News Lextter

Media In A Changing World

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Recent Important Innovations in the Media Sector

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Editorial

At this moment it makes sense to publish a newsletter exclusively on issues related with the Media sector, not only due to the circumstance that it is a sector that has deserved front page coverage in the Media, particularly in relation to the acquisition movements verified (we need only recall the recent assignment of 49% of the equity of SIC, of 100% of the equity of Lusomundo Serviços or of the put option of a significant part of the equity of Media Capital) but also to the recent legislative innovations that have been introduced.

In this "Newslextter", several lawyers analyse the latest legislative developments and share their experience in the sector, certain that its divulgation will be of interest and to the benefit of many PLMJ clients. ▪

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The creation of the Regulatory Authority for the Media

Por Vasco Marques Correia

The most recent Law nr. 53/2005, of November 8th has just been published in the Official Gazette creating the ERC – Entidade Reguladora para a Comunicação Social (ERC - "Regulatory Authority for the Media" - ERC) and concomitantly rendering the "old" Alta Autoridade para a Comunicação Social (AACS) ("High Authority for the Mass Media") extinct, which has been surrounded by extreme controversy, especially during its final phase of existence.

The creation of the ERC is inserted in an extensive motion attempting to institute regulatory authorities that should be independent from the political power - particularly from the Government - as well as from the (economic and factical) powers, aiming to regulate certain sectors, as is the example of the Competition Authority, Regulatory Authority of the Energy Sector and Regulatory Authority of Health.

It is a welcome motion because its respective contemplation corresponds to the introduction of a form of sectorial organization that has long been in force in economies that are more developed than the Portuguese economy, with good general results and as such implies a harmonization and approximation of those organization / regulatory forms within extended economic areas, as is particularly the case of the European Union.

The approval of the above referred Law was preceeded by an amendment to the Portuguese Constitution recently carried out and which, among other innovations, resulted in the express contemplation of the ERC.

In the words of the legislator, "the ERC is a public collective body, with the nature of an independent administrative authority which aims to perform the duties that were constitutionally conferred, defining the guidelines of its activities, without being subject to any directives or guidelines by the political power".

In practical terms, the ERC succeeds the AACS in the generality of its competences and all administrative procedures in course that have not been concluded until the date of entry into office of the members of the respective Regulatory Board shall be transferred to that Board, the members of the AACS to remain in office until the taking over of duties occurs.

Under the terms of the new Law, the legal regime that will rule the structure and operationality of the already existing Media Institute ("Instituto da Comunicação Social") will be amended by the Government to harmonize it with the innovations introduced and the placement of several officers of the referred Institute at the ERC, under the regime of service commission, also being foreseen.

Without intending to go into excessive detail that perhaps is not adequate for an informative newsletter, it should be referred that the ERC was essentially conferred with the competences and powers at the level of regulation and supervision of the Media sector, being independent in the undertaking of its duties and freely defining the guidelines of its activities, without being subject to any directives or guidelines by the political power, in strict compliance with the Constitution and with the law.

All entities, under the jurisdiction of the Portuguese State that undertake Media activities and, particularly, news agencies, individual or legal entities who edit periodic publications, independently to the distribution means used, radio and television operators through any means, including electronic, entities that provide to the public, through electronic communications, radio or television programme services, in as far as they should decide on its selection and aggregation, and entities that regularly provide to the public, through electronic communications networks, contents submitted to editorial treatment and organized as a consistent whole, are subject to the supervision of the ERC.

The objectives of the regulation of the communication sector to be adopted by the ERC are essentially to promote the cultural pluralism and diversity of speech in several lines of thought, the free divulgation and the free access to contents, the protection of the more sensitive public - in particular children - to assure that information is ruled by criterias of demand and journalistic rigor, to assure the protection of receivers of the content services whilst consumers and the protection of individual personality rights.

Among the most relevant attributions of the ERC, we would like to point out the guarantee of the free exercise of the right of information and freedom of the press, to watch over the excessive concentration of the ownership in the media industry, to protect the independence of means in light of political and economic powers, to assure the compliance of rights, freedoms and guarantees and effective expression and confrontation of several lines of opinion, to assure the exercise of broadcasting rights, of reply and political rebuttal and to supervise the compliance of publicity campaigns promoted by public entities with the constitutional principles of impartiality and exemption of the Public Administration.

