

The Revitalization of the Marketplace of Ideas: Competition Law as a Means of Defending Democracy

Antonio Miño López¹

Abstract

This paper examines the evolving intersection between competition law and the "marketplace of ideas," contrasting the legal frameworks and recent developments in the United States and Spain. Historically, antitrust regulation aimed to preserve a diverse influx of information to protect democratic discourse, a principle deeply rooted in U.S. First Amendment jurisprudence. However, modern enforcement has shifted toward purely economic metrics, focusing on consumer welfare and advertising rates rather than informational pluralism.

Through a comparative lens, the study analyzes recent shifts in U.S. antitrust enforcement—highlighted by regulatory interventions in ideologically motivated cases such as *Children's Health Defense v. WP Company LLC* and *State of Texas v. BlackRock, Inc.*—which demonstrate a renewed willingness to regulate non-price viewpoint competition when it yields adverse economic repercussions. Conversely, the Spanish legal system historically decoupled ideological disputes from antitrust scrutiny, delegating the evaluation of media pluralism during mergers to sector-specific governmental bodies rather than independent competition authorities. This institutional design faces criticism due to the executive branch's inherent conflict of interest in

¹ Lawyer for the Xunta de Galicia, adjunct professor at the University of Vigo, anlopez@uvigo.gal

overseeing the very media outlets that monitor its actions. Ultimately, the paper underscores the ongoing consolidation within traditional media and argues that as media mergers increasingly impact both freedom of enterprise and democratic expression, Spanish antitrust authorities may inevitably face a resurgence of claims grounded in the defense of political and informational pluralism.

Keywords: Antitrust Law; Competition Policy; Marketplace of Ideas; Media Mergers; Media Pluralism; Political Pluralism; Freedom of Expression; First Amendment; Viewpoint Competition; Economic Efficiency

1. Introduction

I consider it a great honour to have been invited to contribute to this book². The most productive and intense years of my career were spent as Deputy Director-General for Investigation at the Galician Competition Authority (Comisión/Consello Galego da Competencia, CGC), between 2010 and 2015. This period represents, to the extent that one may speak of it, a “before and after” in my professional and academic trajectory: five years in office, numerous infringement proceedings, a doctoral thesis, a monograph, dozens of scholarly articles, lectures, and seminars both in Spain and abroad, all of which constitute the tangible output of this experience.

If anything characterizes the field to which this work belongs, it is the increasingly widespread and enduring concern among scholars and legal practitioners regarding the

² The book's title is "*Vigésimo aniversario de la creación de la Comisión Galega da Competencia*" ("*20th anniversary of the creation of the Comisión Galega da Competencia (Galician Competition Authority)*").

possibilities available to public authorities responsible for enforcing competition law. From this perspective, it has become apparent that actions and sanctions concerning agreements and practices involving collusion, abuse, and restrictive agreements have become partially obsolete in light of the increasing use of conventional antitrust procedures.

Nevertheless, this innovative efficiency-oriented approach to competition law has also generated a new concern in the field of competition defense. There is a long tradition in legal doctrine and practice surrounding the European Union and a substantial body of work devoted to the “marketplace of ideas” in constitutional law, particularly with respect to freedom of expression, where the tendency to “carve out” and “separate” innovative intervention—critically assessed in the United States—should not distract us from returning our attention to Europe and Spain.

The following sections will first address the treatment of the marketplace of ideas in competition law, particularly in relation to media concentration in the United States and Europe, with special emphasis on the influence of this market on the millions of media users in Spain over recent decades. Subsequently, the concentration of media ownership in Spain in recent decades and the likely reduction in the diversity of ideas will be examined. The fourth section presents the conclusions.

2. The "marketplace of ideas"

2.1. The "marketplace of ideas" as a subject of antitrust law

Antitrust law originated in the United States with the purpose of curbing the collusive and monopolistic practices of large corporations in key sectors of the American economy

(*Sherman Act*, Sections 1 and 2). Any sector or firm is susceptible to engaging in anticompetitive practices, provided that it carries out an economic activity for which a market exists and where it can compete with actual or potential competitors.

Information and communication media (*media*)—understood *latu sensu* (traditional media, via the Internet, and through social networks)—engage in economic activities within a market, which can be affected by anticompetitive behaviour actionable by antitrust authorities. This occurs, for instance, in mergers between operators (*media mergers*). The traditional approach limits antitrust scrutiny to examining the impact of a merger on advertising rates within the affected market. However, an alternative perspective argues that the antitrust analysis of a media merger should be expanded to include its impact on the "marketplace of ideas."

The "marketplace of ideas" is by no means identical to the media advertising market. In the latter, competition is measured by easily quantifiable advertising procurement ratios; the former, by contrast, focuses on news and entertainment, the political, economic, and social vision advocated by each media outlet, and informative pluralism as a determinant of political pluralism. The defining elements of the "marketplace of ideas" are intangible and intimately linked to the existing political regime of each state. The concept of the "marketplace of ideas" is grounded in the underlying belief that truth prevails when information is disseminated as widely as possible from diverse and antagonistic sources³. It traces back to a famous dissenting opinion by Justice Holmes in *Abrams v. United States*, 250 U.S. (1919). For Holmes, the constitutional doctrine embodied in the First Amendment is that "*the ultimate good desired is better reached by free trade in ideas*—

³ STUCKE, M. y GRUNES, A., «Antitrust and the Marketplace of Ideas». *Antitrust Law Journal*, Vol. 69, 2001, p. 249.

