LEGAL ANALYSIS OF THE PROPOSED AMENDMENT OF BROADCASTING ACT No 53/2000

A. THE SCOPE AND AIM OF THE PROPOSED AMENDMENT

A.1 The scope of the Proposed Amendment

The Proposed Amendment to the Broadcasting Act n° 53 of 17 May 2000 (the **Broadcasting Act**) introduces ownership restrictions on holdings in radio and television broadcasting and defines a number of other restrictions prohibiting certain type of companies from obtaining or retaining a broadcasting licence:

"*The issuance of broadcast licence is subject to the following conditions:*

a. *It is not permissible to issue a broadcast licence to an enterprise whose main business is unrelated to media operations. Also it is not permissible to issue a broadcast licence to an enterprise which is partly or wholly owned by a corporation or a conglomerate with a dominant market share in any field of business activity. Nor is it permissible to issue a broadcast licence to an enterprise in which the ownership share of another enterprise exceeds 25%. Also, it is not permissible to issue a broadcast licence to an enterprise if the aggregate ownership share of other enterprises within the same conglomerate exceeds 25%. Also, it is not permissible to issue a broadcast licence to an enterprise if it or other enterprises in the same conglomerate hold an ownership share in a newspaper's publishing company or if it is partly or wholly owned by such an enterprise or conglomerate.*

b. *The provision of Point A also applies if there are between enterprises close ties other than those of a conglomerate which may entail dominance.....*"

A.2 The aim of the Proposed Amendment

The Comments on the Proposed Amendment state that "*the principal objective of this proposed amendment is to ensure that ownership of media enterprises and concentration in the media market do not impede desirable variety in the media market in Iceland. The proposed amendment is predicated on generally accepted views on the importance of the media for freedom of thought and expression in a modern democratic society. The media are of key importance as forum for expressing differing views on general political, cultural and social issues. The media, therefore, are important for the exercise by individuals of their rights to freedom of thought and expression. In a democratic society the media's important role in this respect gives rise to the demand that the public be served by multi-faceted, independent and strong media enterprises. The proposed amendment reflects the view that Icelandic law should serve to protect these interests.*"

In other words, the Proposed Amendment is aimed at promoting media pluralism.

B. THE INTERNATION MEDIA LAW RELATED FRAMEWORK

Iceland is a Member of the Council of Europe and is a Party to the European Economic Area Agreement (the **EEAA**).

B.1 Summary of the relevant instruments at the level of the Council of Europe

Sustaining and promoting pluralism in the media is a long-standing objective of the Council of Europe.

The concept of pluralism implies the possibility for different groups and interests in society to express themselves in the media. This requires the existence of a variety of independent media outlets in relation to the size of the market and the resources available to it. Pluralism presupposes a variety of media reflecting different political and cultural views with due respect for the principle of editorial independence.

From a legal perspective, the notion of "media pluralism" should be understood as diversity of media supply, reflected, for example, in the existence of a *plurality of independent and autonomous media* (generally called structural pluralism) as well as a *diversity of media types and contents (views and opinions) made available to the public.* Therefore both the structural/quantitative and qualitative aspects are central to the notion of media pluralism. It should be stressed that pluralism is about diversity in the media that is made available to the public, which does not always coincide with what is actually consumed.

The concept of pluralism is comprised of two features. *Political* pluralism, which is about the need, in the interests of democracy, for a wide range of political opinions and viewpoints to be represented in the media. Democracy would be threatened if any single voice within the media, with the power to propagate a single political viewpoint, were to become too dominant. *Cultural* pluralism, which is about the need for for a variety of cultures, as reflects the diversity within society, to find expression in the media.

(a) Recommendations by the Committee of Ministers of the Council of Europe

At the level of the Council of Europe, there is no political agreement or will to adopt binding measures on media ownership as there is no consensus as to what sort of regulatory regime would be appropriate to guarantee pluralism.