The Bodies of the ERC are the Supervisory Board, the Executive Board, the Consultive Board and the sole auditor.

The regulatory board is the collegiate body entrusted with the definition and implementation of the regulating activity of the ERC, consisting of solely five members, two of whom shall undertake the duties of Chairman and Vice-Chairman, four of them being appointed by the Portuguese Parliament and the fifth member appointed by agreement between the four members initially appointed.

The mandate of the regulatory board - by express legal provision, not renewable - is of five years and the respective members must be appointed from among individualities of well known repute, independent and with technical and professional competence, being totally independent in respect to the sector they are to regulate, once appointed.

The executive board is the body responsible for the administration of the services and for the administrative and financial management of the ERC, consisting of the Chairman, Vice-Chairman of the regulatory board and of the executive director.

The consultive board, in turn, is a body to be consulted and to participate in the definition of the general lines of actuation of the ERC, contributing for the articulation with public and private entities representing the relevant interests under the scope of the Media and sectors linked thereto, consisting of a large number of sixteen members, such board being presided by the Chairman of the regulatory board of the ERC.

The ERC has very significant competences, being able to proceed with inquiries and examinations in respect to any entity or locality, being able to proceed with the inspections and measures deemed necessary for the undertaking of its purposes and the parties concerned must give all collaboration that is lawfully requested. The referred authority and its agents are subject to the duty of secrecy in the undertaking of their duties, save for the effects of preparatory inquiries in procedures that fall within their attributions.

The ERC also has its own regulatory competences, being able to adopt directives and recommendations that aim to encourage standards of good practice in the Media sector, being entrusted by law to promote the institution of co-regulation and self-regulation mechanisms.

The ERC is subject to parliamentary supervision and judicial control through the administrative, civil and arbitral jurisdictions, depending on the nature of the acts to be investigated or the questions to be settled and furthermore subject to the supervision of the Public Court of Auditors ("Tribunal de Contas") under the scope of specific attributions of such board, being compelled by law to have a site on the internet in which its whole activity and legislation applicable to the sector must be permanently accessible to all interested parties.

As in many other cases, practice - more than the regulations - will define the board.

Anyway and in theory, the Law that has just been published immediately contains the necessary and sufficient intents and purposes for the entry into office of the new authority to be crowned with success, permitting the opening of a new page on the regulation of a sector of major importance in any modern and developed society.

We hope that this will be the case ▪

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Advertising - In A Time Of Change?

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The advertising activity assumes, at several levels, a predominant role in the media. In fact it is a means of communication that, since primordial times, has always been present in the socio-economic relations between individuals because it is well known that advertising, publicity, is the most efficient form to ensure the launching, strengthening and acknowledgement of trademarks and to motivate respective sales.

Advertising is undoubtedly an area that influences the outlines of consumption in general, thus contributing for the successive fluctuations of this socio-economic phenomenon.

The advertising phenomenon assuming an enhanced function was largely due to the spreading of new means of publicity techniques (compared with traditional means), such as using the telephone, the telefax, the internet, cash dispenser machines, aircrafts, among others. The divulgation of the advertising message not rarely resorts to hi-tech resources which, as we know, have been the object of successive advances and improvements, contributing for the growing development of the advertising activity.

However, in certain cases, advertising may cause a negative influence in consumption in general. It is commonly broadcasted on the news that we are going through an age of exaggerated "consumerism", mainly resulting from the harmful effects of advertising.

If it is certain that such harmful effects cannot be neglected, it is also true that there are enormous benefits which have been proven and are associated with the advertising activity. Consequently it is between these two points that the legislator must have a regulating duty and try to harmonise the interests of all intervening parties and receptors of the advertising activity

In this context, the Advertising Code is the source of essential law in the regulation of the most significant aspects of the advertising activity.

