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*Case No COMP/M.6547 –
ANTENA 3/ LA SEXTA*

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 4(4)

Date: 14/03/2012



EUROPEAN COMMISSION

Brussels, 14.03.2012

C(2012) 1840

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

To Comisión Nacional de la Competencia

Dear Sirs,

**Subject: Case No COMP/M.6547 – ANTENA 3/ LA SEXTA
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to Spain.**

Date of filing: 2 March 2012

Legal deadline for response of Member States: 26 March 2012

Legal deadline for the Commission decision under Article 4(4): 11 April 2012

I. INTRODUCTION

1. On 2 March 2012, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The notifying parties request the operation to be examined in its entirety by the competent authorities of Spain.
2. According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition in a market and this market presents all the characteristics of a distinct market.

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3. A copy of this Reasoned Submission was transmitted to all Member States on 2 March 2012.
4. By letter of 9 March 2012, the Spanish competition authority, Comisión Nacional de la Competencia (CNC) as the competent authority of Spain informed the Commission that Spain agrees with the proposed referral.

II. THE PARTIES

5. **Antena 3 de Televisión, S.A. ("Antena 3")** is a company listed on the Madrid stock exchange. Antena 3 is heading the Antena 3 group of companies. Antena 3 operates in Spain as a nationwide provider of television services and holder of a license that enables it to operate four free-to-air ("FTA") digital terrestrial television ("DTT") channels. Antena 3 is also present in the fields of radio broadcasting, television and film production, management of advertising in cinemas, event management, rights management and computer services. The main shareholders of Antena 3 are Grupo Planeta de Agostini, SL ("GPDA") with 44.584% of Antena 3's share capital and UFA Film und Fernseh GmbH Unipersonal ("UFA") with 20.49% of Antena 3's share capital. 5% of Antena 3's share capital belongs to its own treasury stock. The remaining 29.93% is widely dispersed. GPDA is the Spanish head of the strategic alliance between the Planeta Group (publishing and Spanish multimedia communication Group) and the De Agostini Group (Italian multinational group that operates in the publishing, production and distribution of content for television and cinema as well as in the financial sector and insurance) (the "Alliance"). Since 25 May 2005, both the Planeta Group and the De Agostini Group hold a 50% share in GPDA.²
6. [...]*

III. THE OPERATION AND CONCENTRATION

7. The transaction in question involves a series of agreements that will result in Antena 3 acquiring 100% of the share capital of La Sexta.

IV. EU DIMENSION

8. This transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation. The undertakings concerned, Antena 3 and its parent companies (the Planeta Group and the De Agostini Group) and La Sexta, have an aggregate worldwide

² Prior to 25 May 2005, the Alliance's shareholding in Antena 3 had been held though Kort Geding, S.L., (55% of the Planeta Group and 45% of the De Agostini Group). In May 2005, both Groups decided to restructure their common businesses in Spain and integrate them all under GPDA (based on an agreement between the Planeta and De Agostini groups dated 25 May 2005).

* Should read: **La Sexta, S.A. ("La Sexta")** is an unlisted company which holds a license for the provision of audiovisual media services, which enables it to operate four DTT channels nationwide. Currently, La Sexta operates three of these four channels, which are all free-to-air channels.³ La Sexta's shareholders are: GAMP Audiovisual, SA ("GAMP"), which holds 51.98% of La Sexta's share capital, and is a 77% owned subsidiary of Imagina Media Audiovisual, SL ("Imagina"), Imagina, which holds 40.77%, and Gala Commercial Developments, SL ("Gala"), which holds 7.254%. La Sexta is currently duly controlled by Imagina.

³ The fourth channel is currently leased to a third party, who operates it as a pay-TV channel.

turnover of over EUR 5 000 million (Antena 3's group worldwide turnover is EUR [...] million and La Sexta's worldwide turnover is EUR [...] million). The aggregate EU-wide turnover of the undertakings concerned is more than EUR 250 million (Antena 3 EUR [...] million and La Sexta EUR [...] million). The undertakings concerned do not achieve more than two thirds of their aggregate EU-wide turnover within one and the same Member State.