*that the best test of truth is the power of the thought to get itself accepted in the competition of the market [...] [we should be] eternally vigilant against attempts to check the expression of opinions that we loathe"*⁴, unless they imminently threaten to immediate interference with the lawful and pressing purposes of the law. He added that the best test of truth is the success of an idea in achieving acceptance in free competition with other ideas. Just as competition yields the best product, competition in the marketplace of ideas promotes truth.

As Justice Learned Hand observed in *United States v. Associated Press*, this "*presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection*"⁵. In conclusion, a major purpose of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, and not to tolerate the monopolization of that market, whether by the government, corporations, or any individual. As Justice Greene wrote in the *AT&T* case, "*as the Supreme Court has recognized, by promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws*"⁶. Based on this interpretation of the First Amendment to the U.S. Constitution, a very significant body of legal doctrine and jurisprudence maintains that antitrust laws are applicable to anticompetitive restraints on the marketplace of ideas in which media outlets operate. The Supreme Court and lower courts have made this connection explicit.

For instance, in *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court stated that "*application of the antitrust laws to newspapers is not only consistent*

⁴ HOLMES, *Abrams v. United States*, 250 U.S. (1919), 630.

⁵ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S.1 (1945).

⁶ *United States v. AT&T*, 552 F. Supp. 131, 184 (D.D.C. 1982), *Maryland v. United States*, 460 U.S. 1001 (1983).

*with but actually shares the underlying values of the First Amendment"*⁷. In *Red Lion Broadcasting* ...the Supreme Court declared that *"application of the antitrust laws to newspapers is not only consistent with but actually shares the underlying values of the First Amendment"*⁸. In *Red Lion Broadcasting*, the same Court affirmed that *"it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee"*⁸.

A brief reading is enough to warn that including agreements concerning intellectual content (including videos from social media) within the category of abuses prohibited by competition law underestimates one of the functions of the limits imposed by competition law itself. The superior value of competition in the market for ideas is not the approximation to the truth through the accumulation of ideas put forward in open competition and analysed critically, but rather the promotion of economic efficiency and consumer welfare. Including the market for ideas in an analysis of competition law would amount to principles and constitutional values that are difficult to reconcile: freedom of ideas and political expression as an essential element of political pluralism and, on the other hand, the Rule of Law.

The U.S. courts, beginning with the Supreme Court, were fully aware of this unique situation. Pitofsky, then chairman of the FTC that ruled on the *AOL-Time Warner* merger in 2000, addressed these concerns when describing the interrelationship between antitrust

⁷ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 800 n.18 (1978).

⁸ *Red Lion Broadcasting*, 395 U.S., 390. Todas las sentencias citadas por STUCKE, M. y GRUNES, A., en «Antitrust and the Marketplace of Ideas», op.cit., pp. 251 y 252.

analysis and diversity of expression. In an interview with the Washington Post about that transaction, Pitofsky stated:

*“Antitrust is more economic. And if I believe that freedom in general is negotiated among politicians, in the publication of books, on television, in the publication of newspapers, etc., what can be done is to look at the interests involved and ourselves to ask whether there is a conflict, a concentration, concerning the mining of coal. I want to say, if any monopoly in the economic sector is going to be harmful to books or newspapers, but antitrust legislation is going to have to distinguish whether books, newspapers, or newspapers are speaking of applications that are not merely a means for that economic monopoly”.*⁹

An economic-legal perspective that allows the market for ideas to be incorporated into the scope of competition law should consider rivalry among the media as a species of competition based on price (non-price competition), the same way as product quality, supplier location, customer service, the convenience or novelty of the place where the good is sold, or the maintenance of prices. In fact, there are no means of communication due to price competition (presses) or substitutes due to price, which are very similar (written press and newspapers, radio, television, internet). Competitors for the diffusion of one or another type of medium are not solely the same means of communication, and the relationships are not necessarily those of direct substitutes in the short term. Consequently, competition over price (the market for advertising) is diverted and this causes the economic market to become based on that market.

⁹ KLEIN, A., «A Hard Look at Media Mergers», Washington Post, 29 de noviembre de 2000. Citado por STUCKE, M. y GRUNES, A., en «Antitrust and the Marketplace of Ideas», op.cit., pp. 255.

2.2. The Relationship Between the First Amendment and Antitrust Regulation

Since *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980), U.S. courts have definitively recognized that commercial speech enjoys less protection than political speech because commercial speech is more likely to be misleading and therefore more susceptible to arbitrary restrictions on commercial discourse by public authorities, provided that such restrictions are justified by the pursuit of economic objectives and by the resilience and experience of consumers.

