

Robert Bodewig

Audiovisual Media and Market Definition

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



Berliner
Wissenschafts-Verlag

Table of contents

- Foreword..... 5
- Table of contents..... 7

- Introduction** 23

 - A. Overview..... 25
 - B. Previous Publications and Analytical Framework..... 26
 - C. Audiovisual Media Industry 28

- Chapter I: Market Definition** 31

 - A. The Purpose of Market Definition..... 33
 - B. Legal Bases for Market Definition 35

 - I. Market Definition in U. S. Competition Law (Antitrust Law) 36

 - 1. Section 1 Sherman Act..... 36
 - 2. Section 2 Sherman Act..... 38
 - 3. Section 7 Clayton Act..... 40

 - II. Market Definition in EU Competition Law..... 42

 - 1. Art. 101 TFEU..... 43

 - a. Art. 101 par. 1 TFEU 43

 - aa. Appreciable Effect on Trade..... 43
 - bb. Prevention, Restriction or Distortion of Competition.... 44
 - cc. Appreciable Effect on Competition..... 45

 - b. Art. 101 par. 3 TFEU 46

 - aa. Block Exemptions..... 46
 - bb. Fines 46

 - 2. Art. 102 TFEU..... 47
 - 3. Art. 2 par. 3 of the EC Merger Regulation 47

 - III. Market Definition in German Competition Law 49

 - 1. § 1 GWB 50

 - a. Prevention, Restriction or Distortion of Competition 50
 - b. Appreciable Restriction of Competition..... 50
 - c. De Minimis (Bagatellbekanntmachung)..... 51

 - 2. § 2 GWB and § 3 GWB 51
 - 3. §§ 18 et seqq. GWB 53
 - 4. § 36 GWB 55

Table of contents

- C. Market Definition Concepts / Direct Assessment of Market Power 56
 - I. Concepts Based on Market Definition 56
 - 1. Demand-Side Oriented Market Concept (Bedarfsmarktkonzept) 57
 - a. Economic Origin 57
 - b. Application in German Competition Law 58
 - c. Amendment..... 60
 - d. Criticism..... 60
 - aa. Subjectivity..... 60
 - bb. Average Consumer vs. Marginal Consumer..... 61
 - cc. Circularity 62
 - 2. Concept of Business Plans 62
 - a. Concept 62
 - b. Criticism..... 63
 - 3. Hypothetical Monopolist Test (HMT) / SSNIP Test..... 64
 - a. Concept 64
 - b. Amendments..... 66
 - c. Criticism..... 67
 - 4. Econometric Tools 68
 - a. Natural Experiments / Shock Analyses 68
 - aa. Concept 68
 - bb. Criticism 69
 - b. Price Correlations 69
 - c. Critical Loss Analyses..... 69
 - aa. Concept 69
 - bb. Criticism 70
 - II. Alternatives to Market Definition (Direct Approaches)..... 71
 - 1. Lerner Index 72
 - a. Concept 72
 - b. Criticism..... 72
 - 2. Elasticity of the Residual Demand 73
 - a. Concept 73
 - b. Criticism..... 73
 - 3. Absolute Numbers 74
 - 4. Persistent Price Discrimination..... 74
 - a. Concept 74
 - b. Criticism..... 75
 - 5. Market Power Inferred from Exclusion Payments 75
 - 6. Effects-Based Approaches..... 75

