

***Case No IV/M.1574 -  
KIRCH / MEDIASET***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 03/08/1999

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## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03.08.1999  
SG(99)D/6093

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 IV/M. IV/M.1574 – Kirch/Mediaset**

Notification of 30 June 1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 30 June 1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which the undertakings Kirch Media GmbH&Co.KGaA and Kirch Vermögensverwaltungs-GmbH&Co.KG (together referred to as the “KirchGroup”), and Mediaset S.p.A. (“Mediaset”) and Medusa S.p.A. (“Medusa”) both controlled by Fininvest SpA (together referred to as the “MediasetGroup”) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control by purchase of shares in 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 and with the EEA Agreement.

**I. THE PARTIES’ ACTIVITIES AND THE OPERATION**

3. KirchGroup is one of the two major commercial media groups in Germany. It is one of the major suppliers of programming for television in Europe as it owns a wide range of broadcasting rights to films, TV programmes and sports events. Its activities include pay-TV operations in Germany, Austria and Switzerland. It has recently acquired 95% of Premiere, the leading pay-TV operator in Germany, which it is to merge with its own digital TV service DF1. It operates free-TV channels in Germany (SAT 1, DSF) and holds participations in Spain (25% of Telecinco) and Italy (1,3% in Mediaset).

4. Mediaset, a publicly listed company at the Italian stock exchange, is active in commercial television in Italy, i.e. Mediaset owns and operates 3 channels, Italia 1, Retequattro and Canale 5, and controls Publitalia, the Italian market leader in advertising sales. It also holds according to the notification a stake of 25% in Telecinco in Spain. Moreover, Mediaset has some minor activities in the fields of telecommunication, and music production and distribution. Fininvest SpA has a 10% stake in Telepiù, the leading pay-TV operator in Italy.
5. Medusa, a publicly listed company in Italy, is active in the production, co-production, financing, co-financing, acquisition and sale of films, music and soundtracks publishing. Furthermore, Medusa carries out the activity, either directly or through its subsidiaries, of the building and management of movie theatres.
6. The proposed operation is the creation of a joint venture, which will be active in three fields of commercial free television in Europe: TV-broadcasting, TV-advertising and TV-production, acquisition and distribution of TV-content. Whilst the parent companies remain active in their respective national markets, the proposed joint venture is designed to combine their international activities in the before mentioned sectors.

## **II. CONCENTRATION**

7. KirchGroup and MediasetGroup will hold 50% each in a jointly controlled newly created holding company called "Eureka". The joint venture will fully control three principal subsidiary companies. These companies are European Television Network (ETN), a newly incorporated company which will develop a pan-European broadcasting network; Publieuros Limited, a newly incorporated company, and Publieurope International, an existing company active in international television advertising, both companies to be acquired by the joint venture from the MediasetGroup; and Beta Distribution, transferred to the joint venture by the KirchGroup which will operate in production, distribution and purchase of international television programming and of international theatrical motion pictures.
8. The joint venture will perform on a lasting basis all the functions of an autonomous economic entity. The proposed operation, therefore, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **III. COMMUNITY DIMENSION**

9. KirchGroup and MediasetGroup have a combined aggregate worldwide turnover in excess of EUR 5,000 million<sup>1</sup>. Each of them has a Community-wide turnover in excess of EUR 250 million and 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. It does not constitute a cooperation case under the EEA Agreement.

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<sup>1</sup> 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.

## **IV. COMPETITIVE ASSESSMENT**

### **A. Relevant product market(s)**

10. The proposed concentration concerns mainly the following areas:

- (i) free access TV;
- (ii) marketing of TV advertising;
- (iii) TV productions;
- (iv) TV rights/licenses

#### **1) Free access TV**

11. Free access TV comprises advertising-financed private television and public television financed through fees or through fees and partly through advertising. There is, therefore, a relevant product market for TV advertising where the broadcasters compete for advertising revenues. This market must be distinguished from advertising through other media, in particular through the print media<sup>2</sup>. It can be left open if there is, in the strict economic sense of this notion, a market for viewers where the TV broadcasters compete against each other for audience shares. In any event, the audience shares in the TV broadcasting are a determinant factor for the success of the broadcasters in the TV advertising market and have, therefore, to be assessed at least in the context of this market<sup>3</sup>.

#### **2) Marketing of TV advertising**

12. Normally, TV advertising is carried out only by the TV broadcasters and constitutes the market for free access TV as described above. By contrast, the joint venture Eureka, through its subsidiaries Publieuros and Publieurope will be active in the sale of advertising time and sponsorship for TV broadcasters on an international basis, i.e. to clients which acquire advertising time from different national broadcasters on a 'pan European' basis.

