

MEDIA CONCENTRATIONS AND PLURALISM*

Alexandre L. Dias Pereira**

Introduction

1. Notion of media and technological convergence

The word 'media' is often used to refer undertakings that operate means or channels of social communication, information or entertainment, including press, radio, television, and online communication, as well as, in a broader sense, cinema, advertising, publishing, music, film and audiovisual production, and distribution (press, books, cinema, etc).

Technological convergence and changes brought by the Internet may require the concept of media to be redefined, in the sense that the internet offers a single online digital medium as a complement, or as a substitute, to a variety of means of communication. As Walden puts it,

'the development of the internet is causing a fundamental shift in the nature of the media industry and, as a consequence, calling into focus the suitability of existing governing laws and regulation, including media ownership rules. It can be argued, for example, that given an individual's potential capability to reach a global audience

through the internet, ownership controls no longer make sense as a tool of pluralism.'¹

Nonetheless, despite the impact of the Internet on traditional media and in particular the migration to the electronic environment, media are still operating through the traditional channels.

2. Sources that guarantee the preservation of the plurality of the 'media' in Portugal

The preservation of the plurality of the 'media' in Portugal is guaranteed by several legal sources.

To begin with, the Constitution of the Portuguese Republic provides for in Article 38(4) on freedom of press and other media that the State guarantees freedom and independence of media from political and economic power, and establishes the principle of specialty for undertakings that hold bodies of general information and treating and supporting them in a non discriminatory way and preventing their concentration namely through multiple and cross participations. Moreover, the Constitution also provides for in Article 39 that media regulation, concerning namely concentrations, is implemented by an independent administrative authority, the ERC (*Entidade Reguladora para a Comunicação Social*)².

Then, plurality of the media is addressed by several media statutes, namely the provisions of the former Television Act on media concentration and ownership transparency³, which are still in force as they have not been repealed by the new Television Act⁴, as well as the Press Act⁵, and the Radio Act⁶.

* This paper originated as national report on 'Plurality of Political Opinions and the Concentration of Media', XVIII International Congress of Comparative Law, AICD/IACL (Académie Internationale de Droit Comparé / International Academy of Comparative Law) and American Society of Comparative Law (ASCL), July 25 to August 1 2010, Washington D.C.

** Prof. Dr. LL.M, Faculdade de Direito, Universidade de Coimbra, Portugal.

¹ Ian Walden, 'Who Owns the Media? Plurality, Ownership, Competition and Access', in *Media Law and Practice*, ed. David Goldberg, Gavin Sutter and Ian Walden, Oxford University Press, 2009, 19-55, at 54.

² Law 53/2005 of 8 November (Lei n.º 53/2005, de 8 de Novembro), Article 2.

³ Law 32/2003 of 22 August (Lei n.º 32/2003, de 22 de Agosto).

⁴ Law 27/2007 of 30 July (Lei n.º 27/2007, de 30 de Julho), Article 98(2).

At the EU level, the respect for the preservation of the plurality of the media is provided for the Charter of Fundamental Rights (Art. 11(2)).

At the international level, Portugal has approved and ratified the Convention on Cultural Diversity, adopted in Paris on 20 October 2005, which provides that the Parties have the sovereign right to adopt policies and measures to protect and to promote the diversity of cultural expressions within their territories, including the stimulation of media diversity.

3. Rationale of the plurality of the media

Pluralism of the media is an essential condition of basic civil rights in a democratic society⁷ such as the right to information and freedom of expression and confrontation of opinions, as well as an important means of preservation of language and cultural diversity. Media plurality is generally conceived as information independence and confrontation of opinions, mainly on political and economical issues, and it is seen as an ‘internal plurality’ in the sense that each newspaper and radio or television operator is supposed to be independent and to assure pluralism of ideas and opinions.

Part I. Media Regulations and ‘Anti-Concentration’ Measures

4. Anti-concentration measures in Portugal: background and rationale

In Portugal there are anti-concentration measures specific of the media sector which are aimed to implement the basic principles and rules of the Constitution.

Concerning TV undertakings, the Media Regulatory Authority (ERC) issues a previous binding opinion in mergers assessed by the Competition Authority. However, those binding opinions can only be negative in case merger operations present grounded risks for freedom of expression and plurality of opinion⁸. A similar solution had already been provided for concerning mergers of press undertakings⁹.

Concentrations of radio broadcasting undertakings require a previous authorization from the Media Regulatory Authority¹⁰, and they are to be denied in case it manifestly affects freedom of expression and plurality of opinion.

Reference to a person’s right to information, as opposed to the mere assertion of the principle of the freedom of expression, is not expressly provided for as an alternative justification for anti-concentration measures.

5. Scope of application

The Constitution provides basic principles for media regulation (Arts. 37 to 40), and texts specific to the media sector are limited to some media, in particular to those known as traditional media (press, radio and television).

The Press Act aims to guarantee the constitutional freedom of press¹¹, including the right to inform, to get information and to be informed without impediment or discrimination, including the prohibition of any sort of censorship¹². Limits to freedom of press can only be imposed in order to safeguard rigor and objectivity of information, to guarantee personality rights (e.g. name, privacy, image), and to defend the public interest and democratic order¹³.

⁵ Law 2/99 of 13 January 1999 (Lei n.º 2/99, de 13 de Janeiro).

⁶ Law 4/2001 of 23 February (Lei n.º 4/2001, de 23 de Fevereiro).

⁷ See C. Edwin Baker, *Media Concentration and Democracy – Why Ownership Matters*, Cambridge University Press, 2007; Dieter Dörr, Christine Heer-Reissmann, ‘Meinungsvielfatssicherung und Wettbewerbsrecht’, in *Handbuch Medienrecht: Recht der elektronischen Massenmedien*, Hrsg. von Dieter Dörr, Johannes Kreile und Mark D. Cole, Frankfurt am Main : VR&W Verlag Recht und Wirtschaft, 2008, pp. 185-232.