7.	Merger Simulation Models	77
a.	Concept	77
b.	Criticism.....	78
8.	Pricing Pressure Tests.....	79
a.	Concept	79
b.	Criticism.....	81
D.	The Competition Authorities' General Approaches to Market Definition..	82
I.	European Commission.....	82
1.	General Decision Structure	82
2.	Market Definition	83
a.	Early Development	83
b.	The European Commission's Notice on Market Definition...	83
II.	Federal Cartel Office.....	86
1.	General Decision Structure	86
2.	Market Definition	87
III.	U.S. Department of Justice / Federal Trade Commission	88
1.	General Decision Structure	88
2.	Market Definition	90
E.	Summary.....	93
Chapter II: Markets Defined by the European Commission.....		95
A.	Production of Audiovisual Content	97
I.	Product Markets.....	97
1.	Production vs. Licensing/Acquisition vs. Distribution	97
a.	Motion Pictures for Theatrical Release	98
b.	TV Content.....	99
2.	Arthouse and Mainstream Movies for Theatrical Release	101
3.	U.S. Productions	101
4.	In-House TV Productions	102
5.	TV Content Type/Genre	102
6.	Exhibition Windows.....	104
7.	Scripted TV Content	105
8.	Premium Content	105
9.	Summary	106
II.	Geographic Market Definition.....	106

Table of contents

- B. Licensing/Acquisition of Audiovisual Content 109
 - I. Product Markets..... 109
 - 1. FTA TV vs. Pay-TV and Exhibition Windows 110
 - a. FTA vs. Pay-TV..... 110
 - b. Other Exhibition Windows (Video on Demand/
Linear vs. Non-Linear/Pay per View) 112
 - 2. Content 114
 - a. Films 114
 - b. Local Content 116
 - c. Premium Content 116
 - d. Sports 117
 - e. Library Content 117
 - 3. Summary 118
 - II. Geographic Markets 119
- C. The Wholesale Supply of TV Channels 121
 - I. Product Markets..... 121
 - 1. FTA-TV vs. Pay-TV..... 121
 - 2. Basic Pay-TV vs. Premium Pay-TV..... 122
 - 3. Content Type 124
 - 4. Linear vs. Non-Linear..... 125
 - 5. Infrastructure 125
 - 6. Summary 126
 - II. Geographic Markets 126
- D. The Distribution to Movie Theatres 128
 - I. Product Markets..... 128
 - II. Geographic Markets 129
- E. The Retail Supply of Audiovisual Content
(End-Consumer Market) 130
 - I. Product Markets..... 130
 - 1. FTA TV vs. Pay-TV..... 130
 - 2. Basic Pay-TV and Premium Pay-TV..... 132
 - 3. Linear vs Non-Linear 133
 - 4. Library Content..... 135
 - 5. Infrastructure 136
 - 6. Interactive Platforms 138
 - 7. Individual Channels 138
 - 8. Summary 138
 - II. Geographic Markets 139

F. Home Entertainment	141
I. Product Markets.....	141
II. Geographic Markets.....	143
G. Advertising.....	143
I. Product Markets.....	144
1. TV Advertisement	144
2. FTA TV vs. Pay-TV.....	145
3. Online Advertising.....	146
4. Summary.....	147
II. Geographic Markets.....	148

Chapter III: Markets Defined by the The Federal Cartel Office (Bundeskartellamt).....

A. Licensing/Acquisition of Audiovisual Content.....	153
I. Product Markets.....	153
II. Geographic Markets.....	155
III. Summary.....	155
B. The Wholesale Supply of TV Channels.....	155
I. Product Markets.....	155
II. Geographic Markets.....	157
III. Summary.....	157
C. End-Consumer Market.....	157
I. Product Markets.....	158
II. Geographic Markets.....	158
III. Summary.....	159
D. Advertising.....	159
I. Product Markets.....	159
II. Geographic Markets.....	160
III. Summary.....	161

Chapter IV: Markets Defined by the U.S. Department of Justice/ Federal Trade Commission

A. Programming and Distribution	165
I. Product Markets.....	165
1. Video Programming Services.....	165
2. End-Consumer Market	167
3. Portals.....	169

Table of contents

- II. Geographic Markets 170
 - 1. Video Programming Services..... 170
 - 2. End-Consumer Market 170
 - 3. Portals..... 171
- III. Summary 171
- B. Theatrical Exhibition (Cinemas) 172
 - I. Product Markets..... 172
 - II. Geographic Markets 174
 - III. Summary 175
- C. Advertising..... 175
 - I. Product Markets..... 175
 - II. Geographic Markets 177
 - III. Summary 177

