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### **Expert Opinion**

on the permissibility of the sale of important participations that are not part of the Entertainment segment of ProSiebenSat.1 Media SE following a resolution of the General Meeting obligating the Executive Board to prepare a spin-off of the assets that are not part of the Entertainment segment

prepared on behalf of  
MFE-MEDIAFOREUROPE N.V.

## I. Facts

MFE-MEDIAFOREUROPE N.V. ("**MFE**") holds 26.58% of the shares in ProSiebenSat.1 Media SE ("**P7S1**" or the "**Company**") and has filed a motion pursuant to Section 122 (2) of the German Stock Corporation Act (*Aktiengesetz*, "**AktG**") in conjunction with Article 56 sentences 2, 3 of the SE Regulation (*SE-Verordnung*, "**SE-VO**") and Section 50 (2) of the German law implementing the SE Regulation (*SE-Ausführungsgesetz*, "**SEAG**"), to have *inter alia* the following resolution proposal added to the agenda of the Annual General Meeting of P7S1 convened for April 30, 2024 and to have it published without undue delay (the "**Request for Addition to the Agenda**"):

"It is proposed that the following resolution be adopted:

*In accordance with Section 83 (1) AktG in conjunction with Art. 52 SE-VO, the Executive Board, by way of the request of the Annual General Meeting declared herewith, is obligated, at the earliest possible date, but no later than the date of the 2025 Annual General Meeting, to prepare a spin-off and transfer agreement for the purposes of a spin-off, within the meaning of Section 123 (2) no. 1 UmwG, of the assets of the Company that are not attributable to the Entertainment segment (as described in the 2023 Annual Report) ("**Spin-off Assets**") for absorption by an acquiring legal entity having the legal form of an SE or a German stock corporation (AG) that does not operate any business of its own and that does not hold any other significant assets and whose shares are held by the Company or that is to be acquired or founded by the Company and whose shares will be listed on any stock exchange at the time the spin-off takes effect and to submit such agreement to the General Meeting for approval either as a draft or as an already concluded agreement subject to the approval of the General Meeting and to prepare all reports required for a lawful resolution of the General Meeting on the approval of the spin-off and transfer agreement, or its draft, and to take all other necessary measures. The Spin-off Assets are to comprise all assets including all contracts, liabilities and other legal positions, as well as all employment relationships that are not exclusively or predominantly attributable to the Entertainment segment as described in the 2023 Annual Report. The Spin-off Assets include, in particular, all assets including all contracts, liabilities and other legal positions as well as all employment relationships that are exclusively or predominantly attributable to the Commerce & Ventures segment and Dating & Video segment, each as described in the 2023 Annual Report. If it is unclear whether an asset or an employment relationship is exclusively or predominantly attributable to the Entertainment segment or any other activities of the Company, the Executive Board is to make the attribution at its due discretion.*

*The above request shall not prevent the Executive Board from examining and implementing, in the interests of the Company including the interests of all of its shareholders, alternative options for separating the other segments, Commerce & Ventures and Dating & Video, from the Entertainment segment (each as described in the Annual Report for the 2023 financial year) through the sale of the assets exclusively or predominantly attributable to either the two segments Commerce & Ventures and Dating & Video or the Entertainment segment, provided that it is ensured that a spin-off and transfer agreement will be presented to the Annual General Meeting in 2025 for the*

*purposes of adopting a resolution if a full separation of the segments has not been completed by that time through sales processes."*

The Company has fulfilled the Request for Addition to the Agenda.

The proposed resolution is intended to obligate the Executive Board to prepare a spin-off of the assets not attributable to the Entertainment segment, including the Commerce & Ventures and Dating & Video segments, in particular by drafting a spin-off and transfer agreement governing, *inter alia*, the allocation of the assets and the employment relationships with the staff between the two companies. The aim is to accelerate the separation and focusing of the Company's different business areas as announced by the Company's Executive Board itself and named in the 2023 Annual Report as an aim that is being pursued.

## **II. Subject Matter**

MFE has asked the undersigned for an expert opinion on the following question: Assuming the resolution to be passed by the General Meeting of P7S1 proposed by MFE in its Request for Addition to the Agenda dated March 21, 2024, to obligate the Executive Board to prepare a spin-off and transfer agreement pursuant to Section 83 (1) AktG in conjunction with Article 52 SE-VO is adopted with the required majority:

1. Does the resolution prohibit the Executive Board of P7S1 to dispose of important participations that are not part of the Entertainment segment?
2. Would the Executive Board of P7S1 become liable for damages if it were to dispose of important participations that are not part of the Entertainment segment of P7S1 and such disposal would result in the Spin-off Assets being reduced to such an extent that it would not seem to make sense from a legal or commercial perspective to spin them off to an acquiring legal entity?