Following the arrival of the second Trump administration in 2025, it appears that both the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) have expressed a particular concern regarding exclusive contracts and mergers in the media sector. More recently, the Antitrust Division has vigorously advocated the enforcement of antitrust laws to scrutinize restrictions on viewpoint competition, as reflected in its Statement of Interest in *Children's Health Defense v. WP Company LLC* and in the Joint Statement of Interest filed by the FTC and the Antitrust Division in the *State of Texas et al. v. BlackRock, Inc.* As has been noted, this governmental action before a judicial body on a matter of media organization may undermine constitutional guarantees, especially the right to freedom of expression, when a state seeks to limit the dissemination of ideas, thereby entering into conflict with rights guaranteed under the First Amendment to the United States Constitution.

The issue at stake in *Children's Health Defense v. WP Company LLC* and *State of Texas et al. v. BlackRock, Inc. et al.* is not commercial speech. In both matters, the defendants

were motivated—or were regarded by the agencies as being motivated—by ideas whose expression has long enjoyed First Amendment protection. In *Children’s Health Defense*, the idea concerned the social harms associated with the dissemination of medical information considered irresponsible. In *State of Texas et al.*, the idea, as understood by the agencies, was climate change.

On the one hand, accepting the allegations advanced by the plaintiffs and the agencies in these matters, the expression of ideas produced consequences in the economic marketplace. According to the governmental agencies, the defendants associated with others who shared similar views, such that arguments of collusion could be articulated, thereby implicating the core concerns of antitrust law. Moreover, again according to the agencies’ allegations, the conduct in question generated adverse economic effects for those affected by it. On the other hand, the enforcement of antitrust laws by the agencies in order to restrict individuals who, in their view, promoted ideological principles appears, at the very least, manifestly inconsistent with the freedoms of speech and association guaranteed by the First Amendment.

These ideological principles appear closely related to those at issue in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In 1966, during a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP), attended by several hundred Black individuals, a boycott against white merchants in Claiborne County, Mississippi, was launched. The purpose of the boycott was to compel both civic leaders and business owners to comply with an extensive list of demands concerning racial equality and justice. The boycott relied primarily on speeches encouraging nonparticipants to join the common cause and on nonviolent picketing, although some acts and threats of violence did occur.

In 1969, the white merchants filed suit in the Mississippi Chancery Court seeking injunctive relief and damages against the organizers of the boycott (the NAACP, Mississippi Action for Progress, and several individuals who participated in the boycott, including Charles Evers, the NAACP's field secretary in Mississippi and one of its principal organizers). The Chancery Court held the petitioners jointly and severally liable for all economic losses suffered by the plaintiffs during a seven-year period, from 1966 through the end of 1972, based on three conspiracy theories, including the tort of malicious interference with the plaintiffs' business relations. In addition, the court issued a permanent injunction.

The Mississippi Supreme Court rejected two theories of liability but upheld liability under the common-law theory. Concluding that fear of reprisals had led some Black citizens to refrain from patronizing the plaintiffs' businesses, the court held that the entire boycott was unlawful and affirmed the petitioners' liability for all damages "resulting from the boycott," reasoning that the petitioners had agreed to employ force, violence, and threats in order to carry out the boycott. Nevertheless, the United States Supreme Court held that a collective boycott against white merchants, undertaken to protest the killing of a Black man, was protected by the First Amendment, notwithstanding the boycott's foreseeable economic repercussions.

2.2.1. Children's Health Defence

The plaintiffs in the case are individuals and entities that claim to publish news and opinions concerning COVID-19 across various channels, including, among others, Facebook, LinkedIn, X (formerly Twitter), and YouTube. The defendants, limited to The Washington Post, the British Broadcasting Corporation (BBC), the Associated Press, and

Reuters News & Media, are members of a group known as the Trusted News Initiative (TNI), which includes both news organizations and platforms¹⁰. As stated on the TNI website, hosted by the BBC:

“TNI members work together to build audience trust and to find solutions to the challenges of disinformation. By including both media organizations and social media platforms, it constitutes the only forum of its kind in the world designed to combat disinformation in real time.”

The plaintiffs allege that the defendants conspired *“to exclude rival publishers from the world’s leading Internet platforms when those publishers disseminated news that questioned and competed with the TNI members’ coverage of certain issues relating to COVID-19 and U.S. politics.”* The defendants deny these allegations. They maintain that the TNI is *“an information-sharing partnership within the industry ... aimed at identifying harmful disinformation.”* Although the defendants may flag certain content, each platform independently decides whether to remove or restrict such content in accordance with its own moderation policies.

The complaint was filed in 2023 before the United States District Court for the Western District of Louisiana but was subsequently transferred to the District of Columbia. The Department of Justice submitted its Statement of Interest in July 2025.

¹⁰ The *Trusted News Initiative* is a partnership founded by the BBC that includes organizations from around the world, including : AP, AFP, BBC, CBC/Radio-Canada, European Broadcasting Union (EBU), Financial Times, Information Futures Lab, Google/YouTube, The Hindu, The Nation Media Group, Meta, Microsoft, Thomson Reuters, Reuters Institute for the Study of Journalism, Twitter, The Washington Post, Kompas – Indonesia, Dawn – Pakistan, Indian Express, NDTV – India, ABC – Australia, SBS – Australia, NHK – Japón.

