EN

Case No COMP/JV.50 - BLACKSTONE / CDPQ / KABEL BADEN-WÜRTTEMBERG

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 01/08/2000

Also available in the CELEX database
Document No 300J0050

Office for Official Publications of the European Communities
L-2985 Luxembourg

Brussels, 1 August 2000

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the Notifying Parties

Dear Sir/Madam:

Subject : Case COMP/JV.50 (Callahan Invest/Kabel Baden-Württemberg)

Notification of 28 June 2000 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 28 June 2000, Blackstone Group ("Blackstone") and Capital Communications CDPQ Inc ("CDPQ") notified the Commission, pursuant to Article 4 of Council Regulation (EEC) No. 4064/89[1] (the "Merger Regulation"), of the acquisition of joint control over Kabel Baden-Württemberg GmbH & Co. KG ("KBW") through an investment vehicle, a company called Callahan InvestCo Germany 1 S.a.r.l. ("CAI Lux"). KBW will provide a range of telecommunications and pay-TV services in the Baden-Württemberg region of Germany. Deutsche Telekom AG ("DT") will retain a minority interest in KBW through a 45% shareholding, and CAI Lux will have majority control of KBW with 55%.

2. After examination of the proposed concentration, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. PARTIES

3. Blackstone is a private merchant banking firm based in the US. It is active mainly in financial advisory services, private equity investing and property investment.

4. Caisse de Dépôt et Placement du Québec is a private investment group that invests the funds entrusted to it by Quebec public pension and insurance plans as well as

[1] OJ L 395 of 30.12.1989, p. 1, corrigendum in OJ L 257 of 21.9.1990, p. 13; as last amended by Regulation (EC) No. 1310/97, OJ L 180 of 9.7.1997, p. 1, corrigendum in OJ L 40 of 13.2.1998, p. 17.

Rue de la Loi 200, B-1049 Bruxelles/Wetstraat 200, B-1049 Brussel - Belgium
Telephone: exchange 299.11.11
Telex: COMEU B 21877. Telegraphic address: COMEUR Brussels.

various public bodies. CDPQ is a wholly owned subsidiary and a member of the investment group of Caisse de Dépôt. Its activities are to invest in companies operating in all areas relating to communications, including audio-visual production, wireless technology, multimedia, publishing and media.

5. CAI Lux is a limited liability company organised under the laws of Luxembourg which has recently been formed by Callahan Associates International LLC (“CAI”) and a group of European and North American investors, including Blackstone and Capital. CAI is a global development and operations company focusing on the information, communications and entertainment markets. In Europe, CAI, in partnership with a group of investors, has acquired interests in cable network ventures in France and Spain. CAI has been mandated by its partners to provide strategic and managerial services to these ventures, including to the notified transaction Callahan Invest/Kabel Baden-Württemberg.

6. KBW is an indirect subsidiary of DT. Currently it is a shell company, a German limited partnership whose sole limited partner is Kabel Deutschland GmbH (“KDG”), a wholly-owned subsidiary of DT holding all of DT’s cable assets in Germany. KBW’s sole general partner, Kabel Baden-Württemberg Verwaltungs GmbH (“KBW GmbH”) is also a wholly owned subsidiary of KDG. DT’s existing cable television business in Baden-Württemberg, currently part of KDG, will be transferred to KBW prior to closing (“The Operation”). DT is the main telecommunications operator in Germany. It is active, either directly or through its subsidiaries, in all areas of telecommunications services, including pay-television services. Currently it is also the principal network operator in Germany. The German state holds, directly and indirectly, 58.17% of its shares, and DT has announced its plans to float an additional block of shares on capital markets at some point in 2000.

II. THE OPERATION

7. The acquisition of joint control over KBW will be achieved through a series of steps whereby KDG will transfer the interests in KBW and KBW GmbH to a newly created acquisition vehicle, Barbarossa 2 Vermögensverwaltungs GmbH (“BidCo”), in turn a wholly-owned subsidiary of Barbarossa 1 Vermögensverwaltungs GmbH (“HoldCo”), to be known as KBW, which ultimately will be owned 55% by CAI Lux and 45% by KDG.

