwegian broadcasting markets. Market analysis was applied to the predefined wholesale market for transmission services for broadcasting, and the market for deliverance of broadcast content to end users (Market 18). However, the Authority found that the conditions for sector-specific regulation were not met. The Authority concluded that competition law was a sufficient legal basis for addressing the concerns that the sector-specific *ex ante* regulation is intended to address in these markets. Even if it was assumed that the barriers for market entry were relatively high, it was thought that the market was moving towards effective competition.[41]

Initially, the NTV licence stated that NTV would provide capacity for a competing pay-TV provider (in addition to RiksTV) after the shutdown of the analogue network, cf. section 4.8, second paragraph. Upon request of NTV, this condition was removed from the licence by the ministry of culture in 2009. In its decision, the ministry emphasised the importance of the digital terrestrial platform being competitive vis-à-vis other distribution platforms.[42]

Whether the Media Ownership Act should be extended to cover vertical integration has been an issue on several occasions. For instance, this question was discussed during the amendment of the Act in 2004. Based on a consultation, the ministry of culture found that vertical integration did not constitute a major problem in the media field at that time. The ministry concluded that the Act should not be expanded to cover vertical integration, but that the development of this area should be followed closely in the future.

40) This implies that the local TV broadcaster does not have must-carry privileges.

41) Norwegian Post and Telecommunications Authority 20 November 2006. In 2007, the EU Commission removed Market 18 from its list of recommended markets.

42) www.regjeringen.no/nb/dep/kud/pressesenter/pressemeldinger/2009/nye-vilkar-for-det-digitale-bakkenettet.html?id=571013

According to the Expert Group that has proposed changes to the Media Ownership Act, the media-specific anti-concentration rules should not be expanded to cover vertical integration.[43] The Group supports this proposal with several arguments. First, the main cause for concern in the media market, as in other markets, is horizontal ownership concentration. Further, the Group points out that caution should be exercised when intervening in an emerging and dynamic market, and that many vertical media distribution markets are characterised by technological development and rapid changes. Also, special regulation of vertical integration in the media market would, in the opinion of the Group, result in regulatory costs. In the Expert Group's opinion, the regulation in the Competition Act and Electronic Communications Act of vertical integration and critical bottlenecks in a competition perspective is sufficient. Should a vertically integrated enterprise demonstrate undesirable behaviour, intervention after the fact may better serve the objective, as permitted by the legal basis in section 11 of the Competition Act.

43) Media Ownership Report 2012 pp. 126-127.

POLAND

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I. Audiovisual media services and enabling services

Media services in Poland are regulated by *ustawa Prawo prasowe* – the Press Law of 1984[2] that sets general standards for a broadly defined "press" with a meaning coming close to "mass media",[3] including standards for journalistic activities, and – in case of broadcasting programme services – by *ustawa o radiofonii i telewizji*, the Broadcasting Act of 1992 (BA).[4] So far non-linear audiovisual media services are not specifically regulated. They are only subject to the basic standards set by the Press Law. However, in September 2012 the governmental draft of a revised Broadcasting Act, aimed at regulating such on-demand services in line with the Audiovisual Media Services Directive (AVMSD), was submitted to the parliament.[5]

1. Approach to public service media

Both public service media (PSM) and commercial broadcasting services are covered by the BA. The Act, however, contains special provisions on the public service remit, the specific tasks, structure, governance, activities and funding of PSM,[6] which influence the market power of PSM operators in different ways. According to the law, the structure of the PSM system consists of the two national organisations *Telewizja Polska S.A.* (Polish Television – TVP) and *Polskie Radio S.A.* (Polish Radio – PR), and 17 regional public service radio companies. Pursuant to the BA, TVP has to have 16 regional branches, each in charge of a regional public TV channel; in practice these channels form the network, which broadcasts the terrestrial news channel TVPInfo, with regional windows. Under the law, PSM

1) Dr iur., lecturer (*adiunkt*) at the University of Warsaw, Institute of Civil Law, Department of Intellectual Property; legal adviser (*radca prawny*) in Warsaw – adviser to the Board of TVP; member of the Copyright Commission in Poland.
2) The Act of 26 January 1984 – the Press Law, Official Journal (*Dziennik Ustaw* – "Dz.U."), No. 5, item 24, with amendments.
3) The notion of the press covers under Article 7 of the Press Law any periodic publications which do not form a closed, homogenous whole, appearing at least once a year, having a regular title or name, a current number and date, including any "media created in the course of technological progress, which disseminate periodical publications through printing, vision, audio or other technique".
4) The Broadcasting Act of 29 December 1993, consolidated version: *Dz.U.* of 2011, No. 43, item 226, with amendments. An unofficial English translation is available at: www.krrit.gov.pl/Data/Files/_public/pliki/office/broadcasting-act_10-08-2011.pdf
5) The Draft Act amending the Broadcasting Act and Certain other Acts, adopted by the Council of Ministers on 21 August 2012, and submitted to the Parliament on 5 September 2012. The text of the draft in Polish is available at: www.sejm.gov.pl/Sejm7.nsf/druk.xsp?documentId=9CBBBAD0BA469231C1257A7200477E46
A first preceding draft, which had aimed to implement the AVMSD and partly concerned on-demand audiovisual media services, had been adopted by an overwhelming majority of the Sejm (the lower house of the parliament) but was then rejected by the senate (the upper house) in 2011, in reaction to protests of the Internet industry and some civil society activists. The critics had questioned, in particular, the proposed registration requirement with respect to on-demand audiovisual media services.
6) Articles 21-32 BA.

organisations may establish other undertakings only in order to fulfill tasks of PSM and subject to the consent of the regulatory body for radio and television, the *Krajowa Rada Radiofonii i Telewizji* (National Broadcasting Council – KRRiT). The law lists the main radio and television channels that the PSM organisations broadcast as their core services. Other channels may be launched only if specific requirements are met, namely: they must fall within categories listed in the law (local channels, channels for transmission abroad, thematic channels), fulfill the public service remit, and – in case of thematic channels – obtain a licence from the KRRiT. Additional conditions are often imposed in these licences. Commercial communications activities in PSM channels are more limited than they are in commercial channels, due to the ban on interrupting programmes with advertising and teleshopping, except coverage of sports events containing mandated intervals and other events containing intervals.[7]

2. Regulation of market entry

The Press Law requires the registration in a District Court of the activity of publishing a daily or periodical.[8] According to the case law, this requirement also applies to the electronic versions of these publications disseminated over the Internet and to stand-alone electronic publications which fulfill the criteria of the press and a daily or periodical publication.[9] In practice, the registration resembles rather a notification, and is relevant mainly in the context of the protection of press titles. The market power of an editing entity or its ownership structure has no relevance in this regard.

Broadcasting of radio or television programme services is subject to licensing by the KRRiT, except for the provision of statutory programme services of PSM and of any webcasting services.[10] The Chairman of the KRRiT grants a broadcasting licence in the form of an administrative decision based on a resolution by the KRRiT. TV webcasting, i.e. television programme services transmitted exclusively on information and communication networks, shall be registered in the register kept by the Chairman of the KRRiT as of May 2011.[11] Retransmission of programme services, except those with must-carry status, is also subject to registration.[12] Audio webcasting (Internet radio) and non-linear media services (both audio and audiovisual) are so far left outside the scope of the Broadcasting Act and thus outside the market-entry regulation that it provides. The governmental draft of the revision of the BA that should regulate on-demand audiovisual media services does not propose any *ex ante* market-entry mechanism (licensing, registration, notification). Instead, it contains an *ex post* reporting obligation. Providers of on-demand AVMS would be obliged to deliver yearly reports to the KRRiT on their activity, to the extent that such services were regulated by the BA. Non-compliance with this obligation would be subject to rather lenient sanctions.

3. Media-specific anti-concentration rules (ownership rules)

3.1. Media-specific anti-concentration rules in Polish legislation are rather limited. They apply only to broadcasting and are related to its licensing. The Press Law does not contain rules on media concentration nor on ownership (limitations). Accordingly, the printed press and electronic media other than broadcasting programme services are not subject to any media-specific anti-concentration rules, foreign capital limits or even legislative requirements with regard to media ownership transparency (except for obligations emanating from general rules applicable to companies).

3.2. Media-specific anti-concentration rules are included in the BA. Article 36.2.2 BA stipulates that a broadcasting licence shall not be awarded if the transmission of the programme service, for which the applicant seeks the licence, could result in "a dominant position of the applicant in mass media in the given area". Similar provisions exist in the context of a possible revocation of a licence

7) Article 16a.7 BA. This exception is narrowly interpreted, as covering only events which are beyond the control of the broadcaster, and does not include studio-based programmes commissioned by PSM. See judgment of the Supreme Court of 29 October 2010, I CSK 646/09, described in more detail in section 4.2.
8) Articles 20-21 Press Law.
9) Judgment of the Supreme Court of 26 July 2007, IV KK 174/07.
10) Articles 33-40b BA.
11) Articles 41 and 44a BA, as amended by the Act of 25 March 2011 (Dz.U. No. 85, item 459) that revised the Broadcasting Act to implement the AVMSD in part, i.e. as far as linear services are concerned.
12) Articles 41 and 44 BA.

and a refusal of consent by the KRRiT for the transfer of rights under the broadcasting licence.[13] Under Article 38.2.1 BA, the KRRiT may revoke a broadcasting licence if by transmitting the programme service the broadcaster gains "a dominant position in mass media on the given relevant market" as defined in the provisions on the protection of competition and consumers.[14] Reaching an identically defined dominant position by the broadcaster obliges the KRRiT, according to Article 38a.3.1 BA, to refuse its consent to the transfer of rights granted by the broadcasting licence in case of merger, division or other transformation of companies.

Different formulations are used depending on whether, on the one hand, the licence is awarded ("a dominant position in mass media in the given area") or, on the other hand, the licence is revoked or consent refused for transferring the licence ("a dominant position in mass media on the given relevant market" within the meaning of the competition law). This and the lack of a definition of the term "dominant position in mass media" create uncertainty as to what to understand by dominant position in this context.

In the case of awarding a licence, the lack of a reference to "the relevant market" and thus competition law could be interpreted as the legislator's deliberate decision in favour of a broader approach that might allow the KRRiT to depart from a (possibly) narrowly defined relevant market within the meaning of competition law (usually limited to parts of the wider "broadcasting market", for example the market for free-to-air national television channels or the market for pay-TV in a given geographic area) and to take into account the position of the applicant in all mass media (including, for instance, non-broadcast media, printed and/or electronic press) in the given geographic area.

Even in the case of revoking a licence or refusing consent for the transfer of rights relating to a licence, where the law refers to the relevant market within the meaning of competition law, the BA speaks about a "dominant position in mass media", which shows a media-specific approach, at least to the product side of the relevant market definition. Consequently, it may be assumed that media-specific anti-concentration rules in the BA that apply to the awarding and revoking of a broadcasting licence and to the requirement of the KRRiT's consent for the transfer of rights relating to a licence, refer to a broadly defined "mass media" market that is geographically relevant. In line with the specificity of media law and its focus on the opinion-forming process, the "mass media" field therefore exceeds the mere broadcasting market or the part thereof relevant within the meaning of competition law.

This approach was eventually adopted in the KRRiT Regulatory Strategy for 2011-2013.[15] The KRRiT notes the different logic and goals of competition law, on the one hand, and of media law, on the other hand. While competition law is concerned with the proper functioning of the free market and free competition between market participants, media-specific anti-concentration rules aim at the protection of media pluralism by referring to dominant opinion-forming power (rather than dominant market power). The KRRiT underlines that in contrast to competition law, Article 36.2.2 BA when explicitly referring to a "dominant position in the given area" means the entire field of "mass media", which includes not only radio and television stations, but also, for example, newspapers. Consequently, if the share of a given entity in each of these separate markets does not lead to a dominant position in any of such separate markets, the competition law rules on abuse of a dominant position do not apply, though the entity may control large parts of information supply and provision of opinions in media in the given area. In such a case the media-specific anti-concentration rules included in the BA should be used. The KRRiT states that when applying these rules the definition of a dominant position under competition law should be considered *mutatis mutandis*, i.e., as referring to the entire field of mass media in a given area, rather than (merely) the relevant market within the meaning of competition law.

The KRRiT admits that the existing legislation does not allow effective prevention of phenomena endangering the pluralism of opinions and sources of information.[16] This is in particular due to the

13) The rights under the broadcasting licence are in principle inalienable and shall not be transferred onto the purchaser of a bankrupt enterprise (Article 38a paras. 1 and 2 BA). As an exception, they may be transferred onto another entity in case of a merger, division or other transformation of commercial companies, upon consent of the KRRiT (Article 38a para. 3 BA).

14) See I.4. below.

15) Krajowa Rada Radiofonii i Telewizji, *Strategia regulacyjna na lata 2011-2013*, 1 March 2011, p. 57-59, available (in Polish only) at: www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/strategie/strategia_110420.pdf

16) *Ibidem.*

absence of a clear definition of dominant position in mass media and KRRiT's lack of powers, when it comes to gathering information necessary to analyse media concentration.

Besides the possibility of revoking a licence or refusing consent for transfer of rights relating to a licence in dominant position cases mentioned before, the BA allows the KRRiT to also apply these measures, should another person take over direct or indirect control of the activity of the broadcaster.[17] This provision also constitutes a certain safeguard against uncontrolled media concentration.

Furthermore, the Polish broadcasting law includes a limit of 49% on foreign capital and control in companies to which a broadcasting licence may be awarded. Also the purchase and acquisition of shares or interests in a company holding a broadcasting licence by a foreign person or an entity controlled by such a person requires the consent of the KRRiT.[18] These limits do not apply to foreign persons and subsidiaries of foreign persons having seats or permanent residence in the European Economic Area (EEA).[19] Exempting EEA-based persons and subsidiaries from these rules, an exception introduced in 2004,[20] significantly reduced the practical meaning of the limit, which was originally designed, in 1992, to promote national broadcasting companies and protect them against powerful foreign players that could dominate the market.

