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Case No COMP/JV.30 - BVI TELEVISION (EUROPE) / SPE EUROMOVIES INVESTMENTS / EUROPE MOVIECO PARTNERS

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 03/02/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3 February 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sirs,

Subject: Case No COMP/JV.30 – BVI Television (Europe) Inc/SPE Euromovies Investments Inc /Europe Movieco Partners
Notification of 22 December 1999 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

1. On 22 December 1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89[1] by which BVI Television (Europe), Inc ("BVI Europe") and SPE Euromovies Investments Inc ("SPE Europe") acquire joint control of Europe Movieco Partners ("Movieco"), a newly created company constituting a joint venture.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

3. BVI Europe is a US corporation and its sole business is Movieco. It is an indirect subsidiary of The Walt Disney Company ("Disney"), whose main businesses are the production and distribution of films and television programmes, the distribution of home entertainment products, consumer products licensing and retail operations, the operation of theme parks and television and radio broadcasting.

[1] OJ L 395 p. 1; corrigendum: 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: 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.

4. SPE Europe is a US corporation and its sole business is Movieco. It is an indirect subsidiary of Sony Pictures Entertainment Inc ("Sony"), whose main businesses are the production and distribution of films, the production and syndication of television programmes, home video acquisition and distribution, the operation of studio facilities, the development of new entertainment products, services and technologies and the distribution of filmed entertainment worldwide.

5. Movieco is a Delaware general partnership. When operational Movieco's business will be the creation, distribution and marketing of a pay-TV movie channel to be distributed initially by cable operators in the Netherlands and Flemish speaking Belgium.

II. THE OPERATION

6. The basic structure of the proposed transaction can be described as follows:

7. BVI Europe and SPE Europe will both have a […] share of Movieco. The Netherlands based broadband cable and telephony company, United Pan-Europe Communications ("UPC"), will hold the remaining […]. UPC, who operates cable networks in the Netherlands and Belgium, will carry Movieco's channel. As will be shown below, UPC does not have joint control of Movieco and therefore they are not a party to the notification.

III. CONCENTRATION

8. The proposed operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, by virtue of being a full function joint venture for the purposes of Article 3(2) of the Merger Regulation.

Joint control

9. Pursuant to the Shareholders Agreement, BVI Europe, SPE Europe and UPC will each appoint two of the six members of the Management Committee of Movieco. The Committee will appointed a CEO to manage and operate on a day-to-day basis.

10. Certain strategic decisions require the unanimous vote of the Management Committee representatives of BVI Europe and SPE Europe, but not UPC. [….].

11. Therefore, the joint venture will be under the joint control of BVI Europe and SPE Europe.

Autonomous economic entity acting on a lasting basis

12. Movieco will have all the resources required to operate independently on the market, including […] staff, know-how and sufficient funding. It is expected that after a start-up period of two years it will spend just over half its budget for licensing film rights on third party films. In conclusion, Movieco will be able to perform on a lasting basis all the functions of an autonomous economic entity.

IV. COMMUNITY DIMENSION

13. The combined worldwide turnover of the undertakings concerned is more than EUR 5 000 million (Sony: EUR 45,168 million, Disney: EUR 20,751 million).

14. Each of them has an aggregate Community-wide turnover in excess of EUR 250 million (Disney: EUR 2,000 million in Europe, Sony: EUR 11,079 million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

A. The relevant markets

15. The Commission considers that two product markets could be considered relevant for the assessment of this operation. The first relevant market, which is defined in *TPS*[2] as the market for the acquisition of broadcasting rights, in particular for films and sporting events, by pay-TV channels. The second market is pursuant to *British Interactive Broadcasting/Open*[3] and *NC/Canal Plus/CDPQ/Bank of America*[4] the market for the wholesale supply of film and sport channels to pay-TV. This involves the supply of channels, which are sold on an individual basis and at a premium to the subscriber by the pay-TV operator, as opposed to the package of general interest and thematic channels.

16. However, for the purposes of the present assessment the precise scope of the relevant product markets can be left open, since on the basis of all plausible market definitions considered, the operation will not lead to the creation or strengthening of a dominant position.

17. With regard to the market for the acquisition of broadcasting rights, in particular for films and sporting events, to pay-TV channels, the parties submit that, although this is a global business, licensing arrangements are made on a national or regional basis (by language).

18. The parties assert that the geographic market for the supply of film and sport channels to pay-TV is national, citing *Kirch/Richemont/Telepiù*.[5] In that Decision the Commission noted that the conditions of competition in television markets vary form Member State to Member State, in particular that channels tend to be designed on the basis of the national or linguistic cultural interests, leading to rights being purchased on a national or language basis. In addition, broadcasting windows for feature films vary between Member States and pay-TV requires an extensive customer service organisation in the country where subscribers are located.

19. For the purposes of this case the exact determination of the geographic scope of the market can be left open because even in the narrowest market definition possible, i.e. a

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[2] Case No. IV/36.327 – TPS, Official Journal L90, 2/4/99, page 10, paragraphs 34 to 36.