8. Following the transaction, KBW will own the regional cable television network assets formerly owned by DT/KDG in Baden-Württemberg.[2] It will operate and be active in the provision and distribution of pay-television services. In addition, CAI and CAI Lux intend to build out the existing cable network further and/or acquire other cable companies to increase penetration levels. They will also upgrade the network in order to provide various telecommunications services, including fixed telephony and Internet access services.

---

[2] These assets constitute the part of the network infrastructure commonly referred to in Germany as “Level 3”, or the connection from national-level distribution from the satellite feed to the premises of the subscriber. Commission Decision 99/154/EC, Deutsche Telekom/Beta Research (OJ L 53, 27.02.1999).

9. KBW will also enter into a number of service agreements with DT and its subsidiary Media Services GmbH ("MSG") to obtain content, technical services, and certain marketing and sales services associated with the offering of pay-television services by KBW to subscribers in Baden-Württemberg.[3]

10. The notified transaction, therefore, essentially represents the transfer of majority control of a single regional part of DT's existing cable network business from DT to buyers Blackstone and CDPQ via the investment vehicle CAI Lux. DT retains a minority stake, through its wholly-owned subsidiary KDG, in the regional business, and remains a key supplier of the business, both by itself as a provider of certain technical services and, through its subsidiary MSG, of content and technical services related to provision of pay-television.

III. CONCENTRATION

Joint control of CAI Lux

11. CAI Lux is composed of the following investors: Angelo Gordon L.P.; BankAmerica; Banco Santander Central Hispano; Edward P. Bass Group; Blackstone; CDPQ; Multitel Cable; Affiliates of Merrill Lynch & Co.; Investcorp Investment Holdings Ltd.; CIBC; and CAI. All decisions affecting the strategic commercial behavior of CAI Lux, such as decisions on business policy, financial planning and investments, and sales and acquisitions, will be taken by a "Required Vote", which is the affirmative vote of 1) shareholders that hold the greater of […] and 2) the affirmative vote of […].[4] Other than CAI, the investors are primarily financial institutions or private investors.

12. Blackstone […] and CDPQ […] are the two largest shareholders in CAI Lux. Given the current shareholding in CAI Lux, both Blackstone and CDPQ have the ability to block decisions made by the governing board of CAI Lux. CAI Lux is, therefore, jointly controlled by Blackstone and CDPQ.

Joint control of KBW

13. HoldCo, or KBW as it will be known, will have an Advisory Board composed of members of CAI Lux and KDG. For the first four years of the business CAI Lux will appoint a majority of the advisory board provided that CAI Lux owns more than 25% of the company. After this initial period, any shareholder owning more than 50% of the total shares of KBW will have the right to nominate a majority of the advisory board.

14. Most decisions that determine the strategic commercial behaviour of KBW must be approved by simple majority vote of the advisory board. However, DT, through KDG, exercises certain veto rights over the following activities of KBW:

---

[3] MSG is a wholly-owned subsidiary of DT, and is currently the only provider in Germany of technical and administrative services related to cable pay-TV platforms, as well as content packaging and distribution for pay-TV via cable.

[4] There is only one exception to this, namely that […] is required for the approval of acquisitions requiring additional equity (*CAI Lux Shareholders Agreement*, Article 2.4.).

- The sale or disposal of any assets or rights that have a fair market value in excess of […] of the fair market value of KBW;
- The acquisition of assets or rights to a business engaged primarily in the communications industry that have a fair market value in excess of […] of the fair market value of KBW, or any other business that has a fair market value in excess of […] of the fair market value of KBW;
- Any action to liquidate KBW or commence bankruptcy or insolvency proceedings; and
- Any merger, recapitalisation, or similar transaction with respect to KBW.