In their motion to dismiss the complaint, the defendants raised several arguments. Among them was the contention that the complaint failed to allege that TNI members had denied the plaintiffs access to any media facility and instead referred only to the conduct of the platforms, not that of the defendant news organizations. However, the defence that attracted the attention of the Department of Justice was the following:

Most of the alleged harms cannot constitute antitrust injury as a matter of law. The complaint alleges that the defendants caused harm by “*suppressing competition in the marketplace of ideas*”; yet this does not amount to a cognizable antitrust injury. The alleged harms concern the free expression of viewpoints and ideas and therefore fall outside the scope of the antitrust laws.

The Department of Justice expressly declined to take a position regarding either the factual allegations of the complaint or the disposition of the motion to dismiss. Nevertheless, it strongly opposed the defendants’ contention that antitrust laws do not extend to the “marketplace of ideas.” In its Statement of Interest, the Department of Justice argued, *inter alia*, that: (1) the Sherman Act protects all forms of competition, including competition in the quality of information; (2) there is longstanding recognition that content competition constitutes a critical feature of — and a benefit to consumers within — the media industry; (3) the defendants’ legal position would seriously harm modern digital markets by effectively immunizing anticompetitive conduct that restricts consumers’ access to diverse viewpoints; and (4) even if the defendants are correct in asserting that their coordinated efforts were directed solely toward establishing standards for identifying misinformation and applying those standards by flagging misinformation among themselves, such joint activities remain properly subject to scrutiny under Section 1 of the Sherman Act because of their potential anticompetitive effects. This analysis may

take into account impacts on the content, diversity, and quality of news insofar as these constitute dimensions of competition affecting consumer welfare in the relevant markets.

Without stating so explicitly, the Department of Justice appears to contend that the application of antitrust laws in this case, in response to ideologically motivated conduct, in fact advances the values underlying the First Amendment.

2.2.2. State of Texas et al.

In May 2025, the FTC and the Antitrust Division submitted a Joint Statement of Interest in *State of Texas et al. v. BlackRock, Inc.*, pending before the United States District Court for the Eastern District of Texas. In that case, Texas and several other states sued BlackRock, State Street, and Vanguard Group. The states alleged that these asset managers used their substantial holdings in multiple competing coal companies to influence management and reduce coal production in the United States in order to advance their commitments to climate goals and carbon-emissions reductions.

When such efforts proved ineffective, the defendant asset managers allegedly voted against, or withheld support from, company management, or threatened divestment. The states further alleged that the defendants derived economic benefit from these actions, insofar as the reduction in coal production increased energy prices, thereby benefiting their investments in energy-sector companies. The lawsuit asserted claims under Section 7 of the Clayton Act and Section 1 of the Sherman Act. On August 1, 2025, the court largely denied the motion to dismiss, substantially adopting the legal positions advanced by the agencies.

In their Joint Statement of Interest, the agencies emphasized, inter alia, the following points: (1) the “solely for investment” exemption contained in Section 7 of the Clayton Act, upon which the defendants based their defense, may be forfeited when an investment is used to harm competition; (2) although the agencies oppose restrictions limiting the ability of institutional investors to invest in competing companies, such investors may not use their shareholdings to suppress competition among firms in which they hold interests; and (3) it is irrelevant that the alleged concerted action among the defendant asset managers, purportedly in violation of Section 1 of the Sherman Act, focused on climate-related issues, since commendable motives do not legitimize anticompetitive practices.

Although the agencies framed their arguments in the Joint Statement of Interest in classic antitrust terms — such as output restriction, suppression of competition, and the extraction of supracompetitive profits — they suggested that the true driving force behind the conduct of the defendant asset managers was not economic but ideological. The plaintiffs contend that BlackRock, Vanguard, and State Street acquired significant holdings in publicly traded coal companies and used their influence to pressure those firms to reduce thermal coal production by 50 percent by 2030, as part of initiatives such as Climate Action 100+ and the Net Zero Asset Managers Initiative. Absent this perceived ideological dimension, one may question whether the agencies would have submitted their Statement of Interest in the case. Unlike the defendants in *Children’s Health Defense*, the defendants in this matter did not invoke free-speech principles in their motion to dismiss but instead confined themselves to rebutting the plaintiff states’ allegations exclusively through conventional antitrust arguments.

The positions adopted by the federal agencies in *State of Texas et al.* and *Children’s Health Defense* reflect the administration’s view that antitrust laws may legitimately be used to

regulate conduct within the “marketplace of ideas” when such conduct produces economic consequences. The litigation remains at an early stage, and it is difficult to predict how far the government’s position will extend or whether the line established in *Claiborne Hardware Co.* will remain intact. What does appear clear is that economically active actors motivated by ideological considerations should exercise caution, at least for the foreseeable future, when engaging in collective conduct that may inflict economic harm upon those with whom they disagree.

