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### REMARKS: THE SPANISH MEDIA MARKET

#### MADRID

Castellana, 216  
28046 Madrid  
Tel: (34) 91 582 91 00

#### BARCELONA

Diagonal, 467 bis  
08048 Barcelona  
Tel: (34) 93 415 70 15

#### BILBAO

Alameda Recalde, 36  
48009 Bilbao  
Tel: (34) 94 415 70 15

#### MÁLAGA

Marqués de Larios, 3  
29015 Málaga  
Tel: (34) 952 12 00 51

#### VALENCIA

Gran Vía Marqués  
del Turia, 49  
46005 Valencia  
Tel: (34) 96 351 38 35

#### VIGO

Colón, 38  
36201 Vigo  
Tel: (34) 996 44 33 80

#### LAS PALMAS

Buenos Aires, 8  
35002 Las Palmas  
Tel: (34) 928 38 38 36

#### BRUSELAS

Avenue Louise, 267  
1050 Bruselas  
Tel: (32) 231 12 20

#### LONDRES

Five Kings House  
1 Queen Street Place  
EC4R 1QS - Londres  
28046 Madrid  
Tel: (34) 91 582 91 00

### 1. Legal changes for a new market

#### 1.1. Mergers in the industry

The foreseeable restructuring of the Spanish media sector is mainly triggered by the measures approved by Royal Decree Law 1/2009, dated February 23. In short, **this norm liberalizes the cross-ownership regime** amongst the different nationwide TV stations, which was formerly limited to 5%.

The new restrictions are the following: (i) the combined share rating may not exceed 27%; (ii) the accumulated rights to use radiofrequencies may not exceed two nationwide digital multiple channels and one regional digital multiple channel; and (iii) three different TV stations should exist, at least.

Telecinco and Antena 3 have share ratings of around 16% each. Thus, a merger between them is excluded; but, they can be the leaders of a merging process with other TV stations with smaller share ratings: Cuatro, la Sexta, Net TV and Veo TV.

Indeed, on June 5, 2009, negotiations between Cuatro and la Sexta to merger into a new joint venture were announced.

On the other side, Royal Decree Law 1/2009 regulates the applicable **limits to non EEA foreign investment** into the share capital of TV stations, which will be subject to the reciprocal principle. It also foresees that non EEA foreign investment may not be increased up to more than 50% of the share capital.

#### 1.2. New funding system for the public TV, under which advertisements will not be broadcast

Currently, Parliament debates a draft law aimed to **suppress advertising in the public TV** broadcast by *Corporación de Radio y Televisión Española* (RTVE).

The lack of advertising revenues is intended to be balanced by the Government through public funding which, partially, will be raised by **contributions imposed to TV stations** covering a territory larger than an Autonomous Community—who will annually contribute 3% of their income if they provide free TV services or 1.5% of their income if they provide pay TV services— **and to electronic communications operators** providing (fixed or mobile) telephone services internet access services, when they operate in a territory larger than an Autonomous Community—who will annually contribute 0.9% of their income.

Amongst other questions, the norm leads to think on the **requirement to define the scope of public service** to be provided by *Corporación RTVE* and how to **determine the net cost to be funded with accountability separation**, so that the limits for State aid ruled under the EC Treaty are not infringed and bearing in mind the points developed by the European Commission Communication (2001/C 320/04) and by Judgment of the ECJ dated July 24, 2003, Case C-280/00, *Altman*.

#### 1.3. Licenses for pay DTT

The analogue switch-off is scheduled by April 3, 2010. As from that date, any TV broadcasting will be digital. For the Digital Terrestrial Television (DTT), this will mean an increase in the number of channels which will compete for luring the audience to their content. The viability of the free TV system in this new model with more service providers is being discussed.

As a result, some nationwide TV stations have fostered the Government to change their licences for being expressly entitled to broadcast pay DTT.

The Government recently announced that those DTT service providers who are entitled to operate more than one channel will be allowed to totally or partially operate one of the channels through conditional access systems.

## **2. Acquiring and protecting audiovisual content is extremely important**

Audiovisual content is one of the most important assets for TV service providers; it is a key element to succeed in differentiating the offered product from competitors'.

