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***Case No IV/M.489 -
Bertelsmann / News
International / Vox***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 06/09/1994

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 06.09.94

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

Registered with advice of delivery

to the notifying parties

**Subject: Case No. IV/M.0489 - Bertelsmann/News International/Vox
Your notification of 4.8.1994 pursuant to Article 4 of Council Regulation
No. 4064/89**

1. This operation concerns the acquisition by News International of a 49.9% stake in Vox, a German general interest TV channel. The notification is being made jointly with Bertelsmann, who owns 24.9% of the shares of Vox. The remainder of the shares are spread between a number of other shareholders.
2. After a preliminary examination of the notification, the Commission has concluded that the operation falls within the scope of Council Regulation No 4064/89 and does not raise serious doubts as to the compatibility with the common market and the EEA agreement.

I THE PARTIES

3. News International plc (which is controlled by News Corporation Limited) is a UK based company. It has interests in printing and publishing of national newspapers in the UK, development and sale of conditional access software, warehousing, transportation, and the provision of satellite television in the UK and Republic of Ireland. News Corporation has interests in the production and distribution of filmed entertainment; television broadcasting; book, newspaper, magazine and insert publishing and data processing.
4. The Bertelsmann Group is active in book and magazine publishing, book clubs, publishing and distribution of music records and private television. Its businesses in the electronic media sector are held by UFA. UFA is owned by Bertelsmann (50%) and Gruner & Jahr (50%). Bertelsmann has a stake of 74.9% in Gruner & Jahr with the remaining 25.1% being held by the Jahr family.
5. Vox is a general interest free access TV channel broadcasting in Germany focussing in particular on information and entertainment ("infotainment"). It has been experiencing financial difficulties and requires a substantial capital injection to enable it to continue broadcasting.

II THE OPERATION

6. The operation involves the acquisition by News International of a stake of 49.9% in Vox. In order to achieve this, News International and UFA have drawn up an agreement by which UFA will obtain for News International shares amounting to this stake. The purchase price which News International will pay for this stake is [...] ⁽¹⁾ a nominal amount of DM1. Bertelsmann will retain 24.9 % of the shares. The remaining 25.2% is currently held by a trustee (14.5%) and other small shareholders (some of whom may have released part of their stake to News International via UFA). The 25.2% not owned by News International or Bertelsmann is also likely to be sold to another third party by the trustee and the other minor shareholders.

III CONCENTRATION

Joint control

7. Under the terms of the shareholders agreement between News International and UFA any shareholder with 24.9% or more of the shares of Vox has veto rights over the adoption and amendment of the business plan, the hiring of the Managing Director and other senior personnel and any changes in programme concept or strategy which departs from the business plan. In addition, all other decisions require a majority of 80% of the shares. News International and UFA will therefore both enjoy veto rights over all issues and will therefore jointly control Vox.

Autonomous economic entity

8. Vox has been in operation since 1991. It is required under German law to be separate from its parents and to have its own staff, resources and licence. It will acquire licences in its own name for the programmes it will broadcast and will act in other ways independently on the TV market in Germany. Advertising will - as previously - be sold through Vox itself except for the Munich area where Vox acts through an agent.

Absence of scope for co-ordination of competitive behaviour

(a) News International - Bertelsmann

9. There is no possibility of News International and Bertelsmann co-ordinating their competitive behaviour as News International does not operate on the same (German free access TV) market apart from through Vox.

(b) Vox - RTL

10. Under German media law, a company can only own less than 50% of any general interest TV station and if it holds a stake of 25% or more in one then it can only have stakes of less than 25% in up to two other general interest TV stations. Bertelsmann is already in the market for free-access TV through its stake in RTL (37.1% held by UFA), RTL2 (7.8% held by UFA) and by the 24.9% stake in Vox.

⁽¹⁾ deleted as a business secret

11. The Commission has considered whether Bertelsmann can co-ordinate the competitive behaviour of Vox, with that of RTL and RTL2. News International is entering the German free access TV market through its purchase of the stake in Vox. The position of Bertelsmann in the joint venture with regard to Bertelsmann's interests in Vox and other TV channels does not change as a result of the proposed concentration (which is the acquisition by News International of a stake in Vox). In addition to that, News International as an entrant in the German market is likely to have different interests to Bertelsmann regarding the business strategy of Vox and consequently will not allow Bertelsmann to co-ordinate competitive behaviour across the three channels. The concentration will therefore not give rise to coordination of the competitive behaviour between Vox and Bertelsmann.

