

**SUMMARY OF THE REPORT-PROPOSAL IN THE SECOND PHASE CASE
C/0231/10 PRISA / TELEFONICA / TELECINCO / DIGITAL+**

I. NATURE OF THE OPERATION AND PARTIES

- (1) On 29 April 2010 the CNC was notified of the concentration operation consisting in the acquisition by PROMOTORA DE INFORMACIONES, S.A. (PRISA), TELEFÓNICA, S.A. (TELEFÓNICA) and GESTEVISIÓN TELECINCO, S.A. (TELECINCO) of joint control over DTS DISTRIBUIDORA DE TELEVISIÓN DIGITAL, S.A. (DIGITAL+). Said notification gave rise to case C/0231/10 PRISA / TELEFÓNICA / TELECINCO / DIGITAL+.
- (2) PRISA is a major media group, TELEFÓNICA is the leading operator of electronic communications services, TELECINCO is one of the main free-to-air TV operators, and DIGITAL+ is the number one pay-TV operator in Spain.
- (3) TELEFÓNICA and TELECINCO were to acquire respective equity stakes of 22% in DIGITAL+, and the remaining 56% of the capital would belong to PRISA. Also, as a result of various agreements between them each of the shareholders in DIGITAL+ would be able to exercise decision-making authority over DIGITAL+, thereby giving them joint control over that company.
- (4) This possibility of wielding decisive influence was to be embodied in the DIGITAL+ Board of Directors, where PRISA would name six directors, TELEFÓNICA two and TELECINCO the remaining two. The approval of certain decisions by the Board of Directors would require the favourable vote of 9 of the 10 directors, so that each of the shareholders would have a veto right over such decisions. Some of these decisions would be of a strategic nature for DIGITAL+ (including the budget, business plan, etc.), so the veto power would translate into decisive influence over DIGITAL+ for each of the three shareholders and, hence, joint control. Each shareholder would also have a strategic capacity to influence in the appointment of the senior managers of DIGITAL+.
- (5) The CNC Council resolved to initiate the second phase of the proceeding and, eventually, the notifying parties amended the agreements that had given rise to the concentration operation, and requested the CNC to close the administrative inquiry due to discontinuation of the notified concentration, on having removed from the sale-purchase contract and shareholders' agreements the provisions that gave TELEFÓNICA and TELECINCO decisive influence over DIGITAL+ after their equity acquisitions.

II. PROPOSED DISCONTINUATION

- (6) PRISA, TELEFÓNICA and TELECINCO modified the various contracts that gave rise to the notified concentration operation. Prominent amongst those modifications is that TELEFÓNICA and TELECINCO will not have veto rights in the DIGITAL+ Board of Directors, so that, amongst other questions, neither the approval nor the modification of the Strategic Plan, nor the annual approval of the DIGITAL+ budget will require the favourable vote of the DIGITAL+ board members appointed by TELEFÓNICA (two of a total of 10) or by TELECINCO (2).
- (7) Also, PRISA and TELECINCO will sign an option contract in favour of TELECINCO whereby, one years after TELEFÓNICA and TELECINCO join the shareholder base of DIGITAL+ the latter may acquire veto rights over DIGITAL+.

III. ASSESSMENT OF THE DISCONTINUATION

- (8) The meaning of control for purposes of a concentration operation is regulated in article 7.2 of the Spanish Competition Act (LDC), which provides that “*control results from contracts, rights or any other means which, having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence in an undertaking*”. In particular, subparagraph (b) of said article 7.2 of the Competition Act 15/2007 refers to “*contracts, rights or any other means which confer decisive influence on the composition, voting or decisions of the organs of the undertaking*”.
- (9) In the concentration operation that has given rise to the case of reference, as seen above, the joint control over DIGITAL+ by PRISA, TELEFÓNICA and TELECINCO arises from the veto rights each of the latter three would have in the Board of Directors on certain strategic matters, as well as from the capacity of PRISA, TELEFÓNICA and TELECINCO to influence in the appointment of the top executives of DIGITAL+.
- (10) In the absence of those elements, after the modifications introduced in their agreements and shareholder's covenants by PRISA, TELEFÓNICA and TELECINCO, the mere presence of TELEFÓNICA and TELECINCO in the capital base and Board of Directors of DIGITAL+ is not sufficient to give them decisive influence over that entity, insofar as PRISA will have a majority of the share capital and Board of Directors of DIGITAL+, and will have autonomy in making strategic decisions in DIGITAL+, as well as in naming and removing the senior managers of that undertaking.
- (11) Nor are there signs, furthermore, that PRISA, TELEFÓNICA and TELECINCO are going to preserve de facto joint control of DIGITAL+, inasmuch as no one of those shareholders is dependent on the others, especially subsequent to the elimination

of certain agreements (no competition covenant, preferential provision of services, etc.) that generated areas of collaboration between the parties.

- (12) As regards TELECINCO's option to recover certain veto rights over strategic decisions in DIGITAL+, the preliminary opinion of this Investigations Division is that mere existence of such option, for so long as it is not exercised, does not give TELECINCO decisive influence over the strategic decisions of DIGITAL+.
- (13) In any event, inasmuch as the hypothetical acquisition by PRISA and TELECINCO of joint control over DIGITAL+ would in principle be a concentration of Community dimension, the European Commission would, according to article 21.2 of EC Regulation 139/2004, be the only competent authority to determine whether mere existence of the option gives TELECINCO decisive influence over DIGITAL+.

IV. PROPOSAL

In view of the foregoing, and by virtue of article 58.4 of the Spanish Competition Act 15/2007 of 3 July 2007, we propose **closing the proceeding**, under article 58.4.d) of said Act 15/2007 on fulfilment of the conditions established in article 44.d) thereof.