Court clarifies rules on cross-media mergers

In a landmark ruling of February 15, 2012, the Bavarian Higher Administrative Court delivered an interpretation of the German cross-media ownership restrictions. For the first time ever, these provisions had been subject to juridical review. The lawsuit was brought by Axel Springer, Europe's largest publishing house, which in 2005 had attempted to acquire ProSiebenSat.1, Germany's leading private broadcaster. This would have been a €4 billion cross-media merger, the largest so far in German history. However, the acquisition was blocked for both competition reasons (by the Federal Cartel Office, "**FCO**") and for media plurality reasons (by the German media ownership Commission, "**KEK**"). Axel Springer had challenged both vetoes in court. The FCO veto was eventually upheld by the German Federal Supreme Court in June 2010, whereas the KEK veto has now been declared unlawful by the Bavarian court.

German media concentration law provides that no company may obtain "predominant power of opinion" (*vorherrschende Meinungsmacht*) in nationwide television. Such predominance is legally assumed to be in excess of 30% audience share, or – alternatively – when exceeding a 25% audience share threshold where a broadcaster also has relevant activities in other media markets.

In the case at hand, ProSiebenSat.1 accounted for only 22% audience share, but at the same time, Axel Springer was very strong in the newspaper market (with its flagship tabloid "**BILD**") and in other media markets such as online media and program guides. KEK therefore added ProSiebenSat.1's actual audience share (22%) to Axel Springer's "virtual" television audience share of 25%. The latter was determined by applying a certain coefficient to Axel Springer's share in other media (eg, 26% share in the newspaper market were considered to resemble 17% of television audience share). KEK then assessed the result of this calculation (22% + 25% = 47%) under the statutory 30% threshold as the ultimate limit on television audience share – and blocked the merger on that basis.

The case was therefore about the meaning of the statutory 25% audience share threshold: is it a binding minimum for the KEK to consider other media activities in its assessment at all, or is the KEK generally free to apply an overall plurality test even if the audience share threshold is not met. Not surprisingly, KEK took the latter position, whereas Axel Springer argued in favor of a binding minimum threshold. This underlying legal question had already been discussed in a prior ruling by the Federal Administrative Court on the same matter which set the grounds for the Bavarian court to now decide on the merits of the case. The Federal Administrative Court held that the 25% threshold is not absolutely binding, but that the KEK may only undercut it if (a) the broadcasters' actual audience share is at least "close" to the statutory threshold, and if (b) the KEK must explicitly justify why the facts of the actual case are so special that it required a decision beyond the statutory audience share limits.

The Bavarian court applied this ruling to the actual case – and ruled that KEK's decision failed to meet either requirement. At 22%, ProSiebenSat.1's actual audience share was too far away from the 25% threshold so for this reason, KEK would not have been entitled to take Axel Springer's other media activities into account for its decision. And moreover, KEK did not sufficiently explain why this particular case had required it to render a veto beyond the audience share thresholds. The court therefore concluded that KEK exceeded its powers in multiple ways.

The ruling sends a clear message to investors in the German media market. German media concentration law is in fact not as unpredictable as it seemed after the Springer/ProSieben case. Quite the contrary: There is no general plurality clause, but statutory law provides for clear limits – and opportunities – to allow cross-media mergers.

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