(c) Film production/film rights

12. Both Bertelsmann and News Corporation (through Twentieth Century Fox) have operations in film production and the trading of film rights in Germany. According to the parties, Bertelsmann is active primarily in the field of television sports rights and has only recently started to extend its activities to fiction and non-fiction television rights. Its total market share for all rights is less than 10%. News Corporation has a market share for foreign-language film and TV programming on the German market of less than 10%. Given that Vox's licence requires it to be an information and entertainment channel and could not purchase significant amounts of sports programming, its low market share on the German free access TV market and the existence of other considerably more powerful players on the German market for film rights including the Kirch Group, it is unlikely that there is a risk of coordination between News International and Bertelsmann through Vox. Whilst News Corporation (through Fox) has a distribution agreement with Kirch, this agreement expires at the end of 1995 for new programming.

(d) Pay-TV and pay-TV technology

13. News International recently created a joint venture (Selco) with Pro 7 which is owned, inter alia, by Thomas Kirch (47.5 %), the son of Leo Kirch. Selco will provide services for pay-TV and will market pay-TV programmes in Germany. Bertelsmann and Taurus (which belongs to the group of Leo Kirch) are shareholders of Premiere, which is the only pay-TV channel in Germany, and of MSG Media Service which will - provided that its creation is authorized by the Commission - offer administrative and technical services for digital pay-TV and other TV communication services. Even though Selco not only provides services for pay-TV but markets pay-TV programmes in Germany and could therefore be seen as a competitor of Premiere on the German pay-TV market, there is no real risk of coordination through Selco and Premiere because Selco will only provide foreign language programmes in Germany which represent a small market segment or even a separate market. Furthermore, programmes provided by Selco are exclusively transmitted via satellite and not by cable whereas Premiere transmits by cable and satellite. Selco rather competes with English language programmes transmitted via Satellite from the UK than with Premiere. At present and since Selco has even not yet started its activities, there are no concrete indications that Selco might offer German language programmes in future.

As to pay-TV technology, Selco will operate on an analogue basis and with an encryption system ("Video Crypt") that is different from that to be developed for the digital services of MSG. It appears unlikely that News International and Bertelsmann will coordinate their development of future encryption systems through Selco and MSG.

Conclusion

14. In conclusion, the operation is a concentration within the meaning of Article 3 of the Merger Regulation, because the joint venture between News International and Bertelsmann will perform on a lasting basis all functions of an autonomous economic entity and there is no scope for coordination of the competitive behaviour of the parents between themselves and with the joint venture.

IV COMMUNITY/EEA DIMENSION

15. The concentration has a Community dimension. The combined aggregate worldwide turnover of News Corporation and Bertelsmann in 1993 exceeded 5.000 million ecus. The aggregate Community-wide turnover of each of at least two of the undertaking was more than 250 million ecus. In addition the parties did not achieve more than two-thirds of their Community-wide turnover in one and the same Member State.
16. The concentration is not an EEA "cooperation" case. The combined turnover of the undertakings concerned in the territory of the EFTA States does not equal 25% or more of their total turnover in the EEA territory. None of the undertakings concerned have turnover exceeding 250 million ecus in the territory of the EFTA States.

V COMPETITIVE ASSESSMENT

Relevant product market

17. This operation concerns the market for advertising in television broadcasting, and more specifically, the segment of that for free access TV and for film rights. While the parties suggest that TV advertising forms part of a wider advertising market, the Commission considers that TV advertising has different characteristics from other media, inter alia in terms of prices (see decision of the Commission of 13.1.1992 - IV/M. 176 Sunrise).
18. Free access TV should be regarded as distinct from pay TV for two main reasons. First, free-access television is financed by advertising revenue, and/or by other means (eg the TV licence fee in Germany and the UK) depending on whether the channel in question is state-owned or a private commercial one, whereas pay-TV is primarily financed by subscription fees. Although a pay-TV channel may take advertising, it is of lesser importance.

