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Case No IV/M.1455 - GRUNER + JAHR / FINANCIAL TIMES / JV

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.4.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Subject: Case No IV/M.1455 – GRUNER+JAHR/FINANCIAL TIMES/JV
Notification of 12 March 1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 12 March 1999, the Commission received a notification of a proposed joint venture between Financial Times Group Limited ("Financial Times") and Gruner + Jahr AG & Co ("Gruner + Jahr") for the purpose of developing and publishing a new German language business and financial daily newspaper to be distributed in Germany, Austria and Switzerland.

2. After an 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 and with the EEA Agreement.

I. THE PARTIES AND THE OPERATION

3. Financial Times is a company incorporated in the United Kingdom. It publishes magazines, newsletters and newspapers including the English language business and financial daily newspaper *Financial Times*. The company also provides related on-line services and a world-wide subscription based dial-up archive service (*FT Profile*) intended for corporate customers. The company is a wholly owned subsidiary of the international media group Pearson plc.

4. Gruner + Jahr is a German company active in the publishing of magazines and regional newspapers, printing and distribution of publications as well as multimedia and online services. The company is controlled (74.9%) by the media group Bertelsmann AG. Bertelsmann AG is involved in the publishing and printing of books, magazines and journals, book clubs, printing, music and record publishing and distribution as well as television and multimedia activities.

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5. The new venture is a 50:50 joint venture between Financial Times and Gruner + Jahr. It will develop and publish a new German language business and financial daily newspaper printed on pink paper, together with a related internet Website. The content of the newspaper will be designed for the German market and it mainly consists of business and financial news but also brief sections on general German news, politics, culture and sports. The newspaper will be distributed in Germany, Austria and Switzerland.

II. CONCENTRATION

Joint control

6. Financial Times and Gruner + Jahr will each have an equal 50% share of the capital of the joint venture. Financial Times and Gruner + Jahr are the Limited Partners of the joint venture, whereas the GmbH is the General Partner entitled and obligated to manage and represent the joint venture. The overall direction, policy and supervision of the joint venture will be exercised by two bodies: the Partners' Meeting and the Limited Partners' Committee.

7. *Partners' Meeting* has the sole competence to decide on any amendment to the Partnership Agreement, on any material change in the nature or scope of the business of the joint venture and on any merger, any disposal or any transfer of the business of the joint venture or dissolution of the Limited Partnership. The Financial Times and Gruner + Jahr will be represented equally at the Partners' Meeting whereas the General Partner has no vote. All decisions require unanimity.

8. *Limited Partners' Committee* takes decisions, such as the approval of the annual business plan and budget, transactions going beyond the customary scope of the joint venture's business and certain types of contracts and liabilities. The Committee comprises of six members, whereby each Limited Partner appoints three members ("FT Representatives" and "G+J Representatives" respectively). The chairman of the Committee is appointed by Financial Times for the first year and by Gruner + Jahr for the second year, following which the chairmanship will alternate between the Limited Partners every two years. The Financial Times and Gruner + Jahr have each one vote in the Limited Partners' Committee. All decisions of the Limited Partners' Committee shall be made unanimously by resolution, unless expressly otherwise provided for by the Partnership Agreement. In the case of deadlock recourse would be made to mediation and arbitration procedures. Should, however, the matter remain unresolved for more than […], the joint venture shall be dissolved.

9. The Agreements establishing the joint venture thus provide for all important business decisions to be taken unanimously either by the Partners' Meeting or the Limited Partners' Committee. Therefore, the joint venture will be jointly controlled by Financial Times and Gruner + Jahr, as neither of them will be in a position to determine unilaterally its behaviour.

Full functionality

10. The joint venture's objective is to be active in different stages of the publishing of the new German language business and financial daily newspaper from news-gathering, editing and printing to distribution, advertising sales, marketing, merchandising and other related activities. The joint venture has access to sufficient resources including

management, finance, assets and staff to conduct its business activities and it operates on the market performing the functions normally carried out by undertakings operating on the same market. The content of the planned newspaper would consist of contributions by the joint venture's own journalists, by news agencies' reports and only to some extent […] be translated from the English language edition of the Financial Times. The joint venture is not limited in time and the intention of Financial Times and Gruner + Jahr is that apart from the capital contributions and the additional capital contributions as defined in the Partnership Agreement, the joint venture will be self-financing and obtain any necessary funds from third parties. […]

11. As the joint venture is set to become an active new player on the market on its own right, the fact that the new newspaper will benefit from the established "FT" and "Financial Times" trademarks, does not call into question the full function nature of the joint venture. It can therefore be concluded that the joint venture will operate on a lasting basis and will perform all the functions of an autonomous economic entity. Thus, the notified operation involving a setting up of the above-mentioned joint venture, is a concentration within the meaning of Article 3(1) (b) of the Merger Regulation.

III. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[1](EUR 3,312 million for Pearson plc in 1997 and EUR 11,629 million for Bertelsmann AG in 1998). Each of Financial Times and Gruner + Jahr have a Community-wide turnover in excess of EUR 250 million ([…] for Pearson plc in 1997 and EUR 6,659 million for Bertelsmann AG in 1998), 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.

IV. COMPETITIVE ASSESSMENT

A. Relevant product market

13. The economic sectors involved in the proposed concentration are the daily newspaper publishing and advertising markets including the related online markets.

14. The proposed joint venture will develop and publish a new German language business and financial daily newspaper together with a related internet Website, the content of which is designed for the German market. According to the parties, the relevant product markets are the reader as well as the advertising market for quality national daily newspapers.

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1 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

15. In previous decisions concerning the newspaper publishing market[2], the Commission has distinguished between the reader and advertising markets. In the market for newspapers the consumers are the buyers of the newspapers as a source of information. In the advertising market, the consumers are the advertisers who buy advertising space to promote the sales of goods or services.

Daily newspaper market

16. From the reader's perspective, a differentiation can be made within the written press between daily newspapers and non-daily (weekly, monthly) magazines. Both products satisfy different information needs of the customers and should be considered as pertaining to different relevant markets. Daily newspapers provide information about events the day after they have taken place while magazines are not capable of providing such immediate coverage. Daily newspapers are also substantially less expensive than magazines.

17. The daily newspaper market can further be divided into national daily newspapers and regional daily newspapers. Regional daily newspapers by definition concentrate on local as opposed to national issues. The national daily newspapers can further be divided into different categories on the basis of the content of the newspaper (daily newspapers for general information, sports papers and financial newspapers) or according to editorial line of the newspaper or the quality of the publication (quality press as opposed to tabloids). Due to possible overlaps of certain information contained in the newspapers, the distinction between different types of newspapers can to some extent become blurred. Differences in the price and selling patterns of such newspapers, however, tend to indicate that they belong to different product markets.

18. In the present case, the distinction between daily press and periodical magazines as well as the distinction between daily newspapers according to different contents appears relevant. The proposed joint venture will develop and publish a new business and financial daily newspaper, the content of which is designed for the German market. The newspaper will, however, also contain brief sections on general German news, politics, culture and sport. It is not necessary, however, in the present case to conclude on the definition of the relevant product markets, since given the nature of the operation even pursuant to the narrowest possible definition of the market as the reader market for quality national daily newspapers, as proposed by the parties, the concentration does not give rise to competition concerns.

Advertising market

19. Newspaper advertisements are intended to promote the sales of goods and services to readers, and their success depends on "targeting" the appropriate socio-economic groupings. For some types of products or services, different media could be seen as substitutable advertising channels while for others, the appropriate channels would be limited to specific media focusing on the target groupings. Therefore, it could be argued, in line with the view taken by the parties, that the relevant product market in the present case is the advertising market for quality national daily newspapers. The Commission has

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2 Decision of 1 February 1999, Case M.1401 - Recoletos/Unedisa; Decision of 29 November 1995, Case M.665 – CEP/Groupe de la Cité; Decision of 15 March 1994, Case M.423 – Newspaper Publishing.

held in a recent case[3] that there can be factors, however, which may speak in favour of considering the sale of advertising space in the written press as a single and thus wider market.

20. Taking account of the nature of the proposed joint venture, the entry of a new competitor in the national daily newspaper advertising market, there is no need to conclude on the precise definition of the relevant markets. Even pursuant to the narrowest possible definition of the market as the advertising market for quality national daily newspapers, the concentration does not give rise to competition concerns.

B. Relevant geographic market

21. According to the view held by the notifying parties and in line with previous Commission decisions, the daily newspaper market as well as the daily newspaper advertising market is generally defined to be national in scope. The present operation, however, concerns a new German language newspaper, the content of which is designed for the market in Germany and which is to be distributed in Germany, Austria and Switzerland. Thus, it could be argued that geographic market is wider comprising Germany, Austria and Switzerland. However, for the purpose of this case the exact market delimitation can be left open as neither under a national definition of the geographic market nor under a wider geographic market comprising also Austria and Switzerland, the concentration gives rise to competition concerns.