### III. Legal Assessment

#### 1. Starting Point under German Stock Corporation and Transformation Law

Pursuant to Section 83 (1) sentence 1 AktG, a company's executive board is obligated, at the request of the general meeting, to prepare any measures that fall within the competence of the general meeting. Pursuant to Section 83 (1) sentence 2 AktG, the foregoing also applies to the preparation and conclusion of agreements that will enter into effect only with the consent of the general meeting. This also includes the subject matter of the Request for Addition to the Agenda, which is the preparation of the spin-off and transfer agreement for the spin-off of the Spin-off Assets; pursuant to Article 9 (1) point (c)(ii) SE-VO and Section 125 (1) sentence 1 of the German Transformation Act (*Umwandlungsgesetz*, "**UmwG**") in conjunction with Sections 13, 36, 65, 76 UmwG, the conclusion of this agreement requires a resolution of the General Meeting of P7S1 so that the preparation of the agreement can be initiated by the General Meeting of P7S1;

for more details on the general meeting's initiation right derived from Section 83 (1) AktG see *Habersack/Foerster*, in: *Großkommentar zum AktG*, 5<sup>th</sup> ed. 2015, Sec. 83 margin no. 8; *Spindler*, in: *Münchener Kommentar zum AktG*, 6<sup>th</sup> ed. 2023, Sec. 83 margin no. 10.

If the Executive Board has been obligated to prepare the spin-off and transfer agreement, it must initiate the conclusion thereof pursuant to Section 83 (2) AktG; this does not affect, however, the requirement under German stock corporation or transformation law of obtaining the General Meeting's consent to the conclusion of the agreement as stipulated in Section 83 (1) sentence 2 AktG. For the facts to be assessed in the case at hand, this means that the Executive Board would have to re-submit the spin-off and transfer agreement regarding the spin-off of the Spin-off Assets to the General Meeting of P7S1 for another resolution and that the agreement would only enter into effect – pursuant to Article 9 (1) point (c)(ii) SE-VO and Section 125 (1) sentence 1 UmwG in conjunction with Sections 65 and 76 UmwG – once it is approved by the General Meeting with a majority of at least three quarters of the share capital represented at the time the resolution is passed.

Irrespective of the right of the General Meeting to initiate the preparation and conclusion of the spin-off and transfer agreement derived from Section 83 (1) AktG, the General Meeting therefore retains the ultimate decision-making right. The Executive Board may, in turn, pursuant to Article 9 (1) point (c)(ii) SE-VO and Section 93 (4) sentence 1 AktG, claim in its dealings with the Company that it is relying on the fact it has been obligated by

Expert Opinion Prof. Dr. Habersack dated April 15, 2024

resolution of the General Meeting to prepare and execute the spin-off and transfer agreement and that it has thus acted in fulfilment of a resolution adopted by the General Meeting. This in turn means that the Executive Board cannot refuse to prepare and conclude the spin-off and transfer agreement by stating that it considers an alternative approach to be preferable; the Executive Board's managerial discretion under Section 76 (1) AktG is limited by the basic competence of the General Meeting and therefore the General Meeting's competence to initiate, and ultimately resolve on, transformation measures;

cf. GroßkommAktG/*Habersack/Foerster, loc. cit.*, Sec. 83 margin no. 13, which includes statements on the limitation of the implementation duty of resolutions adopted by a general meeting in violation of legal or statutory provisions (which is admittedly not the case here).

## **2. No Prohibition of a Disposal of Important Participations**

For the purposes of this Expert Opinion, there is no need to comment on the question as to whether the Executive Board would be prohibited from disposing of important participations that are not part of the Entertainment segment if the resolution adopted by the General Meeting that obligates the Executive Board to prepare a spin-off and transfer agreement did not contain a reservation to this effect. In the situation to be assessed here, the Request for Addition to the Agenda expressly states that the Executive Board is not to be prevented from examining and implementing alternative options for separating the segments through a sale of assets that are not exclusively or predominantly attributable to the Entertainment segment. This is to be seen in light of the fact that with the Request for Addition to the Agenda MFE intended to accelerate the separation and focusing of the Company's different business areas, as already announced by the Executive Board itself, by initiating additional options for action, so that measures serving to achieve this goal in other ways are equally welcome from MFE's point of view. For this reason alone, a resolution adopted by the General Meeting obligating the Executive Board to prepare a spin-off and transfer agreement would not prohibit the Executive Board from disposing of important participations that are not part of the Entertainment segment of P7S1 and thereby implementing the separation of the segments. As set out in more detail under 3. below, this

also applies to the extent that such a disposal would call into question the reasonableness of a spin-off or would constitute a disposal of the Spin-off Assets in their entirety.

