

*Case No IV/M.176 -
SUNRISE*

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 13.01.1992

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PUBLIC VERSION

MERGER PROCEDURE
Article 6(1)a decision

Registered with advice of delivery

To: the notifying parties

Dear Sirs,

Re: Case No. IV/M176 - Sunrise

I. BACKGROUND

1. On 27 November 1991 The Walt Disney Company Limited (Walt Disney), The Guardian and Manchester Evening News plc (The Guardian), Scottish Television plc (Scottish), London Weekend Television (Holdings) PLC (LWT), and Carlton Communications plc (Carlton) notified their agreement in respect of their holding of shares and control of the joint venture company, Sunrise Television Limited (Sunrise).
2. Sunrise has been awarded the licence to provide national UK breakfast time television from 1 January 1993 within the UK commercial television channel known as Channel 3. This channel will replace the current UK channel known as ITV. The licence has been awarded by the Independent Television Commission (ITC) pursuant to the ITC's powers under the Broadcasting Act 1990. The ITC is the statutory body responsible for licensing and regulating television broadcasting services (other than the BBC) in the UK. Channel 3 will incorporate fifteen regional broadcasters and one national breakfast-time broadcaster, that is, Sunrise.
3. The award of the licence to Sunrise is subject to a number of conditions, including the completion of financing of Sunrise as envisaged in the licence application. The completion of financing gives rise to the introduction of Carlton as a shareholder. The notified agreement is designed to put Sunrise in a position to meet the conditions of the licence award. It is not until the terms of the broadcasting licence are fulfilled that Sunrise will be in a position to be operative as an undertaking.

4. The notified agreement is considered to constitute the creation of a new joint venture between the five parents to exploit the licence awarded to Sunrise.
5. After full examination of the notification, the Commission has come to the conclusion that the notified operation does not fall within the scope of Council Regulation N° 4064/89 (Merger Regulation).

The parties

6. Walt Disney is part of the international group of Walt Disney companies. Its activities include television programme licensing and distribution, publishing, character merchandising and licensing.
7. The Guardian is primarily a newspaper publisher. One of its subsidiaries, Broadcast Communications, produces television programmes.
8. Scottish is a broadcasting company, which currently operates the franchise to provide regional television in central Scotland within ITV. Scottish has been awarded the licence by the ITC to operate in the same region within Channel 3.
9. LWT is also a broadcasting company, which currently operates the franchise to provide regional television in London at weekends within ITV. LWT has been awarded the licence by the ITC to operate similarly within Channel 3. LWT also produces and sells television programmes, and hires out studio facilities.
10. Carlton's main activities are producing video cassettes for film studios, video and sound products for television and related industries, and feature film processing. Carlton's subsidiary, Carlton Television Ltd. has been awarded the licence to operate in the London region on weekdays within Channel 3. Carlton's subsidiaries, Zenith Productions and Action Time produce television programmes.

The notified agreement

11. The parties will hold the share capital of Sunrise in the following proportions: Walt Disney 25%, The Guardian 15%, Scottish 20%, LWT 20% and Carlton 20%.
12. The Shareholders Agreement provides that the rights of the parties are identical. Each of the parties has the right to appoint a nominated director to the board of Sunrise.
13. There are also individual related [...]*-year supply arrangements between Sunrise and some of its parents, primarily concerning the use of studio facilities and the provision of programmes.

* deletion of detail, business secret.

II. COMMUNITY DIMENSION

14. The combined aggregate worldwide turnover of the parties in 1990 exceeds 5 billion ECU (Walt Disney group 4,589 million ECU, Scottish 159 million ECU, The Guardian 262 million ECU, LWT 386 million ECU and Carlton 1,069 million ECU). All parties except Scottish achieve a Community-wide turnover of more than 250 million ECU. Furthermore the undertakings concerned do not achieve more than two-thirds of their Community-wide turnover within one and the same Member State. Thus the thresholds of Article 1(2) of the Merger Regulation are met.