[3] Case No. IV/36.539 –BiB/Open, Official Journal L312, 6/12/99, page 5, paragraph 28.

[4] Case No. IV/M1327 – NC/Canal Plus/CDPQ/Bank of America, Official Journal C233, 14/8/99, page 51, paragraph 15.

[5] Case No.IV/M410 - Kirch/Richemont/Telepiù, 2/8/94.

national market, the operation will not lead to the creation or strengthening of a dominant position.

B. Dominance

1. The market for the acquisition of broadcasting rights, in particular for films and sporting events, by pay-TV channels

20. The joint venture will have a limited impact on this market. It will not be purchasing sports rights and is free to purchase film rights from any source. Although it expects to draw heavily on Disney and Sony releases in its two-year start up period, it is expected to acquire a significant amount of its films from third parties afterwards. As Canal Plus is currently the only purchaser in this market, the entrance of Movieco will increase competition on the demand side. Canal Plus retains agreements with the other five major Hollywood studios, as well as independent and European studios.

21. For the reasons referred to above the operation will not lead to the creation or strengthening of a dominant position.

2. The market for the wholesale supply of film and sport channels to pay-TV

22. Movieco will be the only supplier on this market in Flemish Belgium and the Netherlands. Canal Plus is the only other producer of a film and sports pay-TV channel comparable with Movieco[6] that is shown in Flemish Belgium and the Netherlands. However, it does not compete with Movieco at the wholesale level. Movieco sells its channel in the wholesale market to a pay-TV operator, who then sells the channel to the end user in the retail market, whereas Canal Plus supplies its channel directly to the end user via its own pay-TV platform and does not make it available to any other pay-TV operator in Belgium or the Netherlands. There is a direct relationship with the end user as Canal Plus runs its own pay-TV operation (encrypting the channels, selling the end user the decoder boxes and managing subscriptions), only renting cable capacity from the cable operator. It is therefore not competing with Movieco in the wholesale market but with the pay-TV operator who is selling Movieco as part of its offering on the retail market.

23. However, Movieco cannot be said to be dominant. Even if Canal Plus is not directly present on this market, Movieco cannot ignore it, given its position both upstream (in the broadcasting rights market) and downstream (in the retail market). Furthermore there are other potential entrants to this market. Other Hollywood studios, for example, are in the same position as Disney and Sony and could follow by establishing film channels of their own. They are not restrained by a lack of cable capacity for their channels, or lack of capital.

24. Cable operators, like UPC, will buy the Movieco channel and combine it with other channels in order to develop a competing retail pay-TV offering[7]. Canal Plus dominates

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[6] There are other film channels – UPC's Film 1 and Turner's TCM – but these show library, or classic pictures, rather than recent releases and are sold as part of thematic or basic pay-TV channel packages, rather than as a stand-alone premium channel.

[7] UPC and Brutele, a Belgian cable TV operator, have made a start in this direction, offering additional pay-TV channels in several thematic packages. The addition of a premium film channel will make this offering

this market. Movieco therefore facilitates competition with Canal Plus on the upstream retail market between the pay-TV operators, although the joint venture has no presence on this market.

25. The parents' stakes in their two other pay-TV channels do not alter the analysis. Disney has an indirect stake in Eurosport, a pan-European sports channel. This does not operate in the relevant market as it is sold as part of the package of general interest or thematic channels, rather than on an individual basis and at a premium. Sony has an interest in SET, a channel that broadcasts programmes, news and films in Hindi in the Netherlands. This channel is sold individually, and at a slight premium to the channels in the basic package. However, this is a function of its specific target audience rather than its competing with channels like Canal Plus, which have a more general appeal. Even if it is included in the relevant market, its market position is very limited. Accordingly the operation will not lead to the creation or strengthening of a dominant position.

C. Co-ordination of competitive behaviour

26. Pursuant to Article 2(4) of the Merger Regulation, a joint venture having as its object or effect the co-ordination of the competitive behaviour of (at least two of) its parent companies has to be appraised in accordance with the criteria of Article 81(1) and Article 81(3) of the EC Treaty. In order to establish a restriction of competition in the sense of Article 81(1) of the Treaty it is necessary that the co-ordination of the parent companies' is likely and appreciable and that it results from the creation of the joint venture, be it as its object or its effect.

1. Definition of a candidate market for co-ordination

27. According to Article 2(4) second sub-paragraph of the Merger Regulation, the Commission shall, when making the appraisal of co-ordination of the competitive behaviour of undertakings that remain independent in accordance with the criteria of Article 81(1) and (3) of the Treaty, take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.