The "coding" on advertising commenced in the decade of the 80's, with the entry into force of Decree-Law nr. 421/80, of September 30th (which was revoked by Decree-Law nr. 303/83, of June 28th), a pioneer in the legal regulation of the advertising right, which was based on legislation originating from certain countries of the European Union (particularly, France, United Kingdom, Ireland, Italy and Spain). However, Decree-Law nr. 330/90, of October 23rd, was a true legislative milestone, characterised as a coding of the advertising regime, approving the actual Advertising Code (successively amended) and revoking Decree-Laws nrs. 421/80 and 303/83.

The guiding principles of systematization of this Code are still maintained today without any alterations to its chapter and section organisation.

Until this date, the "Advertising Code" has been the object of nine legislative amendments, as set forth in Decree-Law nr. 74/93, of June 10th, Decree-Law nr, 6/95, of January 17th, Decree-Law nr. 61/97, of March 25th, Law nr. 31-A/98, of July 14th (Television Law), Decree-Law nr. 275/98, of September 9th, Decree-Law nr. 51/2001, of February 15th, Decree-Law nr. 332/2001, of December 24th, Law nr. 32/2003, of August 22nd and Decree-Law nr. 224/2004, of December 4th.

There are strong indications that the Summer of 2005 was "inspiring" for a projected amendment to the actual Advertising Code.

As far as it was possible for us to assess until now, it is a government bill that intends to introduce amendments in the following advertising segments:

- Principle of lawfulness: In this aspect, it is intended to foresee that the use of the image of a man or a woman with a discriminatory character is forbidden;

- Slight amendments to the concept of misleading advertising;

- In the chapter on the restrictions to the content of advertising: Possible amendments are "drawing nearer" in respect to the advertising of alcoholic beverages, foods and beverages with a high sugar content, courses, miraculous products or services and credit;

- Sponsorship (once again in a perspective to emphasize restrictions in respect to alcoholic beverages);

- Penalties: On one side, increase of fines, particularly those applicable to companies and, on the other side, alterations at the level of reversion of the amounts of the fines, placing into

perspective that the Consumer Institute will gain a larger percentage of those amounts;

- The obligation of registration of advertising professionals and agencies at the Consumer Institute;

- Introduction of a charge at the rate of 0,5% that aims to finance the regulating and supervisory activity of the Consumer Institute which will fall over the invoicing of the advertising professionals and agencies, being due by the advertisers;

- Regime of release of the fine: To be applied in those situations whereby ICAP - Instituto Civil de Autodisciplina da Publicidade (ICAP – Civil Institute of Advertising Self-Regulation) has decided on a certain advertising content, verifying the compliance of that decision by the agent of the administrative offence;

- Definition of situations of increase of fines;

- Attribution of a devolute character to the appeal of a legal claim.

In summary, we verify a tendency to render some of the principles applicable to the advertising activity more "imprecise" and, on the other side, in an objective scope, we only see issues of an economic-penalty nature which are manifestly in favour of the Consumer Institute.

An evident example of this truly economic display is the referred rate of 0,5%. We clearly doubt its character of a charge. Are we not dealing instead with a new "disguised" tax burden, that is, a true Tax?

In the meanwhile, as announced in certain media, this amendment bill of the Advertising Code has been the object of bitter criticism by bodies which integrate the sector of advertising professionals.

Until now, the final outline of this legislative process is unknown but we consider that it could cause, in the near future, one of the "intense" battles in the Media sector.

On our side, we consider that the advertising law should be the object of amendment aimed at two essential purposes:

(i) On one side, the adoption of measures that permit to interact, in a healthy and constructive manner, the symbiosis of the two antagonistic points referred to above; and,

(ii) On the other side, to accompany the progressing tendencies of the several sectors of the Media. This is the "touchstone" that unfortunately has remained unaltered during the successive legislative amendments.