As regards acquisition of such content, there are two aspects which are currently topical subjects:

### **2.1. Arrangements with collective managers of Intellectual Property Rights (IPRs)**

Two recent judgments from the Supreme Court, in February and April 2009, are new case law on **how tariffs may be fixed by the collective managers of IPRs**. This new case law is favourable to TV stations since they declare that remuneration for IPRs shall be determined based on the *effective use* of the authored content and not on the simple *availability* of said content. This new criterion also implies new questions such as, amongst other:

- How can measurement of *effective use* be implemented;
- How tariffs not adjusted to the new criterion may be revised; or
- The potential unenforceability of the already executed agreements between TV

stations and collective management of IPRs entities.

On the other hand, **competition authorities are also influencing on how tariffs should be fixed by those collective management of IPRs entities**. Last year, the Council of the National Competition Commission (NCC) opened file 651/08 as requested by a complaint lodged by Telecinco, a TV station, against the Asociación de Intérpretes y Ejecutantes (AIE), a collective management entity for alleged abuse of a dominant position when establishing non-reasonable and non-fair tariffs based on the user's income and not on the effective use of the IPRs; that is, precisely, the *effective use* which, according to the Supreme Court, should be the base of the tariffs. Similarly, even though for different reasons, in December 2008, the Council of the CNC already found that AGEDI/AIE abused their collective dominant position by fixing discriminatory tariffs to different users.

### **2.2. Protecting audiovisual content**

New technologies and new forms of TV services challenge the manner in which conventional TV stations may retain value from the audiovisual content they acquire; at the same time, this leads to a legitimate interest of conventional TV stations to protect their content from illicit use by third parties.

Conflicts related to the broadcasting of TV programmes through internet (e.g. hosted in You Tube), or to the plagiarism of TV concepts, or even to the abusive use of third parties' content for the production of own content (e.g. in zapping programmes) are clear examples of how TV stations are keen to protect their investment in audiovisual content. Internet is, increasingly, used by TV operators to broadcast (or re-broadcast) both new and long-standing content.

This new content distribution model has legal implications related to e-commerce (application of the Law 34/2002, dated July 11, on Information Society Services and on E-commerce) and intellectual property (in particular when agreements with authors and/or producers do not refer to on line distribution).

### **2.3. Personal data regulations**

Image of a person as well as other features (name, voice,...) is a **personal data subject to the scope of application of the Organic Law 15/1999, dated December 13, on Personal Data Protection**. Some recent case law, in particular judgments from the National Court dated October 1, 2008 (case Enrique Iglesias & Ana Kournikova) and May 8, 2009 (case Fernando Esteso), are pioneers in the assessment of the legal consequences deriving from the above. This will likely increase litigation in the forthcoming years.

### **2.4. Intimacy, honour and image rights**

Conflicts related to the fundamental rights to honour, intimacy and image are common topics for media. Despite the long time already lapsed since the Organic Law 1/1982, dated May 5, was enforced and the existence of a clear case law arising both from the Constitutional Court and the Supreme Court, **this kind of conflicts often affects to both broadcasters and producers working for them.**

### **2.5. Sport events broadcasting rights**

The market of sport events broadcasting rights (in particular those related to football matches) might change in the short term in view of the **recommendations published by the National Competition Commission in June 2008**. The agreement reached on this matter amongst the two main right holders

(Mediapro and Sogecable) affects this matter where a point of inflection may be the final decision to be issued by NCC concerning sanctioning file open on April 8, 2008 against AVS, Mediapro, Sogecable and the clubs of the 1st and 2nd Division of the Spanish Football League. The agreement reached between Mediapro and Sogecable on June 4, 2009 may be also reviewed by the competition authorities.

### **3. Antitrust relevant applications for TV operators**

We have already commented the relevance of Competition Law for TV operators concerning audiovisual content acquisition, both for acquiring rights from collective management entities and for acquiring football events broadcasting rights. Likewise, Competition Law has also a significant relevance for TV operators in relation to the acquisition of another necessary input from a dominant operator: broadcasting transmission services.

### **3.1. Competition and the market of broadcasting transmission services**

This is a very concentrated market where the dominant operator, Abertis Telecom, might, subject to the review by competition authorities, increase concentration by purchasing two competitors: Teledifusión de Madrid y Axión.

