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The Federal Cartel Office Perspective

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Abstract

This article focuses on the German television (“TV”) market from an antitrust perspective, limited to some competition aspects of the technical and program side of the German TV market. On the technical side, we are in a situation of an emerging market for digital TV where a TV household needs a decoder in order to transfer digital TV signals into analog TV signals, because most households still have analog TV sets and also to descramble encrypted pay-TV signals for subscribers. The other issue, the program side, is more what competition authorities are dealing with, in particular the Bundeskartellamt in its most recent prohibition decision.

THE FEDERAL CARTEL OFFICE PERSPECTIVE

*Dr. Markus Wagemann**

Thank you very much for the kind invitation and for the opportunity to give some comments on the thorough and extremely interesting contribution of Mr. Ulrich Koch. With regard to our enlarged panel, I am tempted to modify the title of our session to *More Competition Through More Discussants*. I do not intend, however, to compete with the other discussant, Mr. Claudio Cocuzza. From what I know about his statement, we will have rather complementary interventions. I will focus on the German television ("TV") market from an antitrust perspective, while Mr. Cocuzza will focus on the Italian TV market.

I entirely understand the complaints of Mr. Koch concerning the problems of regulation and the difficulties of the TV market, in particular concerning agencies and jurisdictions, and I would also agree that deregulation has by far not been achieved until now in Germany. But I would, as Mr. John Temple Lang did this morning, make a clear distinction between competition law and regulation in this sector. As time for interventions is still more restricted in this session, I will limit myself to some competition aspects of the technical and program side of the German TV market.

With regard to free-TV and pay-TV, we currently face a substantial technological change from analog to digital TV as has been pointed out in the presentation of Mr. Koch. Since 1994, we saw several projects attempting to launch digital pay-TV in Germany. There was in 1994, as most of you will know, the project of MSG Media Service,¹ which was prohibited by the European Commission (or "Commission"). Two years later, there was a project called Multimedia Betriebsgesellschaft, in which again Kirch and Bertelsmann, Deutsche Telekom, ARD ZDF, and some other interested parties were supposed to be shareholders. This joint venture operation has been cleared by the

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1. Commission Decision No. 94/922/EC, O.J. L 364/1 (1994) (MSG Mediaservice).

Bundeskartellamt.² Meanwhile, there were other projects that did not come to formal notification to competition authorities. By the end of 1997, we had the case concerning Premiere, mentioned by Mr. Koch, which was blocked by the Commission on May 27, 1998.³ This operation not only included a change of shareholdings in Premiere, the leading German pay-TV channel, but also the creation of two joint ventures, a decoder company for the cable network called BetaResearch and a company for satellite digital TV called BeatDigital, both with Deutsche Telekom, Kirch, and Bertelsmann as parent companies. Most recently, the change of shareholdings in Premiere again became an issue to the Bundeskartellamt. The increase of shares of Kirch and Bertelsmann in Premiere was notified notwithstanding the prohibition by the Commission pending in court, and prohibited by the Bundeskartellamt.⁴

In most of these cases two aspects were involved, the technical and the program aspect. On the technical side, we are in a situation of an emerging market for digital TV where a TV household needs a decoder in order to transfer digital TV signals into analog TV signals, because most households still have analog TV sets and also to descramble encrypted pay-TV signals for subscribers. The decoder represents in a way an essential facility or a bottleneck. A common technical platform has to be established in the market. As opposed to other areas of regulation and deregulation, i.e., energy, transport, etc., we do not have a preexisting essential facility that can be made available or where access can be granted. We are rather on the eve of the launch of a technical platform, and the effort of competition agencies and regulators is to guarantee an open platform that does not leave a potential for discrimination. This technical platform may either be an open decoder box (or "common interface") or a proprietary box. Even if a proprietary box were established, this box may be controlled by certain program suppliers or by a large group of shareholders where not a single one has exclusive control on the operating company. These alternatives of open or proprietary decoders controlled by certain program suppliers or by a large circle of shareholders are at stake in