More far-reaching media-specific anti-concentration rules were proposed in 2002 and included in a draft aimed at revising the Broadcasting Act. They entailed a ban on simultaneous ownership of national television and national radio stations, as well as the disqualification from holding broadcasting licences for publishers of dailies or periodicals. The draft provoked a great deal of controversy and was finally rejected, after the eruption of a political scandal and bribery allegations, called "Rywin-gate".[21] In consequence public debate on further media-specific anti-concentration measures has practically been frozen since.

4. Competition law aspects

The public competition law, as opposed to private unfair competition law, is regulated principally in *ustawa o ochronie konkurencji i konsumentów* – the Act of 16 February 2007 on competition and consumer protection (Competition Act – CA).[22] The Act, in parallel with EU competition law, prohibits competition-restricting practices, including competition-restricting agreements[23] and abuse of a dominant position.[24] It regulates control of concentration of undertakings[25] and prohibits practices infringing collective interests of consumers.[26]

4.1. It is assumed that an undertaking holds a dominant position if its market share in the relevant market exceeds 40%.[27] This presumption is, however, rebuttable. The definition of "dominant position" in the CA as well as related case law make it clear that a high market share alone is not sufficient to determine the dominant position of an undertaking. The Act defines a "dominant position" as an undertaking's market position which enables it (1) to prevent effective competition in a relevant

17) Articles 38.2.4 and 38a.2.2 BA.
18) Article 40a BA.
19) Article 35 BA.
20) The Act of 2 April 2004 amending the BA, Dz.U. No. 81, item 874, that entered into force on 1 May 2004. This revision was aimed at ensuring compliance of the BA with EU law.
21) The so-called "Rywin-gate" was described in the Final Report of the study on "the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", prepared on behalf of the European Parliament by the European Institute for the Media, Düsseldorf, 31 August 2004, part II, Poland, p.156 (2004 EMI study).
22) Dz.U. No. 50, item 331 with changes. The English translation of the Act is available on the website of the competition authority: http://www.uokik.gov.pl/competition_protection.php
23) Articles 6-8 CA.
24) Article 9 CA.
25) Articles 13 *et seq.* CA. The intention of concentration is subject to a notification to the competition authority if the combined worldwide turnover of participating undertakings in the preceding financial year exceeds 1 billion EUR and/or their combined turnover in Poland in that year exceeds 50 million EUR. The competition authority, by way of administrative decision, issues a consent to implement a concentration which does not result in significant impediments to competition in the relevant market, in particular by the creation or strengthening of a dominant position (Article 18 CA).
26) Articles 24 *et seq.* CA.
27) Article 4.10 CA.

market and thus (2) to act to a significant degree independently of its competitors, contracting parties and consumers. Both conditions must be met. This definition is used also in media cases. For example, in the case of the market entry of a new tabloid press title (Fakt by Axel Springer) offered at lower prices and achieving a high market share in the tabloid press (exceeding 40%), the Warsaw Court of Appeal agreed with the competition authority's assessment that no abuse of a dominant position had taken place. The court referred to the said conditions and underlined that market domination must be stable and last sufficiently long, and in principle it would not be achievable for a new market entrant.[28]

"Relevant market" under the CA means a market of goods,[29] which consumers by reason of their intended use, price and characteristics, including quality, regard as substitutes, and which are offered in an area in which the conditions of competition, by reason of their nature and characteristics (e.g. the existence of market access barriers, consumer preferences, significant differences in prices and transport costs), are sufficiently homogeneous.[30]

Definitions of markets in the context of audiovisual media services, adopted in the case law of the *Urząd Ochrony Konkurencji i Konsumentów* (Office of Competition and Consumers Protection – UOKiK)[31] and courts, often refer to leading decisions under EU competition law, but take into account also national circumstances and specificities of local markets.

The case law distinguishes different relevant markets within the broadcasting sector, consequently establishing that there is no homogeneous broadcasting market. Already in 2002, the UOKiK addressed a case concerning the abuse of a dominant position by the Polish public service television (Telewizja Polska – TVP) through reducing prices for TV advertising space for customers spending on TVP over 50% of their advertising budgets, and decided that the relevant market was the market for the dissemination of TV advertisements on free-to-air television.[32] Thus the authority, referring to the case law under EU competition law,[33] distinguished – within the television broadcasting market – between the market for pay-TV and the market for free-to-air (FTA) TV. The latter was found to consist of commercial television financed from advertising and public service television financed from licence fees and advertising. This distinction has been subsequently upheld by the UOKiK and the courts in other cases.[34] Moreover, a tendency towards further partitioning in particular with regard to the pay-TV market has appeared.

In various cases concerning relationships between broadcasters of pay-TV channels and cable operators, the UOKiK and the courts identified within the national market for pay-TV – as relevant – several national markets for pay-TV channels in the Polish language specialised in specific genres or themes.

In 2006 the *Sąd Ochrony Konkurencji i Konsumentów* (Court of Competition and Consumer Protection – SOKiK), competent for appeals against UOKiK decisions, confirmed the authority's assessment that there existed *the national market for pay-TV news channels in Polish*, and *the national market for pay-TV weather channels in Polish*. The case concerned the abuse of a dominant position by the broadcaster of such Polish channels (TVN24, TVN Meteo), which at that time were the only services provided in their respective thematic profiles on the Polish TV market. The abuse was committed by imposing on the cable operator the contractual obligation to retransmit these channels on all its cable networks in different cities.[35]

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28) Judgment of the Court of Appeal in Warsaw of 20 November 2008, VI ACa 704/08, *Fakt v. Super Express*.

29) Goods are broadly understood for the purposes of the CA, as: "items as well as all forms of energy, securities and other property rights, services as well as construction works" (Article 4.7 CA), thus the notion covers also services, including audiovisual ones.

30) Article 4.9 CA.

31) Under the CA the state authority competent to issue administrative decisions in competition law cases is the President of the UOKiK. In the text we use the shortened indication *case law, decisions, practice of the UOKiK*, whenever decisions of the President of the UOKiK are referred to.

32) Decision of UOKiK of 16 December 2002, DDI-110/2002, *TVP Advertising*. The UOKiK found that this practice had been stopped.

33) Decisions of the EC Commission in cases: COMP/M. 469, *MSG Media Service*, OJ 1994, L 364, p. 1; COMP/M. 779, *Bertelsmann/CLT*, OJ 1996, C 364, p. 3; COMP/M. 553, *RTL/Veronica/Endemol*, OJ 1996, L 134, p. 32.

34) See for example: decision of the UOKiK of 5 October 2004, RPZ 24/2004, *Telewizja Kablowa Poznań*; decision of UOKiK of 12 February 2012, DOK-1/2010, *Euro 2008 public viewing*; decisions of the UOKiK of 14 September 2012, DKK-93/2012 *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-vision*; judgments referred to in the next two footnotes.

35) Judgment of the SOKiK of 14 September 2006, XVII Ama 71/05, *TVN24/TVNMeteo*.

Similarly, the court in 2008 agreed with the UOKiK that the broadcaster of the *Animal Planet* channel had abused its dominant position in the *national market for the wholesale distribution of pay-TV science and nature channels in a Polish language version*, which the UOKiK had identified as a separate market, by potentially offering lower prices to cable operators belonging to one of their professional organisations.[36] In this case the UOKiK differentiated first within the pay-TV market (1) the market for basic channels and (2) the market for premium channels (characterised by the presence of films shown shortly after their premiere in cinemas and by the coverage of the most attractive sports events, as well as by a higher price for subscriptions). Then the UOKiK found it necessary to further partition the pay-TV market for basic channels and distinguished channels devoted respectively to (1) news, (2) entertainment, (3) films, (4) sports, (5) music, (6) children, (7) science and nature, as well as (8) generalist channels. The court found this further segmentation of the pay-TV market for basic channels justified and rejected the appellant's argument that such a narrow approach to pay-TV markets would not be in line with the case law under EU law, by referring *inter alia* to the *Hoffman v. La Roche* case in which groups of vitamins were treated as separate relevant markets.

Similarly, in the case concerning the merger of Polsat and JimJam through the creation of a new undertaking (Polsat JimJam) to produce and disseminate a children TV channel, the UOKiK assessed that the merger had a vertical impact upon the national market for the sale/acquisition of TV programme services for children.[37]

The tendency to adopt a narrow relevant market definition in competition-law cases concerning the media, and in particular broadcasting, is consistent with the national case law concerning the printed press.[38] It goes hand in hand with a narrow approach in cases concerning telecommunications and has consequences in cases of mergers including the media and telecoms sectors. In 2011, the UOKiK assessed the acquisition of control over Polkomtel, one of the 3 leading mobile telephony operators, by the company Spartan Holding. The latter belongs to the capital group controlled by Zygmunt Solorz-Żak (ZSZ group) that includes *inter alia* one of the two leading private national TV stations, Polsat, and other TV channels, the satellite TV platform Cyfrowy Polsat (CP) and some of the major VoD services (Ipla/Iplex). The merger has been seen as an important concentration of power in a converging media and telecommunications sector. The UOKiK cleared the transaction, after broad assessment of its impact on the national market for telecommunications services, and reached the conclusion that the merger would not significantly restrict competition on the identified relevant markets for mobile telecommunications services, which were affected both horizontally and vertically.[39] The UOKiK did not find a significant restriction of competition because, even though Polkomtel had a strong, though not dominant, position, the position of the ZSZ group on these markets remained marginal. The UOKiK also noted the impact of the merger on the national market for the dissemination of radio and television programme services via digital satellite platforms within paid-for programme packages on which CP operates. However, the authority found no reason to even assess whether the market power of CP on this market would be transferred to (telecommunications) markets affected by the merger, in particular because: 1) there is no close complementarity between pay-TV and mobile telephony services, 2) other mobile operators may create packages with competitors of CP, and 3) given the significantly smaller number of subscribers of CP's pay-TV services, compared with the size of the mobile telephony market and the number of subscribers of each of its participants, there is no risk of foreclosure of the mobile telephony market for other participants.[40]

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36) Judgment of the SOKiK of 28 November 2008, XVII Ama 107/07, *Animal Planete*.

37) Decision of UOKiK of 9 March 2010, DKK-24/10, *Polsat JimJam*. The authority cleared the concentration having assessed that it would not significantly restrict competition, given the rich offer of TV channels for children.

38) For the printed press the UOKiK and the courts found that there exist such relevant markets as the national market for tabloid newspapers (Judgment of the Court of Appeal in Warsaw of 20 November 2008, VI ACa 704/08, *Fakt v. Super Express*) or the national market for sports dailies (Judgment of the Supreme Court of 19 August 2009, III SK 5/09, *Przegląd Sportowy v. Sport*). In the latter case, the Supreme Court rejected the argument that generalist dailies which included extensive sports sections or extras might constitute a substitute for sports dailies, and found that one should distinguish within daily newspapers between generalist, sports and financial press.

39) The UOKiK defined as relevant markets affected by the merger horizontally: the national market for retail telecommunications services in mobile public networks and the national market for retail services of broadband mobile Internet access; the market affected vertically was defined as the national wholesale market for access and initiation of connections in mobile public telecommunications networks. With regard to Internet access services, the UOKiK held that mobile and fixed line services are not substitutable and belong to different relevant product markets.

40) Decision of UOKiK of 24 October 2011, DKK-126/11, *Spartan/Polkomtel*.

The media-specific market-power aspects of this important merger have in fact not been assessed, which may support the assertion that there is a need for media-specific market-power regulation and that media pluralism as a public interest objective should be taken more into account in competition law cases.

Another important merger of two major audiovisual media groups, Canal+ and ITI/TVN, with the active role being assumed by Canal+, was approved by the UOKiK in September 2012. The merger consists of two transactions:

1. the acquisition of joint control by *Groupe Canal+* and TVN over the entity created by the merger of *Canal+ Cyfrowy* and *ITI Neovision*;[41]
2. the acquisition of control by *Groupe Canal+* over the holding *N-Vision* that controls in particular the broadcaster TVN[42] and *ITI Neovision*.[43]

The practical result of these transactions will be the merger of two pay-TV satellite platforms: Cyfra+ owned by *Canal+ Cyfrowy* and "n" owned by *ITI Neovision*.[44] Canal+ takes over the control of a major broadcaster of FTA and pay-TV channels (TVN) and the company that has been running *inter alia* the competing pay-TV satellite platform (*ITI Neovision*).[45]

The UOKiK established that these transactions horizontally affected the following markets: (1) the national market for the licensing of pay-TV channels, (2) the market for access to pay-TV services in different geographic areas (national and local), and (3) the national market for TV advertising. Although the undertakings participating in the merger would gain on each of these markets a combined share of over 20%, the UOKiK found that the concentrations would neither result in the creation of a dominant position, nor significantly restrict competition in other ways. Rather the concentration was the result of strong competition in each of the relevant markets, in case of pay-TV channels licensing and access to pay-TV in particular from Cyfrowy Polsat, UPC and other major cable operators, and in case of TV advertising from Polsat and TVP.

The UOKiK noted the oligopolistic structure of the markets for access to pay-TV and for TV advertising, and found that the merger would further strengthen this tendency; however, given the strong competition within these oligopolies, the authority saw no threat of significant impediments to competition. This assessment was largely influenced by the chosen delineation of the relevant markets, and in particular by the broad definition of the market for access to pay-TV services, the one mostly affected by the merger. This market was defined as consisting of services of pay-TV satellite platforms, cable TV and IPTV treated as substitutable; the issue is addressed in more detail in section II. Regarding the national market for the licensing of pay-TV channels, the UOKiK differentiated first between FTA TV and pay-TV, and then, in line with earlier case law, saw reasons for further segmentation of the market according to the thematic nature of the channels, and it identified the markets for film channels, sports channels and other thematic channels. However, the UOKiK found that the merger did not threaten competition either in any of such segments or in the market for the licensing of pay-TV channels in the broader sense, in particular because the share of the undertakings participating in the merger in each of these markets was significantly lower than 40% (the threshold for the presumption of a dominant position). The UOKiK took into account the established position of competing national (CP) and transnational licensors (including Time Warner, News Corp., Discovery Communications, MTV Networks) with rich resources, a growing number of channels distributed in a Polish version (over 50 new channels in the last five years) and the prevailing business model to distribute them as widely as possible, including on platforms run by competing media groups.