The Council of Europe's interest in the question of media concentrations and pluralism though is closely related to its commitment to freedom of expression and to the maintenance of cultural diversity in Europe.

In order to assist the Council of Europe Member States in defining an appropriate framework in this area, it decided to draw up in a non-prescriptive manner a set of guidelines aimed at promoting pluralism and ensuring a minimum level of diversity of media supply throughout Europe. In that context the Council of Europe adopted a number of *non-binding recommendations* setting out principles and proposing a menu of quantitative and qualitative measures which Member States are invited to consider and examine in view of the possible implementation thereof in their domestic regulations. Such decisions are to be taken solely at a national level, after taking into consideration the distinct features of the national media landscape in each Member State.

(i) Recommendation N° R (94) 13

On 22 November 1994 the Committee of Ministers of the Council of Europe adopted Recommendation N° R (94) 13 on measures to promote media transparency (**Recommendation N° R (94) 13**).

One of the key issues, which arose, was in fact media transparency, as specific problems might arise in this area as a result of the current internationalisation of the activities of media enterprises and their integration into much larger economic groups. The Committee produced a series of *non-binding guidelines* for promoting media transparency provisions in the Member States, which were conceived as a menu of measures from which Member States are free to choose, in accordance with their situation and requirements. These guidelines cover:

- public access to (basic) information on the media;

- exchange of information on media transparency between national authorities;

- disclosure of information when granting a broadcasting licence to a company (e.g. on media ownership);

- disclosure of information following the grant of a licence (e.g. on media ownership);

- clear definition of the tasks and missions of the authorities responsible for ensuring transparency in the running of the broadcasting companies.

(ii) Recommendation N° R (99) 1

On the basis of information collected in 1997 by a network of national correspondents appointed by the different Member States of the Council of Europe, the Committee of Experts on Media Concentrations and Pluralism adopted Recommendation N°(99) 1 (**Recommendation N° (99)1**) on 19 January 1999. That recommendation outlines, for the attention of Member States, a number of possible non-binding measures to enhance media pluralism.

Recommendation N° (99) 1 defines media pluralism as a plurality of media companies (structural pluralism) as well as a plurality of media types and content (views and opinions) offered to the public. Therefore both structural/quantitative and qualitative aspects are central to the notion of media pluralism. It recommends that the Members States:

- examine the measures contained in an appendix to Recommendation N° (99) 1 and consider including these in their national law or practice where appropriate, with a view to promoting media pluralism;
- evaluate on a regular basis the effectiveness of existing measures to promote media pluralism and anti-concentration mechanisms, and examine the possible need to revise them in the light of economic and technological developments in the media field.

According to the Recommendation, the following measures could strengthen pluralism in the media.

(A) Ownership and anti-concentration restrictions

Recommendation N° (99) 1 states that the Members States may examine the possibility of defining thresholds. The notion of permissible thresholds which a single media company or group should be allowed to control in one or more media sectors is considered valid for curbing media concentrations and protecting pluralism.

Such thresholds can be based on one or a combination of elements, such as:

- a company's audience share;
- the company's turnover;
- restrictions on capital shareholdings.

Audience share thresholds for press, radio and television undertakings, calculated as a percentage of total television viewing, radio listenership or newspaper readership in the transmission or dissemination area of the media undertaking in question, have been largely discussed at both the national and European levels in recent years, and are becoming one of the most favoured regulatory approaches for the protection of pluralism. In contrast, measures based on *capital share restrictions* in media entities are becoming *less used by Member States* as they are easy for companies to get around and are therefore less effective.

Recommendation R (99) 1 only asks Member States to *examine the opportunity of defining thresholds* but does not specify where the upper limits should be set. The decision about precisely where upper audience share, capital share or revenue limits should be fixed is to be taken at the national level, after considering the side of the media market, the level of resources available to it and the level of diversity of ownership economically viable for the market in question.

It is considered that audience share thresholds can be valuable in securing pluralism, although it is also acknowledged that in practice they are difficult to implement.

