

EXECUTIVE SUMMARY OF CASE C/0432/12 ANTENA 3 / LA SEXTA

I. BACKGROUND

The notified concentration operation involves the acquisition by ANTENA 3 DE TELEVISIÓN, S.A. (ANTENA 3) of exclusive control of GESTORA DE INVERSIONES AUDIOVISUALES LA SEXTA, S.A. (LA SEXTA) through the purchase of 100% of its share capital, pursuant to an agreement dated 14 December 2011.

The merger was not properly notified to Spain's antitrust authority, the Comisión Nacional de la Competencia (CNC), until 15 March 2012, owing to the fact that it had a Community dimension and first had to be referred to Spain by the European Commission, following its decision on 14 March 2012 in response to a request by ANTENA 3 dated 2 March 2012.

For that reason, the initial notification of the transaction of 30 December 2011 was dismissed by the CNC Council in its Decision of 7 March 2012 in proceeding C/0418/12.

II. PARTIES

ANTENA 3, which mainly operates in the television advertising and free-to-air television markets in Spain, is jointly controlled by the Planeta group (Spain) and the De Agostini group (Italy). In addition, the RTL group (Germany) has a significant holding in the company.

LA SEXTA, which operates in the same markets as ANTENA 3, is controlled by the IMAGINA group (Spain).

III. RELEVANT MARKETS AND THEIR STRUCTURE

The relevant markets affected by this merger are located along the entire value chain of the Spanish audiovisual sector.

These markets range from the production and sale of audiovisual content, in which ANTENA 3 and LA SEXTA operate mainly on the demand side, to the free-to-air markets, in which both try to secure viewers with attractive programming schedules, as well as the television advertising markets, in which the viewers gained are capitalised on through the sale of advertising space to advertisers.

1. Markets for the production and sale of audiovisual content

These markets supply audiovisual content to television operators, enabling them to arrange the programming of their television channels in Spain.

In these markets, a certain distinction can be drawn between content for pay-TV and free-to-air television (FTA-TV).

Furthermore, data on the structure of the markets illustrates the importance of MEDIASET, ANTENA 3 and LA SEXTA on the demand side of audiovisual content in Spain for free-to-air television. In the case of LA SEXTA, its importance is far higher than its audience share.

In this connection, audiovisual content constitutes a significant entry barrier to increasing audience numbers in the area of FTA-TV, as the number of operators able to make considerable investments in such content is very low, due to the difficulties in making a profit from it in the television advertising market.

2. Markets for the distribution of channels and free-to-air television

The introduction of digital terrestrial television (DTT) in Spain has multiplied the number of television channels available at national level, as well as the number of broadcast license holders for those channels.

There are currently five private licensees distributing 24 television channels in six DTT multiplexes (four channels each).

Of those channels, eight are owned by MEDIASET (which operates seven itself and has leased one to El Corte Inglés for a teleshopping channel), four by ANTENA 3, four by LA SEXTA (which has leased one to IMAGINA for a pay-DTT channel), four by VEO / UNEDISA (which has leased all of them to third-party operators, including one for a pay-DTT channel) and four by NET / VOCENTO (which has leased all of them to third-party operators).

RTVE, for its part, is licensed to broadcast eight DTT channels at national level, although at present it broadcasts only five.

The main market shares by audience in 2011 were as follows: MEDIASET 26.2%; RTVE 22.3%; ANTENA 3 17.1%; regional public television channels 11.2%; and LA SEXTA 7.6%.

However, the audience development prospects for RTVE and the regional government channels are poor given the budget restrictions they are facing, which will prevent them from programming attractive content.

3. Television advertising market

The CNC's investigation has established that the television advertising market differs from the market for advertising through other media outlets, including the Internet, owing to its immediate nature and the extent of its coverage, which makes it an indispensable advertising channel for a significant number of advertisers, especially those offering mass consumer goods.

Two forms of marketing are generally used in the television advertising market: cost-per-GRP sales¹ and discount sales.

The most common method is **cost-per-GRP sales**, which involves selling advertising impressions based on specific targets.² Under this method, the

¹ *Gross Rating Point (GRP)*. One GRP represents a number of impressions equal to 1% of the potential universe of the target audience. It is a standard measure of television advertising impressions.

advertiser purchases a certain number of GRPs for a specific target and negotiates the minimum weight to be applied to the different time slots and television channels to be used to reach the GRPs. However, once these minimum conditions have been decided on, the television operator is free to decide when and how often to air a particular advertisement until the contracted number of GRPs has been reached.

