

# Presentation of European Commission merger cases relevant to the audio-visual sector

## The EC competition rules relevant to the audio-visual sector

The European Commission has had specific merger control powers since the end of 1990 as part of its role under the Treaties in maintaining and developing effective competition within the common market. The main legal instruments governing Commission control over concentrations are the Merger Regulation (Council Regulation (EEC) No 4064/89), an Implementing Regulation of the Commission and a number of interpretative notices issued by the Commission. Under the EEA Agreement, the Commission's power has been extended, to some extent, to cover the EFTA side of the European Economic Area.

Other important provisions of the EU competition policy are contained in the EC Treaty itself. Article 85 (renumbered to Article 81 from the entry into force of the Treaty of Amsterdam on 1 May 1999) prohibits "... agreements between undertakings, decisions by associations of undertakings and concerted practises which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...". In the same way Article 86 (renumbered to 82) prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it ...". Article 90 (renumbered to 86) states that the competition rules, with limited exceptions, also apply to public-sector firms.

Directorate General IV is the Commission Service mainly concerned with the application of the competition rules. DG IV handles furthermore cases under the rules on state aid.

Not only the merger cases but also cases under the other provisions are relevant to the audio-visual sector. In May 1998 the Commission cleared the creation of a digital terrestrial pay-TV joint venture between Carlton and Granada, British Digital Broadcasting (BDB, later known as ONdigital) in the UK. This was done after some amendments to the notified agreements so that BDB would provide competition to the dominant incumbent operator, BSkyB.

In March 1999 the Commission cleared the creation of a company, Télévision par Satellite (TPS), to provide digital satellite pay-TV in France. TPS's parent companies are four French broadcasters, TF1, M6, France 2 and France 3, as well as France Télécom and Suez Lyonnaise des Eaux.

The agreements to create these companies were dealt with in accordance with the provisions under Articles 85 and 86 of the EC Treaty. The alliances are between companies which were not active or only had limited activities on the pay-TV market and were considered to be pro-competitive.

The EC rules on state aid in Article 92 to 94 (renumbered to 87 to 89) and public undertakings in Article 90 (renumbered to 86) are relevant to cases in the audio-visual sector. They concern, among other things, the role and functioning of public service broadcasters. Cases under these Articles are not dealt with in this paper.

## The system of the merger control

All concentrations to which the Merger Regulation applies must be notified to the Commission before they are put into effect. The Commission investigates all notified concentrations to assess whether or not they will create or strengthen a dominant position which significantly impedes competition in the common market or a substantial part of it. Concentrations which are found not to meet these criteria are declared incompatible and must not be implemented. However, the Commission may approve concentrations subject to enforceable commitments from the merging parties to modify the concentration in order to make it compatible.

Since its entry into force in 1990 the application of the principle laid down in the Merger Regulation has been developed through case law and practice. In 1997 the Council adopted its first amendments to the Regulation. By the end of March 1999 the Commission has decided in 947 cases, of which 60 have been approved subject to modifications by the parties in order to make the concentrations compatible with the common market (30 cases with commitments in phase I, the same number in phase II). There are 10 cases with a prohibition decision. A further 18 cases were referred wholly or partly to Member States.

Most cases notified to the Commission are cleared within one month, or six weeks, from the date of notification. If the Commission decides that it has serious doubts as to the compatibility of a concentration with the common market, it undertakes a more detailed, phase II, investigation, for which a further four months is allowed.

All concentrations with a Community dimension must be notified to the Commission. A concentration has a Community dimension if

- the aggregate world-wide turnover of all the parties concerned exceeds 5 000 million euros, and
- the aggregate Community-wide turnover of each of at least two parties exceeds 250 million euros, unless
- each of the parties achieves more than two thirds of its aggregate Community-wide turnover in one and the same Member State.

There is an additional set of lower thresholds applying to smaller operations that might otherwise have to be filed to competition authorities in the Member States. There are no special rules on Community dimension applying to the media sectors.

Member States may not apply their national legislation on competition to any concentration with a Community dimension. They may, however, take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation. Plurality of the media is regarded as a legitimate interest in this respect.

## Presentation of some merger cases

The Commission has dealt with a number of cases relevant to the audio-visual sector under the Merger Regulation. Some of the most well-known cases are briefly presented here. They were all subject to detailed, phase II investigation.

In the RTL/Veronica /Endemol case <sup>(1)</sup>, the Commission intervened against a proposed joint venture (Holland Media Groep, HMG) between two broadcasting companies operating in the Netherlands and a Dutch producer of television programmes, Endemol. This operation would have led to the creation of a dominant position for HMG on the Dutch TV advertising market and to the strengthening of Endemol's already existing dominant position on the Dutch TV production market. However, the Commission accepted in a second case a modified project after Endemol's withdrawal from HMG. An other important modification was the transformation of one of the channels of the RTL Group to an information channel. The RTL/Veronica/Endemol case was dealt with by the Commission following a request from the Dutch government as the concentration did not have a Community dimension within the meaning of Article 1 of the Merger Regulation.

In the MSG case <sup>(2)</sup>, a case concerning pay-TV, the Commission prohibited the creation of a technical service joint venture by Bertelsmann, Kirsch and Deutsche Telekom. This was done as MSG, the joint venture, would hold a dominant position on the technical services market which would have the effect of strengthening the existing dominant positions of the parents on the pay-TV and cable networks markets respectively.