Therefore, if Member States introduce such thresholds for commercial broadcasters, *a number of complementary measures* should also be introduced and come into effect once a company has reached the permitted thresholds. One possibility could be not to grant new broadcasting licences to such companies. If member States do not provide for complementary measures of this type, the audience share thresholds *per se* might not be effective in safeguarding pluralism.

Such complementary measures concern:

- the role of the regulatory bodies and the control they can exercise:
  - when awarding a licence via procedures that guarantee transparency;
  - following the issue of the licence (e.g. powers to act against harmful concentration operations);
- measures above ownership restrictions.

Although the existence of a diversity of separate and autonomous owners of broadcasting and newspaper publishing will *encourage* the conditions for political and cultural pluralism, diversity of media ownership will not always *guarantee* diversity of media output. For example, when individual media owners rely on the same content or sources of media content as their rivals, then standardisation of output will occur, irrespective of diverse ownership. Therefore, to secure political and cultural pluralism, measures above those that focus solely on restrictions on ownership may be needed (e.g. measures regarding the separation between ownership and editorial content, quotas for certain (types of) programmes, frequency sharing, a strong public broadcaster, supervisory powers for the regulating bodies).

Other policy instruments should therefore be used in conjunction with ownership restrictions to encourage plurality within the supply of media.

(B) Media content related guarantees

As regards the broadcasting sector, it is acknowledged that rules on the production and broadcasting of diverse content can be useful in promoting pluralism. The Recommendation mentions "quotas" of original programmes, in particular with a view to ensuring that radio and television services reserve a minimum proportion of their transmission time for content – especially news or current affairs content – which originates exclusively from that service, that is, which is made by that broadcaster or commissioned by it from independent producers. Measures of this type can serve to counterbalance the tendency of different broadcasters relying on the same journalistic sources and "raw material", which leads to a standardisation of output and thus represents a threat to media pluralism.

Another measure mentioned under this heading refers to "*frequency sharing*" arrangements in order to facilitate the access of independent broadcasters (holding a licence) to the programme services of a major broadcaster. It is acknowledged that a measure of this type may be difficult to implement (nevertheless some European countries already foresee programming windows in their legislation). In view of the foregoing, the Recommendation only mentions this possibility under exceptional circumstances, for instance, when a broadcaster is in a dominant position. In this situation, it could be

argued that such a broadcaster should reserve some broadcasting space for the programming of independent broadcasters, who otherwise would not have the possibility of reaching the airwaves. In the event measures of this type are put into practice, it should be ensured that they do not lead to State interference in the programming schedules of broadcasters.

(C) Editorial independence

The question of media owners and how they can influence the editorial content of their outlets has a bearing on media pluralism. It is generally considered that pluralism is better safeguarded when ownership and editorial content are kept separate. This being said, in many countries media owners are entitled to determine the political/editorial line of their media and any restrictions preventing them from being involved in the day-to-day operation of their company would be very difficult to accept. The relationship between the editor and the owner is, to some extent, constitutionally regulated in some countries.

Therefore, the Recommendation N° R (99) 1 is not at all prescriptive on this question and simply provides that member States *may consider ways of encouraging media organisations* to secure the rights of editors to decide on editorial matters. It is acknowledged that this is an issue, which has primarily to be dealt with via self-regulation.

One possibility, which is already found in a number of European countries, is the execution of "editorial agreements" between owners and editors to secure the independence of the latter to take the lead on all editorial decisions free of interference from the proprietors. The terms of such agreements vary and most are constituted on an informal or voluntary basis. There are, however, examples of editorial agreements defined by law or statute (e.g. in Belgium).

(D) Public service broadcaster

The concepts of democracy, human rights and the free circulation of information and ideas are inextricably linked to the notion of public service broadcasting. It should also be recognised that pluralism is well served by the existence of publicly funded non-commercial broadcasting organisations, which are wholly dedicated, to the provision of a range and diversity of high quality programming and to accurate and impartial news coverage. In this respect, it is important to recall Council of Europe Recommendation No. R (96) 10, which stresses the need to guarantee the independence of public service broadcasting. Furthermore, ways of strengthening the internal pluralism of such broadcasters should be examined.