Secondly, free access TV offers a different programme mix from pay-TV. Pay-TV can offer a more specialised programme-mix in order to meet the requirements of a target audience. This can include live coverage of sport events or first television screenings of recent films.

19. The above factors seem to lead to the conclusion that free access TV and pay-TV represent separate markets. However, some substitutability exists between free access TV and pay-TV, since the value of the latter depends directly on the alternative viewing possibilities. In any event, the present case does not raise competition concerns even in the narrowest possible market. Consequently, the precise definition can be left open.

Relevant geographic market

20. The television broadcasting market is undergoing a strong process of development and geographical expansion. This trend is in particular due to the growing importance of satellite television, which enables viewers (through a cable network or a dish) to have access to a greater range of television channels than when only terrestrial broadcast is available. Notwithstanding these technical advances, conditions of competition in this sector seem to vary considerably from one Member State to another for different reasons, e.g. language differences which influence the purchase of programme rights, different rules on time "windows" for release of new films in cinemas, video, pay-TV and free access TV, and varying programme mixes on the basis of the cultural interests of a national or regional audience (see decision of the Commission of 5.8.1994 - IV/M.410 Kirch /Richemont/Telepiù).

In the light of these considerations, it can be concluded that although technical advances have significantly contributed to a gradual process of internationalisation, television broadcasting markets remain mainly national or regional (language-based).

21. However, since the operation does not raise serious doubts as to the compatibility with the common market even on the basis of the narrowest market definition the question of the precise relevant geographic market can be left open.

Compatibility with the common market

Horizontal effects

22. The main measurement of market share is by advertising revenue. However, the audience share can also be used as a secondary measure, since the revenue by advertising and the prices for advertising spots entirely depend on the share of audience for a channel or for a certain programme.

(a) Advertising market shares

23. According to the parties, Vox has a market share of [...] ⁽¹⁾ of the advertising turnover of all general interest TV channels. This compares with market shares of 35% for RTL, 27% for SAT1, 9% for ARD and 7% for ZDF. RTL2, in which Bertelsmann also has a stake, has a share of 1%. These figures are similar whether or not agency commissions are included.

(b) Audience market shares

24. According to the parties and on the basis of statistics covering approximately 32 million German households, Vox had a market share of 1.8% in 1993. Further market share figures for the first half of 1994 suggest that Vox's viewing figures have remained under 2%. According to the 1993 figures, Vox is the ninth largest free access TV station in Germany. ZDF have 17.8%, RTL (in which Bertelsmann has a stake) 17.5%, ARD 16.8% and SAT 1 14.7%. RTL2, the other station in which Bertelsmann have a stake has an audience market share of 3.3%.

(2) deleted as a business secret - less than 2,5%

25. News International has no presence on the German free access TV market. Therefore, the acquisition of Vox will not create a dominant position for News International. Since it is unlikely that News International would have launched a German language programme on its own, News International cannot be regarded as a potential competitor of Vox who would disappear as a consequence of the concentration. Bertelsmann already has a stake in Vox so there is no change to its market position. Even given the financial strength of News International and the possibility for Vox to improve its market position following the completion of the operation the market figures and the number of other channels in the free access TV market prevent that the proposed concentration will create or strengthen a dominant position on the German market for advertising in television broadcasting.

Vertical effects

26. Both News Corporation and, to a limited extent, Bertelsmann have film production and trading activities. As to the purchase of film rights by Vox from News International and its affiliates (which would include News Corporation's subsidiary Fox), it is true that the Fox film and programme library is an important source of programmes for TV channels. However, many other sources exist both for foreign (in the case of Fox mainly English) and German language programmes. There will be no foreclosure of the market for programmes through the proposed operation.

VI PARTICIPATION AGREEMENT

27. In the list of prints to be included in the Shareholders' Agreement / Limited Partnership Agreement and such other Charter Documents of Vox as necessary, the following clause is included:

["..."]⁽¹⁾

This clause cannot be considered as an ancillary restriction to the concentration within the meaning of the Commission notice regarding restrictions ancillary to concentrations as it is not directly related to the concentration [...] ⁽¹⁾ nor is it necessary for the implementation of the concentration [...] ⁽¹⁾.

(3) deleted as a business secret. News International has agreed to offer Bertelsmann certain participation rights in its future activities in Germany.

(4) deleted as a business secret

(5) deleted as a business secret