The agreed number of GRPs can be reached via the frequency with which the advertisement is aired or via coverage (higher audience of the desired target when the advertisement is aired). As a general rule, advertisers prefer higher coverage, although they also look to obtain GRPs on television channels whose audience profile is similar to the desired target audience.

The GRPs obtained by each advertising campaign on each channel are measured by KANTAR MEDIA in real time using a household panel, the results of which are immediately accessible through its database.

In **discount sales**, which involve selling advertising space at specific times, the advertiser pays for the space but not the impressions, with the associated risk that its advertisement might not achieve the desired advertising impressions. Under this sales method, the price charged in terms of impressions actually obtained is usually higher than with cost-per-GRP sales.

The ability of television channels to achieve advertising impressions is largely determined by the applicable legislation, which limits the duration of commercial breaks. This means that there are very significant restrictions on growth in terms of what can be offered by television operators.

It should also be noted that the GRPs generated by the main television operators have remained reasonably stable over time. This has been possible due to the fact that their advertising occupancy and audience levels in absolute terms have remained stable.

Another characteristic of the television advertising market is that the market share of the main operators is far higher than their audience share, even if the audience ratings of RTVE (which has not broadcast advertisements since 2012) are removed from the calculation.

Thus, in 2011 the market shares based on income from television advertising were: MEDIASET 43.6%; ANTENA 3 30.5%; LA SEXTA 11.4%; regional government television channels 8.9%.

This is due to the fact that from the standpoint of major advertisers, it is not feasible in practice to dispense with sustained advertising on the television channels with the highest audience figures, because it would stand in the way of reaching the minimum objectives of coverage and immediacy in advertising campaigns, especially since RTVE's departure from the market, with the result that its viewers may not be reached through television advertising campaigns.

² The targets can be very different in nature and divide the Spanish population into segments based on age, occupation, gender, income, place of residence, etc. The most commonly marketed targets are adults and housewives.

The indispensable nature of the main channels (especially Telecinco and Antena 3) to advertisers has been reinforced by packaging strategies implemented by MEDIASET and ANTENA 3 for advertising on various channels.

As a result of such strategies, advertising on the main channels of MEDIASET and ANTENA 3 can only be purchased in conjunction with advertising on their smaller channels. This means that advertisers are often forced to pay higher prices for these operators' smaller channels than would be the case had they been able to choose to advertise on the main channel alone. This also leads to the smaller television operators being excluded, since the share of advertisers' budgets that could be set aside for such operators is lower.

The most extreme example of this packaging strategy is the "single model" (*pauta única*) system, which was gradually implemented by ANTENA 3 between 2009 and 2010, until it became the only cost-per-GRP advertising sales method used. Under the single model system, the same advertisement is aired simultaneously on all channels whose advertising is managed by ANTENA 3, which means that an advertiser wishing to advertise on the main channel (Antena 3) cannot choose the channels on which its advertisement is aired or negotiate the weighting of each channel with a view to reaching the GRPs.

MEDIASET partly introduced the single model system for its channels in 2011 (although it has not yet been extended to Telecinco). This commercial policy has no equivalent in other European countries.

The anti-competitive effects of these packaged sales strategies have been aggravated by the fact that MEDIASET and ANTENA 3 have imposed on advertisers and media outlets (which usually act as intermediaries for advertisers) minimum levels of GRPs for their respective channels (as a percentage of the total purchased) which must be achieved in the television advertising campaigns.

As a consequence of these minimum levels, the number of GRPs allocated to MEDIASET and ANTENA 3 has gradually increased over time to the detriment of smaller television operators.

The only alternative television operator that has succeeded in maintaining a significant presence in the market is LA SEXTA, owing to its attractive content, considerable audience ratings and aggressive marketing strategies, resulting in lower prices than those charged by MEDIASET and ANTENA 3.

IV. ASSESSMENT OF THE MERGER

The CNC's analysis indicates that the effects of the ANTENA 3 / LA SEXTA merger on competition mainly relate to the **television advertising market** and are of a unilateral and coordinated nature.

In addition, these effects are more far-reaching than in the TELECINCO / CUATRO merger, since the number of main operators is reduced from three to

two (rather than from four to three) and there is no other operator left to act as a "maverick" and provide a meaningful competitive alternative for advertisers.