⁸ Former Television Act (Law 32/2003), Article 4(2), provision still in force as not repealed by the new Television Act (Law 27/2007 of 30 July, Art. 98(2)).

⁹ Press Act (Law 2/99), Article 4(3).

¹⁰ Radio Act (Law 4/2001), Articles 7(2) and 18.

¹¹ Portuguese Constitution, Article 37.

¹² Press Act, Article 1.

¹³ Press Act, Article 49.

On the other hand, the new Television Act¹⁴ provides for that the television activity is aimed at: contributing to the information, formation and entertainment of the public (a), and promoting the right to inform, to get information and to be informed, in rigorous and independent conditions and without impediment nor discriminations (b), promoting citizenship and democratic participation and to respect political, social and cultural pluralism (c), and diffusing and promoting Portuguese language and culture, as well as Portuguese creators, artists and scientists, and the values that express national identity¹⁵.

6. Requirements of application of measures anti-concentration measures

The conditions to the application of the media anti-concentration measures are generally the same as the conditions to the application of the merger control provided for by the Competition Act¹⁶. The notion of concentration is linked to the notion of control, which refers to both direct and indirect control, including the power to determine influence. According to the Portuguese Competition Act¹⁷, control shall be constituted by any act, irrespective of the form which it takes, which, separately or jointly and having regard to the circumstances of fact or law involved, implies the ability to exercise a determinant influence on an undertaking's activity, in particular: acquisition of all or part of the share capital (a); acquisition of rights of ownership, use or enjoyment of all or part of an undertaking's assets (b); acquisition of rights or the signing of contracts which grant a decisive influence over the composition or decision-making of an undertaking's corporate bodies (c).

Moreover, according to a (still in force) provision of the former TV Act, acquisitions of shareholdings in legal TV operator undertakings, or applicants to a TV license, by other TV operator undertakings have to be notified to the Media Regulatory Authority, where they do

not represent a concentration operation subject to previous notification under competition law¹⁸. However, despite an obligation to notify is imposed on the undertakings, the Media Authority is not expressly empowered to authorize or to prohibit this type of concentrations.

On the other hand, the Radio Act provides additional anti-concentration measures. For example, the number of radio operators in which a person may hold a share is limited to 5 and no company can own more than a 25% share in two or more stations that operate in the same municipality¹⁹. Transactions that change the control of a radio licensed undertaking can only take place 3 years after the issuance of the license or one year after its last renovation and it is subject to previous authorization from the Media Regulatory Authority²⁰. The existence of undertaking control is assessed by the possibility to exercise a determinant influence over its activity, namely through the existence of rights of disposal over any of its assets or rights that grant the power to determine the composition or the decisions of its bodies²¹.

Then, in order to implement the constitutional principle of transparency of media ownership²², media specific statutes also provide for measures concerning transparency ownership of media undertakings²³. For example, for purposes of the TV regulation, a qualified shareholding is deemed to exist when it enables a significant influence over the undertaking management, and it is presumed to exist where it corresponds to 10% of the capital of the company or to 10% voting of the voting rights therein²⁴.

Finally, concerning communication conglomerates, it should also be added that ownership of media undertakings holding bodies of general information is subject to the

¹⁴ Law 27/2007 of 30 July.

¹⁵ Television Act, Article 9(1).

¹⁶ Law 18/2003 of 11 July (Lei n° 18/2003, de 11 de Julho).

¹⁷ Competition Act, Article 8(3).

¹⁸ Law 32/2003, Article 4(3).

¹⁹ Radio Act, Article 7(3).

²⁰ Radio Act, Article 18(1).

²¹ Radio Act, Article 18(3).

²² Portuguese Constitution, Article 38(3).

²³ Press Act, Article 16, Radio Act, Article 8, and Law 32/2003, Article 5.

²⁴ Law 32/2003, Article 5(3)(5).

constitutional principle of specialty, meaning that their operations are limited to the media sector²⁵.

7. Implementation and enforcement competence

Those specific media regulations are implemented in first instance by the sector-specific authority, the Media Regulatory Authority (ERC). Nonetheless, merger control of media undertakings is enforced by the Competition Authority, which must take into account the previous binding opinion of the Media Regulatory Authority (ERC). This binding opinion can only deny a media merger where it places serious risks to freedom of expression and confrontation of different trends of opinion.

8. Sanctions for non-compliance

Aside competition law sanctions, there are provisions specific to the media. To begin with, an administrative fine between ten thousand and one hundred Euros is provided for those who exceed the maximum amount of shareholdings in radio operators, as well as to radio operator undertakings involved in concentration or transfer of shares operations that do not comply with the obligations to communicate such operations to the Media Authority²⁶.

Then, concerning TV operators, undertakings that do not comply with the obligation to notify operations of transfers of shares to the Media Authority were subject to an administrative fine between twenty thousand and one-hundred and fifty thousand Euros²⁷.

²⁵ Portuguese Constitution, Article 38(4).

²⁶ Radio Act, Article 68(d).

²⁷ Law 32/2003, Article 70(1). However, it is not clear whether this provision is still force, as the new Television Act that did not expressly safeguarded it.

Part II. Other Ways to Guarantee the Plurality of the Media

9. Obligations of contents (variety of programs, broadcasting quotas, broadcast access right, reply right ...) on the operators

Operators have to comply with obligations of content concerning namely variety of programs, broadcasting quotas, broadcast access right, right of reply, etc. For example, the Television Act provides for limits to the freedom of programming (Art. 27), acquisition of exclusive rights (Art. 32), as well as a set of general obligations concerning broadcasting of diversified and plural programs, objective information, diffusion of creative works or European origin, including in Portuguese, and to guarantee namely the right of reply (Art. 34). Moreover, limits to advertising are also provided for (Art. 40).