9. The Commission is of the view that the Planeta Group and the de Agostini Group have the right to manage GPDA's affairs⁴, and that GPDA, in turn, exercises de facto control over Antenna 3.⁵ Therefore, based on paragraphs 179 and 181 of the Commission's Consolidated Jurisdictional Notice⁶ and Article 5(4) of the Merger Regulation, the turnover of both the Planeta Group and the De Agostini Group should be taken into account in the calculation of Antena 3's turnover.

V. ASSESSMENT

10. On the basis of the information submitted in the Reasoned Submission, the proposed transaction will significantly affect competition in relation to the market for FTA TV/TV advertising in Spain, which is a horizontally affected market.

A. Relevant product markets

11. The proposed concentration concerns the Spanish media sector.
12. According to the notifying parties, the relevant product markets to be considered for the purpose of this decision are: (i) the TV market in Spain, including both pay-TV and FTA; (ii) the upstream market for the production of audiovisual content; (iii) the upstream market for the acquisition of audiovisual content; and (iv) the upstream market for the production and supply of TV channels.

TV market and TV advertising

13. The product market definition for TV proposed by the notifying parties would depart from the existing precedents⁷ as it includes both pay-TV and FTA in a single market

⁴ This view is based on the fact that each group has a 50% shareholding in GPDA, equality of voting rights and the right to appoint an equal number of members to GPDA's board of directors. The consent of both groups is also required to appoint GPDA's President despite the fact that he is nominated by Planeta.

⁵ This view is based on the fact that GPDA exercises more than half of the voting rights in Antena 3 in view of the attendance rate at shareholders' meetings in previous years.

⁶ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1.

⁷ See Commission decision in Case COMP/M.2845 – *Sogecable/Canal Satélite Digital/Vía Digital*; Report of Tribunal de Defensa de la Competencia ("TDC") C74/02 of 13 November 2002 *Sogecable/Vía Digital*; and Report of Servicio de Defensa de la Competencia ("SDC") in case N-05098 *Prisa/Sogecable*. See also, Commission decision in Case COMP/M.993 – *Bertelsmann/Kirch/Premiere*; Commission decision in Case COMP/M.3609 – *Cinven/France Telecom Cable/NC Numericable*, Commission decision in Case COMP/M.4204 – *Cinven/UPC France*; and Commission decision in Case COMP/M.5121 – *Newscorp/Premiere*.

for TV. The notifying parties' main argument in favour of such a wide market definition is based on both demand-side and supply-side substitutability considerations.

14. With reference to supply-side substitutability, the notifying parties' main argument in favour of such a wide market definition is the introduction of digital technology in Spain and the modification of the existing regulatory framework, as a result of which each FTA-TV operator will have several channels and will be entitled to exploit one of them as pay-TV. On the other hand, with reference to demand-side substitutability, digital technology has increased the number of channels available and as a consequence the contents available to customers. Moreover, FTA-TV operators compete for the acquisition of traditional premium content, and there is a tendency towards the reduction of access fees for pay-TV content, in order to meet the demand of customers.
15. Moreover, according to the notifying parties, pay-TV channels are experiencing increased level of advertising revenues. Despite this product market definition, the notifying parties admit that they are exclusively active in the segment for FTA TV and that in accordance with existing precedents the analysis and information provided in the Reasoned Submission focuses on FTA TV services.
16. According to the precedents of the Commission,⁸ the distribution of pay-TV and FTA TV are two separate product markets, based on the different financial models of these two types of platform.⁹ According to the precedents of the Commission, in consideration of the fact that advertising represents the main source of revenues of FTA TV operators, this market should be assessed in the context of the market for the sale of advertising space on TV.¹⁰
17. The product market definition for TV advertising proposed by the notifying parties would depart from the existing precedents¹¹ as it includes all conventional media in a single market for the sale of advertising space. The notifying parties' main argument in favour of such a wide market definition is based on the existing competitive pressure between the different means of communication. According to the precedents of the

⁸ See Commission decision in Case COMP/M.4504- *SFR/Télé2 France* and Commission decision in Case COMP/M.5932 – *Newcorp/BskyB*.

⁹ See also Commission decision in Case COMP/M.4204 – *Cinven/UPC France*.