**Chapter V: Comparison of the Different Markets Defined
by the Competition Authorities 179**

- A. Licensing/Acquisition of Audiovisual Content and Programming 181
 - I. General..... 181
 - II. Pay-TV and FTA TV..... 181
 - III. Linear and Non-Linear..... 182
 - IV. Content 182
 - V. Infrastructure 183
 - VI. Wholesale Supply of TV Channels..... 183
 - VII. Geographic Markets 184
- B. End-Consumer Market..... 185
 - I. Pay-TV vs. FTA TV..... 185
 - II. Infrastructure 186
 - III. Linear / Non-Linear TV..... 186
 - IV. Platforms 187
 - V. Individual Channels 188
 - VI. Content 188
 - VII. Basic and Premium Pay-TV Channels..... 188
 - VIII. Geographic Markets 189
- C. Theatrical Exhibition (Cinemas) 189
- D. Advertising..... 190

Chapter VI: Analysis of the Competition Authorities' Approaches to Market Definition	191
A. European Commission	193
I. Market Definition Practice in the Analyzed Decisions	193
1. Analytical Procedure	193
2. General Market Definition Concept	196
3. SSNIP Test	199
4. Supply-Side Substitution.....	201
5. Drivers	203
6. Future Developments.....	203
7. References to National Authorities	204
8. Barriers to Entry	205
9. Zero-Price Markets.....	205
10. Summary	206
II. Comparison to the Commission's Notice.....	207
B. Federal Cartel Office (Bundeskartellamt)	208
I. Market Definition Practice in the Analyzed Decisions	208
1. General Considerations.....	208
2. Specific Demand	209
3. Contracts.....	210
4. Supply-Side Substitution.....	210
5. Zero-Price Markets.....	210
6. References to the European Commission	210
7. Geographic Market.....	211
II. Assessment	211
C. U.S. Department of Justice / Federal Trade Commission.....	211
I. Market Definition Practice in the Analyzed Decisions	211
1. Analytical Procedure	211
2. General Considerations.....	212
3. Amended Hypothetical Monopolist Test / SSNIP Test	213
4. Price Discrimination.....	213
5. Shock Analysis / Natural Experiment	214
6. Future Developments.....	214
7. Other.....	215
II. Comparison to Guidelines	215

Table of contents

D. Evaluation of the Competition Authorities' Approaches 215
I. Similarities and Differences 215
II. Consequences of the Differences 216

**Chapter VII: Assessment of Different Market Definition Concepts
Regarding Audiovisual Media 219**

A. Particularities 221
I. Complex Market Structure / Vertical Integration 221
II. Product Differentiation 222
III. Cost Structure 223
IV. Zero-Price Markets 223
V. Non-Price Competition 223
VI. Price Discrimination 224
VII. Availability of Services 224
VIII. Large Variety of Business Models 224
IX. Influence of Third Parties 225
X. High Speed of Innovation 225
XI. Media Convergence 226
XII. Legal Restraints 227
B. Market Definition Concepts 228
I. Demand-Side Oriented Market Concept (Bedarfsmarktkonzept) ... 228
II. HMT / SSNIP Test 230
III. Concept of Business Plans 231
IV. Econometric Tools 231
1. Natural Experiments / Shock Analysis 231
2. Price Correlations 232
3. Critical Loss Analyses 232
V. Alternatives to Market Definition (Direct Approaches) 233
1. Lerner Index and Residual Demand 233
2. Merger Simulation Models 234
3. Pricing Pressure Tests and Diversion Ratios 234
4. Effects-Based Approach / Direct Assessment 235
5. Power Inferred from Exclusion Payments 235
6. Persistent Price Discrimination 235
C. Proposal 236