10. Allocation of public funds and the respect of plurality.

The Constitution provides for in Article 38(5) that the State guarantees the existence and functioning of a radio and television public service.

Concerning television, there is a system of allocation of public funds in order to finance the broadcasting public service in proportional and transparent conditions and with a refunding control mechanism²⁸. It is limited to what is strictly necessary to the functioning of the public service and a refunding control mechanism is provided for, as well as the statutory provision that the concession contract of the public service must prevent the concessionaire from adopting practices that are not justified by the rules of the market and which lead to the increase of costs or to the reduction of income²⁹.

Despite the allocation of public funds is not expressly subject to the respect of plurality of requirements, it does actually contribute to the respect of the plurality or at least participate

²⁸ Television Act, Article 57.

²⁹ Television Act, Article 57(4).

in guaranteeing the respect of plurality, as one of the basic principles that justifies the existence of a public service is to guarantee media pluralism³⁰.

As far as press and radio are concerned, there is a system of allocation of public funds to promote in non discriminatory terms the possibilities of expression and confrontation of different trends of opinion³¹.

Part III. Competition Law

11. Competition Law in Portugal: background and constitutive parts

The Portuguese Competition Act is provided for Law 18/2003 of 11 July³². In Portugal there is a Competition Act since 1983. It has been enacted by Decree-Law 422/83 of 3 December³³. This statute has been repealed by Decree-Law 370/93 of 29 October³⁴, which has later been repealed by the currently in force competition regulation enacted by Law 18/2003 of 11 July (Competition Act).

The main constitutive parts of Portuguese competition law are anti-competitive behavior (cartels, i.e. agreements, decisions of associations and concerted practices of undertakings, and trusts, i.e. abuse of dominant position) and mergers (concentrations). A provision on state aid is also provided for in the Competition Act.

Moreover, as a member State of the European Union (EU), Portugal is bound to the EU competition rules³⁵ concerning competitive behavior (cartels, i.e. agreements, decisions of

associations and concerted practices of undertakings), trusts (i.e. abuse of dominant position), and state aid, as well as EC merger control, in special the Merger Regulation³⁶.

12. Enforcement of competition rules.

The Competition Authority (Autoridade da Concorrência) is in charge of implementing national competition rules regarding both anti-competitive behavior and merger control³⁷, as well as EU competition rules concerning anti-competitive behavior³⁸.

Nonetheless, concerning areas subject to sector-specific regulation, the Competition Authority and the sector-specific regulatory authorities work together to apply the competition legislation, in accordance with Chapter III of the Competition Act³⁹.

13. Application of competition rules to the various media (press, radio, television, Internet)

In principle, Portuguese competition rules can be applied to the various media (press, radio, television, internet...) as the Competition Act 'is applicable to all economic activities carried out on a permanent or occasional basis in the private, public or co-operative sectors'⁴⁰. Moreover, several media statutes provide for the application of the competition regulation⁴¹.

However, concerning merger control, the Competition Authority asks the respective regulatory authority to state its opinion, within a reasonable period and without affecting

³⁰ Television Act, Article 50.

³¹ Press Act, Article 4(1), and Radio Act, Article 11.

³² Lei n.º 18/2003, de 11 de Junho.

³³ Decreto-Lei n.º 422/83, de 3 de Dezembro.

³⁴ Decreto-Lei n.º 370/93, do 29 do Outubro.

³⁵ Treaty on the Functioning of the European Union (TFUE), Article 101 et seq. (and applicable Competition Regulations).

³⁶ Regulation 139/2004 of 20 January 2004.

³⁷ Competition Act, Article 14.

³⁸ Council Regulation 1/2003 of 16 December 2002, Article 3.

³⁹ Competition Act, Articles 15; see also Articles 27(4), 29 and 39.

⁴⁰ Law 18/2003, Article 1(1).

⁴¹ Press Act, Article 4(3), Radio Act, Article 7(1), former Television Act (Law 32/2003), Article 4(1) (still in force as not repealed by the new Television Act (Law 27/2007, Art. 98(2)).

the exercise by the sector regulatory authorities of the powers that, within the scope of their specific duties, are legally conferred on them in relation to the concentration in question⁴².

Concerning TV undertakings, the decision of the Competition Authority is bound to the binding previous opinion to be issued by the Media Regulatory Authority (ERC), which nonetheless can only be negative in case such merger operations present grounded risks for freedom of expression and plurality of opinion⁴³. A similar solution had already been provided for mergers of press undertakings⁴⁴. Concentrations of radio broadcasting undertakings require a previous authorization to be issued by the Media Regulatory Authority⁴⁵, which is to be denied in case freedom of expression and plurality of opinion is seriously at stake.

14. Type of merger control implemented in Portugal.

A compulsory prior control is provided for concentrations which either create or reinforce a share exceeding 30% of the national market for a particular good or service or for a substantial part of it or when in the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding € 150 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds two million euro⁴⁶.

Such concentrations are to be notified to the Competition Authority within seven working days of conclusion of the agreement or, where relevant, by the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.

Moreover, a concentration subject to prior notification cannot be put into effect before it has been notified and explicitly or tacitly decided in terms of non-opposition⁴⁷.

15. Notion of ‘concentration’ (determining influence or control)

Portuguese competition law provides for a notion of concentration which includes not only mergers between two or more previously independent undertakings but also those cases where one or more individuals who already have control of at least one or more undertakings acquire control, directly or indirectly, of the whole or parts of one or several other undertakings⁴⁸.