Finally and because we are at a period of reflection on advertising matters, we consider that it would be of extreme interest that strict works of investigation and legislative conception arise with a view to obtain a compilation which we could truly classify as an "Advertising Codex" which may respond to the demands of an open economy and a developed society, meeting the "appeals" of innumerous operators in the production chain of the advertising sector. ■

The Ball Is In … Newark

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Decree-Law nr. 84/2005 was published on April 28th of this year, regulating on the conditions whereby holders of exclusive rights for the television transmission of any events are compelled to assign the respective signal to operators who carry out international broadcasts, for the restricted use thereof.

This law, which regulates a subject already expressed in Article 28 (5) of Law nr. 32/2003 of August 22nd - Television Law, has the merit of defining the rules in the area of the assigning of television rights, until now in a "grey" zone and as from now counts on an adequate legislative framing defending free competition, the divulgation of the Portuguese language and culture and the pragmatism in the settlement of possible conflicts and deadlocks in which the retribution criterias for the assigning of those rights would potentially launch the interested parties. This ruling effort should be praised in an area such as the Media where not rarely additional ruling diplomas are foreseen in the legislative text, the existence of which are delayed in time …(1).

In fact, the scope of Decree-Law nr. 84/2005 cannot be considered as insufficiently ambitious and only time and mainly the practice of the several intervening parties in the sector can dictate the success of this law which, at least under a legislative

point of view, seems balanced and apt to serve at the end of the process the Portuguese television viewer, or the Portuguese speaking viewer, abroad.

Immediately and after insisting on the obligation of television operators, under the jurisdiction of the Portuguese State, who hold exclusive rights for the transmission of events which are considered to be of general public interest, "*to assign the respective signal, via live coverage or deferred coverage, as requested to do so, against payment of a retribution, to operators who carry out international broadcasts intended for Portuguese communities abroad or to Portuguese-speaking countries, for the restricted use thereof*" (check Article 2), Article 3 of Decree-Law nr. 84/2005 clarifies that the acquirers of the above referred exclusive rights are compelled to notify the regulatory authority - which for the purposes of this law is still the Alta Autoridade para a Comunicação Social (A.A.C.S.) ("High Authority for the Mass Media") - not only of that acquisition but also of the main particulars of the contract.

It should be added that this notification not only has the merit of placing the initiative to inform on the acquisition of television rights of a cultural or sports interest in the hands of the acquirer (to the contrary to the regulatory authority having to be attentive to the unfolding of a universe of negotiating situations in the market and immersing in supervisory duties), but also should be made within a period that is perfectly marked in time, that is, within forty eight hours from the acquisition of rights or until the date of the event, when acquired on the eve or two days before the event takes place (check Article 4, number 1).

On the other hand, the notification sent to the A.A.C.S has the effect to enable all operators that have international broadcasts and are interested to be made aware of the conditions of acquisition of exclusive television rights of the event and are the object of that notification, being consequently able to submit a proposal to the legal owner of those rights containing the date and hour foreseen for the broadcast, as well as the proposed retribution for the assigning of those rights.

In many cases, the negotiations could cease to advance further, being closed with success. However, should there be no agreement entered into by the acquirer and the interested operator, and **because in the fair perspective of the legislator, television access to events that are of manifest interest to the Portuguese Communities abroad or to Portuguese-speaking countries cannot be conditioned to the negotiating incapacity or to the commercial and financial strategy of the intervening parties in the Media sector**, Decree-Law nr. 84/2004 provides for the intervention, upon request of any of the interested parties, of the regulatory authority, vested with duties of arbitration and with the power of a final binding decision.

More importantly, Decree-Law nr. 84/2005 further provides, in those cases whereby the negotiations fail with the interested parties, for several mechanisms of a practical value which speed up the procedure whereby the intervention of the A.A.C.S. is required.

Thus, the application to arbitration must be immediately accompanied with a deposit, which value is defined in accordance with the rules clearly set forth in Article 9 which, after notification of the arbitral decision by the regulatory authority, the holder of the exclusive rights may withdraw in the amount that has been attributed in that decision.