Chapter VIII: Summary	241
Bibliography	243
Appendix A: List of Decisions	259
A. European Commission	261
B. Federal Cartel Office	263
C. U.S. Department of Justice / Federal Trade Commission	264
Download-Link Appendix B & C	268
Further content available online	
Appendix B: Decision Discussion	269
A. European Commission	271
I. Production of Audiovisual Content	271
II. Licensing/Acquisition of Audiovisual Content	299
III. The Distribution of Movie Theatres	362
IV. The Retail Supply of Audiovisual Content (End-Consumer Market)	371
V. Home Entertainment	393
VI. Advertising	397
B. The Federal Cartel Office (Bundeskartellamt)	406
I. Licensing/Acquisition of Audiovisual Content	406
II. The Wholesale Supply of TV Channels	412
III. End-Consumer Market	420
IV. Advertising	424
C. U.S. Department of Justice/Federal Trade Commission	432
I. Programming and Distribution	432
II. Theatrical Exhibition (Cinemas)	454
III. Advertising	468
Appendix C: Legislative Material	481
United States of America	483
European Union	485
Germany	487

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.

B. Previous Publications and Analytical Framework

referred to by the Competition Authorities in decisions do not appear in the search results. When these decisions addressed the audiovisual media industry they were nevertheless included. In this study only decisions available in English or German have been examined. Furthermore, decisions which solely revolve around technological markets and parts of decisions which only involve technological markets have not been examined. These are the provision of technical services without any involvement of audiovisual content, i. e. solely transmission services.

As a result, 43 decisions of the European Commission (from 07.04.1995⁵ to 05.09.2019⁶), 9 decisions and 1 case report of the Federal Cartel Office (from 19.01.2006⁷ to 11.04.2016⁸) and 28 decisions of the U. S. Authorities (from 28.04.1994⁹ to 31.07.2019¹⁰) have been examined. This totals 81 decisions ranging from 07.04.1995 to 05.09.2019. A list of these cases can be found in Appendix A and a detailed discussion of cases until 26.06.2018¹¹ is presented in Appendix B.

The great majority of the cases deals with mergers and acquisitions. This study, therefore, especially focuses on the decision practice concerning mergers and acquisitions. Each case was analyzed regarding the relevant markets as defined by the respective Competition Authorities. Although product markets as well as geographic markets have been examined, the main focus lies on the definition of relevant product markets. In order to render the cases comparable, different lines of commerce or stages in the supply chain have been examined together within each jurisdiction: For instance, all cases involving the licensing of audiovisual content are addressed together. Only this approach reveals the Competition Authorities' decision practice in a particular economic sector.¹²

5 Case No IV/M.579 – *Burda/Blockbuster* (07.04.1995) OJ C 129, 25.5.1995, p. 5.

6 Case No COMP/M.9416 – *Bollere Group/M7 Group* (05.09.2019).

7 B6–103/05 – *Axel Springer AG/ProSieben-Sat.1 Media AG* (19.01.2006).

8 B6–32/15 – *DFL II* (Vermarktung der medialen Verwertungsrechte an Fußballspielen der Bundesliga und 2. Bundesliga ab der Saison 2017/2018) (11.04.2016).

9 *U. S. v. Tele-Communications Inc. and Liberty Media*, No. 94–0948 (D.D. C. April 28, 1994).

10 *United States and Plaintiff States v. Nexstar Media Group, Inc. and Tribune Media Company*, Case 1:19-cv-02295 (July 31, 2019).

11 *U. S. v. The Walt Disney Company and Twenty-First Century Fox, Inc.*, No. 1:18-cv-05800 (S.D.N.Y. June 26, 2018) being the most recent decision.

12 Most cases are complex and involve several different commercial areas. Therefore, examining one case after another in its entirety would not have been feasible.