Portuguese competition law seems to favor a broad conception of concentration. Despite it is based on the notion of control, this notion refers to both direct and indirect control, including the power to determine influence. In fact, control shall be constituted by any act, irrespective of the form which it takes, which, separately or jointly and having regard to the circumstances of fact or law involved, implies the ability to exercise a determining influence on an undertaking’s activity, in particular: acquisition of all or part of the share capital (a); acquisition of rights of ownership, use or enjoyment of all or part of an undertaking’s assets (b); acquisition of rights or the signing of contracts which grant a decisive influence over the composition or decision-making of an undertaking’s corporate bodies (c)⁴⁹.

The acquisition of shareholdings or assets under the terms of a special procedure of corporate rescue or bankruptcy, the acquisition of a shareholding merely as a guarantee, and the acquisition by credit institutions of shareholdings in non-financial undertakings, where such acquisition is not covered by the prohibition in Article 101 of the General

⁴² Law 18/2003, Article 39(1)(2).

⁴³ Former Television Act (Law 32/2003), Article 4(2).

⁴⁴ Press Act, Article 4(3).

⁴⁵ Radio Act, Articles 7(2) and 18.

⁴⁶ Competition Act, Article 9.

⁴⁷ Competition Act, Article 11(1).

⁴⁸ Competition Act, Article 8(1).

⁴⁹ Competition Act, Article 8(3).

Regulation on Credit Institutions and Financial Institutions⁵⁰, are not held to constitute a concentration between undertakings⁵¹.

16. Assessment of joint ventures and other alliances.

A joint venture is assessed as a merger in case the establishment or acquisition of a joint undertaking is deemed a concentration between undertakings, i.e. provided that the joint undertaking fulfils the functions of an independent economic entity on a lasting basis⁵². Otherwise, joint ventures and other alliances are assessed with regard to rules on cartels⁵³.

17. Assessment test?

Market dominance is the criterion of the assessment test laid down by the Portuguese Competition Act. Concentrations that neither create nor strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it are to be authorized (a) where those that create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it are to be prohibited (b)⁵⁴.

In order to appraise the effects of notified concentrations on the competition structure, with a view to preserve and develop effective competition in the Portuguese market, in the interests of the intermediate and final consumer, the Competition Authority takes into account several factors, namely: the structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets (a); the position of undertakings participating in the relevant market or markets and their economic and financial power, in comparison with their main competitors (b); the

potential competition and the existence, in law or in fact, of entry barriers to the market (c); the opportunities for choosing suppliers and users (d); the access of the different undertakings to supplies and markets (e); the structure of existing distribution networks (f); supply and demand trends for the products and services in question (g); special or exclusive rights granted by law or attached to the nature of the products traded or services provided (g); the control of essential infrastructure by the undertakings in question and the access opportunities to such infrastructure offered to competing undertakings (i); technical and economic progress provided that it is to the consumer's advantage and does not create an obstacle to competition (j); the contribution that the concentration makes to the international competitiveness of the Portuguese economy (l).

18. Relevance of the use of commitments as remedies.

The Competition Authority may decide not to oppose to the concentration provided that the authors of the notification accept commitments and establish conditions and obligations intended to guarantee compliance with such commitments with a view to ensuring that effective competition is maintained⁵⁵. Such commitments can be either structural or behavioral.

19. Sanction for the failure to notify a merger subject to prior control.

Merger control is actually implemented as mergers are usually notified to the Competition Authority. This has a significant record of merger control decisions, including in the media sector⁵⁶.

⁵⁰ Enacted by Decree-Law No. 298/92 of 31 December.

⁵¹ Competition Act, Article 8(4).

⁵² Competition Act, Article 8(2).

⁵³ See also Competition Act, Article 12(6).

⁵⁴ Competition Act, Article 12(3).

⁵⁵ Competition Act, Article 35(3).

⁵⁶ Ver <http://www.concorrencia.pt>.

Failure to notify a concentration subject to prior notification is deemed an administrative offence with a fine that may not exceed 1% of the previous year's turnover for each of the undertakings⁵⁷.

Part IV. Relationships between Media Specific Rules and Competition Rules: Anti-Concentration Measures and Merger Control

20. Mode of implementation of the various sets of rules (media-specific rules, Competition Law rules).

Media-specific rules and competition law rules are concurrently implemented where a merger is subject to previous notification to the Competition Authority. In these cases the Competition Authority has to request a previous binding opinion from the Media Authority.

However, acquisitions of shareholdings in legal TV operator undertakings, or applicants to a TV license, by other TV operator undertakings have to be notified to the Media Regulatory Authority, where they do not represent a concentration operation subject to previous notification under competition law, according to a still in force provision of the former TV Act (Art. 4(3)). The same applies concerning transactions that change the control of a radio licensed undertaking which are subject to previous authorization from the Media Regulatory Authority (Art. 18(1)).

21. Role of the enforcement authorities.

If the only applicable regulation is the sector-specific regulation and no issue that may constitute an infringement to the Competition Act is assessed, the Competition Authority is not entitled to intervene on even a consultative basis.

In the case of a concurrent implementation, the Media Authority is the first to intervene. There is concurrent implementation where mergers are subject to previous notification to the Competition Authority. Nonetheless, the Competition Authority cannot decide without and against the previous binding of opinion of the Media Regulatory Authority (see supra 15).

On the other hand, in the case of a concurrent implementation, the Competition Act provides rules that allow the Competition Authority to 'communicate' with the Media Authority as a sector regulatory authority (Art. 15). To begin with, concerning anti-competitive practices (cartels and trusts), the Media Regulatory Authority, as an independent administrative authority, has the duty to inform the Authority if it becomes aware of facts which may be described as restrictive competitive practices (Art. 24(2)). Then, the Competition Authority has to request the prior opinion of the Media Regulatory Authority, which is to be delivered within either a maximum of five working days concerning interim measures (Art. 27(4)) or a reasonable period of time prescribed by the Competition Authority concerning completion of the evidence-taking (Art. 28(2)).