In the Nordic Satellite Distribution case, the Commission prohibited a joint venture between Telenor, TeleDanmark and Kinnevik to provide transponder capacity and the transmission and distribution of satellite TV channels to the Nordic area. The Commission concluded that NSD, the joint venture, would hold a dominant position on the market for satellite TV transponder services suitable for Nordic viewers. NSD's dominance would strengthen TeleDanmark's dominant position on the cable TV market in Denmark. Finally, the creation of NSD would lead to ViaSat, a subsidiary of Kinnevik, acquiring a dominant position on the market for distribution of pay-TV and other encrypted channels to direct-to-home households.

In the cases Bertelsmann, Kirsch/Premiere and Deutsche Telekom/BetaResearch of May 1998, the Commission prohibited the creation of joint ventures to supply technical services for pay-TV distributed by cable and satellite. The joint ventures would hold dominant positions on the technical services market which would strengthen the dominant positions of Deutsche Telekom on the German cable network market and of Premiere, a joint venture between Bertelsmann and Kirsch, on the pay-TV market.

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*(1) Case M.553 – RTL/Veronica/Endemol – Official Journal of the European Communities (OJ) L 134/32 (1996);*

*second decision – OJ L 294/14 (1996)*

*(2) Case M.649 – Media Services Group – OJ L 364/1 (1994)*

*(3) Case M.490—Nordic Satellite Distribution – OJ L 53/20 (1996)*

*(4) Case M.993 – Bertelsmann/Kirsch/Premiere – OJ L 53/1 (1999)*

*(5) Case M.1027 –Deutsche Telekom/BetaReseach – OJ L 53/31 (1999)*

Interpretation of the practise

Many of the cases which the European Commission has dealt with relevant to the audio-visual sector are related to the introduction of new technology, for example in connection with digital pay-TV.

The most known competition cases, even in the audio-visual sector, are those where the Commission has intervened against mergers and co-operation. However, in the majority of cases, the Commission has taken a positive view to notified arrangements. It seems that the Commission has recognised the favourable effects that both co-operation between undertakings and mergers can have in the development or introduction of new technologies. The Commission has accepted notified arrangements even where the parties are actual or potential competitors on the markets in question if the overall effect of the project is pro-competitive. The aim of the Commission is to concentrate on the net impact on competition within the common market, that is the balance between technical progress and restriction of competition.

The Commission has taken a negative view when co-operation, as appreciated by the Commission, will eliminate competition on the market in question by foreclosing the access of third parties and creating a dominant position. The goal is to maintain open market structures and to prevent the erection of barriers to entry to the relevant geographic markets. This aspect seems to be of great importance in the practise that has been developed. The creation or strengthening of dominance by joint venture, merger or acquisition is deemed to be unacceptable unless remedies can be found to prevent negative effect on competition. The Commission objects to any such further strengthening even when undertakings have achieved a position of market dominance through superior performance.

The cases, or competition issues within the cases, are often distinguished into two categories, horizontal issues and vertical issues. The first one concerns competitors on the same market or on the same level. The vertical issues are those involving different levels of the supply chain, for example through vertical integration.

Co-operation between direct competitors on the same market can constitute a typical horizontal case, and the Commission seems to be particularly concerned when the parties have dominant positions on the market or dominant positions are created. This applied to the RTL/Veronica/Endemol case. However, the second case involving the same parties was accepted when the parties had promised to change the profile of RTL. This fact illustrates also that joint ventures, as an example, can be accepted when the parties are willing to submit commitments and undertake amendments to the proposed project.

Arrangements between undertakings active on different geographic market have been accepted as they are not deemed to create or strengthen a dominant position on the markets. This practice facilitates co-operation for example between undertakings in different parts of Europe in the introduction of new technology.

Cases involving various levels of the supply chain are often very complex. In the audio-visual sector such cases can involve programme makers and owners of transport infrastructure on different levels. The Commission seems to bear in mind that the operation should not create barriers to entry in any of the involved markets. In connection with the vertical aspect of the RTL/Veronica/Endemol case, Endemol, the most important Dutch programme maker, had to withdraw from the project as its dominant position was strengthened by the creation of the joint venture.

In the MSG case, one of the parties would have strengthened its dominant position through the operation. It was the case with Deutsche Telekom in the German cable network market. In the Nordic Satellite Distribution case, there were several vertical aspects and the joint venture would have strengthened dominant positions in various market in the Scandinavian countries, with the creation of barriers to entry as a negative effect.

In the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch cases the control by Bertelsmann and Kirch on the pay-TV market would prevent the emergence of a competitor on that market. There would be no entry on the technical services market without a second pay-TV operator. Deutsche Telekom's position on the German cable network market prevented the emergence of competition from the private cable operators. The parties were not able to agree on undertakings necessary to ensure competition on the pay-TV market.

## Conclusions

The Commission has intervened in some very important merger cases where it found that the notified projects would create or strengthen a dominant position on a relevant market. In this assessment the risk of foreclosure of further market entry has been essential, and the decisions can therefore be important not only in the enforcement of competition law, but also to ensure media plurality. When the Commission has prohibited a notified project completely, it has been done only in cases where acceptable amendments have not been reached.

The Commission seems to be aware of the importance of the result of the merger cases to the technical progress and the development of the media structure in Europe. A great number of cases have been cleared by the Commission without any difficulties. It applies both to merger cases and to other cases handled under the EC competition rules.