C. Audiovisual Media Industry

When examining the audiovisual media industry, it is important to specify the traded products and services. The European Commission's case law provides for a useful definition: In the case of *News Corp/BSkyB* (2010) the Commission defined "audiovisual content" as comprising "all the 'entertainment products' (for example films, sports, TV programs) that can be broadcast via TV"¹³ This definition was repeated by the Commission in several later cases.¹⁴ A similar definition can be found outside of competition law in Art. 1 lit. b of the Audiovisual Media Services Directive.¹⁵ It should be noted that the definition does not only include content which is actually aired on TV but all content which can be broadcast via TV. Productions that are solely made for streaming on non-TV devices are thus included and the definition is open to changes in technology as it does not solely depend on TV as a broadcasting medium. In this study this definition of audiovisual media is used.

The audiovisual media industry can be broadly separated by content producers, content aggregators and delivery services. Production companies and other service providers create content either for inclusion in their own exploitation scheme or for licensing to other companies. Content aggregators such as TV channels and streaming platforms gather different types of content and bundle this content to a "bouquet" to sell it to the consumer. As most content creators and aggregators do not own the infrastructure to deliver their content to the consumer these services are purchased from infrastructure providers.

The supply chain may differ based on what type of audiovisual content is concerned. In particular, blockbuster movies are subject to a sophisticated exploitation scheme. These so called "exhibition windows" shall provide for an optimal exploitation of the content. Until recently, the exhibition windows appeared as described in the following: First, movies are licensed for theatrical release (cinemas). Following this, licensing encom-

13 Case No COMP/M.5932 – *News Corp/BSkyB* (21.12.2010), OJ C 37, 5.2.2011, p. 5, at par. 55.

14 Case No COMP/M.6369 – *HBO/Ziggo/HBO Nederland* (21.12.2011), OJ C 72, 10.3.2012, p. 24, at par. 17; Case No COMP/M.6866 – *Time Warner/CME* (14.06.2013), OJ C 211, 25.7.2013, p. 1, at par. 13; Case No COMP/M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media* (24.02.2015), OJ C 175, 29.5.2015, p. 11–15, at par. 17; Case No COMP/M.7288 – *Viacom/Channel 5 Broadcasting* (09.09.2014), OJ C 354, 8.10.2014, p. 1, at par. 9; Case No COMP/M.7360 – *21st Century Fox/Apollo/JV* (09.10.2014), OJ C 383, 29.10.2014, p. 2, at par. 10.

15 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services; "programmes" are defined in Art. 1 lit. b as "a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama."

passes DVDs (for rent as well as for sale) and “download to own” (“DTO”). Thereafter, movies are made available for the exhibition on TV or streaming platforms. However, there are certain exhibition windows within the TV sector: The pay-per-view (“PPV”) window followed by the first and second pay-TV window and finally the licensing to free-to-air (“FTA”) TV.¹⁶ Mostly, these exhibition windows are exploited on an exclusive basis with a limited number of runs (“output-deals”).¹⁷

Recently this strict supply chain has become more and more blurred. This is due to the advent of internet streaming allowing easy access to consumers at considerably lower costs and at any time. Lately, the tremendous success of Netflix and the like has changed the old TV and cinema landscape dramatically. Now there are successful audiovisual series launched online first that have not been made for theatrical release or TV airing. These shows are aired later on pay-TV and FTA-TV channels – not earlier. With more and more companies trying to get into this business sector (Amazon, T-Online, Disney etc.) one can only assume that the strict exhibition window system is outdated. Even regarding hugely lucrative Hollywood movies the exhibition windows seem to become more woven into each other as release times between each of the windows have become shorter.

Presently, there is a great variety of audiovisual media services. While FTA TV and some streaming platforms offer free content which is financed by advertising (and in some countries by a compulsory license fee) pay-TV and other streaming platforms are financed by a subscription model. Furthermore, there are companies that offer single content on a stand-alone basis. The economic relations regarding these players are often complex: On the one hand, each of these firms offers services to consumers or advertisers. On the other hand, each company also demands services, like the production and licensing of content or transmission services, from multiple other firms. These differing economic relations must be carefully analyzed.

16 Compare Case No COMP/M.5932 – *News Corp/BSkyB* (21.12.2010), OJ C 37, 5.2.2011, p. 5, at par. 31.

17 *Id.*