The first effect, of a unilateral nature, is the **disappearance of the competitive pressure in the market exerted by LA SEXTA**, which pushed down prices and acted as an important focal point for the grouping of advertising offers for the smaller television channels. Indeed, LA SEXTA sells advertising space for Marca TV and 13 TV and in the past did so for Intereconomía on a temporary basis.

The second effect, also of a unilateral nature, is the **strengthening of ANTENA 3's market power**. In particular, by increasing its audience it increases its pivotal and almost essential role for many major advertisers, which cannot dispense with advertising on ANTENA 3's channels without causing irreparable harm to the coverage of its advertising campaigns, especially since RTVE's departure from the television advertising market.

This effect has been magnified by the packaged marketing strategies implemented by MEDIASET and ANTENA 3, which consolidate the pivotal nature of their advertising offers. Commercial policies based on the single model system are particularly harmful.

The third effect, of a coordinated nature, arises from the reduction in the number of operators in a market that, owing to its real-time transparency and simultaneous contracting of advertising from the main operators, **encourages tacit coordination between MEDIASET and ANTENA 3**. The result is a reasonably symmetrical duopoly covering over 85% of the television advertising market in value, which significantly enhances the ability of ANTENA 3 / LA SEXTA and MEDIASET to tacitly coordinate with each other and increases the incentives for doing so.

These horizontal effects on the television advertising market not only have an impact on the commercial conditions obtained by the advertisers, but also increase the risk of excluding third-party television operators. This is because such operators no longer have the possibility of reaching agreements with LA SEXTA to sell their advertising space and is also due to the fact that the impact of sharing-out the implicit market will be more widely felt (as will the demand-side reduction for television advertising that could be directed towards smaller operators). The foregoing is the result of the commercial policies —the single model system and minimum GRP levels— that have been implemented and entrenched by MEDIASET and ANTENA 3 since 2010/2011.

In the **remaining markets** the effects of the transactions are essentially **vertical**, with an increase in ANTENA 3's power to purchase audiovisual content as well as its capacity, together with MEDIASET, to exclude third-party FTA-TV operators from the acquisition of appealing content, since it will be more difficult for such operators to achieve a return in the television advertising market.

The CNC did not accept the arguments advanced by ANTENA 3 that **LA SEXTA** would be forced to close if the merger did not go ahead, since LA

SEXTA has attractive assets (licence for four national television channels and tax credits) that could be acquired by third-party operators.

Nor did it accept the purported **efficiencies** claimed by ANTENA 3, as they were not quantified, do not constitute real efficiencies and would not be passed on to consumers.

In view of all of the foregoing, the CNC concludes that, in the absence of commitments or conditions, the ANTENA 3 / LA SEXTA merger would **generate risks to the maintenance of effective competition** in the markets considered, especially in the television advertising market in Spain, with the result that **this merger cannot be given clearance on the terms on which it was notified**.

V. ASSESSMENT OF THE COMMITMENTS SUBMITTED BY ANTENA 3

On 14 June 2012, ANTENA 3 lodged a final proposal for commitments which, although influenced by those applied in the TELECINCO / CUATRO merger, were not as strict owing to the exceptions it had introduced (in the areas of content acquisition and term of the commitments) and drafting ambiguities.

The CNC is of the view that the effects of the ANTENA 3 / LA SEXTA merger on effective competition are considerably more far-reaching than in the TELECINCO / CUATRO transaction, given the different dates on which they were analysed and differences in the structure of the markets when the planned mergers were notified. These factors justify the imposition of more stringent measures on the ANTENA 3 / LA SEXTA merger.

In light of the above, the CNC believes that the commitments proposed by ANTENA 3 for the television advertising market do not guarantee freedom of choice for advertisers and media agencies when contracting advertising campaigns on television channels in the manner that suits them best (cost-per-GRP sales; discount sales), nor do they guard against the possible abusive exercise of market power by the merged entity by means of the de facto imposition of channel packages or contract forms in respect of the individualised contracting of channels.

This would enhance the ability of ANTENA 3 to reinforce the indispensable nature of its television channels vis-à-vis major advertisers and use its main channels as leverage in order to oblige advertisers to sign up to its secondary channels, excluding smaller FTA-TV operators.