3. The Declining Importance of the “Marketplace of Ideas” in Assessing the Anticompetitive Nature of Media Mergers

Although relatively infrequent in recent decades, media mergers have generated an important body of doctrine concerning their permissibility. In its Report C47 (*BANCO BILBAO VIZCAYA/ARGENTARIA*), concerning the concentration of media shareholdings resulting from the merger of the two banking groups, the Spanish Competition Tribunal (*Tribunal de Defensa de la Competencia*, TDC) observed that “*the media sector, represented in this case principally by the television subsector, albeit with indirect implications for the written press, is a highly sensitive sector in which competition is indispensable, not only for the economic reasons applicable to other sectors, but also because of the decisive role it plays in shaping public opinion, which constitutes the very core of the democratic system.*”

A preliminary conclusion may already be advanced: whereas the importance of the “marketplace of ideas” and political pluralism among the conditions for admissibility was central in the earliest decisions, it has become effectively nonexistent in the most recent rulings to date.

3.1. Antena 3 Radio

The first merger case to be considered is *Unión Radio*¹¹. The acquisition of control over Antena 3 Radio by Unión Radio (in reality, by the PRISA Group) gave rise to two separate competition-law proceedings: the first concerning anticompetitive practices, and the second concerning authorization of the merger itself.

The first proceeding originated in a complaint lodged by a group of journalists against the PRISA Group for abuse of a dominant position and, in the alternative, for collusive practices arising from a series of agreements between the PRISA Group and the GODÓ Group concerning control over Antena 3 de Radio S.A. (hereinafter, “A3R”)¹². These agreements were concluded between the two principal competitors in the commercial radio market and entailed the transfer of the management and exclusive control of advertising by A3R — the principal strategic variable of its business — to its leading competitor. The Competition Tribunal (TDC) held that the agreements constituted collusive practices contrary to Article 1 of the 1989 Competition Act (*Ley de Defensa de la Competencia*). Since the collusive arrangements preceded the merger and were neither preparatory to nor dependent upon it, the two proceedings were conducted separately¹³.

The merger (or acquisition) of A3R by the PRISA Group was approved by the Council of Ministers pursuant to Article 17 of the 1989 Competition Act (LDC 1989). The Report C

¹¹ Spanish Tribunal de Defensa de la Competencia (Competition Defense Tribunal, TDC), Merger Case No. C91/05, *RADIOS: Acquisition of sole control of Antena 3 Radio by Sociedad de Servicios Radiofónicos Unión Radio*.

¹² Decision of the Competition Defense Tribunal (TDC) of 18 April 2001, Case No. 487/00, *Radio Fórmula*.

¹³ In *Radio Fórmula*, the TDC explained that “where the matter does not involve a single course of conduct, but instead consists of a sequence of acts, or where complex agreements comprise both concerted and concentration elements, as in the present case, those acts must be assessed separately, pursuant to the doctrine established in *Cablevisión*.” *Radio Fórmula*, Legal Ground 3.

13/93, issued by the Competition Tribunal (Tribunal de Defensa de la Competencia, TDC) under the mandate of Article 16 of the same Act, was essential to the decision. Following the recommendations set out in the Tribunal's report, the Council of Ministers adopted a decision on 20 May 1994 approving the notified transaction, subject to compliance with the conditions set out in Report C 13/93.

This decision was challenged before the Supreme Court, which annulled it by Judgment of 9 June 2000¹⁴. The Court accepted the reasoning of both the Council of Ministers' decision and the Tribunal's report with regard to the effects that the notified transaction would have on the maintenance of effective competition in the affected (advertising) markets. However, it disagreed insofar as there had been no analysis of the impact of the transaction on media pluralism.

In its fifteenth legal ground, the Court stated that competition authorities must ensure the protection of media pluralism and the "marketplace of ideas" when reviewing mergers between media undertakings. It held that analyses of corporate concentration operations *"must not be based solely on the preservation of the economic order; but also, and as a matter of priority, on the preservation of the political order and the fundamental principles of a democratic society"*.

To remove any doubt, the same legal ground defines the "marketplace of ideas" and explains its importance:

¹⁴ Spanish Supreme Court, Administrative Chamber (Third Section), Judgment No. 4726/2000, 9 June 2000, Administrative Judicial Review Proceedings No. 533/94 (joined with Nos. 721/95 and 734/95), ECLI:ES:TS:2000:4726.

“Indeed, whereas in other fields the principles of the economic system do not necessarily require a plurality of operators, condemning only the abuse of a dominant position in the market, in the present field a restriction on their number entails the risk of undermining political pluralism and, thereby, the very foundation of the democratic state. The pluralism of the mass media is a value in itself, as it is essential for the process of forming public opinion and, therefore, for the proper functioning of democratic institutions. It has rightly been stated in legal scholarship that there is no democratic state without a free public opinion; and there is no free public opinion without free social communication ensured through a plural structure of media.

It should also be noted that the guarantee of pluralism is not satisfied by the mere preservation of the ‘marketplace of ideas’, that is, the natural competition of opinions and information that may spontaneously arise from the exercise of freedoms of expression and information. Rather, it requires that any thought, idea, opinion or item of information have access to the communicative process, and that potential recipients be able to access a diversity of sources of opinion and information. It is therefore ensured by subjecting media concentration operations to stricter and different limits from those sufficient to guarantee freedom of enterprise in a market economy; limits that ensure the diversity of such media.”