41) Decision of UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision*.
42) TVN is the broadcaster of FTA generalist channels such as TVN and TVN7 and pay-TV thematic channels such as TVN24, TVN Meteo, TVN Turbo, TVN Style, TVN CNBC.
43) Decision of UOKiK of 14 September 2012, DKK-94/2012, *Canal+/N-Vision*.
44) The number of subscribers of the three pay-TV satellite platforms at the end of 2011 was (in millions): Cyfrowy Polsat – 3.5; Cyfra+ – 1.55; "n" – 1.275 (source: KRRiT).
45) This control is to be exercised by Canal+ with ITI (*International Trading and Investments*) Holdings S.A. the dominant entity of the ITI group that includes *N-Vision* holding, which controls *inter alia* TVN and *ITI Neovision*. The takeover by Canal+ of joint control over *N-Vision* will be effectuated by acquisition of 40% of shares and certain rights guaranteeing joint control. The merger of Canal+ Cyfrowy and ITI Neovision consists of transfer of Canal+ Cyfrowy assets to ITI Neovision against the shares in the raised share capital.

Control over content markets was an issue in an important case, which concerned an agreement between Canal+ and the Polish Football Association (PZPN). The PZPN had granted the broadcaster the right of first refusal with regard to exclusive rights to television broadcasts of Polish football league matches. The UOKiK and the courts, including the Supreme Court, found that the agreement restricted access to the market and eliminated from it undertakings which were not parties to the agreement. The relevant market was defined as the national market for rights to television transmissions of football matches in the Polish league.[46]

A narrow market definition with regard to sports rights was consequently adopted also by the UOKiK in the decision concerning public viewing of Euro 2008 football matches, where the product side of the relevant market was limited by reference to matches within one particular event that had no substitutes. Cyfrowy Polsat (the operator of a pay-TV satellite platform belonging to the ZSZ Group), as the exclusive seller, was deemed to abuse its dominant position on the *national market for the sale of rights to public viewing of Euro 2008 relays* by making the sale of these rights subject to the purchase by interested undertakings of a decoder and a technical assistance service, but made commitments to eliminate the consequences of this practice.[47]

With regard to the advertising market the UOKiK follows the decision practice of the European Commission[48] that television advertising and Internet advertising constitute separate product markets, in particular because of differences in reaching targeted recipients, measuring effectiveness and pricing mechanisms. These markets are geographically defined as national ones.[49]

4.2. General public competition law, as an instrument of control of market power and market behaviour in the media sector, is complemented by the application of private unfair competition law.[50] This is illustrated by a case concerning the interruption of programmes in public service television (TVP) channels with advertising. Such interruptions are banned by the BA, except for in natural breaks in case of sports events and some other transmissions of events. The courts, including the Supreme Court, found that this exception has to be interpreted strictly as being applicable only to transmissions of events that are beyond the broadcaster's control, and that the public service broadcaster is not allowed to insert advertising in breaks in commissioned entertainment programmes, even if such breaks are justified for technical reasons, like a change in scenography or the cleaning of a competition arena. Consequently, TVP was ordered to stop such acts considered as unfair competition. Interestingly, the courts referred to the purposes of the ban such as the protection of viewers and the preservation of a competitive balance between private and public broadcasters.[51]

4.3. Polish copyright law[52] as such includes no provisions aimed specifically at limiting market power in the media. However, it provides for safeguards of the position of authors and performing artists, in particular through reinforcing their contractual position,[53] unwaivable remuneration rights exercised exclusively through competent collecting societies (e.g. for authors and performers of audiovisual

46) Judgment of the Supreme Court of 7 January 2010, II SK 16/08, *PZPN v. Canal+*.

47) Decision of UOKiK of 12 February 2012, DOK-1/2010, *Euro 2008 public viewing*. The authority – referring to its decision of 29 May 2006, DOK-49/06, in the *PZPN/Canal+* case (confirmed by the Supreme Court's decision, op. cit. (see previous footnote)) and the decision of the European Commission of 23 July 2003, C 2003/778/EC, *UEFA Champions League* – took note of the "narrower market definitions with regard to football events" in competition cases.

48) Decision of the European Commission of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*.

49) Decisions of UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-Vision*. With regard to the *national market for Internet advertising*, decision of UOKiK of 18 September 2012, DKK-95/2012, *Ringier Axel Springier Media/Onet.pl* (according to the press report: www.uokik.gov.pl/aktualnosci.php?news_id=3639).

50) *Ustawa o zwalczaniu nieuczciwej konkurencji* – the Act of 16 April 1993 on unfair competition, consolidated text: Dz.U. of 2003, No. 153, item 1503, with amendments (UCA); the Act, that includes both the general clause on unfair competition and the list of specific delicts, applies in both B2B and B2C relations. As of 2007 the latter field of application of the UCA became less relevant, as the protection of consumers was complemented by *ustawa o nieuczciwych praktykach rynkowych* – the Act of 23 August 2007 on unfair market practices, Dz.U. No. 171, item 1206 (UMPA), implementing the Directive 2005/29/EC on unfair commercial practices. The UMPA and (to a lesser degree) the UCA are relevant for the application of general public competition law, because unlawful (in the meaning of these acts) activities of undertakings, if detrimental to the collective interests of consumers, constitute a practice infringing collective consumer interests (Article 24.2.3 CA).

51) Judgment of the Supreme Court of 29 October 2010, I CSK 646/09.

52) *Ustawa o prawie autorskim i prawach pokrewnych* – the Act of 4 February 1994 on Copyright and Related Rights (Copyright Act – CRA), consolidated text: Dz.U. of 2006, No. 94, item 658, with amendments. An unofficial English translation is available at: www.mkidn.gov.pl/media/docs/20110512_Act_on_Copyright_and_Related_Rights.pdf

53) Articles 41-68 CRA.

works),[54] and a separate remuneration right for performers from the right of phonogram producers in case of broadcasting of phonograms.[55] In the case of a collective work, for which the producer or publisher holds the copyright, the authors hold the rights to those specific parts which they authored but may transfer these rights contractually.[56]

These provisions have a certain indirect impact on the cumulation of power in the media and entertainment industry, though they do not prevent broadly used buyout agreements.

For broadcasting and the "broadcasting-like" making available (within on-demand services) of published small musical and literary works (*petits droits*), Polish law provides for a solution similar to the system of extended collective licensing, in order to guarantee access to the repertoire: these rights may be cleared only under an agreement with a collecting society, unless the author waives the agency of the society in the agreement with the broadcaster.[57]

Also the provisions concerning collecting societies include safeguards against abuse of their market power, including the prohibition to refuse a licence without important reasons,[58] the obligation of equal treatment of the rights of members and other represented persons,[59] the obligation to accept the management of rights,[60] the duty to submit tariffs for some uses for approval to the Copyright Commission[61] and statutory criteria for calculating the remuneration of collective management organisations (i.e., the revenue derived from the use, and the nature and scope of the use).[62]

These safeguards under copyright law are complemented by competition law. Although competition law is generally without prejudice to the (existence of) rights of intellectual property, it is applicable to contracts between undertakings, in particular licences, as well as to other practices concerning the exercise of such rights.[63] The application of competition law takes the provisions of copyright law into account. The case law addressing restrictions of competition resulting from the exercise of copyright concerns in particular practices of collecting societies (treated as undertakings[64]) such as: requesting an excessive level of remuneration for licences in the absence of approved tariffs and refusing a licence without important reasons;[65] imposing on authors the transfer to the collecting society of different rights (public performance, reproduction and broadcasting) and making the acceptance of management of rights dependent on such a transfer;[66] agreements between collecting societies that fix a minimum level of remuneration for certain uses (films on DVDs).[67]

54) Article 70.2^{1} CRA grants co-authors of audiovisual works and performers the right to remuneration for cinema screenings, rental of copies and their public presentation, TV broadcasting and reproduction of the copy for individual use. The unwaivable remuneration rights are also granted by the CRA in case of *droit de suite* (Articles 19-19^{5}), private copying levies (Article 20), reprography levies (Article 20^{1}), the remuneration for the paid making available of works by centres of information and documentation (Article 30).

55) Article 86.3 and Article 94.4 CRA, as opposed to Article 12 Rome Convention, Article 15 WIPO Performances and Phonograms Treaty and Article 8.2 Rental Directive that provide for the right to *single* equitable remuneration for both performers and phonogram producers. In practice separate rights to remuneration for broadcasting of commercial phonograms are also exercised in Poland by the separate collecting societies in case of performers (SAWP, STOART, STL) and producers (ZPAV).

56) Article 11 CRA.

57) Article 22 CRA.

58) Article 106.2 CRA. The courts interpret this provision as "a duty to contract", which is linked with non-discriminatory treatment of licensees with regard to contractual terms, including the level of remuneration, in the interest of equal chances for entrepreneurs – potential licensees, and thus undistorted competition. See for example the judgment of the Supreme Court of 2 April 2009, III CSK 19/08; judgment of the Supreme Court of 26 June 2004, V CKN 411/01.

59) Article 106.1 CRA.

60) Article 106.3 CRA.

61) Article 110^{12}.2 CRA.

62) Article 110 CRA.

63) Article 2 CA.

64) Judgment of the Supreme Court of 6 December 2007, III CSK 16/07.

65) Judgment of the Supreme Court of 2 April 2009, III CSK 19/08.

66) Judgment of the Supreme Court of 6 December 2007, III CSK 16/07.

67) Judgment of the Court of Appeal in Warsaw, 1 March 2012, VI ACa 1179/11.

5. Must-offer obligations

Must-offer as a complementary rule to must-carry was introduced in 2011.[68]

The must-offer component of the new system lies in the rule that a broadcaster of a programme service with must-carry status (see below at III.) may not refuse a retransmitting operator the consent for the retransmission of this programme service and may not make such a consent conditional upon payment of any remuneration, including in particular any fee for the award of a licence for the use of the broadcast.[69] Moreover, a broadcaster shall make a programme service with must-carry status accessible free-of-charge on application of the retransmitting operator, within 14 days from submission of the application. If the broadcaster fails to fulfil this obligation the Chairman of the KRRiT, upon a motion of the operator, may request the broadcaster to fulfil it, within 14 days from delivery of the request. The retransmitting operator is obliged to retransmit and offer the relevant programme service and inform that it is available for universal and free-of-charge reception, also by digital terrestrial transmission.[70]

The granting of access to archives of public service broadcasters, which is regulated in the Archive Law,[71] serves mainly purposes of education, research and science, rather than the opening of archives for commercial use by competitors. The latter aspect is subject to general competition law.

6. Specific rules for services enabling or facilitating use or reception

Ustawa Prawo telekomunikacyjne – the Telecommunications Law (TL),[72] establishes certain standards for digital radio and television transmissions and for digital receivers. It requires that such networks and equipment ensure interoperability of transmissions, in particular through application of an open interface of the application software.[73] Networks used for digital television transmission should meet the requirements set for the provision of wide-screen TV services, and operators, which receive programme services in such a format, shall broadcast them without format changes.[74] Moreover, as of 2011 digital receivers should make it possible to receive unencoded digital television transmissions and to decode by uniform algorithm encoded digital television transmissions.[75] The enterprises marketing digital receivers may sell equipment that does not fulfil these conditions only if the buyer has been adequately informed about this fact. With regard to the information campaign on the digital switchover, the law also imposes other duties on sellers of digital receivers, broadcasters and authorities.[76]

The TL also lays down obligations for telecommunications undertakings providing conditional access systems (CAS). Among these obligations are the duty to offer broadcasters on equal and non-discriminatory terms services enabling the reception of digital radio and TV transmissions,[77] and the requirement to keep separate accounts for CAS services.[78] Owners of industrial property rights to CAS

68) Articles 43-43a BA, as amended by *ustawa o wdrożeniu naziemnej telewizji cyfrowej* – the Act of 30 June 2011 on the Introduction of the Digital Terrestrial Television, Dz.U. No. 153, item 903 – Digital Terrestrial Television Act – DTTA.

69) Article 43.2 BA.

70) Article 43a BA.

71) The Act of 14 July 1983 on the National Archive Resources and Archives, consolidated text: Dz.U. of 2011, No. 123, item 698, with amendments. Under Article 17.3 of the Act the minister of culture and national heritage, after consultation with the KRRiT, issued the Regulation of 22 May 2006 on detailed rules and procedures for collection, cataloguing, qualifying, classification and making available of archive materials of public service broadcasting entities. The Regulation determines in §§ 33-37 rules of access to archive materials of PSM and catalogue information. In principle, audio and video materials are made available, upon written request, on the premises of the relevant PSM entity.

72) The Act of 16 July 2004 Telecommunications Law, Dz.U. No. 171, item 1800, with amendments. The English translation is available at: www.en.uke.gov.pl/_gAllery/10/58/1058/telecommunications_law.pdf

73) Article 132.1 TL.

74) Article 132.2 TL.

75) Article 132.2a TL as added by DTTA. Technical and operational requirements for digital terrestrial receivers, in particular safeguarding their interoperability and facilitating access for persons with disabilities, are determined in the Regulation of 18 December 2009 by the minister of infrastructure, Dz.U. No. 221, item 1742.

76) DTTA – in particular Articles 6, 12-16.

77) Article 133.1 TL, with the possibility of derogation of this duty, by way of decision of the telecommunications authority, for undertakings which lack significant market power on the market for CAS provision (Article 134 TL).

