

**SUMMARY OF THE REPORT-PROPOSAL IN THE SECOND PHASE CASE C/230/10  
TELECINCO / CUATRO**

**I. NATURE OF THE OPERATION AND COMPANIES INVOLVED**

- (1) On 28 April 2010 TELE CINCO gave notice of a concentration operation consisting in the acquisition of exclusive control of CUATRO. In addition, PRISA, TELEFÓNICA and TELE CINCO gave notice on 29 April 2010 of their plan to acquire joint control of DIGITAL+.
- (2) Both of these concentration operations had been previously remitted to Spain by the European Commission for analysis by the CNC.
- (3) After their notification, on 17 May 2010 the Investigations Division, based on the close connection between both concentrations, resolved to join the two cases in a single proceeding to be examined together. On 30 June 2010 the CNC Council resolved to initiate the second phase of the proceeding, in order to be able to conduct a more detailed analysis of both operations.
- (4) On 20 October 2010, the Investigations Division resolved to annul the decision to join the two concentration operations in a single case. Therefore, the resolution on the case of record only authorises, subject to commitments, the TELE CINCO/CUATRO concentration operation.
- (5) TELE CINCO'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.
- (6) TELE CINCO 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.
- (7) CUATRO operates the free-to-air television business of PRISA, and owns the licence for one national DTT multiplex and the greater part of its TV advertising business.

**II. RELEVANT PRODUCT MARKETS AND THEIR ANALYSIS**

- (8) The TELE CINCO/CUATRO concentration operation involves the merger of two of Spain's leading FTA-TV operators.

- (9) As such it affects the entire value chain of the TV-related audiovisual sector, which runs from the production of audiovisual content to their broadcast to the end viewer.
- (10) The main competition problems, however, are seen in the TV advertising markets and in the markets for acquisition of audiovisual content.

#### **IV.1. MARKETING OF CONTENTS MARKET**

- (11) The marketing of audiovisual contents comes one step after their production on the value chain and can be carried on by the producer of the contents or by a third party engaged by the producer to distribute them. In addition, the marketing of audiovisual content is of vital importance for competing in downstream markets, insofar as contents are necessary inputs for being able to offer an appealing and differentiated programming that can attract subscribers and viewers.
- (12) Diverse national and Community precedents have distinguished between different content distribution markets according to the nature of the content (motion pictures, series, football matches of the Spanish Liga and the King's Cup competitions, other football matches, etc.), the broadcasting format, etc.
- (13) Access to Premium content, and to the different broadcasting formats and windows is greatly limited by the control PRISA currently holds over much content. In this sense, the characteristics of the content distribution markets, in which supplyside operators strive to attain the largest possible number of windows, together with the parties' position in those markets, would result in TELECINCO having greater capacity and incentives to act on a coordinated basis with DIGITAL+, PRISA and TELEFÓNICA, and this entity would achieve bargaining power that could not be matched by other free-to-air TV operators in Spain in terms of the windows and turnover involved. This could eventually hinder or even block access to certain audiovisual content by other FTA television competitors.
- (14) TELECINCO, CUATRO, DIGITAL+, PRISA and TELEFÓNICA, in aggregate, are present in all content demand segments, whether linear, non-linear, premium channels and thematic channels, and are present in both the pay-TV and free-to-air broadcast segments. This singular position would allow them to participate in the acquisition of TV content, programmes and channels by making package purchase offers that would be unmatched by other purchasers and would have lower costs per operating window.