Moreover, Article 29 of the Competition Act provides specific rules of co-ordination with sector regulatory authorities. On one hand, whenever the Competition Authority is aware of facts occurring in the media sector, as an area subject to sector regulation, which may be described as practices restricting competition, it shall immediately report such facts to the Media Regulatory Authority for the subject matter, for the Media Authority to state its opinion within a reasonable period of time, to be set by the Competition Authority (Art. 29(1)). On the other hand, whenever, within the scope of its attributions and without prejudice to the provisions of Article 24(2), the Media Regulatory Authority officially or at the request of regulated bodies assesses issues that may constitute an infringement to the Competition Act, it shall immediately inform the Competition Authority of the case and supply the essential facts (Art. 29(2)). And before reaching its final decision, the Media

⁵⁷ Competition Act, Articles 9 and 43(3)(a)).

Regulatory Authority informs the Competition Authority of its draft proposals, so that the Competition Authority may state its opinion within a reasonable period of time prescribed by the Media Authority.

Concerning mergers, Article 39 of the Competition Act provides detailed rules of coordination with the Media Authority as a sector regulatory authority. To begin with, whenever a concentration of undertakings affects a media market, before reaching a decision before or after an in-depth investigation, the Competition Authority must ask the Media Authority to state its opinion, within a reasonable period prescribed by the Authority. According to the Press and Television Acts, the opinion of the Media Authority is binding, and it shall be negative in case the merger causes grounded risks to freedom of expression and plurality of opinion; a similar criterion is provided for in the Radio Act, by which the Media Authority is empowered to authorize mergers (see supra 15).

22. Examples of mergers in the media sector examined at the European level.

Several mergers in the media sector have been examined by the European authorities⁵⁸. In the sector of book publishing and sales reference goes to the case Lagardère / Natexis / VUP case, in which the merger was approved subject to conditions imposed by the Commission to ensure effective competition in the French-language publishing market.

Moreover, in the case of Sony / BMG, a joint venture combining the recorded music businesses of Sony and Bertelsmann, the European Commission approved the creation of the joint venture, after it concluded that it did not have sufficiently strong evidence to oppose the deal. However, this decision was later overturned by a European Court, when the Court of First Instance upheld a complaint from a group of independent record labels, saying the union of Sony Music and BMG required more scrutiny⁷.

⁵⁸ http://ec.europa.eu/competition/sectors/media/overview_en.html

Another example is the Télé2 decision. Under the EU Merger Regulation, the European Commission has approved the purchase of the fixed telephony and Internet access businesses of Télé2 France by the French mobile telephony operator SFR. This operation raised serious competition concerns in pay-TV markets in France and the Commission launched an in-depth investigation. These concerns have been addressed by commitments guaranteeing DSL operators equal treatment with the new entity as regards access to television content owned by the Vivendi group, of which SFR forms part. Based upon these commitments, the Commission authorized the merger, concluding that it would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.⁵⁹

23. Use of the provision of the EU regulation that allows the protection of justifiable interests (art. 21, § 4, Regulation n° 139/2004).

The corresponding provision of the previous Merger Regulation⁶⁰, which allowed also for the protection of justifiable interests, has been used by the Portuguese authorities not in the media but in the financial sector, in the case BSCH/Champalimaud, concerning the acquisition of a controlling interest in the Champalimaud group by Banco Santander Central Hispano (BSCH) of Spain. However, the Commission considered that the measures adopted by the Portuguese authorities to veto this acquisition on grounds of national interest had violated EU Internal Market and competition rules and therefore sued Portugal before the ECJ. Nonetheless, as Portugal withdrew the measures in question, the European Commission decided to close the two infringement procedures it had opened in 1999 against Portugal in the so-called *Champalimaud* affair.

⁵⁹ http://ec.europa.eu/comm/competition/mergers/cases/index/m90.html#m_4504.

⁶⁰ Regulation (CEE) 4064/89 of the Council of 21 December 1989, Art. 21(3).

V. Other Rules that Guarantee the Plurality of the Media and Competition Rules

24. Assessing the obligations (e.g. production and broadcasting quotas, ‘media chronology’) that curtail competition ... in the name of competition protection.

Obligations that may curtail competition, such as production and broadcasting quotas and ‘media chronology’, are aimed at protecting other values such as cultural diversity and plurality of opinion. Therefore, they can hardly be assessed in the name of competition protection, as they are grounded upon different values of public interest.

25. Allocation of public funds to guarantee the plurality of the media and its compatibility with competition requirements.

The Portuguese Competition Act provides that ‘aid granted to undertakings by a state or any other public body must not significantly restrict or affect competition in the whole or in part of the market’ (Art. 13(1)). However, ‘compensatory payments made by the state in return for the provision of a public service, whatever the form of such payments, shall not be considered aid’ (Art. 13(3)). The Portuguese State makes compensatory payments to RTP in return for the provision of the TV and radio broadcasting public service as provided for by Law 30/2003 of 22 August.

Accordingly, the allocation of public funds that consist of compensatory payments made by the state in return for the provision of the broadcasting public service are not considered state aid and therefore fall outside the scope of application of the state aid provision of the Competition Act.

In what concerns the allocation of public funds that do not consist in such compensatory payments, they can be treated as state aid, meaning that they should not significantly

restrict nor affect competition in the whole or in part of the market even if aimed to guarantee the plurality of the media.

Nonetheless, the control mechanism provided for under the Competition Act to assess the conformity of such allocation of public funds with competition requirements is rather fragile, as the Competition Authority is only empowered to, at the request of any interested party, ‘scrutinize any aid or aid project and formulate such recommendations for the Government as it deems necessary to eliminate the negative effects on competition of such aid’⁶¹. Consequently, the Competition Authority cannot but to formulate recommendations to the Government and provided that any interested party has requested them.

