



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

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**COPYRIGHT, COMPETITION AND INNOVATION**

**QUESTIONNAIRE – NATIONAL REPORT OF SPAIN**

*Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.*

*Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.*

***Please, keep your answers short and factual.***

***Please send national report to [rxalabarder@uoc.edu](mailto:rxalabarder@uoc.edu).***

***National Reporter: Vanessa Jiménez Serranía***

## 1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

*Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:*

### 1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

In the Spanish Copyright Act (TRLPI) <sup>1</sup> we find several cases in which the scope of exclusive rights takes into account competition and innovation, although this is not expressly stated, such as:

- Article 13 TRLPI: In Spain, by virtue of this article, legal or regulatory provisions and their corresponding drafts, the resolutions of jurisdictional bodies and the acts, agreements, deliberations and opinions of public bodies, as well as official translations of all the above texts, are not subject to intellectual property rights<sup>2</sup>. This exclusion is based on the public interest that such texts and communications should be disseminated as widely as possible. In consequence, their free exploitation is allowed.

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<sup>1</sup> Royal Legislative Decree 1/1996, of April 12, approving the revised text of the Copyright Act, regulating, clarifying and harmonizing the current legal provisions on the subject.

<sup>2</sup> Therefore, the scope of application of this article would include laws and regulations issued by all the bodies of the Spanish State (central State, Autonomous Communities, Local Administrations), international treaties, rulings, orders and sentences of jurisdictional bodies, official "pre-legislative" materials (acts, agreements, deliberations, opinions of public bodies) and the resolutions of administrative and constitutional bodies.



- Article 19.2 TRLPI: This article recognises the right of exhaustion in case of the distribution of physical copies of a work<sup>3</sup>.
- Article 21.2 TRLPI: This article establishes that the intellectual property rights of the work resulting from the transformation of an original work (*derivative work*) shall belong to the author of this derivative work, without prejudice to the right of the author of the pre-existing original work to authorise, throughout the term of protection of his/her rights in the latter, the exploitation of the results in any form, in particular by means of reproduction, distribution, public communication or further transformation. Nevertheless, this provision has been interpreted strictly, i.e. the owner of the pre-existing work, once he has transferred his right of transformation, does not have to authorise the reproduction, distribution or communication to the public of the derivative work. Moreover, in practice (especially in the audiovisual field) it is common that the transfer of the right of transformation of an original work implies the authorisation of the transformations of the derivative work that affect the original work.

## 1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

We find several examples in which competition and innovation development considerations have been taken into account (directly or indirectly) by the Spanish legislator, such as:

- Article 33.1 TRLPI: Under TRLPI, the reproduction, distribution and public communication of works and articles on current affairs disseminated by the media is permitted, provided that the author has not reserved these rights. This article establishes two requirements for the application of this limit: the source and the author must be cited if the work appeared with a signature, and the author must be fairly remunerated. It is important to note that literary collaborations do not fall within the scope of this article.
- Articles 33.2 and 35.1 TRLPI: In the interest of current affairs information, the reproduction, distribution and communication to the public of lectures, speeches, court reports and other works of the same nature which have been delivered in public (33.2) and of any work likely to be seen or heard on the occasion of information on current events (35.2) is allowed.
- Article 35.2 TRLPI: This limitation states that works permanently located in parks, streets, squares or other public thoroughfares may be freely reproduced, distributed and communicated by means of paintings, drawings, photographs and audiovisual procedures.
- Article 36.2 TRLPI: According to this article “*the authorisation to broadcast a work shall include the transmission of the broadcast by cable as soon as it is carried out simultaneously and in its entirety by the originating body and without exceeding the geographical area provided for in the authorisation.*” Nevertheless, article 36.2 TRLPI specifies that this authorisation “*shall also include its incorporation in a programme directed towards a satellite that allows reception of the work by*

<sup>3</sup> When the distribution is carried out by sale or other transfer of ownership, within the European Union, by the right holder himself or with his consent, this right will be exhausted with the first sale, although only for successive sales and transfers of ownership carried out in that territorial area.



an entity other than the originating entity, where the author or his successor in title has authorised the latter entity to communicate the work to the public, in which case the originating broadcaster shall also be exempt from the payment of any remuneration". Thus, this article implies that, in the effective access to the work by the public, only one authorisation is necessary, not the double authorisation that would correspond to the transmitter and the diffusing receiver. In other words, according to this rule, it excludes the transmitting entity from the payment of remuneration, both for economic reasons and for reasons of access to culture.

- Article 100.4 TRLPI: Unless otherwise agreed, the author may not prevent the assignee who holds the software exploitation rights from making or authorising the making of successive versions of such software or of software derived from it.
- Article 100.5 TRLPI: No authorisation from the software rightsholder is required in order to decompile such software for interoperability reasons.

See also 4.2 (news aggregators and search engines, art. 32.2 TRLPI) and 4.3 (private copying, art. 31.2 TRLPI and press clipping, art. 32.1 paragraphs 2 and 3).

- Article 40 bis: This article establishes that E&L "may not be interpreted in such a way as to permit their application in a manner that would unreasonably prejudice the legitimate interests of the author or otherwise conflict with a normal exploitation of the works to which they refer." There is a relevant judgment of the Spanish Supreme Court, in which article 40 bis was applied: the *Megakini* case.<sup>4</sup> The initial claim (and the subsequent appeals) focused on the plaintiff's rights as the author of a betting website (www.megakini.com) against the defendant Google Spain S.L. (hereinafter Google) on the grounds of unauthorised copying of this website in its search engine. The basis of the claim was, in short, that the plaintiff had not consented to the inclusion of his website (www.megakini.com) and the use of its content by Google so that Google could communicate it indiscriminately to third parties for the sole purpose of promoting its own sponsored links for profit. According to the plaintiff, his rights were protected by articles 17 and 14.6 TRLPIE and Google's conducts, on the other hand, did not fall within any of the exceptions provided for (at that time) in articles 31 and following of TRLPI. The Supreme Court considered that the cessation of the search engine's operation and compensation to the author of the page was not appropriate. The court applied 40 bis TRLPI, in conjunction with the doctrine of "*ius usus inoqui*" (accepted social use of the right) and considered that the action brought was an abuse of copyright or an antisocial exercise of copyright, inasmuch as the restrictive interpretation of the limits to copyright made by the plaintiff was intended to harm "Google" without obtaining any benefit of its own, other than fame, notoriety or the compensation requested in the lawsuit.

### **1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or "joint-tariffs", "one-stop-shops" ... and explain their impact in the market.**

The following rights of simple remuneration must be mandatorily managed collectively:

<sup>4</sup> Spanish Supreme Court, judgment n° 172/2012, April 3, 2012. ECLI: ECLI:ES:TS:2012:3942.



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- The resale right for the benefit of the author of an original work of art (art. 24.10 TRLPI)<sup>5</sup>;
- The right to an equitable compensation for private copying (arts. 31.2 and 25 TRLPI);
- Several remuneration rights regulated within the scope of the limitations of quotations and summaries with educational and scientific investigation purposes (arts. 32.1 II, 32.2.I and 32.4 TRLPI);
- The equitable remuneration linked to public lending in certain establishments (art. 37.2 TRLPI);
- The rights of audiovisual authors to remuneration for the rental right and for certain forms of communication to the public (arts. 90.2, 3 and 4 TRLPI);
- The rights of performers and producers, both musical and audiovisual, in relation to several acts of public communication of their respective recordings and fixations (arts. 108.4 and 5 and 116.2 and 122.2 TRLPI);
- The right of performers to an equitable remuneration regarding the rental of their performances fixed in phonograms and audiovisual recordings (art. 108.3 TRLPI);
- The right of musical performers to obtain an additional remuneration vis à vis phonogram producers (art. 110 bis.2 LPI).