## **IV.2. ADVERTISING MARKET**

- (15) In FTA television the key funding parameter is advertising, which is largely dependent on audience ratings. In this sense, a critical element for a free-to-air television operator is the contractual relationship established with advertisers or media buyers/sellers, which is conditioned by the FTA broadcaster's capacity to attract TV viewers.
- (16) The TV advertising market is highly transparent, given that buyers and sellers have various sources of information they can purchase that are key to the development of their businesses. These are mainly data supplied by Kantar Media and Infoadex, both considered as the main references in the sector.
- (17) Also, the description of the market on the supply and demand sides suggests that an essential element in the formation of prices in this market is that the supply of advertising space is rigid, given the legal limits on the amount of advertising that can be broadcast. This factor, in a market marked by strong demand-side "seasonality" (prime time vs low-audience slots) means that during prime time slots, when there is a near saturation of supply, the prices are determined by auction, regardless of the supplier's cost structure. This gives rise to highly volatile prices.
- (18) This supply-side rigidity has been aggravated by the discontinuation of advertising in the public TV and radio broadcaster, TVE. Taken together with the bounce in advertising spending after a weak period, this has generated a record increase in prices.

## **III. ASSESSMENT OF THE OPERATION WITHOUT COMMITMENTS**

- (19) In the TV advertising market, given the total audience of the channels whose advertising would be managed by TELECINCO after the TELECINCO / CUATRO concentration, if the advertising of those channels was to be marketed jointly it could become an indispensable outlet for advertisers.
- (20) Furthermore, the current arrangement of the TV advertising market could allow and encourage tacit coordination between the resulting entity and its main competitor, ANTENA 3.
- (21) The acquisition of audiovisual content would see a strengthening of the combined entity's bargaining power for purchasing that content, which would affect both TELECINCO's competitors in the FTA-TV market and the smaller providers of content.

- (22) These problems would be aggravated if TELECINCO were to become a controlling shareholder of DIGITAL+, as it could leverage its simultaneous presence in the pay-TV and FTA-TV markets to monopolise audiovisual content.
- (23) In view of the above considerations and, specifically, the resulting market structure and the barriers to entry existing, this Investigations Division believes the TELECINCO / CUATRO concentration operation, in the absence of certain commitments or conditions, will generate risks to the maintenance of effective competition in some of the markets considered, especially in TV advertising in Spain. These effects would be heightened if TELECINCO becomes a controlling shareholder of DIGITAL+ and is present in its shareholder base with PRISA and TELEFÓNICA.

### **VIII. ASSESSMENT OF COMMITMENTS**

- (24) The commitments submitted by TELECINCO restrict its commercial autonomy when it comes to managing TV advertising and acquiring audiovisual content, which can help counteract the competition problems generated by the concentration operation.
- (25) A first group of commitments is directly related to the TV advertising market and involves the following conditions:
- TELECINCO cannot sell in one commercial package advertising for the two FTA television channels with the largest viewer levels of those that it manages, with the added condition that the aggregate viewership for the TV channels included in each commercial package cannot exceed 22%.
  - TELECINCO cannot apply tied-sale to advertisers of its various TV advertising commercial packages.
- (26) These commitments promote the real possibility that advertisers may continue to advertise separately on the main television channels of the merged entity. In addition, they limit the maximum size of the television advertising packages offered by TELECINCO to an appropriate level to prevent TELECINCO's television advertising from becoming indispensable for a significant number of advertisers.
- (27) The effect of the above commitments on the TV advertising market is strengthened with the following commitments:
- TELECINCO undertakes to break its agreements for joint management of advertising on free-to-air DTT channels of third parties and to sign no new agreements of this kind. In the case of advertising on pay-TV channels, TELECINCO undertakes to maintain the status quo, that is, to manage advertising of the pay-TV channels of third parties through a separate company and with clearly differentiated commercial policies.
  - In order to prevent the structural links of TELECINCO with PRISA and TELEFÓNICA in DIGITAL+ from affecting the TV advertising market,

TELECINCO undertakes that for so long as it is a co-shareholder in DIGITAL+ with PRISA or TELEFÓNICA, it will not jointly market advertising with media managed by the other parties and that it will apply market conditions to its shareholders if they contract advertising.