On the other hand and in a commendable innovation of Decree-Law nr. 84/2005, even if an agreement of the owner of the exclusive rights does not exist in respect to the value of the retribution, the television operator interested in the international broadcasting has the power to exercise the right of broadcasting in the assumption that: i) the notification of acquisition of the exclusive rights addressed to the A.A.C.S. was made in the twenty days prior to the event taking place; and ii) the television operator has proceeded, in the conditions defined in number 3 of Article 7 and in Article 9, with the delivery of the deposit until the eve of the date before the event takes place. Obviously the exercising of that broadcasting right, even because it involves the lack of agreement of the owner of the exclusive rights in respect to the retribution, will originate *per si* the arbitration process with the intervention of the A.A.C.S.

We have still not referred in this brief summary of the regime of Decree-Law nr. 84/2005 that the law also foresees the rules to be applied in those cases whereby there are more than one operator interested in the international broadcast.

In accordance with the provisions of Article 13, number 1, in case the exclusive right for the television broadcast has been previously acquired by an operator who carries out international broadcasts under the conditions object of this law and other operators wish to exercise the same right, the amount paid by the first acquirer shall be apportioned among those who come to acquire them. In the case of events, in which the respective interest is significantly affected by a deferred broadcast, namely as far as sports are concerned, the operators who intend to benefit from the above mentioned apportionment must carry out the television broadcast within the same time parameters as the first acquirers, which is understandable because it would be unfair that the original acquirer, who was compelled to assign the rights over the broadcasting of sports events and similar, be in a worst situation of opportunity of broadcasting than if he were not compelled to assign those rights.

It should be noted that all technical costs arising from the signal provision shall be borne by the beneficiary operator (check article 14).

In conclusion and as referred to above, we are of the opinion that Decree-Law nr. 84/2005 provides television operators under the jurisdiction of the Portuguese State with a balanced legislative instrument for all intervening parties, which privileges a certain pragmatism in an area where until now the dragging of negotiations

or the commercial and financial intention of several groups of the Media sector, frequently dictated the impossibility of television access to events of manifest interest to the Portuguese viewer living abroad or to Portuguese-speaking countries.

Decree-Law nr. 84/2005 benefits free competition between television operators, and, in particular, benefits "Mr. Silva" who, having already taken a seat in a Portuguese coffee shop in Newark, with a mobile phone in front of him and after eating a typical Portuguese custard tart, emotionally awaits the whistle for the start of the inaugural game of the "Portuguese football team" in German territories.

Let us hope that "Mr. Silva" will continue to go to work on the day after the televised football games with a smile on his face. This would mean that regulating, legal, negotiating, bureaucratic, technical and finally sports difficulties have not prevented "Mr. Silva" from showing off to his friends and work colleagues (who perhaps could not name a Portuguese city…) the brilliance of our football players and consequently feeling prouder of his Portuguese condition. ■

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(1) It should be stated in this respect that the A.A.C.S, in the follow up of a consultation addressed to that authority and after an opinion obtained from the Media Institute, confirmed our understanding that not only is there a lack of regulation provided for in Law nr. 4/2001 of February 23rd / Radio Law (Article 21 applicable ex vi Article 33) for the concession of authorisation for the radio broadcast via satellite and by cable, but also that such fact cannot prevent an administrative authorisation in that respect, notwithstanding the existing legislative omission.

The Battle for "Media" Earth

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Nowadays, we all understand (depend on?) the role that the Media has in our lives. In fact, as we always have a radio, newspaper or television nearby, we can almost say that they start the day with us, accompany us to work, eat with us and many times entertain us in the evenings.

However, this omnipresence is not a futile consequence of the technological advance. The Media has conveyed the information society to us and with it a society which, besides being global, is more attentive, interested, responsible, conscientious and therefore more demanding. Civic rights are assured in a more effective form due to the speed and wideness of news spreading, being certain that hidden is also the danger of manipulation by other powers with a view to gain benefits of a diverse nature, considering that published or transmitted opinion frequently turns into public opinion, such is the trust that it inspires.

Consequently, it is many times called the 4th power and is more and more dominating. In fact, it is extraordinary how a relatively recent reality has gained a power that in relation to all others has the capacity, if not to rule, at least to influence. The media groups are nowadays extremely strong business structures, as we may verify that all the largest are quoted on the stock exchange, besides being the only sector that can auto-advertise at the same time that undertakes its normal activity, and we all know the multiplying importance of advertising in the business world today.