However, concerning the EU state aid control mechanism, the allocation of public funds to media undertakings may be deemed state aid for purposes of Article 107(1) of the TFUE (and related regulations) even if they consist of compensatory payments made by the state in return for the provision of the broadcasting public service.⁶² However, the assessment of this state aid must take into account that the undertaking is charged with a service of general economic interest as provided for under Article 106(2) of the Treaty.

Part VI. Implementation of the Regulation

26. Recent cases in the media sector examined by the Portuguese competition authority.

The Competition Authority has examined several cases in the media sector. A more recent case concerning various areas is PRISA/ MEDIA CAPITAL (Proc. 54/2006).

⁶¹ Competition Act, Art. 31(2).

⁶² Case 10/5/2000, Proc. T-46/97 (SIC v Commission).

The merger, notified on 7 November 2006, consisted of the projected acquisition of sole control of Grupo Media Capital SGPS, SA ('MEDIA CAPITAL') by Promotora de Informaciones SA ('PRISA'), by means of a bid to purchase the shares representing its registered capital.

PRISA was a Spanish-registered company listed on the stock exchange, which, as a holding company of Grupo Prisa, controlled a group of companies operating mainly in the sectors covering communications, education, culture and entertainment, mostly in Spain, but also in France and Latin America. In Portugal, Grupo Prisa operated in the sectors covering cable channel distribution, through Grupo Sogecable; school book publishing, through Constância Editores SA; and promotional marketing, through Prisa Innova SA.

On the other hand, MEDIA CAPITAL was a listed company, under Portuguese law, which, as a holding company of Grupo Media Capital, held a group of companies that operated essentially in the sectors involving television, radio, outdoor advertising, as well as press and internet services in Portugal.

Under Article 35 (1) (b) of the Competition Act, the Council of the Competition Authority has decided, on 29 December 2006, not to oppose the merger on the grounds that it was not likely to create or to reinforce a dominant position that might result in significant barriers to effective competition in the following markets: (i) the national market for advertising on open-signal television; (ii) the national radio advertising market; (iii) the national market for the supply of outdoor advertising space and (iv) the national market for music publishing and distribution.'

27. Specific problems regarding the demarcation of markets and the analysis of the organisation of markets.

The Competition Authority faced specific problems regarding the demarcation of operated markets.

To begin with, concerning TV broadcasting, the Authority distinguished free access (open signal) from conditional access TV taking into account different sources of income (advertising v. user subscription). The Competition Authority rejected the existence of an autonomous market for end viewers of TV open signal as a commercial connection was only established with advertisers. Therefore the relevant market in free access (open signal) TV consisted only of the advertising market.

The Competition Authority identified also the market of acquisition of broadcasting rights. However, considering the residual presence of Media Capital in this market, as its own contents were mainly sold intra-group, the Competition Authority excluded this market from its analysis, and focused on the market of advertising in open signal TV. Moreover, for reasons of cultural diversity, language and regulatory specificities, the Competition Authority limited the geographical market to the Portuguese territory.

Concerning radio broadcasting, the Competition Authority also limited the relevant market to advertising in radio broadcasting, as the relevant commercial transactions consisted of broadcasters selling advertising 'air time' to advertisers. The Competition Authority considered this to be an autonomous market from other advertising markets for technical and price reasons. Moreover, the Competition Authority held that, despite some radio operators of Media Capital had local or regional limited broadcast, the advertising effect had national reach and therefore the geographical market should be delimited by the Portuguese territory.

Concerning outdoor advertising, the Competition Authority held this to be an autonomous and unitary market despite the diversity of means of outdoor advertising, reasoning that all those different means have in common to present an advertising message at a public place to a public in movement. The geographical scope of this market was also limited to the national territory because advertisers plan their advertising campaigns at national scale and the undertakings of this sector also operate at the national scale.

Moreover, for purposes of this operation, the Competition Authority demarked the market of musical edition and distribution as an autonomous market, with geographical scope corresponding to the Portuguese territory.

28. Specific problems related to the low number of operators on the markets.

The market of advertising in open signal TV was considered to be concentrated, according to the IHH criterion, due to the low number of operators and the high share of Media Capital. Moreover, significant barriers to entry into this market existed as an administrative license to operate TV broadcasting both in open signal and cable distribution was required. Nonetheless, the Competition Authority considered that the operation consisted of a mere transmission of market shares between the merging undertakings without significantly affecting the market structure. In short, the merger was found not to create nor reinforce a dominant position which could cause significant impediments to competition within the market of advertising in open signal TV.

A similar reasoning was applied to the markets of advertising in radio broadcasting, outdoor advertising and musical edition and distribution, in which, despite the low number of operators, barriers to entry were found to be not so significant.

29. The use of commitments as remedies considering the characteristics of the sector involved.

In the PRISA/MEDIA CAPITAL case no commitments have been used. In a different case, the projected merger Sonaecom/PT, the Competition Authority has conditioned the authorization of the concentration upon the acceptance of commitments. It was a case in the telecommunication sector but with ramifications into the media sector. In particular, the Authority conditioned the merger upon Sonaecom assuming a set of conditions concerning the media and content markets.

In an earlier decision (case 47/2003, - PPTV / PT CONTEÚDOS / SPORT TV), the Competition Authority decided not to oppose the concentration on the grounds that, subject to the imposition of conditions tied to monitoring obligations, the concentration would not create or reinforce a dominant position that might result in significant barriers to competition in the Portuguese market for the television broadcasting rights of football matches and match summaries involving national teams, the distribution market for pay-TV sports channels or the multimedia content market for football.