- (28) There is a second block of commitments which serve to limit the power of Telecinco in the free-to-air TV market and which also indirectly serve to safeguard competition in the television advertising market. To be precise:
- TELECINCO undertakes not to extend its offer of free-to-air TV channels by leasing DTT channels from third party operators.
  - TELECINCO undertakes not to 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.
- (29) In addition, to prevent TELECINCO from using its strengthened position in the free-to-air TV market and presence as controlling shareholder in DIGITAL+ to distort competition in the pay-TV market, TELECINCO undertakes, on certain conditions, to maintain its current policy of assigning its FTA channels to the pay-TV platforms free of charge.
- (30) TELECINCO has also presented a third block of commitments aimed at counteracting the vertical effects generated by the merged entity's heightened power as buyer of audiovisual contents. Thus:
- TELECINCO undertakes to limit the duration of its exclusive contents acquisition contracts to three years, without including preferential acquisition rights or rights of extension. This makes it possible for the exclusive rights that TELECINCO has acquired or may acquire over contents generator (for example producers of films and TV series) to come onto the market periodically. TELECINCO also limits the period for which it may exploit a particular film in exclusivity on FTA-TV to five years.
  - TELECINCO undertakes to restrict its ability to exclude national television producers as suppliers of programmes to FTA television competitors.
- (31) Furthermore, in order to address the effects that would be generated by the structural ties between TELECINCO and PRISA and TELEFÓNICA in DIGITAL+, TELECINCO accepts absolute limits on its ability to purchase the most attractive audiovisual contents, premieres of cinema films and television series from major studios as well as major sporting events. These absolute limits are linked to its condition as controlling shareholder in DIGITAL+ and will serve to prevent TELECINCO from using its simultaneous presence on the pay and free-to-air television markets to monopolise FTA-TV audiovisual contents.
- (32) An initial period of three years has been established for the commitments, extendable by a further two years if the market circumstances that made them necessary have not changed.

## **ANNEX 1. Commitments proposed by GESTEVISIÓN TELECINCO S.A. on 19 October 2010**

*“Set out below is the package of commitments that Telecinco makes with the aim of dispelling the concerns expressed by the CNC in the proceeding of reference.*

- (i) *Telecinco undertakes not to market in one and the same commercial offer (“commercial package”) advertising or any other form of TV commercial communication for the two free-to-air (FTA) channels with the greatest viewership of those it manages (hereinafter, the “principal channels”). In addition, the aggregate audience of the channels included in each commercial package will not exceed 22%. For purposes of determining the audience of each channel, every six months there will be taken into account the average audience for the preceding half year.*
- (ii) *Telecinco undertakes not to pursue commercial policies and pricing policies in particular that entail, formally or de facto, directly or indirectly tied sales to advertisers of the various advertising commercial packages for the TV channels.*
- (iii) *Telecinco undertakes not to make new contracts for managing advertising of third party free-to-air DTT operators at the national, regional or local level.*

*With respect to advertising management contracts already signed with third party free-to-air DTT operators at the national, regional or local level prior to the concentration operation, Telecinco undertakes to limit the term of those agreements to a maximum of one year from the entry into force of these commitments.*

*Telecinco undertakes that the management of advertising of third party non-group pay-TV channels, including Digital+, will be done through a different company than the one that manages advertising of the Telecinco FTA channels, with full functional and commercial autonomy.*

- (iv) *Telecinco undertakes, for so long as it maintains a joint holding with Prisa and/or Telefónica in Digital+, not to jointly market advertising with media managed, respectively, by Prisa and/or Telefónica, and their subsidiaries or investee companies (hereinafter “Prisa and/or Telefónica”).*
- (v) *Telecinco undertakes, for so long as it has a joint holding with Prisa and/or Telefónica in Digital+, to apply market conditions to Telefónica and Prisa and not a preferential treatment or exclusivity in the contracting of advertising by those companies.*
- (vi) *Telecinco undertakes not to make exclusive acquisition contracts for third-party audiovisual content with terms beyond three years and undertakes that those contracts will include no clauses providing for tacit renewal, rights of first refusal and redemption or options for extension or preferential acquisition for succeeding periods. By way of exception to the above,*