(E) Support measures for the media

Support measures for the media are generally divided into two distinct categories: direct subsidies and indirect incentives, such as fiscal reductions. It is generally considered that measures of this type can be useful to enhance media pluralism and diversity and serve to counteract market distortions and failures.

(F) Scientific research

Given the complex and sometimes ambiguous relationship between media concentrations and pluralism, it is considered important that further research in this area is conducted. Member States are therefore invited to commission or support research on this subject. The specific impact which the new communication technologies and services may have on pluralism should be the main focus of future studies.

(b) The European Convention on Transfrontier Television

The European Convention on Transfrontier Television of 5 May 1989 (the **ECTT**)[1], and in particular its article 10*bis* states that the Parties to the ECTT shall endeavour to ensure that programme services transmitted or retransmitted by a broadcaster do not endanger media pluralism.

The Comments on this provision state that *"this paragraph emphasises in a more general manner the responsibility of the transmitting Parties in view of the importance of maintaining media pluralism, without however imposing any specific obligations on them."*

A minimal form of transparency is however an obligation under the ECTT.

"Article 6 – Provision of information
1 The responsibilities of the broadcaster shall be clearly and adequately specified in the authorisation issued by, or contract concluded with, the competent authority of each Party, or by any other legal measure.
2 Information about the broadcaster shall be made available, upon request, by the competent authority of transmitting Party. Such information shall include, as a minimum, the name or denomination, seat and status of the broadcaster, the name of the legal representative, the composition of the capital, the nature, purpose and mode of financing of the programme service the broadcaster is providing or intends providing."

(c) The European Convention for the Protection of Human Rights and Fundamental Freedoms

Finally, one must consider the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (the **ECHR**), and in particular the freedom of expression guaranteed by article 10:

"Article 10 – Freedom of expression

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Although article 10 of the ECHR does not expressly mention media pluralism, it is clear from the case law of the European Court for the Protection of Human Rights that pluralism of opinions and views[2]:

- is essential for freedom of expression and must therefore be guaranteed by the Member States who are the *"ultimate guarantor of the principle of pluralism"*[3];

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[1] As amended according to the provisions of the Protocol ETS N° 171, which entered into force on 1 March 2002.

[2] This basic perspective was defined in *the Observer & Guardian* case and the *Sunday Times* case (both dated 26 November 1991, Vol. 216, §§59-60 and Vol. 217, §§50-51) and has been repeated ever since by the European Court for Human Rights.

- may be a legitimate interest for restrictions on that same freedom of expression under article 10 § 2 of the ECHR if any measures to guarantee media pluralism is:
  - laid down in law;
  - proportionate and necessary in a democratic society.

The European Court for the Protection of Human Rights also held that, under the third sentence of §1 of article 10, States are permitted to regulate through a licensing system the way in which broadcasting is organised in their territories, particularly its technical aspects. These are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at the national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interference whose aim is legitimate under the third sentence of paragraph 1, even though it may not correspond to any of the aims set out in paragraph 2. The compatibility of such interference with the ECHR must nevertheless be assessed in the light of the other requirements of paragraph 2 (see *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 25, 21 September 2000; *Radio ABC v. Austria*, judgement of 20 October 1997, *Reports of Judgements and Decisions* 1997-VI, pp. 2197-98, § 28; *Informationsverein Lentia and Others*, 24 November 1993, Series A no. 276, p. 14, § 32; and *Groppera Radio AG and Others v. Switzerland*, judgement of 28 March 1990, Series A no. 173, p. 24, § 61).

This implies that the proposed measures must be relevant to achieve the objectives of the proposed legislative measures (i.e. enhancing pluralism) and that Contracting States should opt for measures that are the least restrictive for the freedom of expression, as guaranteed under article 10 of the ECHR.