This concentration involved the acquisition by the undertakings PPTV – Publicidade de Portugal e Televisão, SA (marketing of advertising and television rights), and PT Conteúdos, SGPS, SA (management of equity investments in other enterprises), of joint control of the commercial enterprise SPORT TV Portugal, SA (activity of television and broadcasting, and the acquisition and resale of television broadcasting rights for events, to produce, make and market programs on sporting events, for reference to them, and advertising and any activities that raise the commercial value of individuals and objects related to the different types of sports and other activities connected with those referred to above). The acquisition took place by means of the purchase, in equal parts, of the total investment hitherto held by RTP (Rádio e Televisão de Portugal, SGPS, SA) in SPORT TV PORTUGAL, SA., accompanied by SPORT TV's acquisition and exclusive exercise of the broadcasting rights for the main division matches in the National Football Championship for the seasons 2004/2005 to 2007/2008.

In a more recent case - *Ongoing/Vertex*⁶³ -, the Media Authority issued a legal opinion against a projected merger which would result of the acquisition of a significant part of the shares (35%) of a relevant media company (*Media Capital*) by another one in the sector (*Ongoing*), which already had a dominant position in a third media company (*Impresa*).

⁶³ See non confidential version available at <http://www.erc.pt>.

The Media Authority held that in order to assure pluralism and diversity of opinion by means of controlling media concentrations, *Ongoing* could only acquire joint control of Media Capital in case it would hold less than 1% of *Impresa's* shares and refrain from directly or indirectly interfere in its internal affairs, either social, editorial or else.

The Media Authority found out that the sectors of open signal TV and information channels distributed by cable and the production of TV contents to be those in which the risks to diversity and plurality of media would be more sensitive, as *Ongoing* would be at the same time in a position of joint control of *Media Capital* and of privileged access to confidential information of *Impresa*, where both companies had a joint dominance of the market (for ex. 75% of advertising). The Media Authority based the imposition that *Ongoing* should have less than 1% of *Impresa's* as a means to prevent the diversity of TV programs to be affected.

30. Concurrent implementation of Competition Law (merger control) and the sector-specific regulation (anti-concentration measures).

In PRISA/ MEDIA CAPITAL, both the ERC (Media Regulatory Authority) and the ANACOM (National Communications Authority) did not object to the projected merger, and the Competition Authority also cleared the merger from the viewpoint of competition law.

In the PPTV/PT CONTEÚDOS/SPORT TV case, the Media Authority held that the concentration would aggravate the situation of risk concerning external pluralism, as it would make harder and delay the possibility of entry of operators in the market due namely to the conditions imposed to RTP and the long term of the exclusive broadcasting rights. Nonetheless, the Media Authority decided not to issue a previous negative opinion on the concentration, reasoning that it would not cause a reduction of the number nor the quality of the events of general interest as sport events previously held by RTP would remain

available on the market, and that the relevant provisions of the Television Act in force would not be infringed. Moreover, the Media Authority emphasized as a positive effect the socialization of those broadcasting rights previously held by RTP and now available on the market on an offer-and-demand basis.⁶⁴

Taking into account the opinion of the Media Authority, in particular the danger for external plurality of media, the Competition Authority did not prohibit the concentration, but imposed commitments and obligations to ensure compliance with competition rules.

In a different recent case, IMPRESA, the media sector-specific authority (ERC) assessed whether the merger would affect the plurality of opinion. In particular, addressing the issue of external plurality, the ERC reasoned that a condition for such plurality of opinion to take place would be the existence of different autonomous undertakings operating in the market. The authority found that the projected merger would not reduce the number of players in the market as the acquirer undertaking was only replacing the acquired.⁶⁵

31. Conceptual convergences and divergences between Competition Law and sector-specific regulations.

The Media Authority establishes a close connection between (external) plurality of media and the structure of the market reasoning that a competitive structure of the market is a decisive factor for plurality of media. A point of divergence between competition law and sector-specific regulations may be found in the so-called internal plurality concerning quality and diversity of content which is not by itself guaranteed by competition law.

⁶⁴ See Decision of Council of the Competition Authority, at p. 14, at <http://www.concorrenca.pt>.

⁶⁵ See final decision in Portuguese, pp. 23-24, available at <http://www.concorrenca.pt>.

Part VI. Prospects and Improvements

32. Efficiency of anti-concentration measures.

The decision praxis of the Media Authority seems to indicate that the media sector anti-concentration specific measures concerning the so-called external plurality are somehow redundant as media pluralism is closely connected with the competitive structure of the market. It is possible however that, despite the competitive structure of the market, a merger endangers freedom of expression and media pluralism from the viewpoint of the so-called internal pluralism.

33. Towards a European anti-concentration regulation?

In December 2007, the Audiovisual Media Services Directive⁶⁶ entered into force, extending the scope of the EU audiovisual regulation to emerging media services, but no anti-concentration measures specific to the media sector are provided therein. However: 'Responding to continuing political concerns about media concentration, and its possible effects on pluralism and freedom of expression, the Commission launched a three-step approach for advancing the debate on media pluralism across the European Union in 2007.'⁶⁷ And Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, repealed Council Directive 89/552/EEC.

On the other hand, the Merger Regulation does provide that pluralism of media is a legitimate interest for the protection of which Member States can adopt adequate measures

⁶⁶ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; OJ L 332 of 18 December 2007.

⁶⁷ http://ec.europa.eu/information_society/media_taskforce/pluralism/index_en.htm.

concerning a concentration with community dimension that has been declared compatible with the internal market by the European Commission (Regulation 134/2004, Art. 23(4)).

In Portugal, a new Act on Media Pluralism and Non Concentration has been approved by the Parliament but it has later been vetoed by the President⁶⁸.