*Telecinco will be permitted to have contracts that cover the “total life” of each series and entertainment programme. With respect to motion pictures, each film may be exploited under exclusivity for a maximum period of five years.*

*As regards audiovisual content exclusive acquisition contracts now in force that surpass the above limits, Telecinco undertakes to give the provider a right, which may be exercised within six months after the date the commitments come into force, and subject to payment of consideration according to objective and proportionate criteria, to amend the contracts to bring them into line with those limits, without modifying the rest of the conditions established there. Telecinco also expressly waives making use at any time of such extension, option or preferential acquisition mechanisms as may be contained in those contracts.*

*For the purposes provided in this commitment, any modification or novation of the exclusive audiovisual content acquisition contracts that Telecinco may have in place will be considered a new contract and be subject to the commitments indicated above.*

- (vii) *Telecinco undertakes, for so long as it is a controlling shareholder of Digital+, not to make in the same year exclusive acquisition contracts for free-to-air television of the entire production of films and new series, respectively, from more than three of the following producers: Paramount, Disney, CBS, Warner, Universal, Sony/Columbia and Fox. In addition, while it is a controlling shareholder of Digital+, Telecinco undertakes not to acquire more than 60% of the total yearly volume of new productions from all of the producers indicated above in series and films, respectively.*
- (viii) *Telecinco undertakes, for so long as it is a controlling shareholder of Digital+, to limit the exclusive exploitation of audiovisual rights of sports events for FTA television broadcast according to the following conditions:*
  - *Telecinco undertakes not to exploit in FTA television in the same year the broadcast rights for matches of the first division Liga football competition and the broadcast right of football matches of more than one of the other official national or international competitions.*
  - *Telecinco undertakes not to exploit in FTA television in the same year broadcast rights for more than two of the following blocks of sports events:*
    - *Formula 1 world championship*
    - *Motorcycling world championship*
    - *Official national or international competitions in which there participate first division basketball clubs of the national team*
    - *The Tour of France and/or Spain's La Vuelta cycling competitions*
- (ix) *Telecinco undertakes not to rent or lease multiplex channels owned by third party DTT operators.*

- (x) *Telecinco undertakes, for so long as it is a controlling shareholder of Digital+, to guarantee the distribution of its FTA television channels on pay-TV platforms other than those of Digital+ and Telefónica, without requiring any economic payment, provided that (i) at least one of them distributes it, (ii) those platforms guarantee a reliable system for measuring viewership, and (iii) Telecinco is not required to pay any consideration whatsoever.*
- (xi) *Telecinco undertakes not to oppose granting its authorisation to the launch of new services or improvements in broadcast quality by the operators with which it shares multiplexes, provided that (i) such launch does not harm the quality of its own broadcasts and (ii) it receives reciprocal treatment from the operators which it shares multiplexes.*
- (xii) *Telecinco undertakes to enter into no contracts that involve rights of exclusivity or first refusal for the acquisition of the entire production of national content producers, to expressly waive exercise at any time of exclusive rights for acquisition of the entire production or right of first refusal over more than two programmes, with producers not created with the support of Telecinco, and not to renew with exclusivity or first refusal provisions the contracts made with producers that have been created with Telecinco's support.*

*These commitments will, unless otherwise indicated, have an initial term of three years. At the expiry of that period, the CNC will assess whether there has been a significant change in the structure or regulation of the markets considered such as would justify maintaining, adapting or eliminating any of the conditions for an additional period of two years.*

*Notwithstanding the stipulated duration of the above commitments, Telecinco may ask the CNC to modify their content and duration if there is a significant change in the structure or regulation of the markets considered.”*