C. Assessment

<u>*Daily newspaper market*</u>

22. If we consider the market for quality national daily newspapers in Germany, to constitute the relevant market in the present case, as proposed by the parties, this new newspaper would compete with *Handelsblatt* (161,347 sold copies per day), *Frankfurter Allgemeine Zeitung* (400,307 sold copies per day), *Süddeutsche Zeitung* (413,587 sold copies per day), *Die Welt* (218,307 sold copies per day), the *Börsenzeitung* (estimated 14,000 sold copies per day) and *Neue Zürcher Zeitung* (estimated 12,000 sold copies per day).

23. The joint venture envisages sales levels to reach […] copies per day for the first year of business. The new newspaper will be sold through three channels: news stands ([…]), subscription ([…]) and bulk sales ([…]), whereby in the subsequent years the amount of sales through subscriptions and news stands is expected to rise. The sales in Austria and Switzerland are expected to amount to less than […] of the total sales of the newspaper. The estimation is based on corresponding sales figures of *Handelsblatt* (approximately 5%) and *Frankfurter Allgemeine Zeitung* (approximately 3%).

24. According to the parties, there are no horizontal affected markets. The joint venture has no market share at present and neither Financial Times nor Gruner + Jahr is present in the markets of the joint venture in Germany, Austria or Switzerland. Nevertheless, there appears to be a small overlap in the market, since Financial Times is involved in the publishing of a daily business and financial daily newspaper in Germany. The company sells 21,475 copies per day of its English language edition of the *Financial Times* in the German market. The focus of the English language edition is not, however, on the events

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3 Decision of 1 February 1999, Case M.1401 - Recoletos/Unedisa.

on the German market and thus it does not necessarily belong to the same market with the new German language business and financial daily newspaper the content of which is designed for the German market.

25. The parties are also of the opinion that there are no vertical affected markets, since any upstream of downstream activities of the parents would amount to market shares of less than 25%. Gruner + Jahr has printing and distribution activities in Germany and owns printing facilities in Berlin and Dresden. It is estimated that the company's market share of the newspaper printing business in Germany amounts to less than [<5 %]. Taking all the printing activities of Gruner + Jahr and Bertelsmann together their market share in Germany would amount to [5-10%] and [<5 %] in the EU.

26. Furthermore, the printing of newspapers and magazines requires the use of different technologies. The necessary technical equipment is not exchangeable and appears to be rarely combined in one printing plant. The parties argue that the printing sites of Gruner + Jahr fail to have sufficient spare capacity and are not ideally located to qualify for the decentralised printing concept envisaged by the parties to achieve nation-wide distribution […].

27. Similarly, the parties maintain that the distribution activities of Gruner + Jahr in the field of German-wide distribution of magazines and distribution of regional newspapers is very limited in scope. Due to the punctual delivery of newspapers to subscribers, the distribution of newspapers requires to some extent different organisational procedures than the distribution of magazines, which is mainly effected by post. The market share of Gruner + Jahr in the newspaper distribution business in Germany is estimated to be less than [<5 %].

28. The parties aim, however, at outsourcing both the printing and distribution of the new newspaper and expect the level of own printing to involve very limited volumes, if any.

29. The joint venture has no market share at present in the market for daily newspapers and the launch of the new newspaper will provide for an additional source of competition and thus has a pro-competitive effect. The joint venture neither gives rise to concerns relating to horizontal or vertical affected markets.

<u>Advertising market</u>

30. The main competitors in the daily newspaper market, namely *Handelsblatt* (estimated advertising revenues EUR 110 million in 1998), *Frankfurter Allgemeine Zeitung* (estimated advertising revenues EUR 330 million in 1998), *Süddeutsche Zeitung* (estimated advertising revenues EUR 230 million in 1998), and *Die Welt* (estimated advertising revenues EUR 50 million in 1998) have well established positions also in the advertising market. The joint venture has no market share at present in the advertising market and the launch of the new newspaper will provide for an additional source of competition also in the market for advertising. The proposed concentration will therefore not give rise to competition concerns.

V. ANCILLARY RESTRICTIONS

31. The notifying parties submitted a number of contractual obligations they wish to be declared ancillary to the concentration. These contractual obligations cover non-

competition obligation, confidentiality clauses as well as granting of trademark and copyright licenses.

a) Non-compete obligation

32. The parties have agreed (Section 21 of the Partnership Agreement) with certain exceptions not to compete with each other in publishing a German language business and financial daily newspaper for the length of the joint venture and also for a period of two years thereafter, if the joint venture is terminated by reason of deadlock or in accordance with Section 9.1 of the Joint Venture Agreement. If the joint venture is continued by one party the non-compete obligation applies to the exiting partner.

