

Robert Bodewig

Audiovisual Media and Market Definition

A Comparative Analysis of the European, German
and U.S. Competition Authorities' Decision Practice



Berliner
Wissenschafts-Verlag

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Die juristische Fakultät der Heinrich-Heine-Universität Düsseldorf hat diese Arbeit im Jahr 2019 als Dissertation angenommen.

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Datum der mündlichen Prüfung: 21.03.2019

D 61

Bibliografische Information der Deutschen Nationalbibliothek:

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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Behaimstr. 25, 10585 Berlin,

E-Mail: bwv@bwv-verlag.de, Internet: <http://www.bwv-verlag.de>

Druck: docupoint, Magdeburg

Gedruckt auf holzfreiem, chlor- und säurefreiem, alterungsbeständigem Papier.

Printed in Germany.

ISBN Print 978-3-8305-5028-0

ISBN E-Book 978-3-8305-4193-6

Foreword

This study was accepted as a dissertation by the law faculty of the Heinrich-Heine-Universität Düsseldorf in 2019. The oral examination took place in March 2019. Decisions of the Competition Authorities have been considered until December 2019. Literature and decisions in Appendix B could be considered until August 2018.

I am very thankful for the support from my advisor Prof. Dr. Rupprecht Podszun. I would also like to thank Prof. Dr. Hans Jürgen Meyer-Lindemann for his second opinion.

To my parents Prof. Dr. Frauke Henning-Bodewig and Prof. Dr. Theo Bodewig who have always given me unconditional support and valuable advice I am deeply indebted.

Special thanks deserves my girlfriend Johanna Blau. She is not only a wonderful mother to our daughter Clara but has always given me strength and support.

Munich, March 2020

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List of Abbreviations

3D	Three Dimensional
ABA	American Bar Association
Abl.	Amtsblatt
ACM	Autoriteit Consument & Mark
ADSL	Asymmetric Digital Subscriber Line
AG	Aktiegesellschaft
Am. Econ. Rev.	American Economic Review
Antitrust ABA	Antitrust Magazine of the American Bar Association
Antitrust Bull.	Antitrust Bulletin
Antitrust L.J.	Antitrust Law Journal
Art.	Article
AS	Aksjeselskap
BayRS	Bayerische Rechtssammlung
BCA	Belgian Competition Authority
BEJTE	The B. E. Journal of Theoretical Economics
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
BKartA	Bundeskartellamt
BT-Drucks.	Bundestagsdrucksache
BV	Besloten vennootschap met beperkte aansprakelijkheid
Cal. L. Rev.	California Law Review
C. D. Cal.	United States District Court for the Central District of California
CGUPPI	Coordination Gross Upward Pricing Pressure Index
CJEU	Court of Justice of the European Union
C. M. L. Rev.	Common Law Market Review
Co.	Company
Colum. L. Rev.	Columbia Law Review
Competition Pol'Int'l	Competition Policy International
DBS	Direct Broadcast Satellite
D. D. C.	United States District Court for the District of Columbia
DMA	Designated Market Area
DoJ	United States Department of Justice Antitrust Division
DSL	Digital Subscriber Line
DTH	Direct to Home Satellite
DTO	Download to Own
DTT	Digital Terrestrial Television

List of Abbreviations

DVB-T	Digital Video Broadcasting – Terrestrial
DVD	Digital Video Disc
E. A. G. C. P.	European Advisory Group on Competition Policy
EC	European Community
ECJ	European Court of Justice
E. C. L. R.	European Competition Law Review
EEA	European Economic Area
E. g.	Exempli gratia
EGC	European General Court
Et al.	Et alii / et aliae / et alia
Etc.	Et cetera
Et seq.	Et sequens
Et seqq.	Et sequentia
EU	European Union
Eur J Law Econ	European Journal of Law and Economics
E. V.	Eingetragener Verein
FCC	Federal Communications Commission
FCO	Federal Cartel Office
Ff.	Die Folgenden
FIFA	Fédération Internationale de Football Association
Fordham Int'l L.J.	Fordham International Law Journal
FTA-TV	Free-to-air TV
FTC	Federal Trade Commission
FttH	Fibre to the Home
GCP Antitrust Chronicle	Global Competition Policy Antitrust Chronicle
Geo. L. J.	Georgetown Law Journal
Geo. Mason L. Rev	George Mason Law Review
GmbH	Gesellschaft mit beschränkter Haftung
GmbH & Co. KG	Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft
GmbH & Co. KGaA	Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft auf Aktien
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
GUPPI	Gross Upward Pricing Pressure Index
GVBl.	Gesetz- und Verordnungsblatt
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Harv. L. Rev.	Harvard Law Review
HD	High Definition