15. These particular veto rights, in their exact form between the notifying parties, do not confer joint control of KBW to DT under the Merger Regulation, as they do not include veto rights over the business plan, appointment of management, or budget control.[5] With regard to the veto right over the specified levels of sales, acquisitions or other investments, KBW's investments, in this particular case this right does not confer joint control because the notifying parties are not restricted from pursuing investments and acquisitions in other regions via a separate investment vehicle. Moreover, the CAI Lux shareholders agree that those directors of KBW nominated by CAI Lux shall be directed to vote together at meetings of the Board of Directors of KBW as instructed by the Board of Directors or Shareholders of CAI Lux, as the case may be.

16. Due to the particular contractual arrangements of this case, therefore, only Blackstone and CDPQ through CAI Lux acquire a position of joint control over KBW.

Full-function joint venture

17. KBW, though currently a shell company, will hold the assets to the currently existing cable network business of KDG in the Baden-Württemberg region. In this particular transaction, KBW will continue the existing pay-television business of KDG/DT in the near term (approximately 2-3 years), while expanding its range of services to include telephony and Internet access as soon as the network is upgraded for full two-way operation. The notifying parties assert that telecommunications services other than pay-television services will constitute the […] of its revenue within approximately […] years.

18. With the significant investments to be made by the notifying parties, both for purchase of the assets themselves and for upgrades upon transfer of control of KBW, KBW will have the necessary financial resources and personnel, independent of the notifying parties, to provide pay-TV via cable in the German market. It will therefore perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Article 3(2) of the Merger Regulation.

[5] See Commission Notice on the concept of a concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998).

IV. COMMUNITY DIMENSION

19. The combined aggregate world-wide turnover of Blackstone (…)* and CDPQ (…)* exceeds ECU 5 billion. The aggregate Community-wide turnover of each of these companies is more than ECU 250 million. KBW did not achieve any turnover in 1999 as it is a newly created company. The undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation.

*(*Business secrets between the Parties)*

V. RELEVANT PRODUCT MARKETS

Pay-television

Transmission capacity for television

20. The Commission held in its decision in Deutsche Telekom/Beta Research[6] that the distribution of pay television via cable, as opposed to other transmission methods (e.g. satellite and free-to-air), may constitute a separate relevant product market in Germany. While the competitive environment is changing rapidly, in Germany the product characteristics and functionality of satellite distribution of pay-television remain significantly different from the point of view of the consumer. However, regardless of how the market for pay-television transmission capacity may be constructed, there is no difference with regard to evaluation of the competitive impact of this transaction, and thus the relevant market definition is left open.

Technical and administrative services for pay-television

21. In order to provide pay television, a conditional access system is required. The system *inter alia* scrambles programs for distribution and unscrambles them for viewing at the subscriber premises, requiring the use of a set-top box in addition to a television set. Technical services for pay television may also include software provision and configuration for both subscriber premises and operator premises equipment. In addition to technical services, there is a wide range of administrative services that are necessary to providing pay television. Subscriber management systems, including customer service functions, must be provided in order to process orders, track billing, and ensure quality of service.

Telecommunications services

22. It is the Commission's established practice to consider the relevant product markets as being the markets for domestic and international voice and data telecommunications services, with a segmentation between the voice market (in which both residential and business customers participate) and the data market (primarily used by business), and further segmentation into domestic and international markets.[6]

---

[6] Commission Decision 99/154/EC, Deutsche Telekom/Beta Research (OJ L 053, 27.02.1999).

[6] Commission Decision in case JV.2 (ENEL/FT/DT) of 27.5.1998 .

23. Even if the markets were to be defined more narrowly than those listed above, the definition of the relevant product market can be left open since, on the basis of the assessment set out below, the concentration would not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part thereof.

Internet access service

24. Access to the Internet involves connecting a customer to a network running the Internet Protocol (IP). Access may be provided at a variety of bandwidths, with low-bandwidth service (e.g. dial-up service) offered generally to residential customers and high-bandwidth service (e.g. dedicated, high-speed connections) to business customers.[7] For the assessment of this concentration, the market may be defined as Internet access service without distinguishing between classes of users.