The Judgment considered that the appropriate benchmark for assessing compliance with media pluralism in this case should be the limits established in the Sixth Additional Provision of Law 31/1987 of 18 December. It concluded that the undertaking resulting from the transaction approved by the Council of Ministers exceeded the ownership limits for broadcasting licences set out in that Additional Provision and, therefore, undermined media pluralism. The twentieth-second legal ground of the Judgment was unequivocal in

stating that “*the conditions to which the absence of objection to the transaction was subject could be effective in the field of competition law*” but were not sufficient to guarantee respect for media pluralism¹⁵.

By stating in its seventeenth legal ground that this position finds support in multiple judgments of the Constitutional Court, the ruling appears to attribute a quasi-constitutional role to competition authorities in the context of media mergers. This is because “*the freedoms enshrined in Article 20 are not only fundamental rights of each citizen, but also represent the recognition and guarantee of a fundamental political institution, namely free public opinion, which is inextricably linked to political pluralism as a fundamental value and a requirement for the functioning of the democratic state; in order for citizens to freely form their opinions and participate responsibly in political affairs, they must also be broadly informed so that they can weigh diverse and even opposing viewpoints; or that the institutional function of the right to information is the formation of a free and plural public opinion characteristic of a democratic state.*”

However, immediately afterwards, it affirms both the independence and the insufficiency of competition authorities in protecting these rights, a function which falls outside their remit:

“*[...] in a Resolution of 16 September 1992, the European Parliament stated that existing competition rules alone cannot guarantee diversity of opinions and pluralism in the media sector; this is so because, although there is in principle a convergence of interests between the objective of maintaining pluralism and that of maintaining competition, their meaning*

¹⁵ TDC Report C91/05, *supra*, p. 90.

and nature are different, since the latter relates to the conduct of economic agents, whereas the former is linked to informational diversity [...] ‘[...] In Spain, the entire basic regulatory framework for the sector, from the 1980 Statute of Radio and Television to the 1987 Telecommunications Law, is guided by the principle of safeguarding media pluralism [...]’ ‘[...] From all the foregoing, it may be concluded that the protection of pluralism and of free competition in the field of radio broadcasting, although they share points of contact and in some cases the objectives of pluralism may be achieved through the protection of competition, are not dependent on one another. Media pluralism may be ensured in the absence of a competition regime and, conversely, a situation characterised by competition among different broadcasting operators may entirely disregard media pluralism. Competition, therefore, is not the only means of guaranteeing informational diversity, which, as an essential value of a democratic society, may be protected through different mechanisms [...]’.”

Following the judgment, the Competition Tribunal (TDC) issued a second report in which it defined the scope of the economic concentration proceeding in the media sector, stating in its second conclusion that “*the relevant product market affected by this transaction is that of the sale of radio advertising space*”.¹⁶ This position appears to adopt the traditional approach to such concentrations, whereby competition authorities assess them on the basis of objective variables (advertising turnover, number of broadcasting stations, number of potential listeners or viewers, etc.).

The notified transaction was found to constitute an obstacle to the maintenance of effective competition in the relevant market and, therefore, should only be authorised

¹⁶ Competition Defense Tribunal (TDC), Merger Case No. C91/05, *RADIOS: Concentration through the acquisition of sole control of Antena 3 Radio by Sociedad de Servicios Radiofónicos Unión Radio*.

subject to the divestiture conditions set out in the report (twelfth conclusion). The transaction would comply with media pluralism requirements provided that the resulting undertaking did not exceed the ownership limits established in the Sixth Additional Provision of the Telecommunications Law 31/1987 of 18 December, as amended by Law 10/2005 of 14 June.

The Competition Tribunal adopted similar considerations in merger case C68/01 Grupo CORREO / PRENSA ESPAÑOLA (2001).

3.2. Antena 3 Televisión / La Sexta

On 30 December 2011, Antena 3 de Televisión, S.A. (“Antena 3”) notified the National Competition Commission (Comisión Nacional de la Competencia, CNC) of a concentration consisting in the acquisition of sole control over Gestora de Inversiones Audiovisuales La Sexta, S.A. (“La Sexta”), through the purchase of 100% of its share capital. Pursuant to Article 58(4)(b) of Law 15/2007, the authorisation of the concentration may be made subject to compliance with conditions. The CNC approved the merger in its Decision of 13 July 2012 (Case C-0432/12, Antena 3 / La Sexta).

The decision does not address whether the merger guarantees media pluralism or the “marketplace of ideas”. It confines itself to endorsing the report of the State Secretariat for Telecommunications and the Information Society (Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información, SETSI) included in case file C/0418/11 Antena 3 / La Sexta. In that report, SETSI states that the transaction has no impact on television media pluralism and complies with Article 36 of Law 7/2010 of 31 March, General Audiovisual Communication Law, *inter alia* because the combined

audience share of Antena 3's and La Sexta's digital terrestrial television multiplexes is below 27%.

Both the Supreme Court judgment of 9 June 2000 (Antena 3 Radio) and the subsequent report of the Competition Tribunal suggested that compliance with the conditions laid down in Law 7/2010, General Audiovisual Communication Law, was sufficient to consider the requirement of media pluralism fulfilled. It is evident, however, that the assessment of that law by competition authorities can only be admitted incidentally, for the purposes of merger control proceedings. Institutional and regulatory developments called for a specialised and independent body to assess compliance with that law by both public and private entities.