78) Article 133.2 TL.

have the duty to license on equal and non-discriminatory terms manufacturers of consumer equipment intended for receiving digital radio and television transmissions. In so doing, these rightsholders may not prevent the manufacturers from including in such equipment a common interface that allows a connection to other CAS and/or elements relevant for other CAS.[79] The telecommunications authority may impose on undertakings an obligation to provide access to the associated facilities, namely application programming interfaces (APIs) and electronic programme guides (EPGs), in order to ensure access to digital radio and television transmissions for end-users.[80]

II. Platform operators and converged services

Media law addresses the market power of platform operators through the recently revised must-carry rules (as described in more detail below at III.) that now cover in a technologically neutral way all operators retransmitting programme services.[81] The operators of DTT multiplexes are obliged to transmit the programme services licensed for a given multiplex, to grant access to broadcasters with relevant licences on equal and non-discriminatory terms and to secure uninterrupted digital transmission of a multiplex signal. The law also regulates the negotiations and the content of the agreement on the access to the multiplex. In this context, it grants the telecommunications authority some of the required regulatory powers.[82]

The TL includes the provisions on regulation of the telecommunications market. The regulatory competence and powers lie with the President of the *Urząd Komunikacji Elektronicznej* (Office of Electronic Communications – UKE) and include:

- conducting market analysis with regard to telecommunications products and services;
- defining relevant markets;
- assessing whether there are undertakings with significant market power in the relevant market, and
- imposing upon undertakings with significant market power regulatory obligations as well as amending and repealing such obligations, in particular regarding access issues.[83]

The UKE may for instance issue an administrative decision by which it imposes on an operator with significant market power the obligation to treat all telecommunications undertakings equally in relation to access. In particular, the UKE may oblige the undertakings to offer equal conditions in comparable circumstances, and to offer their services and make information available under terms that are not less favourable than those applied within the undertaking itself or in relation to its subsidiaries.[84]

The market power of media platform operators is addressed to a significant extent under general competition law. The relation between telecommunications law and competition law is complementary (and does not follow the *lex specialis* rule). As explained by the Supreme Court: "The provisions of telecommunications law do not forbid undertakings to conclude agreements restricting competition or to abuse a dominant position. They only provide for additional restrictions and limitations of telecom operators' freedom, which go beyond the UOKiK's competences of influencing telecommunications undertakings' behaviour. The UKE acts *ex ante*, while the UOKiK acts *ex post*."[85] This assessment is confirmed by the TL of 2004, which declares that its provisions are without prejudice to competition law and broadcasting law.[86] Consequently, the competences or concrete regulatory actions (such as tariffs approval) of the telecommunications authority do not exclude the application of competition law to market behaviour of telecommunications undertakings.[87]

79) Article 135 TL.
80) Article 136 TL.
81) Article 43 of the BA.
82) These duties were introduced by the DTTA that added to the TL the provisions on operators of multiplexes and access to a multiplex (Articles 131a-131g TL).
83) Articles 15-54 TL.
84) Article 36 TL.
85) Judgment of the Supreme Court of 19 October 2006, III SK 15/06.
86) Article 1.3 TL.
87) Judgment of the SOKiK of 28 February 2008, XVII Ama 52/07.

The competition case law concerning platform operators, and in particular cable operators and digital satellite platform operators, is rich and concerns aspects such as practices vis-à-vis end-users (in particular conditions of contracts, for instance abusive provisions preventing or obstructing termination of contracts, unfair changes to agreements, misleading advertising),[88] relations with broadcasters,[89] anti-competitive practices vis-à-vis other operators,[90] and mergers of operators.[91]

Regarding the definition of the product market on which pay-TV platform operators act, there is a prevailing tendency in case law to broadly define the market for pay-TV access services, which covers services of cable television (CATV), satellite platforms and IPTV operators, on the grounds of substitutability of these services for end-users. Such a broad approach was adopted already in the 1999 judgment of the Antimonopoly Court according to which "operators of traditional cable television and operators of digital satellite TV are competitors" within the meaning of competition law.[92] This approach was followed in further case law by the courts[93] and the UOKiK,[94] though in some cases a different, narrower approach was adopted.[95] Recently, taking into account the results of an extensive analysis of the market for pay-TV access services,[96] the UOKiK has applied the broad definition of this market, in particular, in important merger cases. In the case concerning the merger of two major cable operators (UPC and Aster) in 2011, the UOKiK found that services consisting of the delivery of TV channel packages to end-users provided by CATV, digital satellite platforms and IPTV operators are in principle substitutable, because, in spite of different modes of TV signal transmission, these services are comparable for consumers. Consequently, operators of these services compete on the same market for pay-TV services. Digital terrestrial TV (DVB-T) does not form part of this market, as long as it is not used to offer pay-TV channels.[97] The same logic was applied and thus the same product market definition of *services of access to pay-TV (pay-TV services)* was adopted in the 2012 merger cases of Canal+ and ITI, resulting in consolidation of two digital satellite platforms.[98] The UOKiK noted, however, the stronger competition between operators of such platforms given that the reach of their networks does not limit them in providing their services – while the opposite is true for cable and IPTV operators.

The geographical reach of the relevant market for pay-TV services is, however, defined differently for satellite platforms, on the one hand, and for cable television, on the other. For cable operators the relevant market is assessed as a local one – limited to the given city or locality. In case of satellite

88) See for example: decision of the UOKiK of 24 April 2003, DPI 27/2003, *Canal+ Cyfrowy – inter alia,* automatic extension of a fixed-term agreement; decision of the UOKiK of 31 December 2009, DDK-11/2009, *Cyfrowy Polsat* – changes in the list of channels; decision of the UOKiK of 21 July 2010, DDK-7/2010, *Canal+ Cyfrowy* – improper way of informing on changes in agreements; decision of the UOKiK-Bydgoszcz of 19 July 2012, RBG-15/2012, *Canal+ Cyfrowy* – misleading advertising ("Canal+ and HBO – the gift for all").

89) See for example: judgment of SOKiK of 28 November 2008, XVII Ama 107/07 and judgment of SOKiK of 14 September 2006, XVII Ama 71/05 – referred to in section I.4.1.

90) See for example: decision of the UOKiK of 5 October 2004, RPZ 24/2004, *Telewizja Kablowa Poznań* – concerning the agreement between the cable operator and the local housing cooperative that granted the operator exclusivity for connecting to cable networks houses belonging to the cooperative. More recently: decision of the UOKiK of 23 November 2011, DOK-8/2011, *DVB-H* – concerning the agreement between four major mobile telephony operators that restricted the development of DVB-H mobile television.

91) Decision of the UOKiK of 10 November 2001, DDI 59/2001, *Wizja TV*; decision of the UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster*; decision of the UOKiK of 13 April 2012, DKK-32/2012, *Multimedia/Stream*; decisions of the UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-Vision*.

92) Judgment of the Antimonopoly Court (now: SOKiK) of 17 March 1999, XVII Ama 77/98, *TOYA*.

93) Judgments of the Antimonopoly Court of 12 August 2002, XVII Ama 30/02 and of 2 April 2001, XVII Ama 12/01.

94) UOKiK decisions of 29 November 2004, RPZ-29/2004, *Telewizja Kablowa Poznań*; of 24 February 2005, RKT-8/2005, *VECTRA/Śląska Telewizja Kablowa*; of 28 December 2005, RWR-73/2005, *VECTRA/Metalowiec*; of 31 December 2008, RBG-50/2008, *Housing Cooperative in Lubicz*.

95) Decision of the UOKiK of 10 November 2001, DDI-59/2001, *Wizja TV/UPC*. In this merger case the UOKiK defined the relevant market as the digital satellite pay-TV market, departing from the case law of the Antimonopoly Court, on the grounds that CATV had limited possibilities to reach as many end-users as were reachable by satellite TV platforms (due to prohibitive costs of building cable infrastructure in rural areas) and of lower prices of access to CATV.

96) Raport z badania rynku usług dostępu do płatnej telewizji (*Report from analysis of the market for pay-TV access services*), UOKiK 2011, available (in Polish) at: http://www.uokik.gov.pl/analizy_rynku2.php#faq1593 . For the English summary see: *OECD - Annual Report on Competition Policy Developments in Poland - 2011*, p.10:
http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)12&docLanguage=En

97) Decision of UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster.* Similarly: decision of the UOKiK of 13 April 2012, DKK-32/2012, *Multimedia/Stream*.

98) Decisions of the UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-Vision*.

platform operators, the pay-TV market is defined as the national one. Consequently, the UOKiK finds that there are different competitive conditions for pay-TV services on different local markets and notes the existence of "asymmetry of substitutability within the geographical reach of the market for access to pay-TV services".[99]

Recent case law illustrates that the practical consequences of this assessment are significant. The merger of Canal+ and ITI and their satellite platforms was evaluated from the national pay-TV perspective with the conclusion that neither dominant positions nor other significant impediments to competition would be created. By contrast, the impact of mergers of cable operators is regularly measured on the relevant local market, namely cities or localities where the merging operators act, and where penetration of satellite TV platforms is relatively lower. In effect, the merger of the cable operators UPC Polska and Aster in 2011 was assessed as significantly restricting competition on pay-TV markets in the cities of Warsaw and Cracow (where the combined market share of the two companies was around 50-60% in each of the cities, thus exceeding the threshold of 40% for a presumed dominant position). Consent for the takeover was given under the condition that (1) UPC resell a part of the network belonging to Aster in the buildings where so far the services had been provided by both companies; (2) the customers not be limited in the choice of the operator and (3) the continuity of the services be guaranteed.

The UOKiK differentiates the market for pay-TV access services in different geographical areas from the retail market for fixed services of broadband Internet access.[100] The latter is assessed as separate from the retail market for mobile broadband Internet access.[101]

Competition relevant activities of platform operators take place not only on the retail market of offering access to services to end-users, but also on the wholesale market where broadcasters offer their channels to platform operators. In the case concerning licence price fixing by the professional organisation of cable operators in recommended framework agreements with broadcasters of pay-TV channels, the relevant market was defined as *the global wholesale market for pay-TV channels aimed exclusively at a Polish audience.*[102] The practice of the cable organisation, which had usurped the role of market regulator with regard to relations between cable operators and pay-TV channels, was found to be detrimental to the public interest and anticompetitive.

III. Distribution (network operators)

In 2011 the must-carry rules, previously applicable to cable networks only, were significantly changed[103] and extended in a technology-neutral way to any retransmissions,[104] including retransmissions by satellite platforms. This was deemed necessary because the penetration of digital satellite platforms (over 6 million users) had surpassed that of cable networks (4.6 million users). The following programme services have a must-carry status: TVP1, TVP2, TVP regional channel – TVPInfo (in case of regional/local retransmissions – relevant for a given area), as well as channels transmitted on 10 August 2011 on the basis of a licence for analogue terrestrial broadcasting by the listed companies. This concerns in practice the programme services of Polsat, TVN, TV4 and TV Puls.

A periodic review of the must-carry rules has to be carried out every two years by the chairperson of the KRRiT, and the results of the assessment have to be submitted to the minister of culture, who then must take action to ensure proportionality and transparency of these rules.[105] The assessment should be based on the societal interest with regard to the provision of information while ensuring

99) See decisions referred to in the two preceding footnotes.
100) Decision of the UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster*. Geographically this market was defined in the decision as local, differently than in the UOKiK decision of 8 February 2007, RBG-2/2007.
101) Decision of the UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster*; decision of the UOKiK of 24 October 2011, DKK-126/11, *Spartan/Polkomtel*. In the latter decision concerning the takeover of one of the major mobile telephony operators by the media group (ZSZ) the mobile Internet access market was defined as national.
102) Judgment of the Court of Appeal in Warsaw of 13 September 2006, VI Aca 185/06, *TVN24/PIKE*.
103) Articles 43-43a of the BA as amended by the DTTA.
104) Except for retransmission in terrestrial DTT multiplexes, which are regulated in the DTTA.
105) In practice that could mean a submission to the government of a draft aimed at revising the provisions on the must-carry rules in the BA.

access to culture and art, and facilitating access to learning, sport and scientific achievements, as well as dissemination of civic education.

The KRRiT in early 2012 made a first assessment of the new rules and declared that they unnecessarily fixed the channels with must-carry status and petrified the oligopolistic structure of the television market. At the same time, the new rules do not specify in which package of the operator's service must-carry channels should be offered. According to the KRRiT, this should take place in every package including the basic one. The KRRiT sees the need for legislative changes with regard to must-carry rules, which should provide for more flexibility for the regulator to determine the actual list of must-carry programme services. During the legislative works, a similar proposal had already been discussed that would have empowered the KRRiT to determine the list of must-carry channels, except for major PSM channels which would have had must-carry status under the law. According to the proposal the KRRiT would have issued its regulation within certain statutory limits and on the grounds of clear criteria based on media-pluralism and cultural-diversity considerations.

Network operators' activities are subject to the regulatory competencies of the UKE, in particular regarding telecommunications access, referred to in section II. This regulatory framework is complemented by the application of competition law. This complementarity of competition law has been illustrated by a decision of the UOKiK of 2007. The decision concerned the application of different transmission fees for public and private broadcasters by the telecom operator on the national market for transmission services of radio and television programmes in a terrestrial network. In doing so, the telecom operator was found to have abused a dominant position. The decision, in line with the complementarity doctrine, was issued despite the fact that the operator was subject to regulatory measures by the UKE.[106]

In 2011, the UOKiK issued an important decision on the cartel of four mobile telephony network operators that prevented the introduction and the development of a new DVB-H technology on the wholesale market for mobile TV. Four mobile operators co-ordinated their conduct towards the company ITF that had won the tender for a reservation of frequency enabling digital television broadcasting via mobile phones. In order to render such services to end-users, ITF needed to conclude agreements with mobile telephony operators. The operators co-ordinated their negative reaction to the wholesale offer by ITF, exchanged strategic information about the offer and agreed on PR actions questioning its reliability. As none of the operators granted ITF access to their networks, ITF was unable to launch the application. The UOKiK found that this practice by four mobile operators amounted to an agreement restricting competition on the national retail market for mobile telephony and on the national wholesale market for mobile TV services provided in the DVB-H technology. The authority ordered to discontinue the practice and imposed on the cartel participants fines exceeding 113 million PLN (approx. 27 million Euro). The decision was issued on the basis of both Article 6.1 of the Polish Competition and Consumer Protection Act and Article 101.1 of the Treaty on the Functioning of the European Union (following consultations with the European Commission).[107]

106) Decision of the UOKiK of 25 October 2007 (DOK-95/07, *TP EmiTel*). The decision was annulled by the judgment of the SOKiK of 19 October 2009, XVII Ama 66/08, but this judgment was in turn annulled by the judgment of the Court of Appeal in Warsaw of 13 May 2010, VI ACa 126/10, that sent the case back to the SOKiK.