Therefore, it is not strange that we are presently witnessing the battle for the ownership and expansion of media groups and debates on its consequences.

The issue of "Media Concentration" assumes here particular importance.

The argument against the concentration of companies is well known and is based on the eventual loss of competition, through the creation or strengthening of a dominant position in the market that may prevent, misrepresent or restrict it.

Naturally this problem is raised in the media sector with even more intensity because constitutional rights are concerned, such as the freedom of expression and information, and the concerns with the promotion of cultural diversity and the defence of pluralism of opinions and of the media itself.

Analysing the legislative situation in Portugal concerning the question of protection of competition (in which the concentration issue is inserted), we can see that, before the foreseeable adhesion of Portugal to the European Communities, on January 1st, 1986, it was confined to the concept of "unfair competition" which, however, cannot be confused with the present Competition Law because "it is a parallel institute which does not aim at the protection in itself of the market system but the protection of economic agents against acts of their competitors that are contrary to the principles of professional good practices" . In fact, in 1986, the "metamorphose of the Portuguese economic order" occurs, whereby we assumed the Community principles of free competition, free movement of persons and goods, services and capital - since the path was opened for the constitutional reviews of 1982 and 1989 that further provided for the direct applicability of Community Directives and Regulations.

It was then that the first legislation for competition protection arose in this Country, which was Decree-Law nr. 422/83 of December 3rd (already foreseeing the adhesion) and Decree-Law nr. 428/88 of November 19th, the first ruling was about restrictive competition practices (that include individual practices) and the second, the prior control of concentration operations. In 1993, Decree-Law nr. 371/93 of October 29th replaced the former laws and covers the competition rules, concentration of companies (which may occur by merger, by dominium of one or more companies by a person or persons who already hold one company and, finally by the incorporation of a common company by the other two or more companies) and of a new regime on State aids and withdrawing the restrictive individual competition practices from its scope, submitting these to the general regime of administrative offences.

Presently, Law nr. 18/2003 of June 11th is in force, which maintains the previous material structure but in more detail, besides replacing the Competition Board to the High Authority of Competition, as the supervisory body. The main innovations we would like to point out is the end of the presumption of the former Article 3(3), which assumed the existence of a dominant position from a simple quantitative verification of market quotas and, specifically as concerns the control of concentrations, the requirement, for the effects of prior notification, that at least two of the companies involved have a turnover exceeding two million euros (Article 9, nr. 1 - b). We consider that with this an opening of the regime can be understood by procuring a more casuistic analysis and avoiding that operations of a small dimension have to be the object of unnecessary investigation.

However, for each field of the media, it is the specifically regulating laws that, under the scope of concentration, firstly clarify us. Consequently, regarding the Press, it is the specific legislation itself (Law nr. 2/99 of January 13th) that reverts to the competition law, only foreseeing the intervention of the regulatory authority (the former A.A.C.S.) in operations of horizontal concentrations.

As concerns Radio, it is the law (nr. 4/2001 of February 23rd) that specifies that an individual person or company can only hold a maximum of five radio broadcasting operators.

Finally, regarding Television (Law nr. 32/2003 of August 22nd) and as occurs with the Press, it is the law itself that reverts to the competition law, only foreseeing, once again, the intervention of the regulatory authority.

However, as may be verified, all of them have the sole objective to prevent monomedia concentrations, that is to say, between companies linked to the same sector of the media. Thus, because of this, it was desirable, or even demandable, that a law unitarily rule the multimedia concentration, considering that this is a reality (which consequently only comes under the general sphere of the law of protection of competition).

How can this omission be understood? The desire to strengthen national groups in light of multinational groups? In any case, its specific and global regulation would be even better, which the legal security and strategies of the groups themselves would appreciate.