### **3. A Disposal of Important Participations Does Not Constitute a Breach of Duty**

The question remains whether the Executive Board, assuming it were to be obligated by the General Meeting to prepare a spin-off and transfer agreement, would remain authorized to dispose of important participations that are not part of the Entertainment segment of P7S1 also in the event where this would result in the Spin-off Assets being reduced to such an extent that it would not seem to make sense from a legal or commercial perspective to spin them off to an acquiring legal entity. In this context as well, it is decisive that the Request for Addition to the Agenda expressly states that the Executive Board is not to be prevented from examining and implementing alternative options for separating the segments through a sale of assets that are not exclusively or predominantly attributable to the Entertainment segment. For the Executive Board of P7S1, this means that it could not be accused of any breach of its duty of care insofar as the disposal of significant assets that are not part of the Entertainment segment as such is concerned; in particular, a breach of duty could not be justified with the accusation that such disposals would undermine the spin-off request.

This also applies in the event where such disposals would result in the Spin-off Assets being reduced to such an extent that it would not seem to make sense from a legal or commercial perspective to spin them off to an acquiring legal entity. The resolution sought to be adopted by MFE's request makes a disposal of assets that are not part of the Entertainment segment, and therefore in particular important participations, subject to the provision that a spin-off and transfer agreement must be presented to the Annual General Meeting in 2025 if a "full" separation of the segments has not been completed by that time through sales processes. It does, however, serve to ensure that the General Meeting will still resolve on the spin-off of assets not attributable to the Entertainment segment even if parts of them were disposed of without this having constituted a complete divestiture. This, in turn, serves to protect the right of the General Meeting as set out in III.1. above to resolve on the spin-off of any remaining parts of the Spin-off Assets, but does not restrict the managerial discretion of the Executive Board in disposing of these assets. This must be seen in light of the situation described under I. above that the aim of the Request for Addition to the Agenda is to

accelerate the separation and focusing of the Company's different business areas, as announced by the Executive Board itself, by initiating an additional option for action.

This separation – but not the manner in which it is implemented – therefore constitutes the strategic aim pursued by MFE. This in turn explains the fact that the resolution is to expressly permit the Executive Board to dispose of the Spin-off Assets in their entirety, thus making another resolution by the General Meeting on the spin-off obsolete. Where assets remain that could be spun off, the General Meeting is to retain its ultimate decision-making right regarding the spin-off as mentioned under III.1. above. In that event, however, the spin-off is at the discretion of the shareholders (and is therefore not to be resolved on by them just because the Executive Board has been obligated by the General Meeting to prepare a spin-off and transfer agreement) – irrespective of whether any disposals have occurred at all, whether rather insignificant parts of the Spin-off Assets were disposed of or whether the Spin-off Assets have not been disposed of in their entirety but a spin-off of the remaining parts thereof does not appear to make sense.

It is therefore clear, however, that the Executive Board's managerial discretion with regard to the disposal of assets that are not part of the Entertainment segment would not be restricted by the resolution obligating it to prepare the spin-off and transfer agreement; it would remain free to bring about the separation of the segments in other ways, in particular through disposal transactions, in full or in part. This would not affect the requirements in connection with the Executive Board's duty of care under Section 93 (1) sentence 1 AktG and therefore the fact that it is obligated – as reiterated in the Request for Addition to the Agenda – to act in the Company's best interests when deciding whether and if so, under what conditions, such a disposal should take place; in particular, the Executive Board would not be authorized to dispose of participations (whether material or not) at an inopportune time or at a dumping price. This obligation would exist, however, irrespective of the Request for Addition to the Agenda and also irrespective of whether or not such disposals call into question the reasonableness of a subsequent spin-off.

#### **4. Conclusion**

If the Executive Board were to be obligated by the General Meeting to prepare a spin-off and transfer agreement, it would still remain authorized pursuant to Section 93 (1) sentence 1 AktG to dispose of important participations that are not part of the Entertainment segment of P7S1. This applies also in the event where such disposals would result in the Spin-off Assets being reduced to such an extent that it would not seem to make sense from a legal or commercial perspective to spin them off to an acquiring legal entity: Whether or not a spin-off will take place is therefore at the ultimate decision-making power of the General Meeting of P7S1 (subject to a disposal of the Spin-off Assets in their entirety, which the Executive Board is also permitted to perform) and is prejudiced neither by the obligation of the Executive Board to prepare a spin-off and transfer agreement nor by any disposal transactions undertaken by the Executive Board even where those result in a spin-off of the remaining parts of the Spin-off Assets not appearing to make sense.

Pullach, April 15, 2024

Prof. Dr. Mathias Habersack