107) Decision of the UOKiK of 23 November 2011, DOK-8/2011, *DVB-H*. The English summary is available in: *OECD - Annual Report on Competition Policy Developments in Poland - 2011*, p.4-5; http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)12&docLanguage=En

Part III

Measuring the Concentration of Audience for Television and Video On-line

Measuring the Concentration of Audience for Television and Video On-line

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Concentration of television audience market shares

The most classical indicator for measuring concentration of the TV audience market is the TV national audience daily market share, calculated over a given period (most frequently one year). In most of the European countries (with the exception of Luxembourg and Malta) the data are calculated by national audience measurement institutes, using the methodology of sampling and measuring by peoplemeter. Yearly data are communicated, channel by channel, to the European Audiovisual Observatory by Eurodata-TV, the international service of the French institute Médiamétrie. Based on our knowledge of ownership (through the database MAVISE, the database AMADEUS and information provided by national sources), we have calculated the 2011 national daily audience market shares of the various groups. There is no legal European definition of a TV group, but there is no great difficulty in identifying groups through the analysis of ownership structure, which is in general well documented.[1] We have then calculated the combined audiences in 2011 of the four leading groups by country (table 1) and also calculated the daily audience market shares in 2011 of the leading groups in Europe in each of the markets where their channels are available.

Using daily national audience market share for measuring concentration of the TV market has various theoretical and practical limits that should be considered when comparing the figures.

1. It may be discussed that the national daily audience market share is a pertinent indicator for measuring the "relevant market" on which competition authorities will analyse a TV market.[2] Various questions should be considered

- Is the national market the correct geographical approach? The fact that a group is operating channels in various countries may give to it a specific strength to negotiate rights with programme providers. In particular the audience markets share of the thematic services provided by US conglomerates are relatively small when considered from the perspective of national markets. But once cumulated at the European level they are all but negligible.

1) It is open to discussion whether the leading shareholding by a single person in various companies or groups constitutes per se a new group. In 2008, the Hungarian Broadcasting Authority considered that John Malone was at the same time the leading shareholder in both Liberty Global and in Discovery Inc. that this was sufficient to consider that there is a "John Malone Group". We have not taken this approach and considered only the ownership of companies by other constituted companies or holding.

2) For a discussion on the concept of "relevant market" to be defined to assess concentration in the media sector, see the various reports published between 2002 and 2005 by the DG Competition of the European Commission:
http://ec.europa.eu/competition/sectors/media/documents/index.html
Of particular interest (and challenging for any perspective of precise measurement of concentration on a relevant market of the media sector), see in particular: *Market Definition in the Media Sector, Economic Issues*, by Europe Economics. November 2002, http://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf

- Is the daily audience market share of all channels available in a country a real pertinent market? Markets may be subdivided into free and paying channels, in channels by genre, in channels for a specific target,…

- Is the all day audience the correct period to take into consideration? Market shares may be very different if considered during an all day period or during the prime-time.

2. The comprehensiveness of data available differs from country to country. In some countries the data at our disposal may be considered as comprehensive (i.e. we can analyse 100% of the audience), but in most of the countries the category “others” may be very important (between 25% and 33% of the audience, as indicated by the data in column 2 of table 1). Those gaps may be due to a variety of reasons including technical or contractual. The gaps will generally concern the small channels and not the leading ones. But the accumulation of tiny audience shares of various thematic channels provided by a group may, once cumulated, be substantial. In case of non comprehensive coverage, the market shares and rate of concentration should be considered as a minimum.

3. The level of concentration of the daily national audience market share is not necessarily the best indicator for measuring the quality of pluralism and cultural diversity. As a matter of fact, it may be observed that the level of concentration measured by the cumulated daily audience market shares of the four leading groups is higher in the countries where public broadcasters still have a leading position on the audience market share. The fact that public broadcasters are better providers of pluralism and diversity may of course be discussed but this should be done by analysis of the programmes and editorial policies, not by the simple calculation of audience market shares.

Table 1 : TV daily audience market shares of the four leading TV groups (2011)

Audience data for channels were provided by Eurodata TV Worldwide and its network of audience measurement institutes.

We have calculated the audience shares of goups on the basis of our knowledge of ownership (Databases MAVISE and AMADEUS).

Mergers that took place during 2011 were considered only when finalised by 31 December 2011. Mergers that took place in 2012 have not been taken into consideration.

The sign > indicates that the figure is at a minimum, when market shares for small thematic channels or foreign channels are not available.

Market shares of public broadcasting groups are indicated in bold.

	Non identified market shares
Sweden	0,0%
Finland	9,0%
Germany (1)	3,8%
Czech Republic	9,3%
Italy	7,1%
Norway	1,6%
Denmark	5,4%
Belgium (Flemish Community)	16,7%
Portugal	16,6%
Poland	2,9%
Netherlands (2)	12,0%
United Kingdom	0,0%
Croatia	17,8%
Swiss (Italian speaking)	18,8%
Belgium (French Community)	12,4%
Bulgaria	10,8%
France (all TV households) (3)	12,1%
p.m. France (cable, satellite, IPTV households) (4)	1,4%
Austria	9,5%
Slovenia	1,80%
Spain (5)	0,0%
Slovakia	28,1%
Cyprus (6)	20,7%
Estonia (3)	18,6%
Swiss (German speaking)	18,7%
Swiss (French speaking)	25,7%
Greece	11,6%
Hungary	12,2%
Lithuania (2)	24,9%
Russia	11,4%
Latvia (7)	29,1%
Ireland	29,6%
The former yugoslav Republic of Macedonia	30,9%
Romania	2,7%
Luxembourg (2009/2010)	33,7%

(1) ARD is considered as a group, albeit it is composed of independent regional organisations.
(2) In Cyprus, in Estonia, in Lithuania and in the Netherlands the viewing of home video and of programmes stored on PVR are included in the calculation of TV audience market shares. For EE and NL we have recalculated the figures, excluding DVD and video.
(3) The level of concentration will increase in 2012, with the take-over of the Direct 8 Channel (Bolloré Group) by Canal+.
(4) This population represents around 74.4% of the households. The data available on market shares for thematic channels are more detailled and comprehensive than the data related to the overall population in the preceeding line.
(5) The level of concentration will increase in 2012, with the merger of Antenna 3 (third group) and La Sexta, part of Imagina Media (fourth group). The new group will have around 33% of market share.

Market shares of the 4 leading groups				Total	Total
1	2	3	4	3 leading groups	4 leading groups
34,8%	28,9%	19,5%	8,7%	83,2%	91,9%
44,3%	>27.7%	>14.5%	3,0%	>86.5%	>89.5%
> 27.2%	>26.5%	>20.7%	**>14.5%**	74,4%	88,9%
33,7%	**27,0%**	22,0%	5,5%	82,7%	88,2%
40,2%	>36.8%	>6;1%	4,1%	83,1%	87,2%
>41.1%	>25.7%	11,2%	8,5%	>78%	>86.5%
39,7%	**28,4%**	>9.6%	>7%	>77.7%	84,7%
41,8%	>24.6%	10,2%	4,0%	>80.6%	>84%
27,20%	26,80%	26,70%	3,30%	80,7%	84%
36,5%	24,3%	20,1%	2,3%	80,9%	83,2%
>33.7%	>27.6%	16,6%	>4.6%	>77.9%	>82.5%
36,9%	23,2%	**11,7%**	10,2%	71,8%	82,0%
30,1%	27,7%	>21.5%	2,0%	>79.3%	>81.3%
35,8%	**22,6%**	20,1%	1,5%	78,5%	80,0%
>27.6%	**20,5%**	>17.2%	13,3%	>65.3%	>78.6%
44,4%	21,1%	**8,4%**	3,9%	73,9%	77,8%
29,9%	>29.1%	>14.2%	>3.9%	>73.2%	>76.1%
29,9%	**25,3%**	15,7%	11,7%	70,9%	82,6%
37,5%	>17.1%	>10.7%	**>8.9%**	>65.3%	>74.2%
37,9%	**26,90%**	6,60%	2,6%	71,4%	74,0%
>25%	**22,7%**	>17.1%	>7.9%	>64.8%	>72.7%
34%	23,80%	**12,20%**	1,90%	70,0%	71,9%
20,8%	17,4%	**17,0%**	16,6%	55,2%	71,8%
19,4%	**18,5%**	17,8%	11,4%	55,7%	67,1%
31,6%	>15.5%	11,1%	**8,4%**	>58.2%	>66.6%
28,7%	15,9%	**12,8%**	>8.2%	57,4%	>65.6%
>20%	17,0%	**13,3%**	13,1%	>50.3%	>63.4%
29,8%	19,7%	**11,9%**	>4.9%	>61.4%	>66.3%
>24.4%	17,7%	**11,3%**	8,4%	>53.4%	>61.9%
>19.9%	>16.8%	>14.3%	>7.6%	51,0%	58,6%
>16.6%	>16.1%	**12,9%**	11,3%	>45.6%	>56.9%
31,7%	13,9%	**>6.9%**	>4.2%	>52.5%	>56.7%
22,2%	14,8%	9,7%	**7,9%**	46,7%	54,6%
21,5%	18,5%	**7,6%**	6,3%	47,6%	53,9%
>27.3%	>11%	>8.7%	**>6.4%**	>47%	>53.4%

(6) In Cyprus, video represented in 2010 3.2% of audience market share. No data available for 2011, but it is probably included in the 20.7% non identified.

(7) In September 2012, MTG (second group in 2011) announced the take-over of NMM (the first group). The take-over is pending the agreement of the Competition Comission.

Source: European Audiovisual Observatory

Table 2: National daily audience market shares in 2011 of the leading TV groups active in Europe

> indicates a market share as a minimum
n.a. indicates that data is not available
_ indicates: does not apply

2.1. Pan-European groups

	ProSiebenSat1 Media AG (DE)		RTL Group (DE)		TF1 (FR)	
Main brands	Pro7, Sat1, Kabel1, part of the former SBS group		RTL, M6, IKO		TF1, Eurosport	
	Number of channels	Daily audience	Number of channels	Daily audience	Number of channels	Daily audience
AT	12	>17.1%	11	>10.7%	11	>0.6%
BE (French Community)	3	n.a.	10	>27.6%	15	>17.2%
BE (Flemish Community)	3	n.a.	15	0,4%	22	>0.2%
BG	3	>0,3%	1	n.a.	3	>0.4%
CH (German speaking)	12	11,1%	n.a.	>15.5%	n.a.	>0.7%
CH (French speaking)	n.a.	n.a.	n.a.	>8.2%	n.a.	15,9%
CH (Italian speaking)	n.a.	n.a.	n.a.	n.a.	n.a.	>0.5%
CZ	4	n.a.	7	>0.2%	4	n.a.
DE	12	>20.7%	21	>26.5%	4	>0.7%
DK	10	>7%	5	n.a.	4	1,1%
EE	3	n.a.	5	n.a.	5	n.a.
ES	–	–	(1)	(1)	5	n.a.
FI	4	3,0%	5	n.a.	4	n.a.
FR	4	n.a.	17	>14.2%	19	>29.1%
GB	–	–	–	–	4	n.a.
GR	–	–	3	13,10%	32	n.a.
HR	3	n.a.	3	>21.5%	7	n.a.
HU	7	19,7%	15	>29.8%	5	n.a.
IE	–	–	–	–	3	n.a.
IT	–	–	–	–	18	n.a.
LT	3	n.a.	5	n.a.	5	n.a.
LU	3	>13.1%	20	>27.3%	7	>8.7%
LV	3	n.a.	–	–	4	n.a.
NL	3	n.a.	9	26,2%	10	>0.9%
NO	5	11,6%	n.a.	n.a.	n.a.	>0.5%
PL	3	n.a.	4	n.a.	42	0,7%
PT	1	n.a.	4	n.a.	7	0,5%
RO	6	4,4%	3	n.a.	4	0,8%
RU	–	-300,0%	n.a.	n.a.	5	n.a.
SE	4	8,7%	1	n.a.	4	0,7%
SI	3	0,3%	6	1,9%	2	0,4%
SK	3	n.a.	6	n.a.	6	n.a.

(1) After the takeover of La Sexta by Antena 3, RTL Group owns a 19.2 % share in Antena 3 Group. Antena 3 had a market share of >17.1% in 2011 and La Sexta of 7.9%.
(2) Each linguistic version or HD version of Eurosport, Eurosport2 and Eurosportnews are counted as a separate channel.
(3) In Russia, the RTL Group is a minory shareholder (30%) of Ren TV. Ren TV had a 4.4% daily market share in 2011 and is controled to a level of 68% by the National Media group.

2.1. Former pan-European groups with reduced European coverage

	Mediaset (IT)		Vivendi (FR)	
	Number of channels	Daily audience	Number of channels	Daily audience
AT	–	–	1	n.a.
BE	–	–	10	n.a.
CH (Italian speaking)	n.a.	22,60%	–	–
CH (French speaking)	n.a.	n.a.	5	>2.3%
ES	13	>25%	–	n.a.
FR	–	–	55	>3.9% (1)
IT	–	>35.9%	–	–
PL	–	–	14	>1.6%
PT	–	–	1	>0.1%
SI	3	0,3%	–	–

(1) 11.7% in the multichannel universe (cable, satellite, IPTV households).

2.2. Regional groups - Nordic and Eastern European Groups

	Baltic Media Alliance (GB)	CME (US/BM)	Gasprom Media (RU)	MTG (SE)	Sanoma (FI)	Telenor (NO)
BE (Flemish Community)	–	–	–	–	10,2%	–
BG	–	44,2%	–	21,1%	–	–
CZ	–	33,7%	–	22,0%	–	–
DK	–	–	–	>9.6%	–	>0.5%
EE	13,0%	–	4,60%	>17.8%	–	–
FI	–	–	–	n.a.	>14.5%	n.a.
HU	–	–	–	>4.3%	2,5%	–
LT	5,4%	–	–	>24.4%	–	–
LV	11,3%	–	5,10%	>16.1%	–	–
NL	–	–	–		15,8%	–
NO	–	–	–	8,5%	–	0,3%
RO	–	21,5%	–	0,5%	0,1%	–
RU	–		21,90%	9,8%		–
SE	–	–	–	19,5%	–	1,5%
SI	–	37,9%	–	6,6%	–	–
SK	–	34,0%	–	–	–	–

(1) In Russia MTG has a 38.6% share in the CTC Media group (channels CTC Network and Domashny).