13. Insofar the joint venture will act as an advertising agency. Its activities are not limited to broadcasters controlled by Eureka or its parent companies, but will include also the sale of advertising time and sponsorship of broadcasters controlled by third parties. Eureka will be, therefore, active on the market for the marketing of advertising time through agencies, which has to distinguished from the market of free access TV as described above.

#### **3) TV production**

14. With respect to TV productions, a distinction has to be made between in-house productions produced by broadcasters and used for captive use and productions commissioned by a broadcaster to a producer. Only the latter are offered on a market and the relevant product market has, therefore, to be limited to TV productions, which are not used for captive use<sup>4</sup>.

#### **4) TV rights/licenses**

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<sup>2</sup> Commission Decision Bertelsmann/CLT of 07/10/1996, para 14

<sup>3</sup> Commission Decision Bertelsmann/CLT of 07/10/1996, para 15

<sup>4</sup> Commission Decision RTL/Veronica/Endemol; OJ L134/32 of 05/06/1996, paras 24, 88, 89

15. As regards the acquisition and licensing of TV rights, a distinction can be made between film and other fiction rights on the one hand and sports rights on the other<sup>5</sup>. For the purpose of the present case, it can, however, be left open whether or not there are separate relevant markets. The acquisition and licensing of sports rights is excluded from the scope of Eureka's activities and even on the basis of a separate market for film and other fiction rights the proposed concentration would not lead to the creation or strengthening of a dominant position.

### **B. Relevant geographic market**

16. Although in certain niche markets there are already programs broadcast throughout Europe, TV broadcasting still generally takes place on national markets, as already outlined in several decisions of the Commission<sup>6</sup>. Correspondingly, the markets for TV advertising are also national markets, since TV advertising is directed to the area where TV broadcasters have their main audience. In the present case, however, Eureka's subsidiaries Publieuros and Publieurope are geared to act as agencies for the marketing for TV advertising on an international or cross-border basis. Nevertheless, it can be left open whether this means that the joint venture will be active on several national markets or over time on an evolving broader geographic market. In none of these cases, the proposed concentration would lead to the creation or strengthening of a dominant position.
17. The markets for TV productions may be sometimes broader and comprise a particular language region, although there are situations where even in a given language region the markets are, however, limited to each of the countries in these regions<sup>7</sup>. The situation is similar with respect to the markets for TV rights. Although the demand for a large part of these rights is EU-wide or even world-wide, in particular for international sports events and movies, rights are normally granted for one specified country or language region<sup>8</sup>. In the present case, there is no need for an exact delineation of the geographic markets for TV productions and TV rights. The assessment would not change if the geographic markets affected by the proposed concentration were broader than national.

### **C. Effects of the concentration**

18. KirchGroup and MediasetGroup, the current companies of Eureka are essentially active in different geographic markets. Therefore, there is no significant overlap between both companies. Accordingly, the activities related to the assets transferred to Eureka, are essentially complementary.

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<sup>5</sup> Commission Decision Bertelsmann/CLT of 07/10/1996, para 18

<sup>6</sup> Commission Decision RTL/Veronica/Endemol; para 25; Bertelsmann/CLT, para 20

<sup>7</sup> Commission Decision RTL/Veronica/Endemol; para 25

<sup>8</sup> Commission Decision Bertelsmann/CLT of 07/10/1996, para 21

### **1) Free access TV**

19. KirchGroup has a strong position on the German market for free access TV where the channels linked to KirchGroup have an audience share of around 28% and a share in TV advertising of around 50%<sup>9</sup>. MediasetGroup has a strong position on the market for free access TV in Italy where, according to the parties, its channels have an audience share of 42 % and a market share in TV advertising of 60%. However, given that these are different geographic markets, there is no overlap between KirchGroup and MediasetGroup. KirchGroup will transfer to the joint venture indirectly a minority shareholding in SAT 1. Both parent companies will transfer to the joint venture a minority shareholding in the Spanish TV channel Telecinco, in which KirchGroup and MediasetGroup according to the notification each currently hold a stake of 25 %. Therefore, the creation of the joint venture will not result in any addition in market shares. Furthermore, it will not lead to an anticompetitive co-ordination of the parent companies in their activities outside the scope of the joint venture. Italy and Germany are different geographic markets and the parties had a joint activity in Spain already before the creation of the joint venture.