H-DSL	High Data Rate Digital Subscriber Line
HMT	Hypothetical Monopolist Test
Id.	Idem
I. e.	Id est
Inc.	Incorporated
Int. J. Ind. Organ.	International Journal of Industrial Organization
IPTV	Internet Protocol Television
JbNSt	Jahrbücher für Nationalökonomie und Statistik
J. Comp. L. & Econ.	Journal of Competition Law & Economics
J. Econ. Persp.	Journal of Economic Perspectives
J. L. & Econ.	Journal of Law and Economics
JZ	JuristenZeitung
KG	Kammergericht
K&R	Kommunikation und Recht
Lit.	Litera
LLC.	Limited Liability Company
L. P.	Limited Partnership
Ltd.	Limited
MLB	Major League Baseball
MMDS	Multichannel Multipoint Distribution Service
MMR	Multimedia und Recht
MSO	Multiple Systems Operator
MSTD	Multichannel Subscription Television Distributor
MVPDs	Multichannel Video Programming Distributors
NACE	Nomenclature statistique des activités économiques dans la Communauté Européenne
NAICS	North American Industry Classification System
NBA	National Basketball Association
NE	Netzebene
NHL	National Hockey League
NMa	Nederlandse Mededingingsautoriteit
No.	Number
Notre Dame L. Rev.	Notre Dame Law Review
Nr.	Number
N. V.	Naamlooze Vennootschap
NZKart	Neue Zeitschrift für Kartellrecht
OECD	Organisation for Economic Co-operation and Development
Ofcom	Office of Communications for the United Kingdom
OFT	Office of Fair Trading

List of Abbreviations

OJ	Official Journal of the European Union
OLG	Oberlandesgericht
OPTA	Consumentenautoriteit and Onafhankelijke Post en Telecommunicatie Autoriteit
OTA	Over The Air
OTT	Over The Top
OVDs	Online Video Programming Distributors
P.	Page
Par.	Paragraph
Plc	Public Limited Company
PPV	Pay per View
Pub.L	Public law
PVR	Personal Video Recorder
Res. In L. & Econ.	Research in Law and Economics
Rev. Indus. Org.	Review of Industrial Organization
Rn.	Randnummer
RSNs	Regional Sport Networks
RStV	Staatsvertrag für Rundfunk und Telemedien
Rz	Randzeichen
S.	Sentence
SA	Société Anonyme / Sociedad Anónima
S. D. N. Y	United States District Court for the Southern District of New York
SE	Societas Europaea
SMATV	Satellite Master Antenna Television Systems
S. p. A.	Società per Azioni
S. r. l.	Società a responsabilità limitata
S. R. O.	Společnost s ručením omezeným
SSNDQ	Small but significant non-transitory decrease in quality
SSNIP	Small but significant non-transitory increase in price
SVODS	Subscription Video on Demand Services
TFEU	Treaty on the Functioning of the European Union
Trade Reg. Rep.	Trade Regulation Reporter
TV	Television
TVOD	Transactional Video on Demand
U. A.	Uitgesloten Aansprakelijkheid
UEFA	Union of European Football Associations
U. K.	United Kingdom
UPP	Upward Pricing Pressure
U. S.	United States

U.S. C.	United States Code
V.	Versus/vom
VMVPDs	Virtual Multichannel Video Programming Distributors
VOD	Video on Demand
Vs.	Versus
WRP	Wettbewerb in Recht und Praxis
WuW	Wirtschaft und Wettbewerb
WuW/E	Wirtschaft und Wettbewerb – Entscheidungssammlung
ZWeR	Zeitschrift für Wettbewerbsrecht

Introduction

A. Overview

In recent years, the audiovisual media industry has been subject to radical change. While traditional TV services offer programming at fixed viewing times new content aggregators like Netflix provide a great variety of content at any time the consumer desires. This surge in competitive offerings has also increased market concentration. Even large media companies have become interesting targets for mergers. In addition, companies not yet in the media business have entered the market and have acquired media firms to enhance their competitiveness. As a consequence, these mergers and acquisitions in the audiovisual media industry are increasingly on the radar of the Competition Authorities.