In addition to the aforementioned, the right of cable retransmission is also subject to mandatory collective management, despite being an exclusive right (art. 20.4 b/ TRLPI).

The remaining exploitation modalities that fall under any exclusive right (reproduction, distribution, public communication and transformation) may be subject to voluntary collective management.

The following two remuneration rights are also subject to voluntary collective management:

- The right to an equitable remuneration regulated under art. 33 TRLPI regarding works and art. on topical subjects disseminated by the media;
- The equitable compensation for the use of orphan works once the right-holder has requested the termination of the consideration of the work as orphan (art. 37 bis.7 TRLPI).

Furthermore, article 168 established a one-stop shop for invoicing and payment system. In this case, CMOs authorised by the Ministry of Culture and Sport are obliged to participate in the management, financing and maintenance of the one-stop billing and payment shop accessible via Internet “*within the terms and conditions determined in the regulations in force, and in which users of the repertoire managed by them may obtain up-to-date information on the individual and total cost to be paid to all such societies and operators, as a result of the application of the tariffs to their activity, and make the corresponding payment*”.

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<sup>5</sup> Until the latest reform of the Spanish Copyright Act, that took place in March 2019, the resale right for the benefit of the author of an original work of art was object of voluntary collective management in Spain.



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From an economic point of view, such measures offer significant efficiencies not only to rightsholders, but also to commercial users. For the former, it allows them to obtain an economic return for the acts of exploitation of their works and other subject-matter which, in most cases, would be difficult for them to control directly and personally. For the latter, it offers easy access to the works and services they need (which means lower search and negotiation costs). Thus, statutory/compulsory licensing and compulsory collective management provides a balancing factor between the interests of ownership and the interests of access. These advantages are particularly relevant in the case of secondary acts of exploitation or non-commercial use of related works and subject-matter, especially when rights of different groups of rightsholders converge in the same act of use or exploitation.

**1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)**

In Spain there are certain licensing practices that favour the development of related markets. An example is the case of the licences granted by the collecting management society CEDRO, in relation to *press clipping* activities (for further information on *press clipping* see 4.3).

The object of these licences is the reproduction, distribution and public communication (in the form of making available) of newspaper articles incorporated in press reviews to the number of users specified in the contract itself. These newspaper articles must obviously form part of CEDRO's repertoire (otherwise it would not be authorised to issue this authorisation) and the conditions set out in article 32.1 TRLPI, paragraphs 2 and 3 must be met<sup>6</sup>. This centralised management of licences considerably reduces the search and negotiation costs both for *press clipping* companies and for companies and organisations wishing to use press dossiers internally or externally.

**1.5.- By any other means?**

**2. A STUDY CASE: DATA ECONOMY**

*Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)*

*Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc ) available either online, in digital form or in analogue form.*

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<sup>6</sup> See <https://www.cedro.org/usuarios/licencias-de-derechos-de-autor/licencia-anual/uso-de-prensa>



**2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?**

Machine reading is not expressly addressed in TRLPI. It should be noted that the wording of article 18 TRLPI states that reproduction “*means the direct or indirect, temporary or permanent fixation, by any means and in any form, of the whole or part of the work, allowing it to be communicated or copies to be made.”*

Nevertheless, and although machine reading or machine mining are not expressly mentioned on the provisions concerning *sui generis right* on databases, article 134.1 TRLPI expressly states that: “The maker of a database, irrespective of the form in which it has been made available to the public, may not prevent the legitimate user of the database from extracting and/or re-using non-substantial parts of its contents, evaluated qualitatively or quantitatively, irrespective of the purpose for which it is intended. In cases where the legitimate user is authorised to extract and/or re-utilise only part of the database, the provisions of the preceding paragraph shall apply only to that part.”

Furthermore, article 135.1 TRLPI, regarding exceptions to the *sui generis right* of databases, establishes: “*the lawful user of a database, irrespective of the form in which it has been made available to the public, may, without the authorisation of the maker of the database, extract and/or re-utilise a substantial part of the contents of the database in the following cases: (a) in the case of an extraction for private purposes of the contents of a non-electronic database; b) extraction for illustrative purposes of teaching or scientific research to the extent justified by the non-commercial objective pursued and provided that the source is indicated; (c) in the case of retrieval and/or re-utilisation for the purposes of public security or for the purposes of administrative or judicial proceedings.”*

However, as establishes art.135.2 TRLPI these provisions “*may not be interpreted in such a way as to allow their application in a manner which unreasonably prejudices the legitimate interests of the rightsholder or is detrimental to the normal exploitation of the protected subject-matter.*”

**2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.**

The fundamental legal framework regarding data produced by the Public sector in Spain essentially comprises:

- Act 37/2007, of 16 November, on the re-use of public sector information, amended by Law 18/2015, of 9 July.
- Royal Decree 1495/2011, of 24 October, which implements Law 37/2007, of 16 November, on the re-use of public sector information.

*The article 5 of this RD establishes a mandate for the creation and maintenance by the Secretary of State for the Civil Service of the Ministry of Territorial Policy and Public Administration and the Secretary of State for Telecommunications and the Information Society of the Ministry of Industry, Tourism and Trade of a catalogue of reusable public information corresponding, at least, to the General State Administration, which allows access, from a single point, to the different reusable public information resources available. This catalogue must be interoperable with other catalogues created by other public authorities.*



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*Article 6 establishes that the State Secretariat for the Civil Service of the Ministry of Territorial Policy and Public Administration and the State Secretariat for Telecommunications and the Information Society of the Ministry of Industry, Tourism and Trade will exercise a general function of promoting the reuse of state public sector information, developing, to this end, information actions, general advice and support, awareness, training and study on reuse, including, where appropriate, the use of social networks for the construction of virtual communities of administrations, citizens and companies with an interest in the reuse of public information.*

- Directive (EU) 2019/1024 of 20 June 2019 on open data and re-use of public sector information (currently being transposed).
- The European Data Governance Act Regulation (Data Governance Act).

Alongside to these regulations, on a practical level, the Aporta Initiative was launched in 2009 to promote the opening of public information and development of advanced services based on data. It is backed by the Ministry of Economy and Business, the Ministry of Territorial Policy and Civil Service and the Public Corporate Entity Red.es.

The Aporta Initiative operate via [datos.gob.es](https://datos.gob.es) and it can be used for all data ecosystem agents:

- Users, citizens or professionals who demand data and/or want to find out about the latest news, application or services related to data.
- Public entities who provide and use public data, and who want to be up-to-date with sector news.
- Reusers and “info-media” who require data sources to create products and services they want to publicise.

Furthermore, in March 2019, the current Agreement (C-003/19-ED) was signed between the General State Administration, through the current Ministry of Economic Affairs and Digital Transformation, and the public business entity Red.es for the promotion of openness and reuse of public sector information.