By assigning this task to SETSI, the first requirement is met (specialisation), but not the second (independence). SETSI forms part of the Ministry of Digital Transformation and Public Service. It is therefore inappropriate for the Government to decide on the level of media pluralism resulting from a merger. Media outlets report on and comment on the actions of the executive branch. If decisions on mergers are partly dependent on the same executive authority that may be subject to their praise or criticism, this may easily influence the outlet's stance towards the government. Accordingly, this assessment should be entrusted to an organically and functionally independent body or commission competent to rule on this aspect of economic concentrations.

The Decision of the National Competition Commission (CNC) of 28 October 2010, issued in merger case C/0230/10 Telecinco / Cuatro and approving the transaction, provided further clarification regarding the authority competent to issue the mandatory non-binding report on media pluralism.

It notes that the competence of the State Secretariat for Telecommunications and the Information Society (SETSI) is temporary, pending the effective establishment of the State Council for Audiovisual Media (Consejo Estatal de Medios Audiovisuales, CEMA). Once the transitional period had elapsed, the CEMA would become the regulatory and supervisory authority for the sector, exercising its powers under the principle of independence from political and economic influence.

The CEMA was provided for in Title V of the now repealed Law 7/2010 of 31 March, General Audiovisual Communication Law. Article 47(f) assigned it the function of “verifying compliance with Articles 36 and 37 of the Law regarding the limitation on the acquisition of shareholdings between audiovisual media service operators, and issuing opinions on such transactions when, as concentrations, they are subject to authorisation by the National Competition Commission.”

However, the CEMA was never established; its creation was rejected in 2012 as part of the cost-saving measures implemented by the government of Mariano Rajoy¹⁷. As a result, responsibility for issuing the report continues to rest, to this day, with the Spanish Government.

3.3. The increasing concentration of media outlets and its effects

Three years after the Decision of 13 July 2012 (Case C-0432/12, Antena 3 / La Sexta), the CNMC decided to maintain the conditions attached to the merger. It considered that

¹⁷ Then Deputy Prime Minister Soraya Sáenz de Santamaría was unequivocal in her remarks regarding the controversial Consejo Estatal de Medios Audiovisuales. Speaking at the press conference following the Council of Ministers meeting held the previous Friday, she stated that “*the previous government's final budget forecast for 2012 estimated its cost at nearly seven million euros. By refraining from establishing it, we are directly saving seven million euros and, most likely, another regulatory authority can carry out the same task with equal effectiveness and without generating additional costs.*”

the competitive situation in the Spanish television advertising market had not improved since then. In particular, the extension of unified advertising scheduling (“pauta única”) across La Sexta channels, together with channel bundling strategies and pricing negotiation practices in the advertising market, had further weakened competitive pressure.

Moreover, the reduction in the number of channels operated by Atresmedia has not affected its audience shares or advertising investment ratios. Nor have the risks of restrictive effects on competition in the free-to-air television market and in the acquisition of audiovisual content disappeared. To a large extent, competition in these markets is determined by conditions in the television advertising market.

The CNMC noted that the different distribution windows used by free-to-air and pay television, together with the slow development of OTT (over-the-top) operators, meant that the competitive pressure exerted by these new players as buyers of audiovisual content in relation to free-to-air broadcasters is not sufficiently strong to discipline the behaviour of traditional television operators¹⁸.

At present, media concentration is evident, particularly in television and radio. The reduction in the number of outlets may have contributed to a decline in media and political pluralism and to the risks facing what is traditionally known as “press freedom”¹⁹. However, the media landscape is undergoing continuous transformation. Traditional mass

¹⁸ In the same year, 2015, the Spanish National Markets and Competition Commission (Comisión Nacional de los Mercados y la Competencia) imposed a fine on Atresmedia for failure to comply with the conditions relating to the television advertising market (between October 2012 and February 2014), content acquisition, and content distribution markets (between September 2012 and November 2014).

¹⁹ «Monitoring Media Pluralism In The European Union. Results Of The Mpm 2025. Country report: Spain», Centre for Media Pluralism and Media Freedom, Robert Schuman Centre, 2025.

media are steadily and rapidly losing audience share and advertising revenue in favour of other media (social networks, telemarketing and digital marketing, internet service providers, etc.). This shift may influence the definition of relevant markets when assessing media mergers and when evaluating anti-competitive agreements and abuses of dominance.

4. Conclusions

This paper has not addressed the ideological and political considerations underlying recent U.S. cases. A mere reading of *Children's Health Defense* makes clear how political conflict in that country is shaping antitrust law. The alleged conduct does not concern monopolistic mergers, but rather collusive practices by media outlets (and their associations) that denigrate or prevent rival firms from operating in the market on the basis of opposing ideological positions in a highly polarised society.

Without diminishing the importance of those considerations, the underlying issue in cases such as the one mentioned is a legal one: the limits of competition law. The relevant question is the extent to which its scope can be stretched without distorting its nature. Goods, services, labour inputs, and political ideas are fundamentally different entities, yet they are treated as sharing a common feature: they function as inputs that influence firms' competitive position in the market.

