

***Case No COMP/M.1943 -
TELEFONICA /
ENDEMOL***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 11/07/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.07.2000

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Subject: Case No COMP/M.1943 TELEFÓNICA/ENDEMOL

Notification of 8.06.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 8.06.2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which Telefónica S.A. (Telefónica) acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the Dutch company Endemol Entertainment Holding N.V. (Endemol).
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. Telefónica, the incumbent Spanish Telecom operator, is the holding company of a group of corporations which operate in the telecommunications and audio-visual sectors. It provides its services basically in Spain and South America.
4. Endemol is a Dutch company which focuses its activities mainly on the independent production and sale of TV programmes. In addition it distributes TV programmes and has

¹ OJ L 395, 30.12.1989 p.1; corrigendum OJ L 257 of 21.9.1990, p. 13, last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p.1, corrigendum OJ L 40, 13.2.1998, p.17).

recently started some Internet activities. Endemol carries out its activities in Western Europe (mainly in the Netherlands, Germany, France, the U.K. and Spain), as well as in a number of countries elsewhere (such as Poland and South Africa).

5. The proposed concentration concerns the acquisition by Telefónica of all outstanding ordinary shares in the capital of Endemol by means of a public offer to be paid in the form of Telefónica's shares. As a result of the operation, Telefónica will acquire sole control over Endemol. After the completion of the concentration, Endemol will be a separate stand-alone division within the Telefónica group. Endemol will continue to be the parent company of its current subsidiaries.

II COMMUNITY DIMENSION

6. Telefónica and Endemol have a combined aggregate worldwide turnover in excess of EUR 5 billion (Telefónica 22 957 million and Endemol 437 million), their aggregate community-wide turnover is more than EUR 250 million (Telefónica [...] and Endemol [...]) 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.

III COMPATIBILITY WITH THE COMMON MARKET

The relevant markets

Production of TV programmes

7. The notifying party claims that, according to past Commission decisions² and the Court of First Instance³, production of TV programmes by independent producers (i.e. non-broadcasters) constitute a separate product market vis-à-vis in-house production of programmes by TV broadcasters because: (1) most programmes produced in-house by TV broadcasters are intended for captive use and are not offered to third parties; (2) TV broadcasters invest substantial resources in in-house production activities, which involve significant costs and limit their need for external products; (3) broadcasters focus their in-house production activities on certain types of programmes (e.g. news, culture, youth, documentaries, sports, some types of entertainment etc.), while independent producers are specialised in large scale high budget entertainment programmes.
8. The Commission does not fully share the views of the notifying party. The Commission is of the opinion that because of the existence of TV broadcasters that produce TV programmes, there is a need to distinguish between programmes limited to captive use and programmes which are also sold to third parties. As established in previous Commission decisions, most of the programmes produced in-house by TV broadcasters are limited to captive use and are not offered on the market. Nevertheless, the investigation into the Spanish market, most directly concerned in this case, revealed that programmes produced in-house by TV broadcasters are in some cases sold to third parties. Since the latter are in direct competition with programmes produced by independent producers, they have to be included in the relevant product market concerning production of TV programmes. In the past above-

² Cases IV.M 1574 KirchGroup/Mediaset, IV M 553 RTL/Veronica/Endemol

³ Case C 221/95 Endemol Entertainment Holding BV vs. Commission

mentioned Commission's decisions and judgement of the Court of first instance, in-house production of TV broadcasters was excluded from the relevant product market because it was only intended for captive use in the relevant geographical markets mentioned in the decisions and was consequently not taken into account when calculating the market size and the market shares. Accordingly, in-house production which is not available in the market should be excluded from the relevant product market of TV programme production whereas in-house production sold to third parties has to be included since it competes with independent productions.

9. As regards the geographical scope of TV production, in the RTL Veronica/Endemol case the Commission considered that in the Netherlands the market for TV production was nationwide mainly due to language and cultural differences. In the present case, the market investigation carried out by the Commission among Spanish operators has shown that approximately two thirds of the programmes and channels⁴ bought by TV broadcasters from independent producers have been produced on a local basis whereas the other third have been imported mainly from American programme producers and channel producers. As regards Spanish TV producers 5% to 30% of their sales are made to foreign broadcasters. Nevertheless, in the present case there is no need for an exact delineation of the geographic scope of the market for TV production since the assessment would not change if the geographic market affected by the proposed concentration were broader than national.

