

***Case No COMP/M.4547 -
KKR / PERMIRA /
PROSIEBENSAT.1***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 22/02/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.02.2007

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

**Subject: Case No COMP/M.4547 – KKR/PERMIRA/PROSIEBENSAT.1
Notification of 18/01/2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 18 January 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (“Merger Regulation”) by which Kohlberg Kravis Roberts & Co. (“KKR”, USA) and Permira Holdings Limited (“Permira”, UK) will acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of ProSiebenSat.1 Media GmbH (“P7S1”, Germany) by way of purchase of shares.

I. THE PARTIES

2. KKR and Permira are both private equity firms with investments in a range of different businesses. With respect to the media sector, KKR and Permira jointly control SBS Broadcasting (“SBS”), a Dutch group active in free TV, pay TV, radio and print mainly in the Nordic region, the Netherlands, Belgium, Hungary, Bulgaria, Romania and Greece. Furthermore, Permira solely controls All3Media Group Ltd (“All3Media”), a UK-based TV production and distribution company².

¹ OJ L 24, 29.1.2004 p. 1.

² The Commission authorised by its decision on 22 September 2006 the acquisition of control of All3Media by Permira, case no COMP/M.4353 – PERMIRA/ALL3MEDIA GROUP

3. P7S1 operates five free TV channels in Germany and the company has minor activities in Austria and the German-speaking part of Switzerland. Furthermore, P7S1 achieves negligible revenues from pay TV, internet platforms, online marketing and merchandising.

II. THE OPERATION AND THE CONCENTRATION

4. Via the acquisition vehicle Lavena Holding 4 GmbH (“Lavena”), in which each of KKR and Permira holds a 50% share, they will acquire all shares from German Media Partners L.P. which confer them a 75.1% voting interest in P7S1.
5. KKR and Permira will exercise joint control over P7S1 which has already been active in the market for many years and will constitute a full-function joint venture. Hence, the proposed transaction constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. KKR and Permira have a combined worldwide turnover of more than €5,000 million. The aggregate Community-wide turnover of each of the two undertakings exceeds €250 million. Neither KKR nor Permira has achieved more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The concentration therefore has a Community dimension.

IV. RELEVANT MARKETS

7. The proposed transaction involves mainly the market for free TV in Germany. The impact of the merger has been assessed also with respect to other TV-related activities, namely pay TV, TV production, acquisition of TV rights and the distribution (licensing) of TV rights where it appears that the parties' activities are anyhow negligible and not overlapping.

The market for free (access) TV

8. According to the notifying parties, the present transaction mainly involves the market for free (access) TV. It constitutes a product market distinct from the market for pay TV³ as conditions of competition differ, as it has been established by the Commission's constant decisional practice⁴. Free access TV is usually financed by advertising revenues and there is no commercial relationship between the broadcaster and the viewer/ subscriber.
9. With respect to the geographic market, the parties submit that the market for free (access) TV or TV financed by advertising is national in scope or, for the purpose of this case, could be delineated along the German-language area, for instance comprising Germany, Austria and the German-speaking part of Switzerland. This would reflect the area where P7S1's programs are aired (through cable, satellite and, to a lesser extent, digital terrestrial). The market investigation has largely confirmed the parties' view. Some buyers of TV advertising space refer to instances of international or at least pan-

³ COMP/M.1943 – Telefonica/Endemol

⁴ See for instance case COMP/M.2876 Newscorp/Telepiù.

European advertising campaigns for which advertising space was purchased from TV broadcasters across country borders. However, it appears that part of the content and the language of the campaign is again customised to the individual country and the consumer taste.

10. On this basis, the Commission concludes that for the purpose of the present case the geographic scope of the free (access) TV market is still national in scope or along the relevant language borders. The question to consider potentially a wider pan-European market can be left open since the proposed transaction would not raise any competition concern in such a geographic area.

V. ASSESSMENT

Free (access) TV

A. Horizontal effects

11. The proposed transaction mainly involves the market for free TV in Germany. As indicated above, P7S1 operates five free TV channels, financed by advertising, in Germany which represents [80-90]% of its overall turnover.
12. On the basis of a national or alternatively the German-speaking area, the transaction does not lead to any horizontal overlaps. P7S1 is active in Germany and to a small degree in Austria and German-speaking Switzerland. In terms of viewer share, P7S1 reaches approximately 22% of the TV viewers in Germany⁵. When considering the share of P7S1 with respect to advertising, it would amount to approximately 45%⁶. Outside these areas, P7S1 has no activities. SBS carries out its TV operations in the Nordic region, the Netherlands, the Dutch-speaking part of Belgium, Hungary, Romania, Bulgaria and Greece but is not present on TV markets in Germany. All3Media has no TV broadcasting operations.

B. Vertical effects

13. A limited vertical relationship arises from the present transaction between PS71 and All3Media, which is solely controlled by Permira (one of the parent companies of the joint venture Lavena). All3Media is active in TV program production and in TV licensing and is mainly active in the United Kingdom, where it generates [70-80]% of its EU turnover. PS71⁷ purchases one TV production from All3Media, which represents a value of [...]. The overall sales volume of All3Media in Germany amounts to approximately [...] in 2006 which represents on the market for the distribution (licensing) of TV broadcasting rights a market share of less than 1% in Germany.

⁵ The share of P7S1 in terms of viewers in Austria and German-speaking Switzerland is negligible.