B.2 Analysis of the proposed amendment

(a) No legal obligation

There is no obligation *per se* under international law for Iceland to introduce ownership rules in its domestic broadcasting laws.

The Council of Europe only adopted recommendations with the overall objective of outlining in a non-prescriptive manner a number of principles or policy measures which could be useful to Member States when designing their national rules to protect pluralism and limit concentrations. Ownership rules are only one of the measures proposed by the Council of Europe next to appropriate safeguards for editorial independence. There is however *no legal obligation* to adopt restrictive media ownership rules. The Council of Europe even explicitly warns Member States that they must take into consideration the size of the relevant media market (including the level of resources available to it) when examining the measures suggested in the recommendations.

(b) Conformity of the Proposed Amendment with mandatory European media law

Iceland is however legally bound by the provisions of the ECHR. The Proposed Amendment must therefore comply with article 10 of the ECHR, and must in particular, be laid down in law and be proportionate and necessary in a democratic society.

(i) Laid down in law

It is clear that the restrictive media (ownership) rules will become a part of the Broadcasting Act and will therefore be 'laid down in law'.

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[3] European Court of Human Rights, *United Communist Party of Turkey v. Turkey*, 30 January 1998.

However, subparagraphs a and b of the Proposed Amendment are vague and imprecise.

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Second, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his or her conduct: a citizen must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (*Sunday Times* judgement, p. 31, § 49; *Silver and Others* judgement, 25 March 1983, p. 33, §§ 87 and 88).

It could be open to debate whether the first two sentences of subparagraph a and the whole of subparagraph b of the Proposed Amendment are precise enough to allow a person to foresee the consequences of (non-) compliance. As we are not qualified to advise under Icelandic law, please refer to your Icelandic legal advisers for this analysis.

(ii) Proportionate and necessary in a democratic society

The European Court for the Protection of Human Rights held that the adjective "necessary" within the meaning of Article 10 § 2 of the ECHR implies the existence of a "pressing social need". The Contracting States have a certain margin of judgement in assessing the need for interference. That margin, however, goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance – frequently stressed by the Court – of open and free debate in a democratic society and the free flow of information (see *Tele 1 Privatfernsehgesellschaft mbH*, cited above, § 34, and *Radio ABC*, cited above, p. 2198, § 30).

In light of the case law of the European Court for the Protection of Human Rights, we believe that the Proposed Amendment is not proportionate and not necessary in a democratic society as it does not serve a pressing social need taking into consideration the specific features of the Icelandic media landscape.

In general it is clear that the specific situation in the Icelandic media market does not justify the Proposed Amendment given the small number of inhabitants of the country and the relatively large number of national[4] media operators (television, radio, print), including a (strong) public service broadcaster. Pluralism of the media – quantitative (the number of players on the market) and qualitative (the ability to express different views and opinions) – seems therefore to already exist.

One may also notice that the absence of statutory ownership and anti-concentration restrictions was instrumental for the survival of two newspaper after the merger between Baugur Group and the almost bankrupt Frett. The bankruptcy of Frett would undoubtedly have reduced the diversity of media supply in Iceland and hence the possibility for different groups in society to have their views reflected in the media. In smaller media markets in Europe the involvement of private investors positively influences media pluralism provided the appropriate safeguards and processes are in place to ensure editorial independence.

We also believe that the Proposed Amendment only focuses on one single aspect of possible measures for enhancing pluralism and does not have a broader scope as suggested by Recommendation N° R (99) 1. The Proposed Amendment is not accompanied by complementary measures and opts for the most restrictive approach.

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[4] Without even mentioning the possibility to capture foreign broadcasters (e.g. via satellite).