2. See BIENNIAL REPORT OF THE BUNDESKARTELLAMT 1995/1996 142 (1997).

3. Commission Decision No. 99/. . ./EC, O.J. L 53/1, at 31 (1999) [hereinafter *Premiere*].

4. *Decision of 10 January 1998, B 6 - 72/98, WIRTSCHAFT UND WETTBEWERB 53 (1998).*

the cases I mentioned. In particular, the prohibition by the Commission in May 1998 focused on this issue. The case was actually very close to a clearance decision. In the end, it was a question of commitments, proposed by Kirch, Bertelsmann, and Deutsche Telekom, but finally an agreement could not be reached.⁵

The other issue, the program side, is more what competition authorities are dealing with, in particular the Bundeskartellamt in its most recent prohibition decision. The first problem is the definition of the relevant product market. This area may actually be a topic where Mr. Cocuzza and I do compete, as you will notice in the course of his statement. We learned from Mr. Koch that pay-TV is under strong competitive pressure from free-TV. I basically agree with Mr. Koch, but I would like to emphasize that this pressure comes from free-TV as a whole and not only from public free-TV channels. We have thirty TV channels in Germany: twelve public and eighteen private channels, all of which are free-TV channels. They undeniably exert a strong pressure on pay-TV. For pay-TV, Germany is therefore an extremely difficult product market. I would entirely agree with Mr. Koch on that point.

Nevertheless, in technical terms of market definition under antitrust law, pay-TV and free-TV are two different product markets. I think this distinction is a very important point and it has ultimately been recognized by Kirch and Bertelsmann in the proceedings before the Commission in early 1998. It is true that the two TV markets are very closely related to each other: the viewer rate is decisive for the prices for advertising and for revenues resulting from advertising. But, there are still different relationships between those who pay and those who offer the services: TV suppliers and viewers in pay-TV; TV suppliers and advertisers in free TV. What we have seen in the last ten years is that the free-TV advertising market has been a very dynamic market. There were considerable growth rates. I think private TV in Germany was launched in 1984 and developed particularly during the early 1990s. Growth rates, however, have been declining in most recent years. Advertising income is still growing but much slower. This decrease in growth is first due to the phenomenon that viewers are to some extent fed up with TV adver-

5. *Premiere*, O.J. L 53/1, at 31 (1999).

tising spots, especially during films. So limits are achieved in this respect. The second reason is probably that to an increasing extent premium films, i.e., Hollywood productions that are first in the cinemas and attractive sports events, have shifted to pay-TV channels. The Premier League in Germany or very attractive premium films are first shown in *Premiere*. Private TV suppliers try to achieve revenues through pay-TV and to promote pay-TV through those attractive programs.

This result was actually the situation when the *Premiere* case was brought to the Bundeskartellamt in the second half of 1998. The Bundeskartellamt argued that the concentration, which leads to a 50-50 joint venture of Kirch and Bertelsmann, would result in a strategy of the two groups coordinating their free-TV channels. Presently, as Mr. Koch said, we have strong competition in the TV advertising market. There is a risk, however, that this competition will no longer exist if the two leading free-TV suppliers are also exclusively controlling the single pay-TV supplier in Germany. There may be a strategy of so-called complementary programming between free-TV and pay-TV in the future.

Limiting my remarks to that, I would just like to emphasize that we have an emerging digital pay-TV market with a large number of channels. This market, even if it is emerging very slowly in Germany due to the wide range of free-TV channels, must be protected and we cannot allow a monopoly in digital pay-TV as this market is just in the stage of being established. The idea from an antitrust perspective is to avoid a foreclosure effect in this market. I noticed that in her intervention on the aviation industry and air transport cases decided by the Commission and by the Bundeskartellamt, Ms. Romina Polley pointed out that it should be ensured that market entry remains possible. As to pay-TV, competition authorities are equally worried that a new market might be foreclosed and further entry might become impossible.

My personal hope, and this is my very final remark, is that the technical development of digital TV will lead to a situation where regulation is no longer required to the extent we presently have it. We expect a very large number of digital channels. Licensing, therefore, will no longer be required and the problem of foreclosure effects may disappear. The technical develop-

ment in itself has a deregulatory effect and this result may, in the long run, even solve the jurisdictional mess we have in Germany.

Thank you very much for your attention.