33. The parties maintain that in view of the risks involved in the proposed transaction as far as the substantial investments in terms of finance, good will, know-how and reputation of the parties are concerned, the purpose of the non-compete clause is to secure the value of the intangible assets transferred to the joint venture and to avoid situations resulting in one party continuing the business of the joint venture on its own or with another partner and thus benefiting from the key assets made by both parties.

34. The Commission considers that this clause is designed to ensure that the interests of the joint venture are protected from free-riding by one of the parties during the operation of the joint venture and for a period limited to two years after withdrawal of one party and is thus directly related to and necessary for the implementation of the concentration. Furthermore, the Commission considers that the non-compete clause is also necessary in cases of termination for the reasons referred to above, however, only for a start-up period of five years from the launch of the newspaper. This clause is intended to protect the interests of the joint venture in the particular circumstances of this case, where either of the parties appear capable of launching a competing newspaper immediately after exiting the joint venture by unilaterally exploiting the combined know-how and goodwill transferred to and developed by the joint venture.

b) Confidentiality clauses

35. The confidentiality clause in the Joint Venture Agreement (Section 11), imposes an obligation on the parties not to use for their own business purposes or to disclose to any third parties, without the consent of the other parties, confidential information for a period of five years after the termination of the Agreement. Similar clauses also for a period of five years have been included in the Partnership Agreement (Section 23), Financial Times Copyright Agreement (Section 12) and Gruner + Jahr Copyright Agreement (Section 11).

36. The Commission considers that to the extent that these provisions could constitute appreciable restrictions of competition, they could be viewed as follows:

   – for the period the notifying parties remain in the joint venture, they would be necessary to protect the value of the assets transferred or made available to the joint venture.

   – for the five year period after the termination of the joint venture, they would be ancillary to the concentration, because of the substantial know-how being transferred to the joint venture.

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c) Trademarks and other intellectual property rights

37. The parties aim at ensuring the successful launch and continuous performance of the new newspaper and the linked on-line service by branding it strongly under the well-established “FT” and “Financial Times” trademarks. To this effect the Joint Venture Agreement (Section 13) and Financial Times Trademark License Agreement (Section 2.3) provide that all trade mark rights in the Masthead of the joint venture’s newspaper and in related Website shall belong to Financial Times and that it may not use, license or allow any third party to use the Masthead or any part thereof for a German language business and financial daily national newspaper targeted primarily at the German market for a period of [more than five years] after the termination of the joint venture.

38. The Commission considers that these clauses reflect the withdrawal of the Financial Times from the market assigned to the joint venture and hence they are an integral part of the transaction to the extent they refer to the product markets and geographic markets where the joint venture will be active at the time of the completion of the notified concentration. The Commission does not, however, consider the proposed [more than five years] period after the termination of the joint venture to be an integral part of the notified operation nor to be ancillary to it. The Commission considers that based on the information provided by the parties about the nature of the good-will and intellectual property rights relating to the Masthead, the clauses, to the extent they might constitute restrictions of competition, can only be covered as ancillary up to five years after the termination of the joint venture.

39. Provision is made in the Joint Venture Agreement (Section 17) to the effect that for the purpose of their own businesses Financial Times and Gruner + Jahr are granted access to the joint venture’s Subscriber Database on the basis of a non-exclusive, royalty-free license. The Commission considers this provision not to be restrictive and thus there is no need to consider whether it is directly related and necessary for the implementation of the notified operation.

40. The submitted agreements also contain other provisions connected with the use, transfer or termination of the trademark and copyright license (Sections 3, 7.2(a) and 9.1 of the Financial Times Trademark License Agreement; Sections 10.2(a) and 13.3 of the Financial Times Copyright Agreement; Sections 9.2(a) and 12.3 of the Gruner + Jahr Copyright Agreement; and Section 19.1 of the Joint Venture Agreement). Financial Times Copyright Agreement (Sections 4-5) and Gruner + Jahr Copyright Agreement (Sections 4-5) provide for the access, conditions for use and quality of products in the Database containing literary works or artistic works, the copyright of which is owned by *the Financial Times*. In so far as these provisions are restrictive of competition, they are directly related and necessary to the implementation of the joint venture, since they are aimed at guaranteeing the full value of the assets transferred to the joint venture.

VI. CONCLUSION

41. 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.

For the Commission,