When examining mergers or anticompetitive behavior the Competition Authorities must identify market power in a certain market. To do this, as a first step, the relevant markets are defined. In the audiovisual media sector this can be a challenging task not only because of its cultural, social and political importance but also because of its unique economic characteristics. It is, thus, of interest which exact relevant markets the European, German and U.S. Competition Authorities have defined and which approach they have taken to do so. Furthermore, an analysis of the different market definition concepts can provide valuable insights into the optimal way of defining markets in the audiovisual media sector.

There is no recent publication analyzing the Competition Authorities' market definition practice in the audiovisual media sector. This thesis, therefore, examines the decision practice of Competition Authorities in three major jurisdictions: The European Commission, the German Federal Cartel Office ("FCO") as well as the Antitrust Division of the United States Department of Justice ("DoJ") and the Federal Trade Commission ("FTC"). A critical analysis of previous decisions by these Competition Authorities can provide useful insights on how to manage new challenges in this field. Based on this comparative research a proposal on how to best define the relevant market in this very sector is presented.

This thesis is divided into eight chapters: To illustrate the necessity of market definition, first, the legal bases and different concepts of market definition which have been developed in competition law and economics are described in detail (Chapter I). Then, the different markets defined in the audiovisual media sector by the respective Competition Authorities are presented (Chapters II–IV). To highlight similarities and differences the findings are compared with each other (Chapter V). Further, it is examined which market definition concepts were effectively used by the Competition Authorities (Chapter VI). Based on this, an approach to define the relevant market in the audiovisual media

industry is proposed (Chapter VII). To establish this proposal, in a first step, the economic particularities of the audiovisual media industry are described. In a second step, different concepts of market definition are examined regarding their aptitude to manage these particularities. Finally, the findings are summarized (Chapter VIII). Appendix A lists the assessed decisions. Appendix B provides a case discussion sorted by jurisdiction and business area. The relevant legal provisions can be found in Appendix C.

B. Previous Publications and Analytical Framework

There is no comprehensive overview of the European, German and U.S. Competition Authorities' market definition practice regarding the audiovisual media sector yet. Studies from 2002 and 2005 are outdated and do not specifically focus on audiovisual media.¹ They, therefore, lack depth regarding this sector. Also, in neither of these studies the practice of the United States' Competition Authorities has been examined.²

As this study discusses the evaluation of market definition by the different Competition Authorities, its ultimate goal is a complete picture of all relevant decisions. To achieve this, the respective internet databases³ of the Competition Authorities have been searched for audiovisual media related codes.⁴ However, several cases which were

1 Bird&Bird, Market Definition in the Media Sector – Comparative Legal Analysis, December 2002 (available at http://ec.europa.eu/competition/sectors/media/documents/legal_analysis.pdf); Institute of European Media Law e. V. (EMR), Media Market Definitions – Comparative Legal Analysis, 18.07.2005 (available at http://ec.europa.eu/competition/sectors/media/documents/2005_media_market_definition_study_en.pdf).

2 In the latter study even the German Federal Cartel Office's practice was not assessed.

3 European Commission: <http://ec.europa.eu/competition/elojade/isef/index.cfm>;
FCO: http://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3591512&docId=3589936; DoJ: <https://www.justice.gov/atr/antitrust-case-filings>;
FTC: <https://www.ftc.gov/enforcement/cases-proceedings>.

4 In the European Commission's web search the following NACE (nomenclature statistique des activités économiques dans la Communauté Européenne) codes were examined: "J.59 – Motion picture, video and television programme production, sound recording and music publishing activities" and "J.60 – Programming and broadcasting activities". In the FCO's web search the commercial areas "media", "telecommunications", "information technology", "e-commerce", "sports" and "entertainment" were examined. In the DoJ web search the following NAICS (North American Industry Classification System) codes were examined: 4833 Television Broadcasting, 4841 Cable and Other Pay TV Services, 7814 Motion Picture Production for TV, 51312 Television Broadcasting, 512110 Motion Picture and Video Production, 512120 Motion Picture and Video Distribution, 512131 Motion Picture Theaters (except Drive-Ins), 513120 Television Broadcasting, 513220 Cable and Other Program Distribution, 515120 Television Broadcasting, 515210 Cable and Other Subscription Programming and 516110 Internet Publishing and Broadcasting. In the FTC's web search the industries "retail", "technology" and "communications" were examined.