Other measures that may effectively enhance media pluralism in the Icelandic broadcasting market by way of less restrictive actions are, amongst others:

- Compulsory content regulations to ensure a high level of editorial quality and independence;
- A minimum proportion of transmission time for news or current affairs content produced by the broadcaster;
- Editorial codes and statutes;
- Rules on impartiality and non-discrimination in information and news programmes;
- Statutory restrictions on the sourcing of news content (or other forms of cooperation) by television networks;
- Supervision by sector specific authorities regarding content regulations (including sanctions).

In conclusion, we believe that the proposed measures do not stand the proportionality test of article 10 of the ECHR. The measures are not proportionate to the policy objectives which can equally be achieved by other statutory means. These alternative statutory measures have equally been suggested in the Recommendations of the Council of Europe and are less intrusive from a freedom of expression point of view.

(iii) Comparison with other countries

An overview of the situation in a number of other European countries shows that there is an evolution towards a more flexible approach, relaxing ownership and anti-concentrations rules. There is a general feeling that media pluralism (plurality of output) is not necessarily achieved by severe cross ownership and concentration restrictions and can be replaced or completed by other, less restricting measures on the content and quality side.

In *Belgium* there are no specific media ownership rules. The general principles of national competition law will apply in case of proposed mergers or acquisitions. Media pluralism is guaranteed via:

- A number of measures and rules regarding editorial independence and the quality of the content (code of good behaviour for the newsrooms, obligation to be impartial, etc.);
- Supervising bodies, independent from the Government, competent to take binding decisions.

In the Flemish part of Belgium, the Government is investigating the need for a monitoring system for media concentration, but is not planning to introduce ownership restrictions based on thresholds.

The *United Kingdom* adopted in 2003 legislation resulting in a major reform of communications regulation (the Broadcasting and Communications Act 2003). This Communications Act abolishes the ownership restriction under previous legislation which prevented persons or companies from outside the EEA from holding broadcast licences. A second change maintains the restriction on ownership by a concern holding more than 20% of the newspaper market in relation to Channel 3 licences, but lifts such restrictions in relation to Channel 5 licences, the newest of the terrestrial channels. In addition to this, the concentration restrictions are lifted; it will now be possible for a single company to own all the Channel 3 licences. Restrictions on ownership of radio broadcasting licences are also relaxed.

Content regulation will ensure the quality, impartiality and diversity of broadcast programming.

Competition law will tend to encourage dispersed ownership and new entry.

In 2003, the Norwegian Media Ownership Authority proposed that the national ownership limit for the size of the market share any given player can have in newspapers, television and radio be increased from 20 to 40 percent, at the same time as it is suggested that regulation at local can be abolished.

By the end of May 2004 *France* will adopt a new Electronic Communications and Audiovisual Communications Services Act that will amend the currently Freedom of Communication Act 1986. The intent of the French legislator is to grant flexibility to the cross ownership rules in order to encourage specific types of television services.

In *Germany* the KEK is an independent regulatory body with nation-wide jurisdiction. It examines whether diversity of opinion is assured in connection with the nation-wide distribution of television programmes (Article 36 paragraph 1, first sentence RStV).

The KEK's examination is primarily based on viewer rates. A company may by itself or through companies attributable to it broadcast nation-wide in the Federal Republic of Germany an unlimited number of television programmes, unless it is thereby able to exercise a predominant impact on public opinion. It has a predominant impact on public opinion if the programmes attributable to one company achieve an average annual viewer rating of 30 per cent. The same shall apply if the company reaches an audience share of 25 % and holds a dominant position in a related, media-relevant market or an overall assessment of its activities in television and in related, media-relevant markets suggests that the influence exercised as a result of those activities is equivalent to that of a company with a viewer rating of 30 per cent. In addition, the KEK has to present every three years or upon the request of the states a report on the state of media concentration and on measures to secure diversity of opinion in the private broadcasting sector, taking into account

The case law of the Federal Constitutional Court defines specific obligations to be observed by state legislation dealing with broadcasting. The federal states are under a positive duty to enact rules ensuring that television and radio will serve the purpose to promote the free formation of individual and public opinion. This aim is promoted by a standard of "balanced diversity" of all broadcast programs; communication law has to establish a framework, which will allow different viewpoints to gain access to the medium. Such a standard mandates safeguards against concentration of ownership in the broadcasting industry and against accumulation of power to dominate public opinion. For this reason the legislative bodies of the Länder are specifically obliged to provide for mechanisms which will contain the concentration of control of media outlets; they have to do this in a way which will prevent the emergence of power to dominate communications.