### **2) Marketing of TV advertising**

20. As regards the future activities of Eureka on the market for the marketing of TV advertising through agencies, it cannot be anticipated that Eureka would enjoy a dominant position. In this respect, the only assets transferred to the joint venture are the MediasetGroup subsidiaries Publieurope International, an existing company active in international television advertising, and Publieuros Limited, a newly incorporated company, which is, however, not yet active on this market. According to the parties, Publieurope International achieved in 1998 revenues of around 25 million EUR only.

### **3) TV production**

21. According to the parties, the German Media Commission estimated KirchGroup's market share for German TV production to be 14 %. The TV production of MediasetGroup is mainly earmarked for captive use in its own TV channels. Again, there is no overlap between KirchGroup and MediasetGroup. Therefore, the creation of Eureka cannot lead to an anticompetitive co-ordination of the parent companies in their activities outside the scope of the joint venture. Eureka itself will have to build up its own production facilities since no production activities of the parent companies will be transferred to the joint venture. In those circumstances, it cannot be anticipated that Eureka would enjoy a dominant position.

### **4) TV rights/licenses**

22. KirchGroup has a strong position on the German market for the licensing of TV rights. The parties estimate the market share of KirchGroup on this market to be around 35 %. The activities of MediasetGroup in the Italian market for the licensing of TV rights are not significant. Within the MediasetGroup, Medusa licensed in 1998 the TV rights for 46 films to Italian broadcasters including Mediaset. This is less than 1 % of the total number of

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<sup>9</sup> Commission Decision Bertelsmann/Kirch/Premiere, OJ L 53 of 27/02/1999, para's 81, 83

films broadcast in Italy. Mediaset's activities in the distribution market are mainly limited to the sub-transfer of rights for films and TV-programmes to pay-TV and especially local broadcasters, in the latter case for exploitations over the fifth/sixth showing.

23. KirchGroup through its subsidiary BetaFilm distributes TV rights for films and other fiction also outside Germany. Its activity on the Italian market is, however, limited. According to the parties, KirchGroup has in terms of commercial hours in Italy a market share of 7 %. [...] . BetaFilm will be transferred to the joint venture.
24. Based on the above figures, the creation of the joint venture would not lead to the creation of a dominant position of the joint venture in the Italian market for TV licensing. Given that MediasetGroup has virtually no licensing activities outside Italy (revenues of around 12 million EUR in the whole of the EU outside Italy), the creation of the joint venture will have no impact on the German market for TV licensing.

#### **5) Overall evaluation of the concentration on a Community-level**

25. Some competitors have argued that the proposed concentration may lead overtime to a strong position of the joint venture throughout Europe, in particular through the joint acquisition of TV rights on an international basis. Furthermore, some competitors believe that the position of the joint venture on a European level could have repercussions on the position of KirchGroup and MediasetGroup in their respective national markets, where they will continue to act separately.
26. As regards the future position of Eureka on a European level, it should be noted that there are other players in the TV sector, which operate already today TV networks throughout Europe or which are able to play an important role on the European level. In particular CLT-UFA operates a number of TV channels throughout Europe. By contrast, KirchGroup has today only very limited activities outside Germany and MediasetGroup has virtually no activities outside Italy (except for its participation in the Spanish commercial TV group Telecinco). It can be assumed that the joint venture between KirchGroup and MediasetGroup could only achieve overtime, if ever, a similar position as CLT-UFA on a European level.
27. As regards possible repercussions on the position of KirchGroup and MediasetGroup in their respective national markets, it should be noted that the activities of Eureka with respect to the acquisition of TV rights are limited to situations where those rights can be acquired for more than one country or language region. For the time being, TV rights are, however, normally not acquired on a European-wide basis, but essentially for national markets<sup>10</sup>. Furthermore, it should be noted that the acquisition of sport rights as well as formats, news and entertainment is excluded from the scope of Eureka's activities. This limits further the activities of the joint venture in the acquisition of TV rights to a significant extent.

#### **IV. ANCILLARY RESTRICTIONS**

28. In section 11 of their notification, the parties state that all terms of the Joint Venture Agreement are an integral part of the concentration. They submit, however, that in case the

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<sup>10</sup> Commission Decision Bertelsmann/CLT para 40

Commission should “consider any of the arrangements described on pages 17-29 of this form are not an integral part of the concentration”, these arrangements are in any event directly related and necessary to the implementation of the concentration and should be, therefore, qualified as ancillary restrictions. The Commission does not intend to make an assessment of the arrangements as described in section 2 of the notification on the basis of such an unspecified submission.

**V. CONCLUSION**

29. 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,