III. CONCENTRATIVE OR COOPERATIVE JOINT VENTURE?

15. Unanimity of all the shareholders is required for certain material decisions. This requirement goes beyond the usual protection afforded to minority shareholders.

These matters include:

- actions which affect the conditions of the licence;
- the adoption of the annual business plan, [...]*
- [...]*

As a result Sunrise will be jointly controlled by all its parents.

16. The notified operation is not, however, a concentration within the meaning of Article 3 of the Merger Regulation since it will have at least as its effect the coordination of the competitive behaviour of four of the undertakings concerned in particular in the market for television advertising.
17. Commercial television broadcasters in the UK obtain the major part of their revenue from the sale of television advertising. Without prejudice as to the impact of the notified operation in other markets, inter alia, broadcasting and programme production and supply, the Commission has examined the Sunrise joint venture in particular in the context of the UK advertising sector.

Supply of television advertising in the UK

18. The largest component of the current system of commercial television in the UK (i.e. non-BBC, since the BBC carries no direct advertising) is the ITV channel, made up of sixteen franchise holders. Under the regulations currently in force, the UK is divided for broadcasting on ITV into 14 geographical regions, with one ITV company having commercial broadcasting rights in each, except the London region, where two companies operate at different times. The remaining franchise is to provide breakfast-time programming for the entire network, the franchise currently being held by TV-AM. The ITV companies also sell advertising space for Channel 4 and S4C (the Welsh Channel 4). ITV (including TV-AM) and Channel 4 are estimated to account for around 95% of UK television advertising revenue in 1990, the rest accounted for mainly by satellite television.

* deletion of detail, business secret.

19. The division into sixteen separate areas/time blocks will remain as present within Channel 3. However, some of the existing ITV companies will be replaced by other broadcasters. For example, Sunrise will replace TV-AM and Carlton will replace Thames. The new Channel 3 broadcasters are expected to obtain a similar share of audiences and a similar share of advertising revenue as their predecessors within ITV.
20. In addition, as from 1 January 1993 Channel 4 will sell its own air-time to advertisers. Channel 4's share of advertising revenue may be affected by this change. It currently accounts for around 15% of total advertising revenue.
21. Satellite television is expected by the industry to grow relatively quickly in the next few years. Predictions show a share of UK commercial television audience of around 15% in 1993, and around 20% by 1995. At present, however, satellite television obtains a significant proportion of its revenue from subscription as opposed to advertising.
22. Other developments, in particular the introduction of the near-national Channel 5, from 1994/1995, and possible further penetration of cable television in the UK, are not expected to have a significant impact on television advertising in the short to medium term.
23. It is estimated therefore that Channel 3, including Sunrise, will account for around 75-85% of total UK television advertising revenue in 1993, the balance accounted for predominantly by Channel 4 and BSkyB. Channel 3 collectively is expected to continue to account for a very large share of total UK television advertising revenue in the medium term.

Demand for television advertising in the UK

24. The main buyers of air-time are the advertising agencies and specialist media-buying groups, although some companies buy advertising time directly from broadcasters, without passing through intermediaries. The commercial broadcasters offer different types of audience (geographic, economic, demographic differences), which can be delivered to the advertisers. Overall supply of air-time for advertising is fixed and controlled by the ITC - for example the present level is seven minutes per hour for the ITV companies.
25. The extent to which television is used as an advertising medium by advertisers depends on various factors such as the client's marketing and advertising strategy, budget, target market, and creative considerations. Television advertising has different characteristics from other media, and is more expensive. It accounts for around 30% of total advertising expenditure in the UK.
26. Having decided on the use of television as an advertising medium, advertisers then establish a strategy for its use, within the objectives of the overall campaign. The advertisers will decide at this stage whether to advertise on television nationally, or whether there are regional priorities, for example.