### **2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?**

As mentioned in the previous section, the initiative has facilitated the re-use of data by public administrations. We find a large number of examples of applications and solutions developed using, among others, data supplied by the public administrations here <https://datos-gob-es.insuit.net/en/aplicaciones>. These apps and products cover several sectors: transportation, culture and leisure, education, environment and health and wellbeing.

### **3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND**

*Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:*



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### 3.1.- “Essential facilities” doctrine to foster the development of downstream markets.

The “essential facilities doctrine”, although is not frequently mentioned by Spanish caselaw regarding copyright licensing, has been, nonetheless, applied by Spanish courts and the Spanish Competition Authority:

- The most relevant example of a direct (and peculiar) application of the essential facilities doctrine by Spanish courts is the judgment of the National High Court of March 10, 2010 (ECLI:ES:AN:2010:1153, FONOGRAMAS case).

The subject-matter of the appeal is the decision issued by the Spanish Competition Authority on December 9, 2008, sanctioning file 636/07 (FONOGRAMAS case). This sanctioning file was initiated by a complaint filed by Sogecable SA. (SOGECABLE), Canal Satélite Digital S.L. (CSD) and Distribuidora de Televisión Digital S.A. (DTS), against two Collective Management Societies (CMOs) - Asociación de Gestión de Derechos Intelectuales (AGEDI) and Artistas Intérpretes o Ejecutantes, Sociedad de Gestión (AIE) - for alleged prohibited conduct due to abuse of dominant position in the management of intellectual property rights. Specifically, this abuse consisted in requiring the complainant companies to pay tariffs for the use of the phonograms (that these CMOs managed), which were manifestly higher than those charged to another television operator, Ente Público Radio Televisión Española (RTVE, TVE), throughout the 1990s and up to 2003.

The Spanish Competition Authority concluded that AGEDI and AIE had committed an abuse of dominant position due to apply dissimilar conditions to equivalent transactions with other trading parties and imposed a fine of eight hundred and fifteen thousand (815,000) euros on AGEDI and a fine of six hundred and fifteen thousand (615,000) euros on AIE.

This decision was appealed by the AGEDI and AIE before the National High Court. In the fourth ground of its judgment of March 10, 2010, the National High Court states that: *“It should be recalled that for the purposes of the television market, whether pay-TV or not, the products provided by CMOs are essential facilities, and that in relation to such products there is an obligation to supply and where there is an obligation to supply there is a duty not to discriminate against purchasers or buyers if they are in competition with each other. As the CJEU established in the Commercial Solvents judgment, the principle is that companies in a dominant position must make available to customers the products that are essential to allow competition between them, although the requirement is reinforced when the competitor concerned is a new player on the relevant market.”*

The National High Court reinforces this reasoning in the sixth ground of this judgement making the following statement: *“This is not a case of dominant companies active in the market, but of entities to which the law has given a monopoly on the management of intellectual property rights<sup>7</sup>. As opposed to the undertakings which are faced with the absolute necessity of acquiring the product monopolised by the plaintiffs (AGEDI-AIE), the latter have not engaged in discrimination based on any apparent economic reason: the highest price which the customer was prepared to pay has not*

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<sup>7</sup> It should be noted that this judgment is prior to the transposition of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014.





*apparently been sought, nor has the price been fixed according to the number of units purchased, nor have the television channels been distinguished on the basis of their demand curve. (...) Furthermore, in the case of essential facilities, the CJEU in the Corsica Ferries case held that the differences in tariffs constituted abusive price discrimination, without further consideration.”<sup>8</sup>*

The application of the essential facilities doctrine in this case is particularly controversial because it is not the usual scenario for its application (exclusionary abuse in a related market), but a case of exploitative abuse (discriminatory pricing).

- One interesting example of the application of the essential facilities doctrine by the Spanish Competition Authority is the *lasist/3M case*<sup>9</sup>.

In this case, 3M España, S.A. (3M) held a dominant position on the market for “aggregators” (software for the calculation of the economic management of hospital stays) and offered its products also in the (related) market for “analysers” (software which, on the basis of the codes previously obtained with the aggregators, makes it possible to obtain the forecasts necessary for hospital management)<sup>10</sup>.

In July 1999 *lasist*<sup>11</sup> (3M's competitor in the market for “analysers”) files a complaint with the Spanish competition authority accusing 3M of abuse of its dominant position. Specifically, the antitrust alleged conducts were: (i) the 3M's refusal to grant *lasist* commercial licences for the “aggregators”; (ii) the 3M's refusal to make available to *lasist* general lists and corporate offers of the prices at which the “aggregators” were sold on the market; (iii) and the imposition of unfair prices on the “aggregators”.

The Spanish Competition Authority, applying the essential facilities doctrine, found that 3M had abused its dominant position on the market by imposing, without any objective justification, limitations and disadvantages on its only competitor in the analyser market, distorting competition in that market related to the market for “aggregators” in which 3M held a dominant position.

### **3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?**

The issue of vertical integration has been particularly addressed from a competition law perspective. Several relevant cases in the field of cinema film distribution and sports broadcasting rights have been filed before the Spanish Competition Authority:

<sup>8</sup> This Judgement was appealed before the Spanish Supreme Court by AGEDI and AIE. This appeal was dismissed by the Spanish Supreme Court in its judgment n° 4886/2013, of September 26, 2013 (ECLI:ES:TS:2013:4886). It is significant to highlight that the Supreme Court in its third ground of law quoted verbatim the legal grounds of the appealed judgement.

<sup>9</sup> Spanish Competition Authority, Sanctioning File 517/01, April 5, 2002.

<sup>10</sup> Aggregators and analysers were presented as complementary products to be used together.

<sup>11</sup> *lasist* is a Spanish company that provided (and still provides) its services in the field of health information through the development and marketing of products such as software, comparative or feasibility studies and technical consultancy services. Its activities were mainly focused on areas related to the cost of health care.



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- *Film distributors case*<sup>12</sup>: On 6 February 2003, the Federación de Empresarios de Cine de España (FEECE) filed a complaint before the Spanish Competition Authority against the distribution companies The Walt Disney Company Iberia (Buenavista International Spain), Columbia Tristar Films de España, Hispano Foxfilm, United International Pictures, Warner Sogefilms, Warner Sogebros, the Asociación de Distribuidores e Importadores Cinematográficos de Ámbito Nacional (ADICAN) and three directors of one of them.

The alleged anti-competitive conduct consisted in the adoption of an agreement on the clauses of the standard contracts used in their commercial relations with exhibitors of cinematographic films (with abuse of a dominant position). ADICAN was accused of acting as a medium for distributors to exchange information.

After a lengthy investigation of the case, mainly due to the decision to include the Federation of Film Distributors (FEDICINE) as a possible infringer, the Spanish Competition Authority concluded that the distribution companies The Walt Disney Company Iberia/Buenavista International Spain (BV), Columbia Tristar Films de España (Columbia), Hispano Foxfilm (Hispano), United International Pictures (UIP) and Warner Sogefilms (WS) had engaged a practice of a prohibited conduct: a concerted action to standardise the conditions of exhibition of their films, producing both horizontal and vertical restrictions on competition.

Furthermore, the Spanish Competition Authority accused FEDICINE of another anti-competitive conduct, for having facilitated the exchange of information between competitors through its database.

