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**ARD and ZDF online platform “Germany’s Gold”**

Sector: Television, video-on-demand

Ref.: B6-81/11-2

Date of decision: 18 February 2014

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The Bundeskartellamt has taken administrative proceedings under competition law against a number of commercial subsidiaries of ARD and ZDF, the German public service television broadcasting groups, and against a number of television production companies on account of the planned foundation and implementation of a joint venture for video on demand (title: “Germany’s Gold”). Proceedings were terminated on 18 February 2014 after the parties had abandoned their plans.

Using the planned joint venture platform, the parties wanted to enable consumers to retrieve films, series and other programmes from the pool of the participating enterprises, including the public-service television broadcasters that backed them, or from the pool of third parties. The video content was to be retrievable for a user fee or sometimes financed exclusively by online advertising and was to be offered and advertised by the platform company.

The plan was cleared by the Bundeskartellamt under merger law. However, at the same time, the Bundeskartellamt initiated administrative proceedings against the parties under competition law pursuant to Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Sections 1, 2 and 32 of the German Act against Restraints of Competition (ARC). Following an extensive assessment of the market, the Bundeskartellamt informed them of its provisional competition concerns in order to sound out whether the proceedings could be terminated with a decision under Section 32b of the ARC in exchange for appropriate commitments to resolve the competition problems.

The Bundeskartellamt assessed elements of the contracts between the parties as being problematic from the point of view of competition insofar as these were agreements between ZDF Enterprises on the one hand and the participating ARD corporations (WDR mediagroup,

SWR Media Services, Studio Hamburg FilmProduktion and Telepool) on the other. What was critical was that the project would have involved the joint online distribution of videos by competitors in return for payment and would have envisaged price fixing and certain exclusivity agreements. In addition, it was to be feared that alternative platforms would have had no or only limited access to the videos.

One market affected by the project was the national market for the paid retrieval of audio-visual content via a transmission network (video-on-demand [VOD] final customer market). The market study found that VOD in exchange for payment is a service that typical users do not regard as interchangeable with other services. Among other things, for example, being able to determine what and when one consumes constitutes a major difference between VOD and traditional, linear television entertainment services.

Services funded exclusively by means of advertising are to be distinguished from paid VOD services. This is partly because there continue to be value chains in the film industry which provide for advertising-based utilisation only when this no longer endangers the exploitation of video consumers' willingness to pay directly. However, services financed by advertising also have a certain competitive effect on content provided in exchange for payment. This is to be taken into account as incomplete competition.

Services financed by means of the television licence fees of public-service broadcasters, i.e. the media libraries of public-service broadcasters, are also to be taken into account as incomplete competition. While the initial assumption is not to categorise these as being entrepreneurial activity, users view the media libraries of public-service broadcasters as part of the existing environment and their content as being generally available. In contrast, an extra payment has to be made for commercial VOD. Thus, the size of the media libraries influences the demand for paid VOD. Although users cannot specifically match the licence fee with specific media services, it reduces their willingness to pay.

The establishment of the joint venture also affected the upstream national market for licensing audio-visual content for the operation of a VOD service (VOD licence market). The joint venture was intended to be a customer in this market, while at the same time all the parent companies are already operating as suppliers or potential suppliers in the market. On the basis of the demand-side oriented market concept, the product market was to be defined here as being limited to licensing for VOD use. A distinction is made between copyright and ancillary copyright exploitation rights according to the type of exploitation. Granting a VOD service operator exploitation rights for types of use other than VOD is not interchangeable with rights for VOD because they would not allow him to operate a VOD service.

ZDF Enterprises and the participating ARD corporations are direct competitors in the relevant markets. Both are currently operating in the VOD licensing market. Even before starting their joint venture operations, they are at least potential competitors in the VOD final customer market.

