[DE] BayVGH Upholds Axel Springer AG Complaint about P7S1 Takeover

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On 15 February 2012, the Bayerische Verwaltungsgerichtshof (Bavarian Administrative Court - BayVGH) upheld a complaint by the German publishing house Axel Springer AG against the Bayerische Landeszentrale für neue Medien (Bavarian New Media Office - BLM).

In 2005, Axel Springer AG planned to take over the media group ProSiebenSat.1 Media AG (P7S1) by means of a buy-out (see IRIS 2005-9/13). The Kommission zur Ermittlung der Konzentration im Medienbereich (Commission on Concentration in the Media - KEK) refused to grant the permission required under media law for the planned takeover on the grounds that it could give Axel Springer AG a dominant market position (see IRIS 2006-2/13). This decision was officially implemented by the BLM as the responsible Land media authority. The Bundeskartellamt (Federal Cartel Authority) also prohibited the takeover on the basis of the Gesetz gegen Wettbewerbsbeschränkungen (Act against Restrictions of Competition - GWB) (see IRIS 2006-4/16); this decision was confirmed by the Bundesgerichtshof (Federal Supreme Court) (see IRIS 2010-7/12). The publishing house gave up its takeover plans, but sought a court judgment declaring the decision to refuse permission as unlawful. The BayVGH, to which the case was referred, initially rejected Axel Springer AG's appeal against the lower-instance ruling on procedural grounds (see IRIS 2009-9/12). This decision was quashed by the Bundesverwaltungsgericht (Federal Administrative Court), which referred the matter back to the BayVGH (see IRIS 2011-2/18).

In the latest judgment, the Administrative Court decided that the KEK had "overstepped the boundaries of its decision-making powers in several ways". The crucial factor in the decision (not) to grant approval of the takeover under media law was the overall audience share. At the time in question, P7S1's share had been 22.06%, much lower than the 25% threshold (Art. 26(2) and (3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement) - RStV). Therefore, the fact that the appellant was present in other media-relevant markets should not have been taken into account. Furthermore, the Rundfunkstaatsvertrag provided that regional window programmes and transmissions by third-party broadcasters should be deducted from the overall audience share figures; in this case, this would have reduced the share by approximately 5% (Arts. 26(3) and (5), and 25 RStV). The arguments put forward by the KEK also did not represent

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“particular circumstances” under which broadcasters could, in exceptional cases, be deemed to hold a dominant market position even if their audience share was below the threshold.

The BayVGH’s decision cannot be appealed.

Urteil des BayVGH vom 15. Februar 2012 (Az. 7 BV 11.285)

http://www.vgh.bayern.de/BayVGH/documents/7BV11.285.pdf

Judgment of the BayVGH of 15 February 2012 (case no. 7 BV 11.285)

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