Finally, the Spanish Competition Authority agreed to dismiss the proceedings against ADICAN and the three directors complained of, on the grounds that none of them could be accused of any of the conducts sanctioned by the Law.

After holding an oral hearing on the case, the Spanish Competition Authority stated, firstly, that FEDICINE was responsible for an antitrust infringement for creating and maintaining a database through which distribution companies exchanged sensitive strategic data to circumvent free competition, such as the foreseeable dates for future releases more than a year in advance or the disaggregated figures of takings per film, week of exhibition and cinemas. Accordingly, the Spanish Competition Authority imposed a fine of 900,000 euros on FEDICINE.

Furthermore, the , the Spanish Competition Authority ruled that the companies The Walt Disney Company Iberia/Buenavista International Spain, Sony Pictures Releasing de España S.A. (formerly Columbia Tristar Films de España S.A.), Hispano Foxfilm S.A.E., United International Pictures S.L. and Warner Sogefilms A.I.E. (in liquidation), committed an antitrust infringement by

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<sup>12</sup> Spanish Competition Authority, Sanctioning File 588/05. This decision was appealed by WARNER SOGEFILMS A.I.E and by WALT DISNEY COMPANY IBERIA before the National High Court, who, in its judgments of March 14, 2013 and March 20, 2013, partially upheld the appeal, referring the proceedings to the Spanish Competition Authority for the recalculation of the fine.



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having concerted to standardise their commercial policies, sharing a substantial part of the Spanish film distribution market.

The Authority found that the conduct constituted horizontal concertation between the most prominent operators, with a share of more than two thirds of the film distribution market, and that it had the pernicious effect of completely eliminating any possibility of competition between them in the wide release segment, with vertical effects, by limiting the possibilities of competition between exhibitors, and preventing the final effects of effective competition in the sector from being passed on to consumers. Consequently, the Spanish Competition Authority imposed a fine of 2,400,000 euros on each of these companies.

- MEDIAPRO Case<sup>13</sup>: In 2017 OBWAN NETWORKS AND SERVICES, S.L. (OBWAN)<sup>14</sup> filed a complaint against MEDIAPRO<sup>15</sup> before the Spanish Competition Authority. This complaint was focused on the possible dominant position of MEDIAPRO in the market for the wholesale commercialisation of premium pay-TV channels in Spain, thanks to the fact that its channels BeIN Sports and BeIN La Liga, with Champions League and Spanish La Liga football content, respectively, were very relevant in order to compete in the pay-TV market in Spain.

Likewise, the possible abuse of MEDIAPRO 's dominant position investigated by the CNMC would derive from the application of possible discriminatory conditions to new over-the-top(here-in-after) OTT Internet pay-TV players in Spain, in the wholesale commercialisation of BeIN Sports and BeIN La Liga channels. wholesale marketing of the channels BeIN Sports and BeIN La Liga.

The alleged conduct concerned the wholesale marketing in Spain by MEDIAPRO of the audiovisual rights to La Liga and Copa de H.M. el Rey football league and those corresponding to the UEFA Champions League and Europa League competitions. Moreover, given the importance of football as pay-TV audiovisual content, these conducts were likely to have an impact on the downstream pay-TV market, in which both the complainant and the defendant were present.

This possible discrimination would stem from MEDIAPRO 's initial refusal to apply wholesale marketing models for BeIN Sports and BeIN channels similar to those it has offered to traditional pay-TV operators such as Telefónica. That is to say, models based on a fixed price per season, to new OTT internet pay-TV entrants in Spain.

In this case, MEDIAPRO submitted a series of commitments to remedy this discrimination. In particular, OTT pay-TV operators in Spain, such as Opensport, were offered a wholesale marketing model for the channels BeIN Sports and BeIN La Liga on fair and non-discriminatory terms and conditions compared to those enjoyed by incumbent operators such as Telefónica, and which took into account the TRLPile of these new players.

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<sup>13</sup> Spanish Competition Authority, Sanctioning File S/DC/0604/17 MEDIAPRO FÚTBOL, February 7, 2018.

<sup>14</sup> OBWAN is an over-the-top (OTT) pay-TV operator, authorised since 20 April 2016 to provide such services in Spain, in accordance with the provisions of General Audiovisual Communication Act 7/2010, of March 31, 2010.

<sup>15</sup> MEDIAPRO is an audiovisual operator which, among other activities, acquires and markets at wholesale level broadcasting rights for football competitions worldwide. worldwide.



These commitments applied to the commercialisation of the BeIN Sports and BeIN La Liga channels, covering the 2015/2016 to 2017/2018 seasons, in the first case, and the 2016/2017 to 2018/2019 seasons, in the second case.

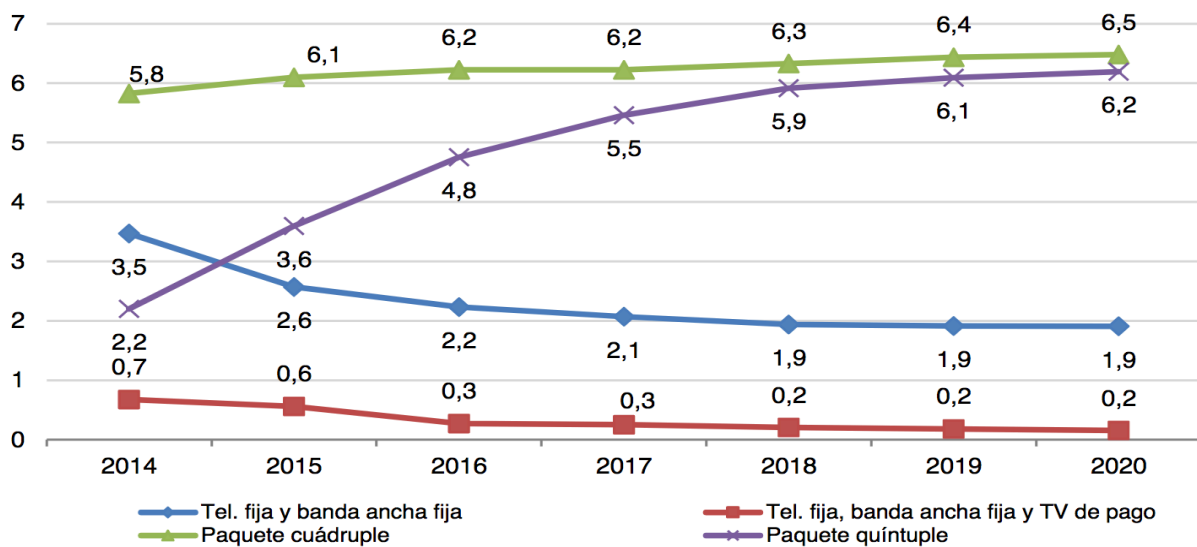
### 3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

The issue of bundling of rights is particularly relevant in Spain in the telecommunications and audiovisual sector. According to the telecommunications and audiovisual sector economic report 2020<sup>16</sup> of the Spanish Competition Authority (CNMC), the Spanish market is characterised by a high degree of bundling, especially in terms of fixed and mobile services combined in the same offer. Thus, at the end of 2020, the total of these offers reached 12.7 million.

