Bundeskartellamt

Case summary 7 November 2011

Prohibition of launch of joint venture between RTL interactive GmbH and ProSiebenSat.1 Media AG in the video-on-demand sector

Sector	Video-on-demand, TV advertising, In-stream video advertising
Ref.	B 6 - 94/10
Date of Decision	17 March 2011

In March 2001 the Bundeskartellamt prohibited the proposed joint venture by RTL interactive GmbH and Pro7Sat.1 Media AG for the creation and operation of an online video platform. The joint venture in its planned form would have further strengthened the dominant duopoly held by the two broadcasting groups RTL and Pro7Sat.1 on the German TV advertising market. The expected coordination of business interests via the joint venture was also very likely to constitute a violation of the prohibition of anti-competitive agreements (§ 1 of the German Act against Restraints of Competition (ARC) as well as Art. 101 of the Treaty on the Functioning of the European Union (TFEU)).

The merger project

RTL interactive belongs to the RTL Group, which is the TV division of the Bertelsmann media group. RTL is one of the two major private TV broadcasting groups in Germany. Its broadcasting portfolio includes the advertising-financed TV channels RTL, Vox, n-tv and SuperRTL. It also has a stake of just under 36% in the broadcasting channel RTL II. RTL is also active in the areas of pay TV, the production of audiovisual content and online/new media.

Pro7Sat1 is the second of the two major German private broadcasting groups. It is owned and jointly controlled by the equity firms KKR and Permira. In Germany Pro7Sat1 operates the advertising financed TV channels Pro7, Sat.1, Kabel1 and Sixx. It is also active in the pay TV area. Like RTL, Pro7Sat1 is furthermore active in the areas of production and online/new media. The company controls the "maxdome" video on demand platform.

According to the notified concept, the planned platform of the joint venture was to be used to set up a platform for catch-up TV, i.e. to give access to cross-channel content which had already been broadcast on television, for a limited duration. Besides RTL and Pro7Sat1, other German and Austrian TV stations were considered as potential clients for this service. The programme content was to be made available free of charge for seven days after broadcast on TV. The platform was to be launched under its own trademark and have a homepage with additional areas reserved for individual clients. Clients would have been able to place adverts in their own individual areas but not on the homepage. Every client was to market its advertising inventory in its own name and for its own account. Video advertising spots were to be made available before, during and following the chosen content. So was traditional display advertising.

Effects of the joint venture project

The project would have chiefly affected the German TV advertising market. The joint venture itself would not have become active in traditional TV advertising; however, the creation of the joint venture would have significantly affected the competitive situation on the TV advertising market because there is a competitive link, at least in the form of competition from substitutes, between TV advertising and the new form of advertising on which the joint venture focuses. In view of the already high level of concentration on the TV advertising market, this substitutability is highly relevant for competition in this market. As a result of the joint venture, so-called in-stream video advertising would have been dispersed via the newly created platform. In-stream video ads are audio-visual advertising spots, similar to short commercials on television, which are played before, during or after a video selected by the user. Based on the results of the market survey, the nature of this form of advertising as well as developments in media use behaviour and terminal equipment technology would suggest that in-stream video advertising can be considered as at least being the "closest substitute" to TV advertising from the perspective of advertisers, if not even as merging into the TV advertising market in the future.

Joint dominance by the parties

According to the results of the market survey, RTL and Pro7Sat1 form a dominant duopoly on the German TV advertising market. Together they hold a stable share of 80-90% of this market. An overall appraisal of all the relevant circumstances and an analysis of the actual market situation show that there is no substantial competition between the two companies (lack of internal competition). Together they enjoy a paramount market position in relation to their competitors (lack of external competition). The structure of the TV advertising market suggests that permanent uniform conduct on the part of the two members of the duopoly is very likely. The economic incentives even after the merger were likely to support this conduct, to enable the parties to maximize their profits by aligning competitive factors.

There is a close behavioural link between RTL and Pro7Sat1. In the TV advertising market many factors allow for and offer the two duopolists incentives to (tacitly) coordinate their competitive behaviour and to refrain from competitive moves. As a result of the high market transparency and the effective deterrence and punitive measures which the parties use to counter competitive moves, there is no incentive for them to deviate from their uniform behaviour. Any competitive measure by one company to increase its own share of the market would be to no avail because this would trigger similar measures by the other company. The substantial symmetry between RTL and Pro7Sat1 and their repeated encounters as competitors on several markets also make it easier for the two duopolists to effectively coordinate their behaviour on the TV advertising market. Even the purchasing behaviour of the advertising industry does not destabilize such coordination.