2.3. US and Japanese International conglomerates

	Discovery	Liberty Global	NBC Universal	News Corp	Sony (JP)	Viacom	Time Warner	Walt Disney
AT	n.a.	n.a.	n.a.	n.a.	n.a.	>1.1%	n.a.	n.a.
BE (French Community)	n.a.	–	n.a.	–	n.a.	>1.4%	n.a.	n.a.
BE (Flemish Community)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	>2%
BG	>1%	–	0,3%	>1.9%	0,3%	n.a.	>0.8%	>2%
CH (German speaking)	n.a.	n.a.	n.a.	n.a.	n.a.	4,7%	n.a.	n.a.
CH (French Speaking)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	>0.8%	n.a.
CH (Italian speaking)	0,1%	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	0,7%
CZ	n.a.	0,5%	0,1%	0,1%	0,1%	n.a.	n.a.	0,7%
DE	>0.7%	n.a.	n.a.	>0.9%	n.a.	>0.9%	n.a.	n.a.
DK	>1.5%	n.a.	n.a.	0,7%	n.a.	>1.6%	>0.7%	>2.6%
EE	n.a.	–	n.a.	–	–	n.a.	n.a.	n.a.
ES	0,1%	0,8%	0,1%	0,6%	0,4%	0,6%	0,5%	2,0%
FI	0,5%	–	n.a.	–	–	n.a.	n.a.	n.a.
FR (multichannel universe)	0,2%	–	1,2%	0,2%	–	1,0%	0,60%	1,8%
GB	1,6%	n.a.	n.a.	10,2%	n.a.	2,0%	1%	1,4%
GR	n.a.	n.a.	n.a.	n.a.	n.a.	1,0%	n.a.	n.a.
HR	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
HU	>1.1%	5,0%	1,3%	0,8%	1,3%	>2.3%	>1.1%	>2%
IE	0,5%	–	0,4%	>5.1%	–	2,5%	n.a.	n.a.
IT	1,2%	n.a.	n.a.	6,1%	0,3%	0,4%	0,4%	0,9%
LT	n.a.	n.a.	n.a.	n.a.	n.a.	>0.2%	n.a.	n.a.
LU	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
LV	n.a.	n.a.	n.a.	1,2%	n.a.	n.a.	n.a.	n.a.
NL	>2.2%	n.a.	n.a.	n.a.	n.a.	>4.6%	n.a.	>1.9%
NO	2,8%	n.a.	n.a.	0,9%	n.a.	0,5%	1,1%	3,1%
PL	1,9%	0,7%	0,6%	0,8%	1%	2,0%	2,1%	2,2%
PT	0,5%	3,2%	0,1%	2,5%	1,5%	0,7%		1,2%
RO	1,5%	2,5%	1,3%	0,6%	0,7%	0,5%	3,2%	2,5%
RU	n.a.	n.a.	n.a.	n.a.	n.a.	>0.7%		
SE	2,2%	0,1%	0,1%	0,4%	n.a.	2,1%	0,9%	1,5%
SI	2,6%	1,3%	0,7%	1,8%	0,1%	0,8%	1,5%	0,7%
SK	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

2.4. Main public broadcasters with significant overspill of national channels in neighbouring countries or pan-European thematic channels

	ARD (DE)	ZDF (DE)	France-Télévisions (FR)	BBC (GB)	RAI (IT)
AT	>9.9%	4,10%	–	n.a.	n.a.
BE (French Community)	n.a.	n.a.	>13.3%	n.a.	n.a.
BE (Flemish Community)	n.a.	n.a.	>0.5%	n.a.	n.a.
CH (German speaking)	8,4%	5,7%	n.a.	n.a.	n.a.
CH (French speaking)	0,4%	n.a.	12,80%	n.a.	0,7%
CH (Italian speaking)	0,5%	0,4%	>0.5%	n.a.	20,1%
DE	>27.2%	>14.5%	–	n.a.	n.a.
DK	n.a.	n.a.	–	0,7%	n.a.
FR	n.a.	n.a.	>29.9%	n.a.	n.a.
GB	–	–	–	36,9%	–
IE	_	–	–	>6.9%	–
IT	–	–	–	n.a.	40,2%
LU (2009-2010)	>6.4%	6%	>3.4%	n.a.	n.a.
NO	n.a.	n.a.	–	1,1%	_
SI	n.a.	n.a.	–	n.a.	0,2%

Source: European Audiovisual Observatory

Concentration of on-line video audience market shares

As for the audience of on-line video, it is possible to propose relatively harmonised data by using the data collected by a single company (comScore) for the six leading European markets (France, Germany, Italy, Russia, Spain, United Kingdom). The data provided in the comScore Video Metrix provided by comsSore are already grouped by ownership (“properties” in comScore terminology) and, in principle cover all the on-line video audience. All on-line video services are measured when the consumption takes place during the connection. However videos viewed after a download (as it is the case for download-to-own VoD services) are not measured, nor are encrypted videos.[1]

From data provided by comScore (40 Top properties for 1st Semester 2012[2]) on the number of unique viewers by properties, the average monthly number of videos viewed by viewers and the average viewing time of a video by viewers, we have calculated the average monthly market share of the 40 leadings properties during the 1st Semester 2012 and the combined market shares of the three and four leading ownership groups.

These data show the importance of the dominance of Google services (mainly YouTube) in the six markets under consideration. The combined audience market share of the four properties is much lower than the combined market shares of the four leading TV groups in the countries. However, it should be noted that porn services (for which the audience data was not commissioned from comScore) are not included in the calculation of the audience market shares. An analysis of the comScore data for the UK for the full year 2010 including porn services shows that the combined audience market share of the four leading properties (three of which are providers of porn services) represented 52.5% of the market.

1) For details, see comScore Video Metrix Methodology, comScore, July 2012.
2) Porn video services are excluded from the list provided. The fact of taking them into consideration would certainly change dramatically the analysis.

Table 3: Audience concentration market share of video online properties in six European countries (1st semester 2012)

	Market shares of the 4 leading groups				Total	Total
	1	2	3	4	3 leading groups	4 leading groups
IT	30,1%	2,3%	1,2%	1,2%	33,6%	34,8%
ES	25,4%	5,5%	2,2%	1,7%	33,1%	34,8%
FR	25,0%	5,4%	2,6%	1,3%	33,0%	34,3%
GB	28,9%	1,2%	1,0%	0,9%	31,1%	32,0%
DE	24,5%	0,7%	0,5%	0,5%	25,7%	26,2%
RU	17,8%	3,5%	3,1%	1,1%	24,4%	25,5%

Source: European Audiovisual Observatory on comScore Video Metrix data

Part IV

Common Grounds and Uncommon Choices

Common Grounds and Uncommon Choices

An Analysis of National Regulation of Market Power in the Audiovisual Sector

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Market power is an umbrella notion of this IRIS Special, used synonymously for the various economic, political and legal positions that frame and determine the actions of market players on a given market. In a converging audiovisual sector, it is important to pay attention to the fact that market power can be acquired at various stages along the value chain. Conditions for strengthening a market position might be set in the phase of generating content up to when content reaches the consumers. If a market player acquires a degree of market power allowing it to severely disturb the balance of any market defined within this value chain, market power becomes an issue for European and national law. Legislation and regulation are in place to reestablish the balance perceived as necessary for market-driving competition. In this sense, the audiovisual sector is no exception in its approach to market power. And still the sector is different in that too much market power may not only endanger the competitive settings of the sector but may in addition become a threat to the freedom of information. It is this latter aspect that in the audiovisual sector turns market power into a particularly sensitive issue to which national legislators and regulators backed by national courts seek sensitive replies.

Countries that believe in the importance of freedom of information also stress the need to have an audiovisual sector designed to provide pluralism and diversity of content so that the exchange of different thoughts can flourish. This need becomes an argument in favour of different types of state interventions used to regulate market power. We have identified three general types of interventions, alongside which the analysis is structured in three parts.

The first type of interventions is made *ex ante* and consists of introducing media-specific anti-concentration rules, that is, rules that stop individual market players from becoming so powerful that their activities can produce harmful effects on the plurality and diversity of the media market. These anti-concentration rules might allow blocking a company from establishing or potentially abusing a dominant position, for example, by hindering it to *de facto* determine what content is available and to whom. This short analysis will explore in a first part to what extent media-specific anti-concentration regulation is still a cornerstone of regulation aimed to secure diversity and pluralism. It is thinkable that in a digitised environment, which facilitates the operation of platforms for a multitude of content and services, legislators see less need for stopping or at least controlling certain market developments (i.e. for negative intervention). Hence, one important question to answer is whether the regulatory focus is still on media-specific anti-concentration rules or whether it has shifted. This entails looking at pertinent anti-concentration measures and their reach. It leads to the questions of what types of rules exist and of whether they also apply to public service broadcasting and on-demand services.

The second type of interventions relates to positive measures that strengthen the position of market players considered to fulfill an important role in fostering pluralism and diversity. One example is the establishment of public media services whose task is to ensure a specific range and quality of information. A positive impact on pluralism and diversity may also be achieved by introducing rules on must-carry or net neutrality. Other provisions address market power concerns that relate to additional layers of media-specific services that have developed alongside the digitalisation of media services. Limited access to reception-enabling devices and services are one case in point. The second part of the analysis addresses rules that complement traditional media-specific anti-concentration rules inasmuch as they intervene in favour of certain content or services or redress discriminating practices towards them.

Finally, states may resort to a third type of interventions, namely the tools of general competition law that apply *ex post*. States might possibly adapt these rules to the specificities of the audiovisual sector. The third part of this analysis will focus on general competition law or more precisely on how it is applied to the audiovisual media sector. It looks at questions such as to what extent do countries follow the general rules and where are specific competition rules in place? What are the key concepts and key actors? And last but not least what are the main challenges of applying competition law to audiovisual media? This part implicitly reflects on how the media-specific legal framework relates to the general competition law framework: Are the two approaches entirely separate, are they mutually dependent, and most importantly are they reconcilable?

All three parts draw on the information given in the country contributions preceding this analysis. Potential misinterpretations of content thus used are entirely the responsibility of the author of this analysis.

I. Is media-specific anti-concentration regulation still an important tool?

One of the main questions that had enticed us to conduct this study was what role national media-specific anti-concentration regulation plays in a converged and connected environment. Media-specific rules traditionally relate to classical media types such as broadcasting and newspapers, and they target concentrations within each of these categories or between the different media or with regard to different categories of owners (e.g. foreign companies, political parties). Pertinent provisions are usually contained in media and especially broadcasting acts. We wanted to know whether these provisions maintain their traditional importance and whether they distinguish between public and commercial broadcasting. Furthermore, we were interested to learn if they cover services such as connected TV or on-demand video.

1. Linear audiovisual media services

We can still note that media-specific anti-concentration regulation targeting linear audiovisual media services continues to play a role in most countries that we included in this study. Examples are:

- the Spanish horizontal ownership rules that include a limit based on audience share and aim fundamentally at preventing the merger of the two main private broadcasters Antena 3 and Telecinco;
- the French limits for the maximum capital share concerning foreign ownership in terrestrial television as well as the limits on the number of terrestrial TV licences and the accumulation of shares in companies licensed for terrestrial broadcasting;
- the German annual average audience share thresholds and limits to transnational shareholding;
- the Italian cap on the number of channels broadcast by the same audiovisual media service provider and the so-called "economic" anti-concentration 20% limit prohibiting dominant positions in an economic relevant market (or any submarket such as the market for audiovisual media services);
- the Hungarian annual audience share thresholds that limit the audiovisual media service providers' ability to expand their services or engage in media-related acquisitions and that might oblige them to take measures aimed at increasing diversity; similar as well as additional qualitative and content requirements may apply to linear media service providers with "significant influence power";
- the Norwegian audience share limits for horizontal and diagonal ownership.

However, concerning television broadcasting, specific anti-concentration rules never existed in Luxembourg and they have been abandoned in the United Kingdom (through the Communications Act 2003) and in the Netherlands (in 2011, when the Temporary Media Concentration Act was repealed) but in the latter two countries specific media ownership issues continue to be monitored by the broadcasting regulatory authorities.[1]

Upon closer examination, it also becomes clear that even in countries without rules labeled as media-specific and anti-concentration some ownership restrictions attach to broadcasting services though this happens in a different way. For example, only enterprises established in Luxembourg may acquire a Luxembourgish broadcasting licence. Hence, licensing becomes the *de facto* means for restricting foreign ownership in broadcasting. Licensing also plays a major role in the United Kingdom's concept of media-specific anti-concentration measures. The Communications Authority, Ofcom, has been empowered to condition broadcasting licences on terms that it considers appropriate "for ensuring fair and effective competition in the provision of licensed services or of connected services" (s. 316 CA03). In practice, this allows Ofcom to apply to prospective licensees certain prohibitions and limitations including those pertaining to vertical/diagonal and other forms of media ownership.[2]

Among those countries whose legal framework contains media-specific anti-concentration rules, many use licence conditions as an additional means for stopping certain concentrations. For example, in addition to the Polish Broadcasting Act's specific limits on foreign ownership, Poland handles media-specific concentration issues mainly through its licensing system. The Broadcasting Act enables the licensing authority to refuse or revoke a licence in situations where a market player might acquire a dominant position. Similarly, Switzerland uses the rule of no-more-than-two-television-licences to counter media-specific concentrations, and Germany checks on "predominant influence on public opinion" when considering the award of a licence.

When looking closer at the legal frameworks of the Netherlands and the United Kingdom – two countries that we listed as having abandoned media-specific anti-concentration rules and as far as the Netherlands are concerned as the only system that also does not "replace" them by checking concentration issues during the process of broadcasting licensing – we note that regulation through licensing does take place further down in the value chain. In the Netherlands, the anti-concentration considerations that other countries link to broadcasting licensing, hit broadcasters that apply for a licence on terrestrial FM frequencies. They are then subject to certain restrictions as to what licences may be combined. Among them is, for example, an ownership cap on accumulated audience reach.[3] In the United Kingdom, Ofcom shall consider ownership aspects when licensing DTT multiplexes or authorising transmission services, which might open up the possibility to look into vertical integration.

Overall, it appears that the digitisation of broadcasting and the diminishing importance of scarcity have removed some of the needs for media-specific anti-concentration regulation. At the same time the concern that one market player or certain well-defined groups of individuals or enterprises might dominate the opinion-forming process persists, at least for the time being. If there are trends at all, one probably consists in using tailor-made anti-concentration measures by attaching specific conditions and/or obligations to licences. Another trend, addressed further below, is the questioning of the criteria and scope of anti-concentration rules in light of connected services.