The distribution of bundles combining fixed and mobile services by operator in 2020 was mainly determined by the performance of Movistar and Vodafone, which occupy the top positions in terms of fixed and mobile subscribers in 2020. the top positions in terms of pay-TV subscribers.

The following tables provide an overview of these sectors in 2020:

Table 1. Evolution of the most contracted bundles (millions of bundles)



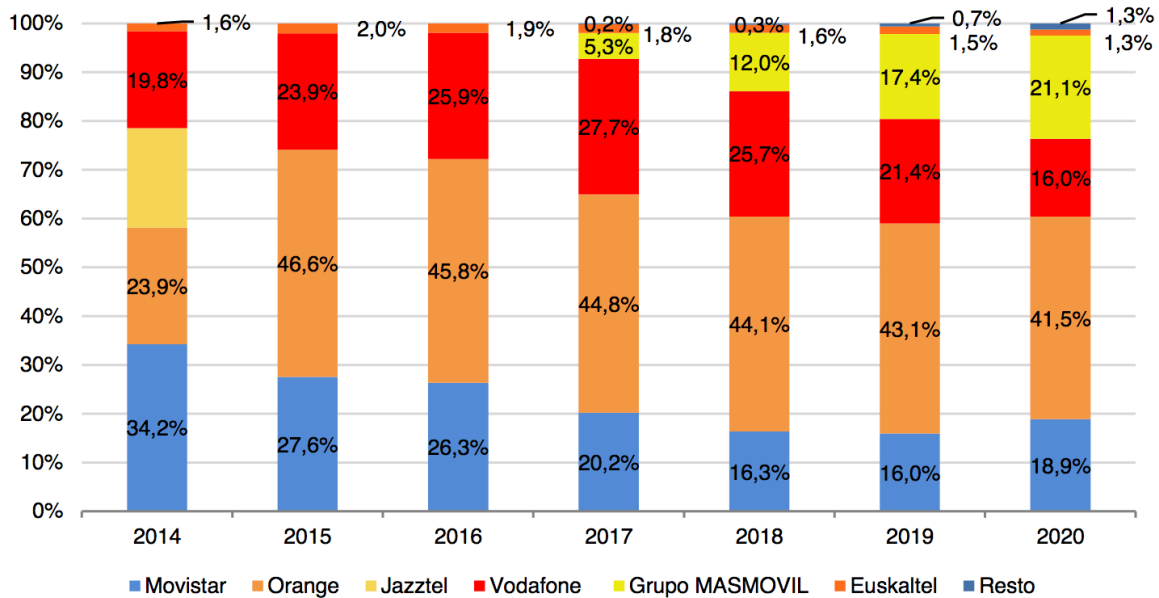
Fuente: CNMC

\*Quadruple bundles (paquetes cuádruples) include fixed and mobile telephony, fixed and mobile broadband and fixed access) and quintuple bundles (paquetes quintuples) cover fixed and mobile telephony, fixed and mobile broadband and fixed access plus pay-TV).

<sup>16</sup> [https://www.cnmc.es/sites/default/files/3600538\\_4.pdf](https://www.cnmc.es/sites/default/files/3600538_4.pdf)

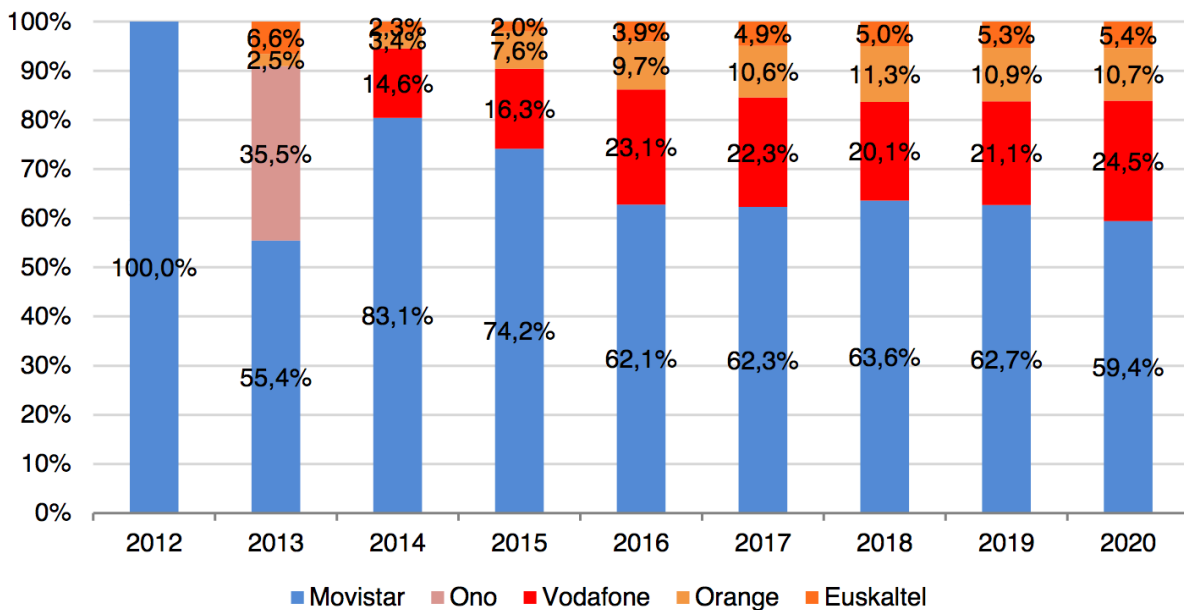


Table 2. Market share by operator for quadruple bundles



Fuente: CNMC

Table 3. Market share by operator for quintuple bundles



Fuente: CNMC



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Competition concerns in these markets due to bundling have been raised especially in the authorisation of mergers by the Spanish Competition Authority.

The most relevant case in recent years has been the TELEFÓNICA / DTS case<sup>17</sup>. On 17 October 2014 TELEFÓNICA DE CONTENIDOS, S.A.U. (TELEFÓNICA) notified to the Spanish Competition Authority the economic concentration transaction consisting of the acquisition by TELEFÓNICA of sole control of DTS DISTRIBUIDORA DE TELEVISIÓN DIGITAL, S.A. (DTS), in which TELEFÓNICA passed the acquisition of sole control of DTS DISTRIBUIDORA DE TELEVISIÓN DIGITAL, S.A. (DTS). (DTS), in which it would hold 100% of its share capital.<sup>18</sup>

The Spanish Competition Authority approved the acquisition of DTS by Telefónica, on the grounds that the remedies offered by the notifying party ensure that the problems posed by the merger in the pay television market and others (electronic communications) will be adequately addressed. The remedies offered were divided into three main areas: pay television market; markets for the wholesale commercialization of content and channels; and terms of access to Telefónica's Internet network.

Regarding the remedies related to the pay television market in Spain, Telefónica undertook not to restrict the mobility of its current and future pay television customers, establishing limitations on its customer retention and minimum term policies. Specifically, it would process requests from its customers to end their subscription within a limited period of time (a maximum of 15 days for customers with unbundled services, for example); it would waive the requirement for and application of minimum term clauses under certain circumstances; and it would not attempt to win back certain types of former customers for a limited period of time (two months) from the day when they request to end their service. Telefónica also undertook to ensure that current DTS contracts with other electronic communications operators, to distribute its television offering by satellite, would be maintained and complied with in full, until the current contracts expire. Once each contract expires, the service should be extended for a period of six months and Telefónica should also refrain from making active sales to customers who acquired this service through third operators.