Furthermore, these commitments do not prevent the situation from arising whereby the ability of ANTENA 3 / LA SEXTA and MEDIASET to tacitly coordinate with each other in the television advertising market is strengthened and the incentives associated with doing so are increased, resulting in detriment to advertisers and smaller FTA-TV operators.

VI. CONDITIONS AND THEIR ASSESSMENT

When determining the conditions to be applied, the CNC refers to the case law of the Supreme Court in the SOGECABLE / VÍA DIGITAL case, indicating that the conditions that may be imposed on a merger must be proportional to the competition problems identified. The CNC has a certain degree of discretion in choosing, from the different solutions available, the one it considers most suitable to safeguard the effective competition existing prior to the merger.

In applying these principles, the CNC has regard to the fact that the number of meaningful operators on the television advertising market is reduced from three to two, creating a reasonably symmetrical duopoly. All of this occurs against a backdrop which has seen the introduction of commercial policies (single model system, minimum GRP levels) which aggravate the restrictive effects of the transaction.

The CNC also underscores the need for the conditions to be capable of being implemented in practice and monitored. In this respect, the CNC has taken account of the fact that it is dealing with imposed conditions rather than commitments submitted voluntarily.

Nonetheless, the CNC has designed a number of conditions using the commitments submitted by ANTENA 3 as a basis, supplementing and strengthening them in the area of television advertising, where it has introduced additional obligations and clarified the scope of the commitments proposed by ANTENA 3.

Conditions

The CNC has made clearance of the merger subject to the fulfilment of **five conditions**.

The **first condition** addresses the problems identified in the **television advertising market**.

The aim of this condition is to ensure that after the merger, ANTENA 3's ability to use its newly acquired market power is limited and, to that end, seeks to prevent ANTENA 3 from implementing commercial policies that unduly restrict advertisers' and media agencies' contractual freedom or exclude third-party operators from FTA-TV.

This condition comprises the following obligations:

- ANTENA 3 / LA SEXTA must terminate their agreements for the joint management of advertising on free-to-air DTT channels owned by third parties, and may not sign any new agreements of this kind.
- ANTENA 3 / LA SEXTA must use different companies to separately sell advertising space on their two FTA-TV channels with the highest audience ratings. Each of these companies may sell television advertising products in respect of channels whose joint audience ratings do not exceed 18% of the average six-monthly share.

- ANTENA 3 / LA SEXTA must publish its range of television advertising products at least once every three months. This must include, as a minimum, the products necessary to ensure that advertising space can be purchased individually on each of ANTENA 3's television channels.
- ANTENA 3 / LA SEXTA may not implement commercial policies that entail the imposition of certain advertising products over others. In particular, the companies that sell television advertising for ANTENA 3 / LA SEXTA may not give precedence to the joint purchase of advertising space on several television channels over individual purchases on each separate channel simply because advertising space is bought jointly on various channels.
- ANTENA 3 / LA SEXTA may not offer to sell advertising space in simulcast unless the advertiser makes an express written request to that effect beforehand. This obligation does not apply to the company that sells advertising for Antena 3.
- ANTENA 3 / LA SEXTA may not place conditions on commercial offers to advertisers or media agencies, requiring them to enter into contracts subject to a minimum investment or GRP level.
- Negotiations between, on the one hand, the companies that manage television advertising for ANTENA 3 / LA SEXTA and, on the other, advertisers and media agencies, must be governed by minimum principles of transparency, objectivity, foreseeability and legal certainty.

The **second condition** contains obligations to limit the reinforcement of ANTENA 3's position on the **FTA-TV market**, which also indirectly safeguards competition on the television advertising market. Specifically:

- ANTENA 3 / LA SEXTA may not extend their range of free-to-air channels by leasing DTT channels from third-party operators.
- ANTENA 3 / LA SEXTA may not block quality improvements at television channels with which they share DTT multiplexes.

The **third condition** requires ANTENA 3 / LA SEXTA to allow **audiovisual content** it has acquired or may acquire to be regularly released on the market. To that end:

- ANTENA 3 / LA SEXTA must limit the term of their agreements for the exclusive acquisition of content to three years, excluding pre-emptive acquisition rights and extensions.
- ANTENA 3 / LA SEXTA must restrict their ability to exclude national television producers as suppliers of programmes to FTA-TV competitors.

In order to make it easier to monitor compliance and implementation of the above conditions, the **fourth condition** lays down a series of obligations relating to periodic reporting on ANTENA 3 / LA SEXTA's conduct on the affected markets.