2. Public service broadcasting

Among the countries that do use media-specific anti-concentration laws for broadcasters, Italy and Norway apply those to all broadcasters no matter if commercial or public. France, Hungary, Spain and Germany restrict these rules to commercial broadcasters. Germany, however, has a separate set of rules regulating the market activities of public service broadcasters that one might qualify as media-specific anti-concentration rules.[4] Poland's anti-concentration rules are linked to the licensing of broadcasters and therefore do not concern those programme services that public service broadcasters must provide

1) For example, the Dutch Media Monitoring System, www.mediamonitor.nl
2) Ofcom exercises the same power with regard to DTT multiplexes and transmission networks, see below.
3) The restrictions on licensing of FM frequencies have, however, a limited practical impact because they concern radio and horizontal ownership.
4) See Articles 11a *et seq.* and Articles 16a *et seq* RStV. Public service media might be considered to be in themselves instruments to provide for media pluralism and diversity, which also accounts for the reluctance of states to subject them to media-specific anti-concentration rules and to apply instead schemes aimed at fostering internal pluralism. These specific aspects of public service media were, however, beyond the scope of our study.

by law. They might still apply to thematic public service broadcasting channels that require a licence. Similarly, other countries use the licensing conditions or the obligations of the *cahiers de charges* – in addition to specific anti-concentration rules – to ensure that public service broadcasters (or privately organised broadcasters offering public services) stick to their public service mission and don't start ousting commercial competitors. This even applies to countries such as Luxembourg and the Netherlands that lack media-specific anti-concentration rules. Another means used to keep public broadcasters within their remits are the public value test applied to the BBC in the United Kingdom[5] or the three-step-test in Germany. Both aim to ensure that a public service media provider does not expand its activity beyond its mandate and to the detriment of commercial competitors. A public value test is also foreseen in Spain (where it has not yet been applied due to a lack of new relevant activities by its public service broadcaster) and Norway. In the Netherlands, the offer of new services by public service broadcasters also requires first an internal check and finally a positive decision by the Ministry of Cultural Affairs (following a public consultation). The increased prominence of testing the value or suitability of new services envisaged by public service broadcasters is a result of the related EU state-aid decisions and the guiding Commission Communication.[6]

Switzerland and Luxembourg have a very specific legal setting for their public broadcasting services as a consequence of their equally specific (though between the two also very distinct) market situation. Both countries have relatively small television markets (in Switzerland additionally sliced in smaller markets by the four official languages) but are surrounded by countries with big markets of the same languages, including strong public services that directly compete with the broadcasters of Switzerland and Luxembourg. In order to remedy these effects both countries introduced particularly strong measures to promote national public broadcasting programme services despite the competitive disadvantages that this brought to the commercial broadcasters in the case of Switzerland and the perpetuation of the concentration situation that resulted in the case of Luxembourg. These measures pertain mainly to the financing of the public broadcasting services. In Switzerland it is secured through reception of most of the licence fee (*Empfangsgebühr*) and liberal rules[7] as to additional advertising and sponsorship revenue (but still respecting the common idea that public service broadcasters should rather be restricted as to the multiplicity of financial resources). In Luxembourg the commercial broadcaster RTL assures the public broadcasting services and in return enjoys an advantageous framework established by the government that allows for sufficient income and secures favourable licensing conditions (leading to a multitude of RTL channels and services). As a further result, in Switzerland the legislative framework is shaped to accept the strong position of the Swiss public service broadcaster and in Luxembourg the law rather promotes than limits a certain degree of concentration.

3. Non-linear audiovisual media services

To date, non-linear audiovisual media services have clearly not been a prime target for media-specific anti-concentration rules. None of the country reports mentions thresholds for audiences or capital shares that might directly limit ownership in on-demand audiovisual media services. These services are also not directly targeted by media-specific anti-concentration measures linked to licensing, simply because none of the countries included in this study has introduced a licensing system for non-linear services. For EU member states the Audiovisual Media Services Directive would also stand in the way of introducing a licensing requirement (and in addition licensing non-linear audiovisual media services would raise constitutional issues related to the freedom of information). In particular, rules which prohibit the accumulation of licences above a certain number, or rules that condition the award of a licence on remaining below certain concentration thresholds within a given market have normally no relevance for on-demand media.

This changes, however, when the evaluation of a concentration or dominant position also takes on-demand audiovisual media services into account. If and under what conditions this might be the case,

5) As far as Channel 4 is concerned, the law requires so-called Schedule 9 arrangements that are meant to ensure that its primary functions are not threatened by its commercial activities.

6) Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance), OJ C 257, 27 October 2009, p. 1-14.

7) It should be noted, however, that the SRG is still subjected to stricter rules on advertising and sponsorship than its commercial competitors.

has been answered in some countries while in others it is likely to be an open question. For example, in Hungary it appears clear that the media-specific anti-concentration rules only apply to linear services. Norway is currently considering whether and to what extent to widen the scope of its Media Ownership Act to include electronic media. And the latest supplementary advice of Ofcom suggests that the United Kingdom might review its rules given that in Ofcom's view "the existing framework for considering plurality might no longer be equipped to achieve Parliament's policy objective".[8] Ofcom recommends that in its periodic reviews (but also merger tests) certain online news providers should be included in any plurality assessment. These providers are namely those that "control the titles which are made available to the public" (and are therefore gatekeepers), "control the prominence of those titles online" (e.g. because they control search engines) or "control the content of those titles" (e.g. because they exercise some editorial control).[9] According to the French country contribution, the discussion on merging the French regulators of audiovisual services (CSA) and electronic communications and postal services (ARCEP) also hints to the more general discussion about the adequacy of certain parameters of media-specific regulation in light of interconnected services and markets.

One aspect might already under today's rules with their focus on broadcasting services allow countries to include in their media concentration considerations effects of non-linear media services: the definition of the relevant markets. In a converged media environment, non-linear media services might be part of a relevant market according to the following line of thought: Any definition of market will have to respect the purpose of media-specific anti-concentration rules and usually these are justified by the goal of achieving media pluralism and diversity. Their aim is to provide an environment that will generate a multitude of information based on which consumers can build their own opinion. No doubt non-linear media services can contribute to this goal. That this goal is still the driving force is visible in countries that use audience-share requirements (e.g. Germany, Norway, and Spain) or that bring in other elements that allow distinguishing markets according to their potential of shaping public opinion. In Hungary, for example, the media law specific rules aim at limiting "significant influence" as opposed to "significant market" power. Either way, a mix of different audiovisual media services, including non-linear services, might for example form one market defined in geographic terms. Mostly countries also simply state the purpose of promoting pluralistic and diverse information in their media-specific anti-concentration legislation. This emphasis might likewise facilitate the bringing in of non-linear media services should this be the desired result.

In practice, however, we did not identify case law that dealt with this very issue. However, a German case concerning the acquisition of ProSiebenSat.1 by Axel Springer AG already brought to the fore the question of how to define "other media-relevant related markets" with regard to the markets for television and daily newspapers. A similar constellation might one day lead to the question of the relationship between the markets for television and non-linear media services.

II. Other specific rules that have an impact on media market power

Extending the notion of "media-specific anti-concentration regulation" to converged services and putting under scrutiny the complete value chain linked to audiovisual media services results in a significantly more colourful picture of relevant provisions: the sources for media-specific rules increase as do the kinds of regulatory instruments that might have a comparable impact. In addition to broadcasting regulation, we especially need to take (tele)communications law into consideration because it shares the potential for counteracting (unwanted) concentration phenomena at a different level of the value chain. Likewise we must look out for rules that specifically address the concentration effects of converged and enabling services. And while doing all of the above, we need to remember that relevant provisions must not necessarily take the form of traditional laws. Obligations and limitations may just as well be rooted in self- or co-regulation or, as already explained, in licensing arrangements.

8) For the United Kingdom, Ofcom in 2010 had submitted a report on plurality in the context of the proposed NewsCorp/BskyB transaction by which it had suggested "that the existing framework for considering plurality might no longer be equipped to achieve Parliament's policy objective" (see point 1.2 of the Report 05/10/2012 "Measuring media plurality – Supplementary advice to the Secretary of State for Culture, Media and Sport and the Leveson Inquiry").

9) Ibid. (FN 8), point 5.4. See also the Report on "Measuring media plurality - Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport" of 19 June 2012, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf

1. Must-carry rule

Must-carry provisions also aim at promoting the plurality of opinion and thereby they strengthen the position of individual players.[10] All countries but Luxembourg and Spain have a rule that obliges electronic communications networks to transmit specific television broadcast channels and services to the public in order to meet clearly defined general interest objectives. Public service (rather than commercial) broadcasters are the principal beneficiaries of must-carry obligations. The must-carry provision can, however, also include privately organised broadcasters, especially to the extent they are entrusted with public service tasks as is the case in Norway and the United Kingdom, or even extend to specific foreign programmes like in Switzerland. The obligation is sometimes restricted to specific forms of retransmission or limited by certain conditions (e.g. in Germany it does not apply to providers of open networks or networks reaching less than a certain number of homes). It may also focus on specific kinds of services such as local broadcasting in Italy. The Netherlands has announced its intention to review its must-carry rules to make the approach more technology-neutral.

Mostly the must-carry obligation is mirrored by a must-offer obligation imposed on the broadcasters benefitting from must-carry. Sometimes this obligation applies only to public service broadcasters (e.g. in the Netherlands provided that copyrights are cleared). Spain also requests its public service broadcasters to grant broadcasting platform operators free access to the public service broadcasters' channels (which might be viewed rather as a recommendation than an obligation) but has no mirroring must-carry provision. Before the adoption of the new Spanish Audiovisual Act, must-offer also applied to commercial broadcasters which are now merely obliged to facilitate access to their main channels provided they receive suitable payment.[11] No must-offer obligations exist in Germany, Italy, and Norway.

2. More relevant rules, especially for services enabling/facilitating use or reception

The switch to digital technology and the emergence of on-demand services put equipment and access issues in the limelight. For example, digital decoders can be part of a proprietary system that fosters the market power of one service provider; electronic programme guides (EPGs) can be biased towards promoting certain services and discriminating against others. Most countries have reacted to the emerging power of providers of services enabling or facilitating use or reception of offers concerning audiovisual media services. Visibly, EU law[12] has had a harmonising effect on the relevant rules of member states.

In Germany the law forbids to establish technical standards for services (such as Application Programming Interfaces (APIs) or Conditional Access Systems (CAS)) allowing access to the platforms distributing broadcasting and comparable telemedia services in a way that would provide undue obstacles or result in unjustified discriminations. The law also stipulates that EPGs must provide equal reference to public and private programmes.[13] In Luxembourg it is possible to impose access-related conditions on companies with significant market power, including measures ensuring access to APIs and EPGs. In addition, fair, reasonable and non-discriminatory (FRAND) terms must be applied with regard to accessing digital receiving devices and digital networks concerning television, conditional access providers must keep separate accounts as to this activity and they are under a licensing obligation towards manufacturers. Very similar rules apply in Poland. FRAND terms are also obligatory for CAS and EPGs in Spain and for distributors of free-to-air DTT in France. Moreover, in France the regulation on the numbering of services limits the distributors' power to organise their services in other ways than "logical numbering" for the DTT channels. In Hungary enabling services such as EPGs are submitted to the same rules that apply to all media services. The Netherlands has specific provisions that would

10) For more information on the must-carry rule, see IRIS *plus* 2012-5, Must-carry: Renaissance or Reformation? (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2012).
11) By contrast, in Norway the cable provider has to pay for the retransmission.
12) Especially important are the provisions of the Access Directive concerning Electronic Programme Guides, Application Programming Interfaces and Conditional Access Systems (Articles 5 and 6 in conjunction with Annex I).
13) For further details, see also B. van der Sloot, "Due Prominence in Electronic Programme Guides", in IRIS *plus* 2012-5, Must-carry: Renaissance or Reformation? (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2012), p. 36.

allow regulated access to enabling services (EPGs, APIs and CAS) but they are currently not applied. In the United Kingdom, Ofcom has adopted a Code for EPGs, which addresses concerns such as the proper listing of public service broadcasting channels and the competitive advantage of a channel provider linked to an EPG provider. It also demands that EPG providers respect FRAND terms.[14] The Ofcom Guidelines on the Provision of Technical Platform Services clarify the conditions (including pricing) that may be (and have been) imposed on conditional access.

The two non-EU members Norway and Switzerland are both concerned about digital reception devices such as decoders. While Norway applies a rule that compels NTV to make EPGs accessible, to use recognised open standards and to provide access to related specifications, Switzerland had discussed a provision that would have promoted the free choice of digital reception devices. In the end, the rule did not pass, mainly because of fear that "old" technology might have become the standard and might stall the development of the market.

3. Net neutrality

The Netherlands has recently introduced a provision into its Telecommunications Act that obliges Internet access providers to distribute services in a non-discriminatory way. Services may neither be blocked nor conditioned on payment from the service provider. In Norway the Post and Telecoms Authority jointly with the industry established certain principles that rather emphasise the rights of users to an Internet connection of specified capacity and quality. This connection must further allow for access to content, services and applications as desired and not discriminate as to the source, type of application, service, content or recipient. The principle of non-discriminatory handling of traffic might be subject to exceptions in some specific cases provided that Internet service providers offer "quality of service" on selected services. In the United Kingdom, some Internet service providers jointly passed an Open Internet Code of Practice. Ofcom, acting as converged regulatory authority, has recently indicated that it deems this self-regulation sufficient for as long as network operators do not prioritise managed services in a manner that leaves insufficient network capacity for best-efforts access to the open Internet. In France, the regulator for electronic communications and postal services ARCEP obtained new powers regarding net neutrality. These enable ARCEP to monitor trends on the data interconnection market and to settle related disputes. ARCEP may also set minimum service quality requirements. Recently, also the German national regulatory authority Bundesnetzagentur (BNetzA) has been empowered to adopt fundamental requirements for non-discriminatory data transmission and access to content and applications. The BNetzA may define the minimum quality of service through the adoption of technical guidelines. Once more, these latest trends show the harmonising effects of EU law, namely of Article 23 of the Universal Service Directive.