¹⁰ In paragraph 16 of the Commission decision in Case COMP/M.1574 – *Kirch/Mediaset*, the Commission held that: "Free access TV comprises advertising-financed private television and public television financed through fees or through fees and partly through advertising. There is, therefore, a relevant product market for TV advertising where the broadcasters compete for advertising revenues. This market must be distinguished from advertising through other media, in particular through the print media. It can be left open if there is, in the strict economic sense of this notion, a market for viewers where the TV broadcasters compete against each other for audience shares. In any event, the audience shares in the TV broadcasting are a determinant factor for the success of the broadcasters in the TV advertising market and have, therefore, to be assessed at least in the context of this market."

¹¹ See Commission decision in Case COMP/M.1958 – *BERTELSMANN/GBL/PEARSON TV*, Case COMP/M.1889 – *CLT-UFA/CANAL+ /VOX*.

Commission,¹² this market should be assessed in the context of the market for the sale of advertising space on TV.

Market for the production of audiovisual content

18. Antena 3 is mainly active in market for the production of audiovisual content for captive use, while only a limited percentage of its production is sold to third parties. On the contrary, La Sexta is not active in the market as it outsources the production of audiovisual content to third parties producers.
19. According to the notifying parties and the Commission precedents¹³, the demand side of this market is composed by TV operators acquiring TV programmes to be broadcast in their platforms while the supply side of the market would include independent producers and vertically-integrated TV operators that produce programmes for their own or for third parties. The Commission has considered in the past that this market included all types of TV programmes and has not segmented it further on the basis of content.¹⁴
20. According to the precedents of the Commission, because of the existence of TV broadcasters that produce TV programmes, there is a need to distinguish between programmes limited to captive use and programmes which are also sold to third parties.¹⁵ The notifying parties propose a product market definition in line with the precedents of the Commission.

Market for the acquisition of audiovisual content

21. The market definition proposed by the parties is generally in line with previous Commission decisions, except that in line with their view that there is a single TV market encompassing FTA and pay-TV, they do not distinguish between acquisition of content for pay-TV and acquisition of content for FTA TV, which is the first level of the segmentation in previous Commission decisions.¹⁶
22. The Commission, in previous decisions¹⁷, has distinguished different markets depending on the audiovisual content distributed: (i) the acquisition of rights to films

¹² See Commission decision in Case COMP/M.1958 – *BERTELSMANN/GBL/PEARSON TV*, Case COMP/M.1889 – *CLT-UFA/CANAL+ /VOX*.

¹³ See Commission decision in Case COMP/M. 1943 – *Telefónica/Endemol*.

¹⁴ See Commission decision in Case COMP/M. 4353 – *Permira/All3Media Group*, at paragraph 10.

¹⁵ See Commission decision in Case COMP/M. 1943 – *Telefónica/Endemol*.

¹⁶ For instance, in Case COMP/M. 5121 – *Newscorp/Premiere*, the Commission noted that notwithstanding the fact that rights for pay-TV and FTA-TV are negotiated at the same time, the type of content required by pay-TV operators is to a certain extent different from that purchased by FTA operators. See also Case COMP/M.2876 – *Newscorp/Telepiù*.

¹⁷ See Commission decisions in Case COMP/M. 5748 – *PRISA/TELEFONICA/DIGITAL+*, Case COMP/M.5776 – *TELECINCO/CUATRO*; Case COMP/M.4504 – *SFR/TELE2 FRANCE*, Case COMP/M.4066 – *CVC/SLEC*, Case COMP/M.2876 – *Newscorp/Tele+*, and Case COMP/M.2845 – *SOGECABLE/CANAL SATELITE DIGITAL/VIA DIGITAL*.

(segmented in turn between films produced by the main American studios - "Majors' films" or "premium films" - and the rest; and with regard to premium films, a further segmentation for the different exhibition windows); (ii) the acquisition of exclusive rights to national regular football events; (iii) the acquisition of rights to national intermittent football events; (iv) the acquisition of rights to other sport events; (v) acquisition of rights to general and thematic channels.