Nor can it be deduced from the current market situation that there is effective price competition between the duopolists on the TV advertising market or that there is substantial competition in the form of product competition for the content of TV programmes.

In addition, RTL and Pro7Sat1 collectively hold an overall paramount market position vis-à-vis other competitors and are not exposed to any significant external competition from the other TV channels. The market position of the parties is also not counterbalanced by the market power of the opposite side of the market or by competition from substitutes.

Strengthening of market dominance

The notified merger project would have strengthened the collective dominance of the parties on the German TV advertising market. With the launch of the joint venture and the framework conditions (based on the parties' corporate structure) for its activities, the significant competition potential of in-stream video advertising which would have affected the German TV advertising market would have been limited from the outset. Contrary to the arguments of the parties, the envisaged model would not have been a purely technical service provider. The envisaged business model would have enabled RTL and Pro7Sat1 to coordinate and harmonize important parameters of competition between them. Although these parameters of competition applied primarily to in-stream video advertising, they would have had direct consequences for the dominated TV advertising market. In-stream video advertising, which is increasingly being used, is a product, which due to its particular closeness to TV advertising, seems like no other likely to exert competitive pressure on the TV advertising market in the form of competition from neighbouring substitutes. In a competitive situation RTL and Pro7Sat1 would have to develop and implement individual strategies in reaction to the increasing possibilities of in-stream video advertising. However, by setting up the joint venture, instead of implementing their own individual parameters of competition, the parties would have applied a joint concept which would have given them a collective advantage over their competitors.

In addition to the possibilities already mentioned, the joint venture would have also increased incentives for the parties to foreclose access to content for competing platforms. The corporate links between the two parties would have also further increased the transparency of competitively relevant information and practices.

This would have diminished competition from substitutes, further stabilizing coordination within the duopoly and helping to maintain the collective dominant position on the German TV advertising market. Although the parties argue that the joint venture would have a positive effect on competition, any such advantages would not have outbalanced their negative stabilization effects within the dominant duopoly. Such benefits, which were also deemed plausible by the Bundeskartellamt, included in particular a wider range of video on demand offers and therefore an expansion of capacity in in-stream video advertising as well as a simpler, uniform navigation through content for video users. Only an open, purely technical platform would have ensured that these benefits outweighed the remaining anti-competitive effects. The companies, however, were not willing to open up the platform to this degree. A central element of the notified project was that it limited access to the platform to TV channels and imposed restrictions on availability duration, availability dates and quality of content. In the authority's opinion, such a platform would have helped to maintain the collective dominance and would have transferred it to the segment of video advertising in online video content.

Commitment proposals inadequate

The commitment proposals offered by the parties could not dispel the competition concerns. In particular, the companies were not prepared to make fundamental changes to the original concept of their project. They did not offer to further open up the platform to other content providers and in technical terms.

Imminent violation of the ban on cartels

The agreements which would have emanated from the joint venture would have appreciably restricted competition within the meaning of § 1 ARC, Art. 101 (1) TFEU for the same reason that they would have stabilized coordination within the duopoly. They would have restricted the freedom of economic action of RTL and Pro7Sat1 in that the parties would have entered a commitment which would have reduced their independence in setting parameters of competition which are of relevance for the TV advertising market. In the case of the product which is most similar to classical TV advertising, the agreements would have had coordinating effects between the duopolists and would have thus limited competition on the TV advertising market within the meaning of § 1 ARC and Art. 101 TFEU. Taking a separate market for in-stream video advertising as a basis, the Bundeskartellamt found that coordination between the parties would have directly led to competition restraints on this market. An exemption from the provision on anti-competitive agreements under § 2 ARC or Art. 101 (3) TFEU was not possible. The efficiency gains which the parties claimed would follow from the anti-competitive agreements could only be expected to materialize to a certain extent. In any case, the competitive restraints would not have been necessary to realize the expected efficiency gains in the form of an increase in capacity for in-stream video advertising and a simplified navigation through content. It was also not likely that consumers would have had a fair share of the resulting benefit. This is particularly true for those elements of the agreements which extended beyond the launch of an open, purely technical platform, which limited access to the platform to TV channels and included restrictions on availability duration, availability dates and quality of content. In addition, they would have diminished the possible efficiency gains. The Bundeskartellamt has therefore prohibited the creation of the joint venture under § 32 ARC. Its decision took account of the excessive cooperative and coordinating nature of the joint venture. The imminent competition restraints for the German TV advertising market were considerable and justified a double control under § 36 ARC and § 1 ARC as well as Art. 101 TFEU.

The decision is not yet final. The companies have appealed the decision at the Düsseldorf Higher Regional Court.