28. There are several markets, which could be assessed for the purposes of Article 2(4). The first is the neighbouring market of the wholesale supply of basic pay-TV channels to pay-TV operators. Both Sony and Disney are present in this market. The other markets relate to the production of films and the various markets in which the rights for films are acquired, other than for pay-TV. This includes theatrical release, pay-per-view and free-to-air TV. It does not include the acquisition of film rights for the pay-TV market . There is no scope for co-ordination here as the parties have entered into an agreement which places control of access to most of its films in the hands of the joint venture. This is dealt with under ancillary restrictions in section VI. Even if there was not such exclusivity, the market for broadcasting rights for pay-TV would raise

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more competitive with Canal Plus. Canal Plus has taken action against UPC when the later attempted to prevent Canal Plus renting capacity on its networks.

essentially the same issues of co-ordination considered below and lead to the same conclusions.

2. Assessment under Article 2(4)

29. It has to be examined whether the operation might have the effect of co-ordinating the competitive behaviour of the parents. There are no indications that the operation has the object of co-ordinating the competitive behaviour of Disney and Sony as suppliers of basic pay-TV channels to pay-TV operators. Their position on that market is insignificant and both parties have specifically stated that they retain the option to launch new channels to compete with each other and they remain free do to anything they wish that does not involve the supply of film to another pay-TV channel. Even in relation to pay-TV the parties have specifically retained the option to launch two particular channels and supply them with animated or children's films. These are, for Sony, an animation channel and, for Disney, a proprietary channel marketed primarily towards children and families.

30. There does not seem to be a scenario in which the joint venture creates an incentive for co-ordination in this market. Essentially, the parties have agreed to exploit all their current films in the pay-TV market exclusively[8] through the JV. There is therefore no scope for co-ordination. The only area where there is overlap between the joint venture and the projected parents channels is that of broadcasting feature length animation or family films, where they could agree to not broadcasting such films at the same time. As such features make up a very limited part of the joint ventures repertoire this would have a very limited impact on competition.

31. Disney and Sony have significant positions as film producers and suppliers of rights for those films to various markets, due to their control of two of the seven major Hollywood studios. Their position in terms of films released, both library pictures and the more valuable recent releases, gives an indication of their position in the market for supplying broadcasting rights. According to the parties, they accounted for [..]% of the titles theatrically released in the US between 1970 and 1988. The parties accounted for [..]% of films released between 1996 and 1998, which are the more valuable films for television.

32. Only about 60% of theatrical releases in the Netherlands and in Belgium are from the US and not all American films are released in Europe. Accordingly the parties figures for theatrical releases in the Netherlands are proportionate. In 1998 Sony and Disney accounted for [..]% of releases, up from [..]% in 1997 and [..]% in 1996.

33. In terms of value of films at the box office, surveys suggest that the parties have similar shares when looking at Europe as a whole. Sony and Disney accounted for about 29% of the European theatrical box office in 1997, a very successful year for Sony, which saw a 75% increase in their box office receipts over 1996. In 1996 the parties accounted for 21% of the combined box office and 20% in 1995. The studios change position over time e.g. in 1997 Disney led with 17% of the market, followed by Warner Brothers and Sony at 12% each, Fox at 11% and Universal at 10%. In 1995 Warner's

8 The exclusivity aspect is not dealt with in this decision, see below under ancillary restrictions.

led with 16%, followed by Universal at 12%, Sony at 11%, Disney at 9% and Fox at 6%. [9]

34. In *UIP*[10], a distribution joint venture involving three Hollywood studios, a market share of 20% for Europe as a whole was not found to eliminate competition. Given the market position of the major studios the combined share of Sony and Disney will not alter that conclusion.

35. Movieco does not create an incentive for Sony and Disney to co-ordinate their behaviour in these various market. The parties remain free to supply any user of film rights in these markets. The creation of the joint venture will not eliminate competition, as there are actual or potential competitors in all these markets.

36. The operation will not lead to any co-ordination of the parents' competitive behaviour in a market outside the joint venture.

VI. ANCILLARY RESTRICTIONS

37. The parties have notified Clause 4 of the Licence Agreements as an ancillary restriction. […]

38. […]

39. The parties submit that the agreement represents the parents lasting withdrawal from the market in which Movieco Partners will operate and that it is a non-compete clause. However, this is not the case as the restriction is on the upstream market to that in which the joint venture operates. The parents will still be free to enter the joint venture's market with a pay-TV film channel, provided they source their films elsewhere. As such this is not a non-compete clause but an exclusive supply agreement.

40. As stated in the Commission notice regarding restrictions ancillary to concentrations, there does not appear to be a general justification for exclusive supply obligations. In the absence of any exceptional circumstances in this case, such exclusivity is not objectively necessary to permit the implementation of the concentration.

41. The notified clause is not directly related and necessary for the implementation of the concentration. Insofar as they could constitute a restriction of competition, they are not, therefore, covered by the present decision.

VI. CONCLUSION

42. 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 (EEC) No 4064/89.

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[9] European Audiovisual Observatory Statistical Yearbook 1998, page 92.

[10] Case No. IV/30.566 – UIP, Official Journal L226, 3/8/89, paragraph 57.

For the Commission,