The market of the broadcasting transmission services is an electronic communications market where the Telecommunications Market Commission has defined the **access obligations imposed on Abertis Telecom to foster competition aimed to benefit TV stations**. Furthermore, the market is in a concentration process for which NCC's position on the conditions that could recommend the Government to require for the approval of the intended mergers might be crucial.

In addition, **the NCC recently fined Abertis Telecom for an abuse of its dominant position consisting of applying anticompetitive discounts linked to contracts for the provision of services in the whole national territory and, mainly, because the imposition to broadcasters of unfair early termination penalties linked to unjustified long service provision agreements**, resolution which will be immediately challenged as announced by Abertis Telecom. Finally, on June 5, 2009 the NCC opened a new sanctioning file against Abertis Telecom concerning an alleged abusive conduct consisting of offering predatory prices to nationwide DTT service providers for upgrading their coverage to 80% of the Spanish population, aimed to exclude competitors.

### **3.2. Assessment of the competition effects of potential mergers amongst TV stations**

Competition law implications are also relevant in terms of the assessment on competition effects of potential mergers amongst TV Stations that could happen after the new the cross ownership regime softened by Royal Decree Law 1/2009, dated February 23, on urgent measures in telecommunications matters.

**There are no real precedents. The most similar case is the merger between Sogecable/Vía Digital; nevertheless, there are notable differences:** (i) in that case, there was a total concentration of satellite TV platforms whilst in the current scenario, even in the case that all TV stations participated in a merger, there would not be a total concentration of media due to, basically, the regulatory restriction imposed in relation to the combined share rating of the merging entities; (ii) when the digital satellite platforms merged, the relevant business was pay TV while the current potential mergers will mainly deal with free TV businesses which means a

different scenario in relation to the scope of protection to users which justified some of the conditions imposed for the approval of the merger Sogecable/Vía Digital; (iii) finally, in the current scenario, there will be no vertical integrations between a TV operator and the owner of football broadcasting rights except, precisely, in the case of the announced merger between Mediapro and Sogecable to which we referred above.

### **4. Advertising**

In December this year, the EU Member States will have to implement **Directive 2007/65/CE (Audiovisual Media Services without Frontiers Directive); one of its objectives is to better regulate new forms of advertising, allowing commercial communications in traditional broadcasting services and softening advertising regulations even though maintaining the limit of 20%.**

On the other side, on June 5, 2009 a draft law to **amend the current Law on Unfair Trade and the General Publicity Law** has been submitted by the Government to the Parliament.

### **4.1. Implementation of the Audiovisual Media Services without Frontiers Directive**

Particular attention must be paid to the manner in which Spanish legislation will adjust the principles of the Directive. The most relevant aspects are the following:

- How *commercial communication* and *television advertising* will be defined;
- Whether stricter rules are to be established by Spanish law;
- How principles of advertising identification and separation are implemented;
- How the more flexible regime for television advertising is implemented regarding the amount of daily television advertising, sponsorship exception,

*product placement*, self-promotion and advertising of ancillary products;

- Surreptitious publicity and teleshopping; subliminal and illicit advertising
- How product placement will be regulated: definition and limits; how recent case law on product placement (cases Marina d'Or and Altadis) will be adjusted.

#### **4.2. Amendments to the Law on Unfair Trade and to the General Publicity Law**

TV operators may be involved in unfair trade litigation (for example, Supreme Court Judgments dated December 16, 2008 regarding joint sale of sport events broadcasting rights by FORTA—an association of regional public TVs. It is advisable to be in the loop on this matter, even more when the Law on Unfair Trade and the General Publicity Law will be reformed in the short term (last June 5, the relevant draft Law was published in the Parliament's Official Gazette) with the aim to implement Directives 2005/29/EC and 2006/114/EC.

In particular, **the following aspects are relevant for TV operators on regulation of publicity in the future Law on Unfair Trade:**

- Misleading acts and omissions;
- Aggressive practices;
- Comparative publicity;
- Misleading practices in codes of conduct;
- Surreptitious commercial communications;
- Definition of Illicit publicity;
- Subliminal publicity;
- Prohibition of publicity for health products or for products which are able to damage health, narcotics, medicinal products, or beverages;
- Promotion of codes of conduct.