⁶ The parties argue that P7S1's market share is about 22% when calculating it on the basis of a viewer's share. However, the Commission has taken the view in previous decisions that the viewer's share in free TV cannot be considered as a standalone factor. To reflect the "double-sided" nature of the free access TV market, it is necessary to consider a market shares based on advertising revenues (i.e. the revenues achieved from selling advertising space) as well.

⁷ For the sake of completeness, P7S1 produces almost all its requirements for its own use and only a negligible number of TV productions are sold to other TV operators.

Other vertical overlaps would not occur since All3Media carries out no other business in Germany.

14. The market investigation examined the possibility for All3Media to foreclose or discriminate against other TV broadcasters by selling its TV productions and distributing (licensing) TV rights solely to P7S1 and SBS. The Commission already found in the case Permira/All3Media⁸ that TV production companies or distributors of TV licenses have no incentive to exclusively deal with broadcasters belonging to the same group (captive licensing). In more general terms, the market investigation confirmed that TV production companies prefer to sell or license their rights to as many broadcasters as possible to gain a wider audience but also to be seen as an independent player. In relation with the present transaction, as mentioned before, All3Media sells few of its TV productions to P7S1 which represents only a negligible amount.
15. Some respondents expressed the concern that P7S1 and SBS may enter into a “first-pick” relationship with All3Media, i.e. P7S1 or SBS would be offered to choose first among new All3Media productions before other broadcasters could do. However, All3Media licenses most of its rights to many broadcasters other than P7S1 or SBS. Moreover, since All3Media’s business on license distribution represents only a very small part of the entire distribution (licensing) of TV broadcasting rights, the proposed operation will give rise to no foreclosure concern.

C. Other potential issues

16. The Commission also analysed other potential effects arising from the transaction.

Joint acquisition of TV broadcasting rights

17. The market investigation also examined whether, through a joint acquisition of TV broadcasting rights, the pooling of P7S1 and SBS would give rise to adverse effects vis-à-vis right owners or and/or to foreclosure issues vis-à-vis competing TV broadcasters as regards access to important TV rights.
18. Both P7S1 and SBS represent a significant demand in terms of acquiring TV broadcasting rights from movie and independent TV production companies. According to the parties, some categories of TV material, i.e. feature films, TV series, fiction products, non-fiction products, documentaries and major sport events, would be of potential interest to an audience wider than national. The right owners typically grant broadcasting rights to allow release of the productions in different language versions. In this context, it appears that the right owners sell their rights to TV broadcasters on a country-by-country basis and only in few instances on a language-by-language basis. They also do so when selling their TV rights to pan-European broadcasters. Even a potential joint acquisition of TV broadcasting rights by P7S1 and SBS would appear unlikely to alter the right owners’ pattern of sales.
19. The Commission examined a possible increased buyer power for PS71 and SBS if they were to acquire jointly TV broadcasting rights. In particular, some respondents to the market investigation expressed the concern that the national public TV stations would

⁸ Case COMP/M.4353 – Permira/All3Media

have more difficulties in acquiring attractive TV broadcasting rights for their national channels as compared to pan-European broadcasting groups that have a potentially wider audience (such as PS71 and SBS pooling together, or the RTL group). Furthermore, according to some respondents, the larger budget available at the joint P7S1 and SBS group would allow them to acquire more different formats and more exclusive TV broadcasting rights and thereby foreclose other TV broadcasters from the access to these rights which are important for the success of a TV broadcaster and thus for its position as a platform for TV advertising. However, the commercial interest of the owners of TV broadcasting rights is to exploit fully their valuable rights more likely on a country-by-country basis than for a wider geographic area. The few exceptions of TV broadcasting rights brought to the Commission's attention in the course of the market investigation, (which are licensed for a geographic area wider than national,) e.g. some international sports events⁹ or some successful feature films represent only a negligible fraction in the vast basket of TV broadcasting rights sold on a national basis. Some owners of TV rights, however, indicated that although attempts for acquiring TV rights on a wider geographic basis were made in the past they hardly became reality. As a matter of fact, the transaction is unlikely to bring about any significant change on the parties' position on a national basis. Even if they were to recur to joint purchases on a wider geographical scale, this would only concern a limited segment of TV rights and will thus not foreclose competing TV broadcasters from access to this type of TV rights.

20. In the light of the above, it can be concluded that the proposed transaction will give rise to no adverse effects vis-à-vis right owners and/or to foreclosure issues vis-à-vis other TV operators.

Joint selling of TV advertising space

21. Finally, the Commission examined the possibility that the new entity may potentially be able to pool forces to jointly sell advertising space for their respective TV channels.
22. However, pan-European advertising content still appears to be a very rare event on TV. The market investigation revealed that the creation of advertising content largely follows consumer taste which differs among Member States. Few respondents indicated the emergence of multi-national advertising campaigns. In particular, multi-national players active in the creation of advertising occasionally launch campaigns targeted to more than one country. However, it appears that even in such instances the campaign is ultimately customised to reflect local consumer taste. Moreover, this is also reflected by the fact that even for multi-national broadcasting TV channels, such as MTV and similar channels, the advertising content is differentiated according to the country or the language region/area.
23. Finally, the respondents to the market investigation considered that they continue to have a sufficiently large choice among TV broadcasters from which they can purchase advertising space. Therefore, no adverse effects are likely to arise in this respect.

D. Conclusion

⁹ For instance, the Olympic Games, the football world championship, Formula 1

24. Therefore, in the light of the above, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the common market.

VI. CONCLUSION

25. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Benita Ferrero-Waldner
Member of the Commission