The market situation in the VOD final customer market, a young market generally regarded as having considerable growth potential, and the considerable resources of the enterprises concerned, particularly their access to a large and constantly growing portfolio of rights deriving from the television operations of their parent companies, enable the parties concerned to join the final customer market for paid VOD separately from one another. ZDF Enterprises and the participating ARD corporations also have an interest in a commercial VOD service. The aggregation of as many videos as possible at one central access point, which is required in order to offer a successful video platform service, does not stand in the way of separate market entry. An essential prerequisite of separate market entry from the point of view of competition is that the content is marketed separately in terms of determining prices and quantities. This does not exclude the possibility of making the videos accessible on a joint, purely technical platform that neither undertakes to carry out sales to final customers nor procures video licences, but provides its shareholders with the necessary technical services. Such a platform would be comparable with a traditional online marketplace.

Furthermore, a form of incomplete competition that is relevant here results from the television broadcasters backing ZDF Enterprises and the participating ARD corporations with their media libraries, which have been financed by means of fees for some time. From an economic point of view, it is to be assumed that the diversity and quality of the media libraries' services would have a considerable impact on the demand for paid VOD.

On the VOD final customer market, the centralised distribution of videos via a joint venture, with prices determined centrally, would eliminate competition on price between ZDF Enterprises on the one hand and the ARD corporations involved on the other. If they entered the market separately, each group would apply its own pricing strategies. In the case of joint distribution, the creation of a central department that determined prices would constitute a coordination instrument. The shareholders' coordination would lie in agreeing that a central department should determine the prices rather than taking individual price decisions. Irrespective of that, ZDF Enterprises and the participating ARD corporations would have been able to coordinate the pricing, particularly through the shareholder bodies of the joint venture.

Joint marketing of VOD, the purpose for which the videos were to be bought from the shareholders, was also intended to coordinate the prices of licences. As a result of this chosen

structure, the licence prices calculated by the partners vis-à-vis the joint venture would have been harmonised since the partners would effectively have been negotiating with themselves.

The licence prices coordinated within the joint venture would also have had repercussions for the shareholders' pricing vis-à-vis other platforms, insofar as ZDF Enterprises and the participating ARD corporations would have made their content available to other platforms at all following the foundation of the joint venture and the change in their incentive situation. It would have been highly likely that the price structure for their own platform would have been used as a reference point for pricing vis-à-vis third parties. This follows from the economic logic pursued by the platform, which is based on concentrating as much content as possible at one contact address in order to attract users' attention. Substantial or more favourably-priced offers of the same content on other platforms would have undermined the very effect the joint platform was aiming to achieve.

The restraints of competition observed above would also have been appreciable. This followed from the fact that at least some of them were restraints of competition by object. That notwithstanding, an argument supporting the view that the restraints of competition would have been appreciable was that the content planned for the joint venture's platform were specifically the television content of the ZDF and ARD stations, which had an indirect interest. Their production was financed from license fees, and at no economic risk, however. This means that distortion of competition was inherent to the service itself since major parts of that service would not have existed without the fees. In this context, the Bundeskartellamt generally regards additional restraints of competition between the commercial subsidiaries of the public-service television broadcasters as appreciable.

The agreements do not qualify for block exemption. The parties have not provided evidence that the agreements qualify for individual exemption under Section 2 of the ARC or Article 101 (3) of the TFEU. In particular, central pricing to achieve possible sales efficiency was not essential and the likely price increase effect was not proportionate.

The Bundeskartellamt called on the parties to resolve their competition problems by designing the platform's business model in compliance with competition law. Specifically, operating an open marketplace on the basis of a joint technical platform is possible under competition law and is an established online business model. In order to compensate for remaining competition problems, the Bundeskartellamt suggested that alternative platforms be given non-discriminatory access to the fee-financed productions.

Negotiations on a solution of this kind, whereby an undertaking enters into commitments under Section 32b of the ARC, were initiated with the undertakings involved, but these were later discontinued by them and the project abandoned.