Regarding the remedies related to the markets for the wholesale commercialization of specific audiovisual contents and television channels in Spain, Telefónica committed to allow third pay television operators access to a wholesale offer of premium channels (those showing previously unseen, exclusive content from the major film and television producers or live sporting events including first division football (Liga de Primera División), Spanish championship football (Copa de Su Majestad el Rey), the Champions League, the Europa League, the World Cup, the Basketball World Cup, Formula 1, Moto GP and the Olympic Games). Each third pay television operator would be able to access a maximum of 50% of the channels included in the wholesale offer and would be free to choose any combination of channels within this wholesale offer. The prices of the wholesale offered must ensure that Telefónica's retail offers were replicable and must prevent situations of margin squeeze.

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<sup>17</sup> Spanish Competition Authority, File C/0612/14 TELEFÓNICA/DTS.

<sup>18</sup> This concentration had direct effects on the pay-TV market and on the vertically related markets for the acquisition and wholesale marketing of individual audiovisual content and TV channels, in which the parties are present, as well as on the related electronic communications markets, where DTS was not directly present, but TELEFÓNICA was, in an environment of increasing importance of audiovisual content as a mechanism for attracting customers in those markets through convergent offers (fixed and mobile electronic communications-pay-TV).



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Incidentally, in 2019, the association FACUA Consumers in Action (FACUA) filed a complaint against TELEFÓNICA DE ESPAÑA, S.A.U. (TELEFÓNICA), VODAFONE ESPAÑA, S.A.U. (VODAFONE) AND ORANGE ESPAGNE, S.A.U. (ORANGE), for an alleged anti-competitive conduct (price cartel). This conduct focused on price increases that mainly affected convergent packages of electronic communications services and, in some cases, pay television. Nevertheless, the Spanish Competition Authority decided not to initiate sanctioning proceedings as it considered that there were no evidences of an infringement<sup>19</sup>.

### **3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...**

The most relevant cases in recent years concerning licensing prices in Spain concern Collective Management Societies (CMOs). Art. 2 TRLPI<sup>20</sup> (in which the conditions of the abuse of a dominant position in the Spanish legal system are determined) is fully applicable to the activity of the CMO in the market, and Spanish CMO have been sentenced in numerous occasions for abuse of a dominant position.

An example of the express recognition of this direct application can be found in the Spanish Supreme Court Judgment of 18 October 2006<sup>21</sup>, in which the Spanish Supreme Court states, regarding the determination of an equitable remuneration for acts of public communication of audiovisual recordings: "*The requirement of fair remuneration is not derived for the appellant only from the aforementioned Art. 122 TRLPI, but also, as it is for other companies or entities that are in a dominant position, from Art. 6 LDC (currently Art. 2 LDC) which considers abuse of this situation, among other things, the imposition of prices or other unfair commercial or service conditions.*" We can highlight the following recent cases in which an CMO has been sanctioned for abuse of a dominant position in Spain:

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<sup>19</sup> Spanish Competition Authority, Sanctioning File S/0625/18 CONCERTACIÓN OPERADORES TELECOMUNICACIONES, January 31, 2019.

<sup>20</sup> Art. 2 LDC determines that: "1. It is forbidden the abusive exploitation by one or more companies of their dominant position in all or part of the national market. 2. The abuse may consist, in particular, of: a) The imposition, directly or indirectly, of prices or other commercial conditions or unequal services. b) The limitation of production, distribution or technical development to the unjustified detriment of companies or consumers. c) The unjustified refusal to satisfy the demands of purchasing products or providing services. d) The application, in commercial or service relations, of unequal conditions for equivalent services, which places some competitors at a disadvantage compared to others. e) The subordination of the conclusion of contracts to the acceptance of supplementary benefits that, by their nature or according to the uses of commerce, do not relate to the purpose of said contracts. 3. The prohibition provided for in this art. shall apply in cases in which the dominant position in the market of one or several companies has been established by legal provision."

<sup>21</sup> In this case, (ECLI: ES: TS: 2006: 6223) the Spanish Supreme Court settled the case EGEDA / AIE / AISGE-Hotels, which confronted these CMOs against the Spanish Federation of Hotels and the Hotel Association of Tourist Areas of Spain This case is judged by the Spanish Supreme Court after the judgment issued by the Contentious-Administrative Chamber of the National Court on January 14 (appeal No 867/2000 and cumulative No 869/2000 and 892/2000), 2004 dismissed the appeal filed against the decision of the Spanish Competition Authority dated 27 of July 2000. This decision imposed on the appellants fines of 45, 10 and 5 million pesetas respectively, for abuse of dominant position (both individual and collective) when trying to impose inequitable and discriminatory tariffs on hotel establishments.



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- *AISGE-Cinemas Case*<sup>22</sup>: In this case, AISGE was convicted of two conducts constituting abuse of a dominant position in relation to the right to fair remuneration for public communication of audiovisual recordings in cinemas. In particular, AISGE had unilaterally and unjustifiably increased the general rate applied and, on the other hand, had applied different rates and bonuses to different cinemas in a discriminatory manner.
- *EGEDA-CEHAT Case*<sup>23</sup>: In this case EGEDA was found to have abused its dominant position by imposing excessive tariffs. In particular, EGEDA had determined the amount of the applicable tariffs according to the category of the hotel (charging higher tariffs to luxury or five-star hotels and exempting hotels with two or less stars from the obligation to pay). This conduct was considered to be anti-competitive since the variable selected lacked justification, as it bore no relation either to the nature and economic value of the provision of the services of public communication of protected audiovisual works or to the actual use of the protected audiovisual works. (It is interesting to point out that these general tariffs were the result of an agreement between the collecting society EGEDA and the Federation of Hotels and Restaurants (FEHR). Nonetheless, it was considered that this conventional origin of the tariffs did not exclude that EGEDA's tariff setting strategy could be characterised as an abuse of dominant position).
- *AGEDI/AIE-Television Operators Case*<sup>24</sup>: In this case the CMO, AGEDI and AIE were sentenced, the authority deeming them responsible for abuse of a dominant position for imposing inequitable and discriminatory tariffs to free-to-air TV operators since 2003.
- *SGAE- Restaurants Case*<sup>25</sup>: In this case the SGAE was convicted for an abuse of a dominant position by the application of discounts in a discriminatory and non-transparent manner in the tariffs applied to the remuneration of the public communication of musical works in dances celebrated during weddings, baptisms and communions or events where the access of the assistants derived from personal invitations. These discounts were linked to conditions that were applied unevenly to the different operators (by sections or blocks). Also since 2009, it had introduced a tariff called "substitute tariff", which was inequitable and discriminatory.

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<sup>22</sup> Spanish Competition Authority, Sanctioning File S / 0208/09. This decision was appealed before the National High Court, who in its Judgment of November 11, 2013 (ECLI: ES: AN: 2013: 4959) dismissed the appeal. This Judgment was appealed before the Spanish Supreme Court by AISGE. This appeal is dismissed by the Spanish Supreme Court in its judgment n° 318/2017, of February 24, 2017 (ECLI: ES: TS: 2017: 668).