VI. RELEVANT GEOGRAPHIC MARKET

Pay-television service

25. Television broadcasting is still organised in the Member States on a national basis. Broadcast licenses are issued either nationally or regionally, in the case of Germany. In addition to the regulatory conditions, which differ for individual Member States, language and cultural differences as well as other conditions of competition (such as systematic differences in product offerings across Member States), taken together, define the market for broadcast television as national. The competitive conditions of pay-television differ systematically across Member States in analogous ways, and the market has accordingly been defined by the Commission in past decisions to be organised nationally.[8]

Transmission capacity for television

26. The relevant geographic market for television transmission capacity would, therefore, presumably be national in scope.[9] However, the distinction between national and possible regional markets for transmission capacity may be left open since there is no difference with regard to the competitive assessment of the transaction.

Technical and administrative services for pay television

27. Technical and administrative services for pay-TV are closely linked to the supply of pay-TV in Germany. In past decisions the Commission has assumed that the relevant geographic market was confined to Germany; however, to the extent that technical and administrative services will be provided by other, non-German-based businesses, the geographic market would probably expand to encompass such areas. In the present case, the market for technical and administrative services for pay-TV may encompass either the German-speaking area or Germany only. In either

---

[7] Commission Decision in case M.1439 (Telia/Telenor) of 13.10.1999.

[8] Commission Decision in case JV.37 (BskyB/KirchPayTV) of 21.03.2000; Commission Decision 99/153/EC, Bertelsmann/Kirch/Premiere (OJ L 053, 27.2.1999).

[9] Commission Decision 99/154/EC, Deutsche Telekom/Beta Research (OJ L 053, 27.02.1999).

context, the assessment of the concentration would be the same, so the relevant geographic market may be left open.[10]

Telecommunications service

28. Telecommunications infrastructure, whether used for local or long distance services, is provided nationally, as historically the incumbent monopoly operator offered them within a specific national territory. Furthermore, the licensing and regulatory framework for the provision of domestic and internatinonal telecommunications (voice and data) are national. Therefore, the geographic market for these services must be regarded as being national in scope.[11]

Internet access service

29. To the extent that Internet access is provided via telecommunications infrastructure, it is dependent upon the location where such infrastructure is deployed.[12] Local telecommunications networks as well as cable TV networks can offer this possibility, insofar as both of them reach the consumers' homes. Therefore, as with telecommunications services, the geographic market for such service is national.

VII. COMPETITIVE ASSESSMENT

A Dominance

Pay-television

30. KBW is not currently active on the market for pay television in Germany. While immediately after the transaction, KBW will have a de facto monopoly in its territory, the transaction itself does not create or strengthen a dominant position on the market for pay-television, as KBW is simply taking over the position previously held by DT.

Transmission capacity for pay-television

31. KBW as a corporate entity does not yet operate in the market for pay television transmission capacity in Germany. KBW will continue and expand on the currently existing cable network business of KDG/DT in the Baden-Württemberg region, and as a result, immediately after the transaction KBW, will have a de facto monopoly in its territory. However, the transaction itself does not create or strengthen a dominant position on the market for pay-television transmission capacity as KBW is simply taking over the position previously held by DT.

32. Blackstone, CDPQ and CAI are currently active on the market for pay television in two other Member States, France (through Exante/NC Numéricable) and Spain (through Spaincom/Cableuropa S.A.). However, on the basis of the above mentioned definition of the geographic market the transaction does not create or

---

[10] Commission Decision 99/153/EC, Bertelsmann/Kirch/Premiere (OJ L 053, 27.2.1999); Commission Decision 99/154/EC, Deutsche Telekom/Beta Research (OJ L 053, 27.02.1999).

[11] Commission Decision in case M.1439 (Telia/Telenor) of 13.10.1999.