Market for the production and distribution of TV channels

23. On the market for the production and distribution of TV channels, broadcasters and retail TV suppliers negotiate the terms and conditions for distributions of TV channels to end-consumers. Within this market, the Commission identified two separate product markets for the wholesale supply of FTA and pay-TV channels, based on the different financial models of these two types of channels. Moreover, within the market for the wholesale supply of pay-TV channels, the Commission indicated that there is a differentiation between "basic" and "premium" pay-TV channels, without, however, reaching a final conclusion as to whether these channels constitute separate markets.¹⁸ The Commission considered, without taking a final position on this issue, whether separate markets should be identified based on the theme of the channel (e.g. films, sports, news, etc.).¹⁹

B. Relevant geographic market

24. The notifying parties consider that, in line with the Commission's precedents,²⁰ the geographic scope of the FTA TV market is national, owing primarily to different regulatory regimes, language barriers, and cultural differences.
25. As to the TV advertising market, the Commission has considered in the past that it was national in scope.²¹
26. The notifying parties claim that the impact of the proposed transaction will only be limited to Spain. In this respect, according to the information provided in the Reasoned Submission, the proposed transaction will not lead to any cross-border effects in the market for the sale of advertising space as Antena 3 and La Sexta are active only in Spain.
27. The market for the production of audiovisual content has been defined as national in scope.²²

¹⁸ See Commission decision in Case COMP/M. 5932 – *News Corp/BSkyb*.

¹⁹ See Commission decision in Case COMP/M. 2876 – *Newscorp/Telepiù*.

²⁰ See Commission decision in Case COMP/M.993 - *Bertelsmann/Kirch/Première* and Commission decision in Case COMP/M.2845 - *Sogecable/Canalsatélite Digital/Vía Digital*.

²¹ See Commission decision in Case COMP/IV.M.553 – *RTL/Veronica/Endemol*. See also Commission decision in Case COMP/M.4547 – *KKR/PERMIRA/PROSIEBENSAT.1*.

²² See Commission decision in Case COMP/M.5776 – *Telecinco/Cuatro*.

28. The geographic scope of the markets for the acquisition of audiovisual content has also been considered to be national or alongside linguistic borders.²³
29. The market for the production and distribution of TV channels has been considered as national or delineated along linguistically homogeneous areas.²⁴

C. Assessment

30. On the basis of the information provided by the notifying parties in the Reasoned Submission, the proposed transaction is an appropriate candidate for pre-filing referral from the Commission to the Spanish Competition Authority in accordance with Article 4(4) of the Merger Regulation.
31. The transaction meets the legal requirements set out in Article 4(4) of the Merger Regulation. The transaction is a concentration within the meaning of Article 3 of the Merger Regulation, it has a Community dimension and it may significantly affect competition in several markets in Spain which present all the characteristic of distinct market in the meaning of article 4(4) of the Merger Regulation.²⁵
32. A preliminary analysis of the information provided by the notifying parties in the Reasoned Submission shows that the proposed transaction may significantly affect the market for FTA-TV/sale of advertising space in TV in Spain.
33. There are other vertically-related markets that would be also technically affected given the parties' combined market share on the downstream market for FTA TV in terms of audience share or advertising revenues. These markets are the upstream market for the production of audiovisual content, and the upstream market for the acquisition of audiovisual content and the upstream market for the production and wholesale supply of TV channels.
34. The notifying parties claim that it is extremely difficult to provide information about the size of the market or about the activity of the competitors in the market for production of audiovisual content and in the market for the acquisition of audiovisual content as well as in the market for the wholesale supply of TV channels due to the lack of a public and reliable source. In any event, the notifying parties consider that their presence in these markets is limited.²⁶

²³ In Commission decision in Case COMP/M.5121 - *Newscorp/Premiere*, the Commission has also noted that *nothing prevents operators from acquiring rights for more than one territory at the time*, although it has found that broadcasting rights are divided and sold on a mainly national basis or, at most, by language area.

²⁴ See Commission Decision in Case COMP/M.5932, *News Corp/BskyB*.

²⁵ See paragraph 16 of the Referral Notice, OJ C 56, 05.03.2005, p. 2.