The other countries looked at in this study don't have concrete rules in place that address the net neutrality issue though most of them have certainly entered into a debate. Net neutrality is still a relatively new issue in the market power discussion but one with future potential.[15]

III. Competition law

The country contributions suggest that media power is connected to names of prominent companies. These names give ready testimony of how seriously competitive the audiovisual media sector is and of the fact that certain players dispose of a particularly strong position in the media sector. Table 3 of the market situation overview (see part III of this publication) illustrates this for the leading TV groups active in Europe. But how exactly does competition law supplement the more specific rules mentioned so far? Possibly the most important feature of competition law is that it applies to all audiovisual services. It thus fills in the gaps that media-specific anti-concentration rules and regulation through licensing obligations leave because they focus on broadcasting and because non-linear services don't require licences. How this particular option of relying on competition law might be used is to a large

14) For further details, see B. van der Sloot, *op. cit.*, p. 35.
15) With this conclusion also N. van Eijk, "Net Neutrality and Audiovisual Services", in IRIS *plus* 2011-5,Why Discuss Network Neutrality? (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2011), p. 5.

extent still an open question given that not too many cases reported in this publication took non-linear services into their focus. Competition law has also supplementing potential to the extent that media-specific rules disregard vertical concentration or other forms of market power in the audiovisual sector.

1. Misuse, mergers & acquisitions

All countries included in our study address through the means of competition law situations where strong market positions cause market problems. All of them distinguish between the abuse of a particularly powerful (mostly called dominant) position and the danger that a position may become too strong as a result of a merger or an acquisition. The national rules are thus perfectly aligned to the logic of EU competition law. Luxembourg lacks a regulatory framework to assess and regulate mergers (its national competition rules apply solely for ensuring effective competition), so that only cross-border mergers will be addressed to the extent they are assessed by the Commission according to EU merger law. The United Kingdom applies its competition law to address any feature or combination of features in a market that prevents, restricts or distorts competition in such a way as to constitute an adverse effect on competition. Thereby, it does not matter whether the effect is caused by the market's structure, the conduct of market players or that of consumers. In contrast, Germany follows the general competition law principle not to address a dominant position if it occurs in the course of a business development that is independent of a merger or acquisition (i.e., cases of natural growth).

2. Adaptation to the media sector

In the United Kingdom, Hungary and Italy mergers in the media sector may receive specific procedural treatment or be subject to additional rules. In the United Kingdom this is due to the rule that mergers raising certain public interest issues, such as plurality issues that might matter if a merger concerns broadcasting, may be referred to the Competition Commission and that such a merger will then also involve the Anti-trust Regulatory Authority and the Communications Regulatory Authority (Ofcom). Clear procedural rules regulate their co-operation. Ofcom will write a report addressing media plurality implications. The public interest issue has to be considered for the outcome of the case (for a more detailed description of the procedures see the contribution on the UK, point 4.2.).

In Hungary merger control in the communications and media domain assigns a role to the Media Council in addition to the otherwise competent Competition Authority. Case law pertaining to the press suggests that these authorities have different approaches as to how to define the relevant markets. While the Media Council tends to emphasise the pluralism of opinions, the Competition Authority sticks to the competition law definition. The Hungarian Competition Authority has to seek the opinion of the Media Council in mergers that concern companies which bear editorial responsibility and the primary objective of which is to distribute media content to the general public via an electronic communications network. The statement issued by the Media Council on the permissibility of an envisaged concentration is principally binding but the Competition Authority can still block a merger or add conditions to it based on the Competition Act (for a more detailed description of potential differences see the contribution on Hungary, point 4.).

Italy too applies rules to undertakings operating in the field of media that are partly different from those applying to other economic sectors. These differences include special notification thresholds and the application of the sector-specific anti-concentration limits. In Italy, concentrations in the media sector are simultaneously notified to the AGCOM and AGCM which have overlapping competences but apply different rules. As a result, diverging interpretations and outcomes are possible even though AGCM is obliged to seek AGCOM's opinion before it decides (for a more detailed description of the procedures, see the contribution on Italy, point 4.3.).

Switzerland abolished its specific merger rules for the media sector reasoning that media-specific competition-protecting antitrust rules were generally unfit to tackle media issues. This resulted in the much higher threshold of the general antitrust law being since also applied to media mergers and in turn in very few media mergers being investigated.

3. Thresholds

The Spanish CNC defines[16] a dominant position as "a situation in which one company is able to behave relatively independently in the market without taking suppliers, customers or competitors into account" (so in the context of abuse). In Poland it is assumed that an undertaking holds a dominant position if its market share in the relevant market exceeds 40%. Yet this presumption is rebuttable depending on the concrete circumstances of each case and further elements such as the ability to act largely independently of competitors, contracting parties and consumers may be considered.

The importance of factual circumstances is likely to be the very reason why most of the country contributions don't reveal an explicit definition of dominant position. They rather focus on the next step, namely the thresholds used in practice to determine whether the abuse or the creation of a dominant position causes or threatens to cause a disturbance of competition. But even there the language remains necessarily vague. Examples include the United Kingdom's test of a "substantial lessening of competition" (a wording that is now also used in Hungary relaxing the former language of "impede the formation, development or continuation of effective competition") and Norway's check on "the creation or strengthening of a significant restriction of competition".

4. Markets/case law

The reliance on case law for developing the competition law framework also means that the exact delineations of markets vary from country to country. In Polish and Hungarian cases, for example, the idea of substitution of goods, a known concept in competition law, is a much emphasised element. In countries where more than one regulatory authority participate in the control of mergers or the check on abuse of dominant positions, this case-law based approach risks that market definitions might diverge within one jurisdiction. This is particularly likely if the authorities use different angles for their judgment. In Italy this seems to be the case for the distinction (or not) of television advertising and pay-TV markets. Certain countries (e.g. Poland and Switzerland) show a trend towards distinguishing numerous markets (markets for information, for sport, for advertising etc).

The competition decisions reported in the various country contributions touch virtually on all possible aspects of market power being exploited or established. They underline that mergers and acquisitions are ever more likely to spread their effects on several markets in vertical, diagonal and horizontal directions. How to judge this under competition law requirements must be decided for each case through studying in depth the factual situation and the potential future impact that a position of power might have in a very rapidly changing market. Other aspects make it additionally hard to recapitulate the great lines or to point to trends in the countries' application of general competition law. Complicating the picture are, for example, media-specific policy goals such as the protection of a pluralistic market (that often lurks in the background even though it is not the principle aim of competition law) but also plainly market-oriented goals such as accomplishing the switch to digital. Another recurrent analysis-hindering theme is the fear of impeding a not yet well enough developed market, especially when Internet-based business models are concerned.

A significant amount of merger decisions or market investigations dealt with the effects of market power on the film rights market in the context of pay-TV services (e.g. TPS/Canalsatellite merger, Sky investigation) but also the free-to-air television services (e.g. Telecinco/Cuatro and Antena 3/La Sexta mergers). Likewise, the Swiss markets for film and sports rights have been the subject of review in the context of Swisscom's acquisition of shares in Cinetrade AG (which was cleared to enable Swisscom's triple play offers) and Cinetrade's dominant position with regard to live sports broadcasts (a monitoring process for abuse is ongoing).

The exclusive marketing of sports rights caused antitrust concerns for the national (and international) transmission markets in Germany. The problems were solved partly through the imposition of obligations that ensure football matches are actually shown on the various transmission

16) Following the definition introduced by the Court of Justice in the United Brands case (27/76 of February 1978), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0027:EN:HTML

platforms. Similar concerns played a role in the investigations of the agreement between Canal+ and the Polish Football Association, where the national market for rights to television transmissions of football matches in the Polish league was recognised as a separate market (and an even narrower market definition limited to the television transmissions of football matches within one event, the European Football Championship 2008, was adopted in the Cyfrowy Polsat abuse case).

Sports rights also mattered in an Italian case that links sports rights to another important area of market power, namely the advertising market. The Mediaset Group was found to have abused its dominant position in the television advertising market by acquiring broadcasting rights for Premier League football matches. Without the opportunity to offer any of these matches, the offers of Mediaset's competitors would have been so unattractive as to *de facto* also exclude the competitors from the television advertising market.

Expected dominance of a market player on the television advertising market accounts for many other cases. In Germany, it was the reason to prohibit the ProSiebenSat1/Bertelsmann merger and block the setting up of the VoD platform Amazon, which would have been a joint venture of ProSiebenSat1 and RTL interactive GmbH. The television advertising market was also one of the major (among many) concerns in the Spanish Telecinco/Cuatro and Antena 3/La Sexta merger cases as well as in the Polish Telewizja Polska/TVP abuse case. It was moreover one of the three main affected markets in the Polish mergers concerning Canal+ and ITI/TVN and in Hungary involving the RTL CEE/IKO Media Holding merger and the IKOT/MRTL acquisition. The advertising market – though not limited to television – was finally at the centre of the UK Granada/Carlton merger. That merger was approved with the so-called "Contracts Rights Renewal" remedy attached to it, which provides advertisers and media buyers with the right to renew their current contracts with Granada and Carlton under the existing terms.

Operators of transmission networks are also regularly subject to competition law concerns focusing on abusive practices: For example, the Spanish company Abertis was accused of imposing abusive conditions on commercial broadcasters and the Swiss Cablecom AG of abusing its market dominant position as a cable network operator to the detriment of a digital pay-TV service. Poland has also had many reasons to use competition law to address abusive practices of platform operators in their relations to broadcasters and other operators as well as mergers between operators.

5. Separate, mutually dependent, reconcilable?

In the majority of countries included in this study, media-specific anti-concentration rules preserve their importance for broadcasting and in particular as an *ex ante* regulatory instrument to regulate in favour of pluralistic and diverse media content. Germany, for example, underlined the importance that it attributes to specific anti-concentration rules by establishing a still unique Commission on Concentration in the Media (KEK),[17] which has the sole task to monitor and enforce compliance with the legal provisions designed to ensure diversity of opinion in nationally transmitted commercial television. Dogmatically, the second set of rules addressing market power, namely competition rules, is a separate area of law. It may look at the same market settings from an economic viewpoint and it concerns a different timeline, namely *ex post* regulation. Moreover, competition law means evaluating market power case by case and these cases often centre around competition for financial means such as advertising revenue or cashing in on copyrights.

As the study shows, countries might feel the need to build into competition law a possibility to also consider pluralism and diversity concerns, a need that echoes in EU law but still lacks explicit recognition as an objective in EU merger cases (while it seems recognised as a welcomed side-effect).[18] Even though pluralism and diversity issues rank second (after market concerns) in competition law, the possibility to take them into account links competition law to concepts, thresholds and goals pursued by media-specific anti-concentration rules. Moreover bringing media-specific issues into the application of competition law opens up opportunities for co-operation among regulatory authorities and integrative procedures. When adequately co-ordinated this can offer countries more flexibility

17) www.kek-online.de
18) For further thoughts on this, see the contribution on EU law (point III.2.) in this publication.

as to how and when they address their media concentration concerns. For example, where specific rules apply only horizontally, competition law can still bring in the vertical and diagonal ownership dimension and accommodate the specificities of each individual case. Whereas media-specific anti-concentration rules are tailored towards traditional media, general competition law is open to all audiovisual media services. The latter may therefore be applied to on-demand services as well as to enabling services. This will become particularly important inasmuch as these non-traditional media services move into the focus of attention, for example, because they might gain greater relevance as revenue sources or bottlenecks. Thus competition law can serve to have a first look into media-specific aspects not regulated by specific rules.

Meanwhile, we can witness how another path for addressing media power pursued by the EU adjudicators and EU regulators increases in importance. A very specific set of rules has developed around public service broadcasting. It consists of case law about state aid, and rules regulating must-carry, access and interoperability. Especially access and interoperability bridge over to the importance of enabling services that are not captured by traditional media-specific anti-concentration rules. The total of these rules achieves a certain level of promoting and protecting important public interests. Among them are, the interest to ensure the availability of a certain kind of content to consumers and the interest to let an innovative and open media sector flourish. A similar development might be under way with regard to rules addressing net neutrality, where consumer rights and interests play an important role. These developments taken together might prove to be forward-looking tools to complement media-specific and general rules addressing market power and possibly to unite them one day in an overarching and converged framework for regulating media power.

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IRIS *Special*

Converged Markets - Converged Power?

Regulation and Case Law

Market power becomes an issue for European and national law makers whenever market players acquire a degree of power which severely disturbs the market balance. In this sense, the audiovisual sector is no exception. But this sector is different in that too much market power may not only **endanger the competitive parameters of the sector** but may also become a **threat to the freedom of information**. It is this latter aspect which turns market power into a particularly sensitive issue for the audiovisual sector. National legislators and regulators backed by national courts seek solutions adapted to this problem.

This IRIS *Special* issue is deals with the regulation of market power in the audiovisual sector in Europe.

The first part of this IRIS *Special* explores the **European Union's** approach to limiting media power, an approach still dominated by the application of competition law. This IRIS *Special* explains the general functioning of competition law and other regulatory instruments. It specifically shows how the various services provided in the audiovisual sector are regulated and what markets are to be distinguished.

The second part contains a description of the legal frameworks of **11 European countries** used to address media power. For each of these countries you will find in particular information on the regulation of audiovisual media services and enabling services, platforms and converged services, and finally distribution services.

The eleven countries were selected for this study because they either represented major markets for audiovisual media services in Europe, or because they developed outside the constraints of the internal market, or because they had some interesting unique feature, for example the ability to attract major market players despite lacking an adequately sized market.

The third part brings in the **economic background** in the form of different overviews concerning audience market shares for television and video online. This data puts the legal information into an everyday context.

The fourth and final part seeks to tie together the **common threads** in **state regulation of media power**, to work out the **main differences** and to hint to some **unusual solutions**. Here and there it will weave in aspects of EU law that have influenced the national legal frameworks.

This IRIS *Special* issue is a milestone on the way towards **greater transparency** in the audiovisual sector concerning the regulation of market power. It also highlights the challenges of regulating converged markets and related market power.

This comprehensive and timely analysis clarifies the complex subject of the regulation of market power across Europe.

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