<sup>23</sup> Spanish Competition Authority, Sanctioning File S/0157/09. This decision was appealed by EGEDA before the National High Court, who partially upheld the appeal in its Judgment of September 7, 2016 (ECLI:ES:AN:2016:3604). This Judgment was appealed before the Spanish Supreme Court by the EGEDA. The Spanish Supreme Court dismissed the appeal filed in its Judgment n° 1796/2017, of November 23, 2017 (ECLI: ES: TS: 2019: 1263).

<sup>24</sup> Spanish Competition Authority, Sanctioning File S / 0297/10. This decision was appealed by AGEDI and AIE before the National High Court, who, in its judgment of April 10, 2015 (ECLI: ES: AN: 2015: 1189), partially upheld the appeal, referring the proceedings to the Spanish Competition Authority for the recalculation of the fine. This Judgment was appealed, in the part that had not been estimated, before the Spanish Supreme Court. The Spanish Supreme Court in its judgment n° 374/2018 of March 7, 2018 (ECLI: ES: TS: 2018: 776) dismisses this appeal.

<sup>25</sup> Spanish Competition Authority, Sanctioning File S / 0220/10 SGAE. This decision was appealed before the National High Court who in his Judgment of December 21, 2015 (ECLI: ES: AN: 2015: 4724) estimated the appeal in part, determining the need for a recalculation of the fine. This Judgment was appealed before the Spanish Supreme Court by the SGAE because it was considered that the allegation of the abuse was unfounded. The Spanish Supreme Court in its judgment n° 975/2018, of June 11, 2018 (ECLI: ES: TS: 2018: 2073), dismissed this appeal.





- *SGAE – Authors Case* <sup>26</sup>: In this case the SGAE was accused of two illicit conducts. The first one was the configuration of a system of discounts and tariffs regarding musical rights for television broadcasting that was not transparent. This system generated unjustified discrimination between television operators. The second of the illicit conducts was the distortion of the capacity of two operators (Antena 3 and Telecinco) to determine their musical contents by imposing abusive conditions. The two operators, both editors of musical works as well as licensees, were offered discounts on the condition that they agreed to restrict their own use of their self-edited contents. The Spanish Competition Authority terminated the procedure by a resolution dated 9 July 2015 accepting the commitments presented by the SGAE in order to remedy these behaviours.
- *SGAE – Concerts Case* <sup>27</sup>: In this case, the abuse of a dominant position occurred through several actions of SGAE in the markets of collective management of intellectual property rights of authors and editors of musical and audiovisual works and the markets for granting authorizations and remuneration of reproduction and public communication rights over the same works. More specifically, this behaviour consisted in the application of unfair and excessive tariffs in the licenses granted by SGAE for the public communication of musical works protected by copyright in concerts held in Spain.

Furthermore, under TRLPI, CMOs are obliged to establish simple and clear general tariffs that determine the remuneration required for the use of their repertoire (art.164 TRLPI). These general tariffs will apply to all users (except the cases in which they were negotiated individually with users or users' associations). The amount of these general tariffs must be established on reasonable terms, taking into account the economic value of the use of the rights in the protected work or other subject-matter in the user's activity, and seeking a fair balance between both parties. Specifically, article 164.3 TRLPI states that the calculation of tariffs should take into account: a) the degree of effective use of the repertoire in the user's activity as a whole; b) the intensity and relevance of the use of the repertoire in the user's activity as a whole; c) the extent of the collecting society's repertoire (for these purposes, repertoire shall mean the works and subject-matter whose rights are managed by a collecting society); d) the revenue earned by the user from the commercial exploitation of the repertoire; e) the economic value of the service provided by the collecting society to enforce the application of tariffs; f) the tariffs set by the collecting society with other users for the same mode of use, g) the tariffs established by homologous collecting societies in other Member States of the European Union for the same type of use, provided that there are homogeneous bases for comparison.

Users or associations of users may challenge these general tariffs before the courts of justice (Commercial Courts) or through an extrajudicial procedure before the First Section of the Commission of Intellectual Property (here-in-after **1<sup>st</sup> Sect.CIP**).

The 1<sup>st</sup> Sect.CIP is an administrative body, configured as a regulator of the intellectual property rights market whose structure, composition and functions are regulated in art. 193 and 194 TRLPI. The SPCPI will exercise functions of mediation, arbitration, rate determination and tariff control:

<sup>26</sup> Spanish Competition Authority, Sanctioning File S / 0466/13. The conventional termination of this file was appealed by the Corporation of Spanish Radio and Television, SA before the National High Court, who rejected this appeal (Judgment of April 25, 2019, ECLI: ES: AN: 2019: 1845).

<sup>27</sup> Spanish Competition Authority, Sanctioning File S / 0460/13. This decision was appealed by the SGAE before the National High Court, who partially upheld the appeal in its Judgment of February 7, 2018 (ECLI: ES: AN: 2018: 414). This Judgment was appealed before the Spanish Supreme Court by the SGAE. The Spanish Supreme Court dismissed the appeal filed in its Judgment n° 522/2019, of April 11, 2019 (ECLI: ES: TS: 2019: 1263).



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- Regarding its mediation function, the 1<sup>st</sup> Sect.CIP may collaborate in negotiations between CMOs and users for the non-exclusive authorization of rights managed by them (art. 194.1 TRLPI).
- Due to its arbitration function, the 1<sup>st</sup> Sect.CIP may provide a solution to any conflicts that may arise regarding the negotiation of rights managed by CMOs. Particularly, the 1<sup>st</sup> Sect.CIP may determine (at the request of a CMO, an association of users, a broadcaster or a particularly significant user - and upon the acceptance of the other party) the amounts in substitution of the general tariffs, taking into account the criteria established in art. 164.3 TRLPI (cf. art. 194.2 TRLPI). The submission of the dispute to the arbitration decision of the SPCPI will not prevent the exercise of any judicial actions. Nevertheless, courts will not be able to hear the claim - when the interested party invokes it by exception - until a resolution has been issued by the SPCPI.
- Concerning its tariff determination function, the 1<sup>st</sup> Sect.CIP will set the tariffs for rights subject to mandatory collective management as well as for rights of voluntary collective management that, with respect to the same category of owners, concur with a right to remuneration on the same work or subject-matter (e.g. exclusive rights and rights of "mere" remuneration of producers of audiovisual recordings for the retransmission of their fixations by any means, ex art. 122 TRLPI). In these cases, the 1<sup>st</sup> Sect.CIP will establish the amount of the tariffs for the use of works and services of the repertoire of the management entities, as well as the form of payment and the rest of necessary conditions to make the managed rights effective, at the request of the CMO, an association of users, a broadcasting entity or a particularly significant user, when no agreement has been reached after six months from the formal start of the negotiation<sup>28</sup>. To establish the amounts/rates, the SPCPI will have to take into account the criteria set in art. 164.3 TRLPI. The rates determined by the 1<sup>st</sup> Sect.CIP will be applied in general for all rights holders and for all users, with respect to the same modality of use of works and benefits and the same sector of users, and may be appealed before the contentious-administrative jurisdiction (art. 194.3 TRLPI).
- As regards its tariff control function, the 1<sup>st</sup> Sect.CIP will ensure that the general rates established by CMOs are equitable and non-discriminatory. For that purpose, 1<sup>st</sup> Sect.CIP should assess, among other aspects, whether in its determination the CMO has applied the minimum criteria provided in art. 164.3 TRLPI. If the 1<sup>st</sup> Sect.CIP finds that these criteria have not been observed or, in general, that the tariffs are uneven or are applied in a discriminatory manner, the 1<sup>st</sup> Sect.CIP will notify it to the National Competition Authority, which shall determine whether there is an anticompetitive infringement (cf art. 194.4 TRLPI). A recent example of the exercise of this function is the decision of July 23, 2020, resolving the tariff determination procedure E/2017/002, (TELEFÓNICA v. EGEDA), in review of the tariffs established by the collecting society EGEDA for the collection of royalties corresponding to the retransmission of audiovisual recordings by pay-TV operators.<sup>29</sup>

