[DE] Media Law Reservations about Springer/ProSiebenSat.1 Merger

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On 10 January 2006, the Kommission zur Ermittlung der Konzentration im Medienbereich (Commission on Concentration in the Media - KEK) decided that it could not approve the proposed merger between Axel Springer AG and ProSiebenSat.1 Media AG.

The procedures (nos. KEK 293-1 to 293-5), which were submitted to the KEK on 8 and 17 August 2005, concern Springer's buy-out of ProSiebenSat.1 (see IRIS 2005-9: 8). The takeover is also being investigated by the Bundeskartellamt (Federal Cartel Authority), which has already stated that the merger is likely to be prohibited.

The KEK acts on behalf of the responsible Landesmedienanstalten (Land media authorities). In this particular case, these are the supervisory bodies in Bavaria (BLM), Berlin-Brandenburg (mabb) and Rhineland-Palatinate (LMK). According to Art. 36.1.2 of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), the KEK is particularly responsible for investigating whether changes in ownership relations (Art. 29 RStV) are likely to threaten plurality of opinion. Such changes should only be deemed acceptable if a licence could still be issued in the changed circumstances, (see Art. 29.3 RStV). According to Art. 26.1 RStV, a licence may not be granted if the new undertaking acquires a controlling influence. KEK decisions, according to Art. 37.1 (in connection with 37.3) RStV, are binding on the other organs of the responsible Land media authorities. This does not affect the right of the body of the Land media authority concerned that is responsible for licensing decisions (and the approval of changes in ownership relations) to refer the matter to the Konferenz der Direktoren der Landesmedienanstalten (Conference of Directors of the Land Media Auhtorities - KDLM) within one month of the KEK's decision.

In the present case, the KEK decided that the merger would give the undertaking a controlling influence. It based its decision on the "material fact" referred to in Art. 26.1 RStV, after noting that, on account of the 22.06% viewer rating of the programmes attributable to ProSiebenSat.1 Media AG (in the reference period August 2004-July 2005), the assumption described in Art. 26.2 RStV did not apply. However, it states that Art. 26.2 acts as a model and shows "that the national television viewer rating is a central criterion for deciding whether a controlling

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influence is produced". The KEK then examined whether the combination of the undertaking's television and other media activities would give it a controlling influence.

The KEK mentions the other media markets that should be taken into account. These other markets are relevant firstly if they are either significant to the formation of public opinion ("public markets") or likely to strengthen the influence acquired through television. Secondly, it also depends on the extent to which the market is comparable with national television ("relationship"). The degree of relationship depends on "the comparable features of the service that have the potential to influence public opinion". According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), these are "primarily" suggestive power, breadth of impact and topicality.

Daily newspapers, in the KEK's view, form a particularly closely related market. Here, the KEK expressly deviates from the cartel law point of view the grounds that it is following the provisions of the Rundfunkstaatsvertrag, which takes viewer ratings into account for national television without distinguishing between different genres or distribution methods. In order to calculate viewer ratings, the KEK applies a "conversion factor" of two-thirds of television viewer ratings. The “Bild” newspaper's 26% share in the overall daily press market is therefore converted into a viewer rating of 17%.

Other shareholdings of Axel Springer AG which are particularly relevant to the investigation are in the markets for programme guides, public interest magazines, radio and online content.

In total, the company's cumulative viewer rating is calculated at 42%.

The undertaking's projected influence over public opinion is not sufficiently reduced by "circumstances designed to increase plurality". The KEK points out first of all that the regional window programmes currently broadcast by Sat.1 do not fulfil the conditions laid down in Art. 25.4 RStV (version in force following the 8th amendment). However, even if these conditions were considered met, and taking into account the provision of transmission time for third parties, the resulting 5% bonus would not be sufficient to prevent a controlling influence.

Secondly, the KEK states that Springer was not prepared to give up its plan to acquire ProSieben or Sat.1, the channels with the widest audience amongst those of the group being taken over.

Thirdly, even if other measures were taken to increase plurality, the merger would still be questionable from a media law perspective. Various models for creating an advisory council have been discussed. Springer rejected a proposal outlined by the KEK for such a body with extensive powers, including in economic matters, in

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relation to Sat.1, for example. In addition, neither the advisory council model proposed in Art. 32 RStV nor the advisory council suggested by Springer, covering all broadcasters, could be considered acceptable.

As mentioned above, any of the Land media authorities concerned could refer the matter to the KDLM before the deadline. The KDLM would have to give its decision within three months. Otherwise, the KEK's decision will remain binding.

Pressemitteilung der KEK zum Beschluss vom 10. Januar 2006

http://www.kek-online.de/cgi-bin/resi/i-presse/362.print

KEK press release concerning the decision of 10 January 2006

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