In *the Netherlands* the Broadcast Act contains a number of anti-concentration provisions based on market share in the newspaper sector. The possibility of a review of these rules is under discussion. Since 1999 a number of studies have been done by a special Royal Commission for media concentrations and (parliamentary) debate is ongoing. Since 2001 there is also a system for monitoring media concentrations. This monitoring results in an annual report by the Dutch supervising authority to the Government to identify areas where legislative action may be useful. In the 2002 Report the Dutch supervising authority proposed to relax the cross ownership restrictions in the newspaper sector and the television sector. However, it also recommended to strengthen the rules on editorial independence, even on a European level, via editorial statutes and an absolute separation between editorial content and commercial interests.

C. THE COMPETITION LAW RELATED FRAMEWORK

C.1 Executive summary

An implementation of the Proposed Amendments would prevent broadcast licences from being issued to certain enterprises, including enterprises which are partly or wholly owned by a corporation or a conglomerate with a dominant market share in any field of business activity. This and the other proposed restrictions would significantly hamper the provisions safeguarding the right of companies from other EEA Member States to establish themselves in Iceland with a view of being active in the broadcasting sector. Likewise, the provisions constitute a hurdle to the free movement of capital. In this context, a complaint may be lodged with the EFTA Surveillance Authority (the "**EFTA Authority**").

1. Freedom of establishment

Restriction

Article of 31 of the EEA Agreement stipulates that there are to be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State.

The Proposed Amendments to the Iceland Broadcasting Act do not allow for a broadcast licence to be issued to an enterprise:

- which has a main business unrelated to media operations;
- which is partly or wholly owned by a corporation or a conglomerate with a dominant market share in any field of business activity;
- in which the ownership share of another enterprise exceeds 25%;
- which belongs to a conglomerate in which the aggregate ownership share of other enterprises exceeds 25%; and
- which belongs to a conglomerate in which one or several enterprises hold an ownership share in a newspaper's publishing company or if it is wholly or partly owned by such an enterprise or conglomerate.

The Proposed Amendments impose severe restrictions on the ability of companies who meet the criteria specified above to invest in broadcasting companies in Iceland or to establish themselves in Iceland in order to be active in the broadcasting sector.

It follows that non-Icelandic companies which are to be considered "nationals" of the EFTA States or the EC Member States[5] meeting the criteria and seeking to establish themselves in Iceland for the purpose of engaging in broadcasting activities, will be hampered from doing so.

This constitutes a restriction to the freedom of establishment within the meaning of Article 31 of the EEA Agreement.

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[5] Article 34 states that companies or firms formed in accordance with the law of an EC Member State or EFTA State or having their registered office, central administration or principal place of business within the EEA, shall be treated in the same way as natural persons.

Mandatory Requirements

However, a restriction on the freedom of establishment can be justified either on the basis of Article 33 of the EEA Agreement or on the basis of the so called "mandatory requirements", which have been identified by the case law of the Court of Justice of the European Communities or the EFTA Court.

Article 33 of the EEA Agreement sets out a list of policy grounds which cannot be prejudiced by the provisions on freedom of establishment, even if they provide for special treatment for foreign nationals (discriminatory restrictions). Public policy constitutes one such justification. It does not seem possible to justify the above mentioned restrictions on this ground.