[12] Commission Decision in case M.1838 (BT/ESAT) of 27.03.2000.

strengthen a dominant position in this case, even based on the narrowest market definition, i.e. in the German market.

Technical and administrative services for pay television

33. KBW does not currently operate in the market for technical and administrative services for pay television. Blackstone Group, CDPQ and CAI are not currently active on the market for technical and administrative services in Germany. Therefore, in this case, the transaction does not create or strengthen a dominant position, even based on the narrowest market definition, i.e. in the German market.

Telecommunications service

34. The cable network being acquired by the parties is not configured to provide telecommunications services at present, as it does not have the necessary return channel and consequently does not support two-way communications capability. CAI Lux will in the future upgrade the network to provide telecommunications services. Neither of the parties to the transaction, Blackstone and CDPQ, are presently active on the market for the provision of telecommunications services in Germany.

35. Accordingly, KBW is not presently active on the market for the provision of telecommunications services in Germany, and therefore, in this case, the notified transaction does not create or strengthen a dominant position.

Internet access service

36. The cable network being acquired by the parties is not configured to provide Internet access services at present, as it does not have the necessary return channel and consequently does not support two-way communications capability. CAI Lux will in the future upgrade the network to provide Internet access. Neither of the parties to the transaction, Blackstone and CDPQ, are currently active on the market for the provision of Internet access service in Germany.

37. Accordingly, KBW is not presently active on the market for the provision of Internet access in Germany, and in this case the transaction does not create or strengthen a dominant position.

38. In conclusion, the concentration notified in this transaction will not result in the creation or strengthening of a dominant position on any of the markets referred to above as a result of which effective competition would be significantly impeded in the common market or a substantial part thereof. The fact that CAI Lux already purchased a similar stake in the regional cable of Nordrhein-Westfalen (KNW)[13] does not lead to the creation of a dominant position either, […][14].

[13] Commission decision in Case JV.46 (Callahan Invest/Kabel Nordrhein-Westfalen) of 19.6.2000.

[14] […].

VIII. ANCILLARY RESTRAINTS

39. The parties have notified a number of Master Service Agreements as ancillary restrictions. These agreements are with DT for technical services relating to the operation of the broadband cable network and with MSG for technical services for pay-TV and the lease of capacity for broadcasting, and take the form of supply and purchase agreements.

Service agreements between DT and KBW

40. The agreements with DT are set out in the Master Service Agreement which is comprised of 12 Term Sheets.[15] This decision does not cover term sheet 7.

41. KBW and DT have agreed that DT will provide a number of services related to the operation of the cable network, network infrastructure, distribution and broadcasting. These services, some of which can only be provided by DT, encompass notably the joint use of cable ducts, the use of cable capacities, the use of optical fibre transmission systems, leased areas and power supply for broadband cable equipment.

42. Under most of the service agreements, KBW has been given a make/buy option, so that KBW is free to decide whether to purchase a service from DT or to either purchase the service from a third party or build out its own infrastructure for operating the cable. This option can be exercised by KBW terminating the agreement with […] months' notice in the […] year of the agreement.

43. DT has no right to the abovementioned termination clauses of the agreements for those services where a make/buy option is not commercially feasible. In such cases, DT is however entitled to terminate the agreements in exceptional circumstances, such as breach of contract by KBW through failure to make the agreed payments.

44. The notifying parties claim that the service agreements do not contain any restrictive provisions. However, this question does not need to be fully addressed in the present decision, because even if the agreements were restrictions of competition, these could be regarded as ancillary to the concentration, for a period of three years, being directly related to and necessary for the implementation of the concentration.

Service agreements between MSG and KBW

45. The other Master Service Agreement relates to services for broadcasting. It was concluded with MSG and comprises [between 5 and 10] Term Sheets.[16]

46. The first term sheet concerns both the access to cable capacity for the supply of feed-in of digital signals and programmes, and the operation of a digital platform for those programmes. KBW is obliged to grant access to […] digital hyperband 8

[15] Service Agreement between Deutsche Telekom and Kabel Baden-Württemberg GmbH & Co KG with Term Sheets 1-12 (Rahmen-Liefer-und-Leistungsvertrag).