34. Requirements of internal plurality (e.g. variety of information sources, variety of the programming, variety in the production, speaking times of the various currents of thoughts) and/or anti-concentration measures specific to the media sector?

Variety of information sources, programming and production as well as speaking times of the various trends of thought are crucial requirements of internal plurality of the media. These requirements of internal plurality appear to be decisive for the Media Authority, in the sense that a concentration that does not affect internal plurality did not receive a negative opinion from the Media Authority despite it aggravated the situation of risk concerning the so-called external plurality of the media (case PPTV / PT CONTEÚDOS / SPORT TV). In short, anti-concentration measures specific to the media sector aimed at guaranteeing structural (external) plurality of media do not seem to be determinant from the viewpoint of the Media Authority.

On the other hand, taking into account that the Media Authority usually assesses the risks to freedom of expression and (external) plurality of media posed by mergers upon the competitive structure of the market, the anti-concentration measures specific to the media sector appear somehow redundant. Nonetheless, anti-concentration measures are also aimed at controlling the internal plurality of media, which is not provided for by competition law itself.

⁶⁸ See <http://www.gmc.pt>.

In short, plurality of media is a sensitive issue and not only a competition law problem, as media regulation is aimed at preserving and promoting other values of public interest. This is acknowledged by the EC Merger Regulation according to which Member States may adopt adequate measures to protect legitimate interests, such as media pluralism, concerning mergers with community dimension which have been declared compatible with the internal market, provided such measures are proportionate and fully compatible with all aspects of Community law.

Literature

- J.J. Gomes Canotilho, Vital Moreira, *Constituição da República Portuguesa Anotada*, I, 4.^a ed., Coimbra Editora, 2007
- Jorge Miranda, *Manual de Direito Constitucional*, Tomo IV - *Direitos Fundamentais*, Coimbra Editora, 2008
- Jónatas Machado, *Liberdade de Expressão*, Coimbra Editora, 2002
- Ian Walden, 'Who Owns the Media? Plurality, Ownership, Competition and Access', in *Media Law and Practice*, ed. David Goldberg, Gavin Sutter and Ian Walden, Oxford University Press, 2009, 19-55
- C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters*, Cambridge University Press, 2007
- Luís Brito Correia, *Direito da Comunicação Social*, reimp., Almedina, 2005
- António Monteiro Cardoso, João Pedro Figueiredo, Alberto de Carvalho, *Direito da Comunicação Social - O regime jurídico da Comunicação Social em Portugal*, Casa das Letras, 2005
- Fernando dos Reis Condesso, *Direito da Comunicação Social (Lições)*, Almedina, 2007
- André Santini, *L'État et la Presse*, préf. Claude Puhl, Paris, Litec, 1990
- Bertrand Cousin, *Le Droit de la Communication: presse écrite et audiovisuel*, Paris: Ed. du Moniteur, 1990
- Denis Barrelet, *Droit Suisse des Mass-Media*, 2.^a éd. rev. et aug., Berne: Ed. Starp, 1987
- Henri Blin [et al.], *Droit de la Presse*, dir. Jacques-Henri Robert, Paris: Litec, 1993
- Wayne Overbeck, *Major Principles of Media Law*, Fort Worth: Harcourt College Publishers, 2009
- Roy L. Moore, Michael D. Murray, *Media Law and Ethics*, 3rd ed. London/New York: Routledge, 2008
- Jörg K. Fischer, *Medienrecht und Medienmärkte*, Heidelberg: Springer, 2008
- Don R. Pember, Clay Calvert, *Mass Media Law*, Boston: MacGrawhill, 2007
- Thomas Gibbons, *Regulating the Media*, 2nd ed. London: Sweet and Maxwell, 1998
- Donald E. Lively [et al.], *Communications Law: Media, Entertainment and Regulation*, Cincinnati: Anderson Publishing, 1997
- Eric Barendt (ed.), *Media Law*, New York: New York University Press, 1993
- Martin Loeffler, Reinhart Ricker, *Handbuch des Presserechts*, 3. Aufl. München: C.H. Beck, 1994
- William E. Francois, *Mass Media Law and Regulation*, 6th ed. Illinois: Waveland Press, 1994
- Marian Paschke, *Medienrecht*, Berlin: Springer Verlag, 1993
- Monroe E. Price, *Media and Sovereignty: The global Information - Revolution and its Challenge to State Power*, Cambridge: The MIT Press, 2002
- Paul Levinson, *Digital McLuhan: A Guide to the Information Millennium*, London/New York: Routledge, 1999
- Frank Fechner, *Medienrecht*, 7. Aufl. 2006
- Daniel L. Brenner, *Law and Regulation of Common Carriers in the Communications Industry*, Boulder: Westview Press, 1992
- David B. Winn, *European Community and International Media Law*, London: Graham & Trotsman, 1994
- David Goldberg, *Regulating the Audiovisual Industry*, London: Butterworths, 1991
- Lesley Ainsworth/Daniel Weston, 'Newspapers and UK media ownerships controls', *Media Law* 1(1995), 2-9
- Lucas A. Power Jr., *The Fourth Estate and Constitution: Freedom of the Press in America*, Berkeley: UCP, 1991
- Thomas Gibbons, *Regulating the Media*, London: Sweet & Maxwell, 1991
- Albrecht Goetz von Olenhausen, *Handbuch des Medienrechts: Rundfunkrecht*, Freiburg: Hochschul Verlag, 1988
- Gerhard Friedrich Holtmeier, *Presse -und Rundfunkfreiheit*, Frankfurt am Main: Peter Lang, 1991
- Horst Von Hartlieb, *Handbuch des Film -, Fernseh -und Videorechts*, München: Beck, 1991
- Joachim Wolf, *Medienfreiheit und Medienunternehmen*, Berlin: Dunker & Humblot, 1985