Condition five establishes that the **conditions are to remain in place for five years**.

Assessment of the conditions

In the area of **FTA-TV** (second condition ANTENA 3), **content acquisition** (third condition) and **periodic reporting obligations** (fourth condition), the obligations of ANTENA 3 are **similar** to those it submitted with its commitments, subject to the removal of certain exceptions. Furthermore, the obligations are practically identical to those incumbent on MEDIASET in the context of the TELECINCO / CUATRO merger.

These obligations counteract the vertical effects of the ANTENA 3 / LA SEXTA merger, as they prevent ANTENA 3 from consolidating its power in the affected markets through agreements with third-party operators holding licenses for DTT multiplexes and guarantee that after the merger, ANTENA 3 will allow the audiovisual content it has acquired or may acquire to be regularly released on the market.

The reporting obligations seek to ensure that ANTENA 3 regularly provides information to the CNC on its conduct in the affected markets in order to make it easier to monitor compliance with and implementation of the conditions.

The **duration of the conditions** largely reflects what was proposed by ANTENA 3 in its commitments (which established a maximum term of five years), although the unjustified link between the solutions in this case and those applicable to TELECINCO / CUATRO has been removed.

In the ANTENA 3 / LA SEXTA case, the CNC has taken account of the fact that conditions are imposed (rather than commitments accepted) and that it is unlikely that the established conditions will succeed in improving the post-merger competition situation within three years, especially given that there is no other major free-to-air operator as an alternative to MEDIASET and ANTENA 3.

Furthermore, the inclusion of a review clause ensures that if there is a significant change to market circumstances before the five-year term expires, the CNC may reduce the period of validity or the scope of some or all of the conditions.

The **main differences** between the conditions established by the CNC and the commitments offered by ANTENA 3 concern **television advertising**.

These differences arise from the more serious competition problems resulting from the ANTENA 3 / LA SEXTA merger, as well as the new commercial policies implemented by ANTENA 3 and MEDIASET (single model system and minimum level of GRPs), in addition to the fact that conditions rather than commitments are applied.

The CNC considered the imposition of the **obligation to use separate companies and teams to sell advertising space on Antena 3 and La Sexta** to be essential, since advertisers and media agencies as a whole stated that in its absence, any other "no link" obligation for the sale of advertising on blocks of channels would be devoid of content since the mere fact that the same person negotiates prices for both blocks allows that person to implicitly link the prices and other commercial conditions offered for each block.

In this regard, the evolution of the television advertising market in recent years has demonstrated that the separation of companies in the above way is key to ensuring that the remaining measures adopted under this condition are effective and can be more easily monitored.

Furthermore, the CNC believes that this obligation is not especially burdensome for ANTENA 3 insofar as separate sales teams already exist at ANTENA 3 and LA SEXTA, and in its commitments ANTENA 3 was prepared to retain separate companies and teams for pay-TV advertising sales.

With respect to the restrictions on the **television advertising offers** that ANTENA 3 can make **by packaging several television channels** (which will only be permitted provided that the joint average six-monthly audience ratings of the channels in question **do not exceed 18%**, in contrast to the 22% offered by ANTENA 3), the CNC points out that the lowering of this limit is absolutely necessary to enable Antena 3 to keep the single model system (as ANTENA 3 requested in its submissions), in order to ensure that the content and audience share of LA SEXTA is not diluted and to counteract the symmetrical duopoly arising as a result of the merger.

In any event, the 18% limit corresponds to the maximum six-monthly audience share ANTENA 3 has obtained in previous years prior to the acquisition of LA SEXTA.

Moreover, it must be borne in mind that the most extensive sales packages for channels formally offered at present by MEDIASET (Telecinco, FDF and La Siete channels) have brought in an average audience of 17.9% in the first quarter of 2012.

In addition, the CNC seeks to use the **obligations relating to the single model system and minimum GRP levels** to restrict the implementation of certain commercial policies that are currently applied mainly by ANTENA 3 and to a lesser extent by MEDIASET, which encourage the exercise of market power and tacit coordination.

Further, the effects of these commercial policies on effective competition in the television advertising market are under investigation by the CNC.

Lastly, as a result of its negotiations with advertisers and media agencies, the CNC has established specific obligations for ANTENA 3 which enhance the transparency and legal certainty of the obligations and build on what was previously offered by ANTENA 3 in its commitments.