However, we in fact believe that the path followed by the Portuguese legislator has been of a progressive opening to concentration. We have referred to this above in regard to the most prominent innovations of Law nr. 18/2003. Another aspect on which we should reflect is the evolution from Decree-Law nr. 428/98 to Decree-Law nr. 371/93 as to the objective quantitative condition so that a concentration operation be previously notified - from a joint turnover in an amount of € 25.000.000,00 (“five billion escudos”), we now have an amount of € 150.000.000,00 (“thirty billion escudos”) – obviously, by considerably increasing the threshold of applicable of the law, it was intended to give a larger freedom for concentration operations.

However the Regulatory Authority for the Media, recently born - last November 8th - (which replaced the High Authority for the Mass Media) expressly contemplates in article 8, sub-paragraph b), the attribution to “watch over the non concentration of ownership of the entities that undertake media activities with a view to safeguard pluralism and diversity”. We understand that this is based on a wrong idea - that the concentration is an evil in itself and for itself. It seems that the concentration is forbidden *ab initio* because only in this manner is the referred pluralism and diversity safeguarded. We consider that a reasonable content of provisions as this and the respective good legislative elaboration would contemplate that to safeguard these interests, the regulatory authority would evaluate if, in practice and specifically when interests would be affected, the prohibition of a determined concentration is duly justified.

We furthermore know that a concentration may perfectly result in good rewards, namely, an increase in the quality of services rendered, the reduction of prices practiced, and a whole optimization of resources. In fact, there are many synergies that may intertwine and capital gains provided by economies of scale, arising from an operation of concentration.

Moreover, the largest Portuguese media groups state that, only through concentration, can they continue and defend themselves from the onset of large multinational media groups and of foreign capital. In fact, as our market is extremely small, together with a difficulty to expand cross-border (at least at European level) due to the language, the imperative need of a reduced number of national media groups is perfectly understandable and, therefore, that we be sensitive to their concentration.

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[1]Articles 37 to 40 of the Portuguese Constitution consisting of the “Information Constitution”.

[2]In António C. Santos, Maria Eduarda Gonçalves and Maria Manuel Leitão Marques, Direito Económico (“Economic Law”)..

[3]In J.J. Gomes Canotilho and V. Moreira, Portuguese Constitution, Annotated.

[4]Another novelty was the extension of its application to all other sectors of activity, now including the financial and insurance sectors

We believe that effectively only in this manner will it be possible to "promote and assure the cultural pluralism and diversity of expression of several lines of thought", which curiously constitutes the first of the objectives to be followed by the new Regulating Authority for the Media - considering that only with the "survival" of the national *media*, with its own identity and cultural and committed individuality can this desire be achieved. If not, the structural weakness of pulverized media groups would inevitably result in the volatility of those groups and their easy acquisition by large foreign conglomerates.

Why be concerned? Even at the limit of a monopolist media structure, is the diversity of opinions unthinkable? Of course not! If this were not the case, then what would be the purpose of the journalist statute, its code of ethics, of editorial statutes? Laws, all laws, are to be complied with.

Therefore, care must be taken with quixotic phobias to try to reincarnate the long gone Senator Sherman because the concentration may, with serious costs - those that are precisely intended to be avoided - be made by force … of circumstances. This is, motivated by the disappearance of the main actors due to their bankruptcy, leaving the market at the mercy of the competition, in the meanwhile monopolist.

The legal rules on concentration have to be reflected taking into consideration the objectives to be achieved, also closely evaluating the ambivalence that may be caused in practice. A situation, concerning which the costs and benefits are still not known, should be specifically analysed and not "forbidden just for the sake of forbidding" in an abstract and displaced form, under the penalty of revealing to be an unfortunate self-destructive normative.

The *media* world is in truth a battle field where diverse interests and powers are fought, sometimes stimulated by simple personal ambitions, in others by whimsical national sentiments but where the duty to inform and the right to be informed is always found.

Alea jacta est, the battle for *Media* Earth will begin. ▪

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[5]The Portuguese Constitution seems to state the same when it is referred in article 38/4 that "The State assures the liberty and independence of the media (…) preventing its concentration (...)".

Nuno Viegas, 2004
Acrílico, esmalte sintético, tinta da Índia, tinta preta, caneta de filtro e lápis de cera / tela
200 x 180 cm
Obra da Fundação PLMJ