Competition between broadcasters

27. As confirmed by all the respondents (advertisers and broadcasters) to the Commission's enquiry, the ITV companies, including TV-AM, compete with each other for a share of the advertisers' overall television budget. This means that, even where there is an overall national television advertising campaign, the extent of advertising within one region as opposed to another is often the subject of negotiation. The regional ITV companies therefore compete with each other and with TV-AM for a share of television advertising of nationally recognised brands.
28. The main basis for competition amongst the broadcasters is price, taking into account the perceived value of the audience and/or the market to advertisers. Prices can vary substantially between regions, based on overall levels of demand. (Prices in London and the South East of England are the highest).
29. Within Channel 3, therefore, Scottish, LWT and Carlton will be competitors of each other for the sale of advertising time, and Sunrise will be a competitor of each of them. Based on 1989/1990 figures the two London area contractors, LWT and Thames (Thames to be replaced by Carlton in 1993) account for almost 26% of total ITV advertising revenue, Scottish around 5%, and TV-AM (to be replaced by Sunrise in 1993) around 5%.
30. Since on the basis of the information available to the Commission there is no separate market for breakfast-time television advertising and some of the parent companies are active on the market of the joint venture, it is reasonable to assume that the joint venture arrangement will give rise to coordination in the sale of television advertising between the regional broadcaster parents, and, in this context, between the parents and Sunrise.
31. Even at the lowest regional level, for example, the arrangement links the principal commercial broadcasters in the London region, Carlton and LWT, and Sunrise with these broadcasters.
32. If the market is taken to be that for television advertising in the UK as a whole, then the arrangement links three regional broadcasters which together will account for around 31% of Channel 3 television advertising revenue, plus a further 5% accounted for by Sunrise. This amounts to some 27% of total UK television advertising revenue on 1993 estimates set out above.
33. If the market should be wider than that for television advertising in the UK, this does not change the competitive relationship between Carlton, LWT, Scottish and Sunrise.
34. It is also noted that other arrangements exist which link the three regional broadcaster parents to other regional broadcasters within Channel 3 which increases the likely success of any coordination.

Regulatory framework in the UK

35. Section 2 of the Broadcasting Act 1990 requires the ITC, as regards licensing, inter alia, "to ensure fair and effective

competition" in the provision of television services, and services connected with them. This provision is understood as covering television advertising. The Act specifies that this requirement does not affect the discharge by the relevant UK authorities of their duties as regards competition under UK law.

36. Licences granted by the ITC contain a condition requiring licensees to refrain from practices or entering into arrangements which are prejudicial to fair and effective competition. Licensees are also required to comply with any direction issued by the ITC for the purpose of ensuring fair and effective competition. Failure to comply with a direction, or breach of a licence condition could lead to sanctions including fines, shortening of the licence period, and licence revocation.
37. The ITC intends to issue a direction to Channel 3 licensees laying out specific rules governing the sale of air-time based on the Statement of Intent on regulation of sales arrangements issued on 25 February 1991. The ITC has stated that in order to preserve choice of advertising opportunity, restrictions will be imposed on arrangements for the sale of advertising which involve the same organisations selling on behalf of licensees in some defined circumstances.

It is envisaged that the ITC will review these restrictions in 1994.

38. The existence of rules and provisions governing competition may limit the risk of formal or informal coordination of competitive behaviour between competitors, but cannot guarantee that such coordination will not take place.

Conclusion

39. For television advertising in the UK, LWT and Carlton will be each other's closest competitors and both will be competitors of Scottish. Sunrise will be a competitor of each of them.
40. The restrictions on formal joint selling arrangements by the ITC described above only serve to prevent one means of possible coordination between the parents or between the parents and the joint venture.
41. The existence of the two other parents of Sunrise who are not broadcasters does not prevent coordination of the competitive behaviour of the three parents and the joint venture which are competitors of each other.
42. It is reasonable to assume therefore that the creation of Sunrise will give rise to the coordination of competitive behaviour of LWT, Carlton and Scottish amongst themselves or between these companies and Sunrise. Accordingly, the notified joint venture does not satisfy the conditions of Article 3(2), subparagraph 2 of the Merger Regulation.

For the Commission,