[16] Service Agreement between MSG Media Services GmbH and Kabel Baden-Württemberg GmbH & Co KG with Term Sheets […] (Rahmen-Liefer-und-Leistungsvertrag).

MHz-channels to MSG until 1 February 2009.[17] […] channels must be provided for […] until […].[18] The remaining […] are required for […]. Regional regulatory requirements necessitate that 3 of the remaining […] channels in the hyperband must carry the public broadcasters, ARD and ZDF. In both cases, the lengths are determined by the duration of the contracts that MSG has signed with third parties.

47. Given that these clauses protect the interests of MSG and not the ones of the Joint Venture, they cannot be considered as directly related and necessary to the concentration as the agreements are new ones between MSG and KBW and do not involve the continuation of an existing long term supply contract. Also, the conclusion of those agreements is not an automatic consequence of the sale of the cable network. Since DT has negotiated each one individually, and buyers in other regions can choose different content supply arrangements there is no necessary connection between the sale of the network and the agreement. Therefore, given the fact that the cable sale and these agreements are separate, the parties' argument that these agreements are required to enable MSG to fulfil its obligations vis-à-vis broadcasters cannot be accepted.

48. By contrast, the services covered by the other term sheets aim at protecting the interests of the buyer, KBW. MSG will provide the digital platform for all the channels, including those it is not leasing. KBW must contribute to […].[19] This agreement to provide the platform for the existing channels may be terminated by KBW with […] months' notice, and for additional channels to be built out by KBW, it can be terminated for the first time after […] years.[20]

49. MSG will also develop the digital platform for new digital programmes and new services, which the parties agree to […].[21] KBW will consider with goodwill an offer from MSG to provide the platform and the content for […] new digital channels expected to come on-line by the end of […]. If KBW uses MSG for these […] new channels, it cannot terminate the agreement until the […] year at the earliest.

50. The remaining term sheets establish that MSG will supply KBW with a number of administrative and technical services:

- Contract management and digitisation for foreign language public service broadcasters carried by KBW. This agreement may be terminated with […] months' notice to the end of a year;
- Administration, contract management and training relating to the analogue television services. These two agreements may be terminated with […] months' notice to the end of a year; and
- Monitoring of signals, operation of the playout centre and optional development of new services. These two agreements run until the end of […].

---

[17] Section 2.2.1 and Section 9.1.

[18] Section 9.3.

[19] Section 2.1.5.

[20] Sections 9.4 and 9.5.

[21] Section 2.1.1.

51. The parties request that the supply arrangements between MSG and KBW be declared ancillary to the concentration, because the agreements do not encompass any restriction and in any case such restrictions were to be regarded as directly related and necessary to the implementation of the transaction. The parties notably claim that while virtually all of the services can be obtained from other suppliers or from internally developed capabilities, it will not be possible to have arrangements in place for all of these services at the time of the closing of the acquisition, and that a transitional period is therefore required for KBW to develop its own assets or find an alternative, especially as the majority of German television channels have signed with MSG for distribution via cable. It can, however, be left open whether the agreements are restrictions of competition, because they are in any case not ancillary to the concentration.

52. First, the parties themselves admit that the services and the content provided for by the agreements can either be obtained from other suppliers or developed by KBW itself, so that KBW is not limited to purchase them from MSG. Second, the parties offer no objective justification for the terms and scope of these agreements.

53. Accordingly the notified agreements between KBW and MSG are not the inevitable consequence of the concentration, nor are they directly related to or necessary for the implementation of the concentration. They are therefore not covered by the present decision.

IX. CONCLUSION

54. In the light of the above, the proposed transaction does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

55. The Commission therefore has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No. 4064/89.

For the Commission,