While the "economistic" conception of the marketplace of ideas has remained constant in U.S. law, the Spanish legal system soon excluded ideological and informational disputes from the assessment of anticompetitive conduct. The solution was to assign a different authority the task of reporting on the impact of media mergers on informational plurality and political pluralism. As observed in Section 3, however, this response has not been

adequate, insofar as the authority responsible for issuing such reports is part of the central government—rather than an independent body.

In any case, there are strong arguments for keeping the marketplace of ideas within the scope of competition law. A corporate transaction (agreement or merger) whose object or purpose is to exclude undertakings engaged in the production and dissemination of information and opinion affects not only freedom of expression and information, but also freedom of enterprise and free competition. For this reason, it is not implausible that, in the future, claims before Spanish competition authorities based on violations of media pluralism and political pluralism may gain traction under antitrust law.

Bibliography

1. Jurisprudence and Public Agency Decisions

United States (Judicial Cases and Statements)

- *Abrams v. United States*, 250 U.S. (1919).
- *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980).
- *Children's Health Defense v. WP Company LLC* (Case filed in 2023; includes the Department of Justice's Statement of Interest from July 2025).
- *FCC v. National Citizens Committee for Broadcasting* (U.S. Supreme Court).

- *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
- *Red Lion Broadcasting Co. v. FCC* (U.S. Supreme Court).
- *State of Texas et al. v. BlackRock, Inc. et al.* (Case pending before the United States District Court for the Eastern District of Texas; includes the Joint Statement of Interest filed by the FTC and the Antitrust Division in May 2025, and the court's decision on August 1, 2025).
- *United States v. Associated Press* (Opinion by Justice Learned Hand).
- *United States v. AT&T* (Decision by Justice Greene).

Spain (Judgments and Competition Decisions)

- National Competition Commission (CNC) / National Markets and Competition Commission (CNMC):
 - Resolution of October 28, 2010, Case C/0230/10 *Telecinco / Cuatro*.
 - Resolution of July 13, 2012, Case C-0432/12 *Antena 3 / La Sexta*.
 - Subsequent decisions by the CNMC maintaining the conditions attached to the merger in Case C-0432/12 *Antena 3 / La Sexta*.
- Spanish Competition Tribunal (TDC):
 - Report C47 (*BANCO BILBAO VIZCAYA / ARGENTARIA*).

- Report C 13/93 (Issued within the framework of the *Unión Radio / Antena 3 Radio* merger).
- Second report or subsequent resolution in the *Unión Radio / Antena 3 Radio* case regarding the relevant market definition.
- Report/Resolution in Merger Case C68/01 *Grupo CORREO / Prensa Española* (2001).
- Supreme Court of Spain:
 - Judgment of June 9, 2000 (Appeal against the Council of Ministers' decision regarding *Antena 3 Radio*).

2. Legislation and Legislative Resolutions

Spain

- Law 31/1987 of December 18 on the Organisation of Telecommunications (including its Sixth Additional Provision and subsequent amendments by Law 10/2005 of June 14).
- 1989 Competition Act / Ley de Defensa de la Competencia (Articles 1, 16, and 17).
- Law 15/2007 of July 3 on the Defence of Competition (Article 58.4.b).
- Law 7/2010 of March 31, General Audiovisual Communication Law (Articles 36, 37, and Title V, Article 47.f).

International / European Union

- **United States:** Sherman Antitrust Act, Sections 1 and 2.
- **United States:** Clayton Act, Section 7.
- **European Parliament:** Resolution of September 16, 1992 on media pluralism and competition policy.

3. Books, Monographs, and Doctrinal Articles

- ALLENDEDESALAZAR CORCHO, R., "Procedimiento de control de concentraciones en España. Balance y algunas propuestas de mejora" [Merger Control Proceedings in Spain: Balance and Some Proposals for Improvement], *VLEX-295367*.
- GANS, J. S., & STERN, S., "Industrial and Corporate Change", Vol. 19, No. 3, June 2010, pp. 805–837.
- KLEIN, A., "A Hard Look at Media Mergers", *Washington Post*, November 29, 2000 (Interview with Robert Pitofsky regarding the AOL-Time Warner merger).
- PARSONS, G. M., "Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas", *104 Minn. L. Rev.* 2157 (2019-2020).
- PÉREZ GÓMEZ, A., "Las concentraciones de medios de comunicación" [Media Mergers], *Quaderns del CAC*, No. 7, 2000, Catalan Audiovisual Council, pp. 80-90.

- POLÁNSKY, J., "The Marketplace of Ideas and EU Competition Law: ¿Can Antitrust Be Used to Protect the Freedom of Speech?", *YSEC Yearbook of Socio-Economic Constitutions* 2021, pp. 199–230.
- PRIETZKE, P., "How and Why the Marketplace of Ideas Fails", *31 Val. U. L. Rev.* 951 (1996-1997).
- ROACH, C. B., "Media Conglomerates, Antitrust Law, and the Marketplace of Ideas", *9 Mem. St. U. L. Rev.* 257 (1978-1979).
- STUCKE, M., & GRUNES, A., "Antitrust and the Marketplace of Ideas", *Antitrust Law Journal*, Vol. 69, 2001, pp. 249-302.