The so-called "mandatory requirements" are an open list of political objectives. They may form the basis for a justification by the government of Iceland for the Proposed Amendments, since the Proposed Amendments apply equally to undertakings and persons having the nationality of Iceland and to other undertakings and persons.[6]

The restrictions arguably aim at safeguarding, to a certain level, diversity in the media market. This policy goal of preserving pluralism in the media has already been accepted by the Court of Justice as a "mandatory requirement".[7]

Necessity Requirement

The case law of both the European Community courts and the EFTA Court sets out clear limitations to the extent in which a law-maker may rely on the mandatory requirements in order to justify an enactment imposing restrictions on the freedom of establishment. Such restrictions are subject to the requirements of proportionality and necessity.[8] Rules must be no more restrictive than is necessary to achieve the end in view.[9]

It follows that non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement can be justified only if they:

- are justified by overriding reasons based on the general interest;
- are suitable for securing the attainment of the objective which they pursue; and
- do not go beyond what is necessary in order to attain their objective.[10]

Restrictions forming part of a cultural policy intended to safeguard the freedom of expression will be in breach of the provisions stipulating the freedom of establishment if they go beyond the objective pursued. In particular, it can be questioned whether conditions affecting the ownership of organisations operating in the audio-visual sector can be regarded as objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.

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6 For an example of the level of justification required for discriminatory restrictions see Case E-3/98 of 10th December, 1998, which holds that the justification on grounds of public policy as envisaged in Article 33 envisages, in so far as it may justify the special treatment of foreign nationals, a perturbation of the social order which any infringement of the law involves and a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

7 Case C-353/89 *Commission v. The Netherlands*, [1991] ECR I-4069 (see also Case C-148/91 *Vereniging Veronica v. Commissariaat voor de Media*, [1993] ECR I-487).

8 See Case 352/85 *Bond van Adverteerders v. The Netherlands*, [1988] ECR 2085 and Case E-2/01 of 22nd February, 2002.

9 See, for example, Case-398/95 *Syndesmos ton en Elladi v. Ypourgos Ergasias*, [1997] ECR I-4047.

10 Case E-5/00 of 14th June, 2001.

Indeed, it could be argued that less restrictive alternatives exist. Examples would be the introduction of regulations which safeguard the independence of the editorial content of the programmes or the impartiality of the reporting, or measures related thereto.

These options seem preferable also with regard to the nature of the media market in Iceland, whose players have frequently experienced economic difficulties. In this regard, it would not be a favourable option to enact legislation which creates or maintains a fractured market.

2. Free movement of capital

Article 40 of the EEA Agreement provides that "within the framework of the provision of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States...".

The nomenclature of the capital movements which come within the reach of this provision is laid down in Annex I to Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. It clearly provides that "participation in new or existing undertaking with a view to establishing or maintaining lasting economic links is a "capital movement" within the meaning of Article 40 of the EEA Agreement."

Clearly, for the reasons identified above, the Proposed Amendments to the Broadcasting Act constitute a restriction within the meaning of Article 40 of the EEA Agreement.

Although the EEA Agreement does not contain a provision similar to Article 58, paragraph 2 of the EC Treaty (which provides that the provisions on the free movement of capital shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaty), it follows from the practice of the EFTA Authority that it will nevertheless accept restrictions on the free movement of capital which can be justified under the provisions on the freedom of establishment.

3. Bringing proceedings for an alleged breach of the EEA Agreement

Article 108 of the EEA Agreement provides for the establishment of the EFTA Court and the EFTA Authority.

Anyone may, in relation to a national measure which the complainant considers to be incompatible with a provision or a principle of EEA law, lodge a complaint with the EFTA Authority. The EFTA Authority has powers to try to bring the infringement to an end and may, where necessary, refer the case to the EFTA Court. A complaint must be submitted in writing. The EFTA Authority has prepared a specific complaints form which complainants may use.

Since national courts and administrative bodies are primarily responsible for ensuring that the authorities of the EFTA States comply with EEA law, recourse to remedy procedures before national administrative or judicial authorities may be considered either prior to or in parallel with a complaint to the EFTA Authority.

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