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<sup>28</sup> In order to request the intervention of the 1<sup>st</sup> Sect.CIP to determine tariffs, the significant user or the users' association must previously make the payment "on account" of 100% of the last tariff they had agreed with the CMO or, in the absence of a prior agreement, 50% of the current general rate (art. 164.6 and 7 TRLPI). If the applicant is an association of users with less than one thousand members, it may request the 1<sup>st</sup> Sect.CIP I to determine tariffs when, at least a number of members representing at least 85 % of the income of all members of the association are up to date with the payment made "on account" (art. 164.8 TRLPI).

<sup>29</sup> For further details, see <https://www.culturaydeporte.gob.es/dam/jcr:e6cada38-ebf1-49f8-8a43-1927e9efe659/acuerdo-publicaci-n-del-texto-definitivo--para-web---aprobado-el-23-de-julio-2020-pr-web.pdf>



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#### 4. ONLINE MARKETS: “VALUE GAPS” (ONLINE PLATFORMS)

*Notice that complete and valuable information resulting from the stakeholders’ dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=68591](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591)*

*<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>*

*Please include only information that is specific to your country.*

##### 4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

Neither in Spanish legislation nor in case law are there any relevant cases in which the value gap issue is addressed.

*If you are an EU country, have you addressed the transposition of Art.17 CDSM Directive? No.*

##### 4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

Yes, article 32.2 establishes that: *“The making available to the public by providers of electronic content aggregation services of insignificant fragments of content disseminated in periodical publications or on periodically updated websites for the purposes of information, public opinion or entertainment shall not require authorisation, without prejudice to the right of the publisher or, where appropriate, other rightholders to receive fair compensation. This right shall be unwaivable and shall be enforceable through the CMOs. In any case, the making available to the public by third parties of any image, photographic work or mere photograph published in periodical publications or on periodically updated websites shall be subject to authorisation.*

This article, in its second paragraph, establishes a special provision for search engines: *“Without prejudice to the provisions of the preceding paragraph, the making available to the public by service providers who provide search tools for isolated words included in the contents referred to in the preceding paragraph shall not be subject to authorisation or fair compensation provided that such making available to the public takes place without any commercial purpose of its own and is strictly limited to what is essential to offer search results in response to queries previously formulated by a user to the search engine and provided that the making available to the public includes a link to the page of origin of the contents.”*

Thus, in Spain, ancillary right exists in favour of press publishers for the aggregation of news and other copyrighted content available online by means of a statutory limitation that authorizes the aggregation of online contents subject to an equitable compensation, managed by the corresponding CMO. Search engines are also authorized to link to this copyrighted content, this time without any remuneration.

*If you are an EU country, have you addressed the transposition of Art.15 CDSM Directive? No*



#### 4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

*For instance, regarding cloud storage and compensation for private copying*

- Private copying:

Art. 31.2 TRLPI establishes: *“Without prejudice to the fair compensation provided for in Article 25, the reproduction, on any medium, without the assistance of third parties, of works that have already been disclosed shall not require the author's authorisation where the following circumstances, which constitute the legal limit of private copying, are simultaneously present: a) that it is carried out by a natural person exclusively for private, non-professional or business use, and for neither directly nor indirectly commercial purposes; b) that the reproduction is made from a lawful source and that the conditions of access to the work or other subject-matter are not infringed, c) that the copy obtained is not for collective or profit-making use, nor for distribution for a price.”*

Thus, the law allows any natural person to make copies in any format (photocopies, handwritten, artistic, digital, etc.) of all types of lawfully disclosed protected works and performances, as long as they are made for private use (neither professional nor business), without commercial, profit-making or collective purposes. The copy must also be made from a lawful source and be lawfully accessible.

Furthermore, article 31.3 expressly excludes from private copying: (a) reproductions of works that have been made available to the public in such a way that any person may access them from a place and at a time of his choosing, the reproduction of the work being authorised, as agreed by contract and, where appropriate, against payment of a price; (b) electronic databases; (c) software programs.

Compensation for private copying is regulated in article 25 TRLPI. It is enforced by means of a levy that is applied to equipment, devices and media that are "suitable" for making private copies. Only collecting societies are authorised and obliged to collect and distribute this compensation, and they must do so jointly (one-stop shop). The rates of the levy are set according to the copying capacity of the equipment, device or medium. The debtors of this levy are the manufacturers or importers of the equipment, devices or media, but the levy is passed on to the consumer in the sales price.

- “Press clipping” (press dossiers):

Art.32.1, paragraphs 2 and 3, establishes: *“Periodical compilations in the form of reviews or press reviews shall be regarded as quotations. Nevertheless where compilations of newspaper articles are made which consist essentially of their mere reproduction and such activity is carried out for commercial purposes, the author, provided he has not expressly objected, shall be entitled to equitable remuneration. In the event of express objection by the author, such activity shall not be covered by this limit*

*In any case, the reproduction, distribution or communication to the public, in whole or in part, of isolated journalistic articles in a press dossier that takes place within any organisation shall require the authorisation of the rightsholders”.*

On a practical level we find four situations concerned (directly or implicitly) by the legislator in Article 32.1 par. 2 and 3 TRLPI. These cases are the following: (i) the uses of the press that will be considered as quotations (and therefore covered by the limit); (ii) the creation of press reviews or press magazines for subsequent commercialisation (*press clipping companies*); (iii) the creation of press dossiers for



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internal distribution by an organisation; (iv) the creation of press dossiers or reviews by an organisation for external distribution (for example, a newsletter for a company's clients).

The only use that does not involve remuneration (and/or express authorisation) is the use of the press that will be considered as quotation<sup>30</sup>.

In the other cases mentioned (ii to iv), we must first consider whether we are dealing with a total reproduction of isolated articles or whether we are dealing with a press review and, in the latter case, whether the author has expressly objected to this use of his work, in order to obtain the relevant authorisation if necessary or to remunerate him/her appropriately.

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<sup>30</sup> For benefit from the limit, the press review would not basically involve a mere total or partial reproduction of journalistic articles, and it should not be carried out for commercial purposes and that it should not be carried out within an organisation. Therefore, it should be understood that this limit could apply to press reviews that compile different journalistic approaches to a topic (e.g. by reproducing in whole or in part different articles with different points of view on a topical issue), which is not reproduced, distributed or communicated publicly within an organisation, distributed or communicated publicly within an organisation (it does not matter whether the organisation is public or private or whether it is a for-profit or not-for-profit organisation) and which is not produced for commercial purposes (which need not be directly for profit, e.g. not distributed free of charge to a company's customers). Thus, the application of this limit, as such, will have a very limited application.