

[DE] Commission on Concentration in the Media authorises RTL's takeover of Sky

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At its meeting on 9 September, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK) approved, among other things, the acquisition of all shares in Sky Deutschland Fernsehen GmbH & Co. KG (Sky) and NBC Universal Global Networks Deutschland GmbH (NBCU) by RTL Deutschland GmbH (RTL). Although the takeover would give RTL a television audience share of around 23% in Germany and have further concentration-related consequences for related markets such as the video-on-demand, advertising and rights markets, the KEK did not identify any serious concerns with regard to the safeguarding of media pluralism. The *Medienstaatsvertrag* (state media treaty - MStV) only considers there to be a potential risk when audience shares are higher.

The KEK monitors media concentration and ensures pluralism in private television at national level on behalf of the state media authorities. Among other things, it assesses changes in shareholdings in order to determine whether they would give a television broadcaster a dominant influence over public opinion. It does this within the framework of the so-called audience share model. Article 60 MStV stipulates that any television broadcaster may provide any number of television services unless it would thereby gain a dominant influence over public opinion. This is presumed to be the case if (i) a broadcaster and its services have an annual average audience share of 30% or more, (ii) an undertaking has an audience share of at least 25% and also has a dominant position in a media-relevant related market, or (iii) an overall assessment of a broadcaster's activities in television and media-relevant related markets shows that the influence on public opinion thereby achieved corresponds to that of an undertaking with a television audience share of 30%. The narrow limits that the *Bundesverwaltungsgericht* (Federal Administrative Court) has set for such an overall assessment must be observed.

However, according to the KEK's assessments, these conditions were not met in the case of RTL's takeover of Sky and NBCU. Sky is a pay-TV and streaming provider (SVoD) specialising in entertainment and sports content that provides a large number of its own channels and offers these as well as third-party channels via the Sky platforms. NBCU, which is itself wholly owned by Sky, broadcasts the 13th Street, SYFY and Universal TV channels for the German market. RTL is an

entertainment company encompassing all media genres. It broadcasts a large number of traditional television channels and is active in the streaming, print, digital, radio and podcast sectors. During the assessment period on which the KEK's investigation was based, the television channels of the aforementioned undertakings achieved a total audience share of 23.2%. Since RTL Television is, for plurality reasons, legally obliged to broadcast regional window programmes as well as provide airtime for independent third parties, a total of 5% must be deducted from its audience share in accordance with the MStV. The remaining audience share of 18.2% does not meet the MStV threshold for media concentration concerns in the television sector. The takeover and bundling of the RTL+, WOW and Sky Stream streaming platforms will make RTL the third-largest SVoD streaming provider in Germany behind Netflix and Amazon Prime Video. The merger between these powerful providers of free TV, pay TV and streaming services will also have an impact on media-relevant markets such as rights acquisition, customer loyalty and television advertising (which in Germany is primarily dominated by the duopoly of the RTL and ProSiebenSat.1 broadcasting groups). According to the case law of the Federal Administrative Court, however, a television audience share below 20% is generally not considered high enough to create a dominant influence over public opinion, even taking into account activities in related media-relevant markets. For this reason, the KEK was unable to include the effects of the merger outside linear television broadcasting in its assessment, since these lie outside the scope of the MStV's current review process (which does not yet take into account the European Media Freedom Act).

With regard to the merger's effects on the internal market, corresponding merger control proceedings are also pending before the European Commission. The Commission will have to examine the competition law implications of the takeover within a broader framework.

Pressemitteilung der KEK

<https://www.kek-online.de/presse/pressemitteilungen/aktuelle-entscheidungen-der-kek-25/>

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