²⁶ For instance, Antena 3 has a limited presence in the market for the production of audiovisual content, and, only exceptionally produces for third parties. In addition, De Agostini is also active in the market for the production of audiovisual content, through its subsidiary Magnolia. On the contrary, La Sexta is not active in the market as it outsources the production to third parties producers. The notifying parties estimate that the combined market share of Antena 3 and Magnolia amounts to [5-10]% in the market for the production of audiovisual content. Similarly, in the market for the acquisition of audiovisual content

FTA TV market in Spain

35. The main FTA TV operators at national level are RTVE (public), Mediaset (Telecinco), Antena 3, NET TV, la Sexta, and VEO. There are also a number of regional FTA TV operators of significant importance in their respective regions, as well as minor players active only at local level.
36. The market shares, in terms of audience, of the main FTA TV operators are shown in the table below:

Evolution of audience ratings of FTA TV in Spain (share of the audience)

	2009	2010	2011
Antena 3	17.9%	17%	18.36%
La Sexta	7.5%	7.3%	8.15%
Combined	25.4%	24.3%	26.52%
RTVE	24.5%	25.9%	23.9%
Telecinco/Cuatro	26.4%	26.6%	28.3%
FORTA ²⁷	14.3%	11.8%	10.8%
Temáticas Conc TDT	3.8%	5.9%	5.44%
TV Local	1.3%	0.2%	0.1%
Others	4.1%	5.4%	5.1%

Source: Kantar Media

37. The proposed transaction leads to combined market shares in terms of audience (including RTVE) of 26.52% (Antena 3: 18.36% and La Sexta: 8.15%).
38. However, audience has been considered in the past only as one indicator, revenues being the other competitive parameter.²⁸ In terms of revenues (advertising) in 2010, Telecinco is the main player with a market share of [40-50]%, followed by Antena 3 ([20-30]%), La Sexta ([10-20]%), the regional operators ([10-20]%) and others ([0-5]%). The public operator TVE has not been considered in view of its withdrawal from the market for the sale of advertising space on TV in Spain in 2010.²⁹

VI. REFERRAL

39. On the basis of the information provided by the notifying parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. The Commission notice on case referral in respect of concentrations³⁰ (point

the notifying parties estimate that their market share amounts to [5-10]%. In the market for the production and distribution of TV channels, the presence of the notifying parties is limited [...].

²⁷ Federación de Organismos de Radio y Televisión Autonómicos.

²⁸ See Commission Decision in Case COMP/M.3330 – *RTL/M6*, at paragraph 19.

²⁹ Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española

³⁰ OJ C 56, 05.03.2005, p.2.

17) indicates that, in seeking a referral under Article 4(4), “*the requesting parties are ... required to demonstrate that the transaction is liable to have a potential impact on competition in a distinct market within a Member State, which may prove to be significant, thus deserving close scrutiny*”, and that “*such indications may be no more than preliminary in nature...*”. In order for a referral to be made by the Commission to a Member State, two legal requirements must be fulfilled. The first requirement is met where there are indications that the concentration may significantly affect competition in a market. This requirement is met in case the transaction leads to the existence of affected markets. In particular, the proposed transaction will give rise to a horizontally affected market in relation to the FTA-TV market / TV advertising. Moreover, the second requirement, being the existence of a separate market having all the characteristics of a distinct market, is met as Commission precedents have consistently defined the FTA-TV market/ TV advertising as being national in scope. Accordingly, on the basis of the information submitted in the Reasoned Submission, the transaction affects Spain only.

40. The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the concentration is liable to take place on distinct markets in Spain, and that the requested referral would be consistent with point 20 of the notice.
41. The proposed transaction appears to meet the legal requirements set out in Article 4(4) of the Merger Regulation. The proposed transaction is a concentration within the meaning of Article 3 of the Merger Regulation; it has an EU dimension and may significantly affect competition in Spain.
42. The proposed transaction might raise significant competition issues in a number of markets presenting all the characteristics of distinct markets in Spain, notably the Free To Air (FTA) TV / sale of advertising space market.
43. The principal effects of the proposed operation would be restricted to Spain. Further, the markets in question present all the characteristics of a distinct market.

Additional factors

44. Spain seems to be the only country concerned. Therefore, even in case of referral, the benefit of the "one-stop-shop" would be preserved.

VII. CONCLUSION

45. For the above reasons, and given that Spain has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by Spain. This decision is adopted in application of Article 4(4) of the Merger Regulation.

For the Commission

(signed)
Alexander ITALIANER
Director General