Free access TV and pay TV

10. According to the Commission's practice⁵ free access TV constitutes a product market separated from that for pay TV since there is no trade relationship between the broadcaster and the viewer subscriber. The conditions of competition are accordingly different and the market share is measured in terms of advertising share and audience rates.
11. Pay TV is financed through a subscription payment, there is a trade relationship between the broadcaster and the viewer and the audience and the key factors to measure the market shares are the shaping of programmes to meet the interests of the target groups and the level of subscriptions charged.
12. As regards the geographic scope the Commission's traditional position, confirmed in the present case, is that, because of linguistic, cultural, licensing and copyright reasons pay TV and free access TV are nation-wide markets.

⁴ In general, cable operators and, to some extent, pay TV do not purchase individual programmes but channels (that is the whole package) from national and international TV broadcasters, programme producers and specialised producers of TV channels that buy programmes from TV producers and elaborate TV channels.

⁵ see for example decision 781/99 British Interactive Broadcasting Open, IV M993 Bertelsman/Kirsch Premiere, IV M 1327 NC/Canal+/CDPQ/Bank of America.

Assessment

Horizontal relationships: Production of TV programmes

13. Telefónica's production, through its subsidiary Antena 3, is essentially used for its own purposes. Antena 3 very seldom sells programmes to third parties. In 1999, sales of Telefónica's programmes to third parties in the EU amounted to [...] million EURO. Antena 3 market shares in the different EU countries where Endemol operates are insignificant. Telefónica's market shares, as regards sales of TV programmes to third parties, are above 0,1% only in Spain [below 0,2%] and Germany [below 0,2]. Endemol's market shares in the different EU countries are below 15% except in the Netherlands [between 50-60%], Spain [between 15-25%] and Portugal [between 10-20%]. These market shares in Spain are only related to sales to free access TV operators. Endemol's total sales to pay TV operators in all the countries where it operates is negligible (less than 1% of its total turnover). Given the insignificant market shares of Telefónica as regards production of TV programmes, the merger will not bring about any material change in the market .
14. It has been brought to the attention of the Commission that Telefónica and Canal Satélite Digital (the two main pay TV broadcasters) hold a strong position as pay TV content buyers with exclusive rights for films and sport events and have concluded an agreement of limited scope for the exploitation of certain broadcasting rights⁶. It has been argued by third parties that, in these circumstances, Telefónica, through the acquisition of Endemol, would strengthen Telefónica's and Sogecable's collective dominant position in the pay TV broadcasting rights. However, according to the market investigation carried out by the Commission, there are no grounds to consider that a collective dominant position exists since the comparative positions of Telefónica and Sogecable concerning their portfolio of audiovisual rights are quite asymmetric and Sogecable has an uncontested leadership. Therefore there is no collective dominant position that could be strengthened by this operation. In any event, if the market for TV production were to be considered as separate from the acquisition and licensing of TV rights of films and other fiction and sports, Endemol's acquisition would only have an impact in the market related to the production and sales of programmes and, as stated before, this impact would be insignificant due to the very modest position of Telefónica. Even if, as stated by a number of third parties, the market were to be considered as "content TV for pay TVs" as a whole⁷ it has to be borne in mind that Endemol's production in Spain has never been sold to pay-TV broadcasters⁸ and in general it can be said that Endemol's total turnover (including all the countries where it operates) linked to sales to pay-TV broadcasters is in any event largely below 1%. In addition it has to be remembered that since the initial aim of Endemol's productions, which is Endemol's success, is to reach as many consumers as possible, there are no grounds to believe that after the merger the situation will change. Endemol's production has never been considered suitable for pay TVs since its business practice has always been to adapt its production to mass broadcasters.

⁶ Case Comp 37.652 Telefónica/Sogecable/AVS II

⁷ programmes, films and sports

⁸ Gran Hermano, because of its special structure particularly suited for a 24 hour emission is broadcasted by two private TVs (Quiero and Vía Digital). Gran Hermano has been initially bought from Endemol by the private free access channel Tele 5.

Vertical relationships: Free access TV and pay TV

15. Although Endemol is not active in this market Telefónica operates as a free access and pay TV broadcaster in Spain which are two markets downstream the production of TV programmes. Concerning free access TV, the Spanish Government granted two licenses in 1990 (recently renewed) to two commercial TV (Antena 3, presently controlled by Telefónica, and Tele 5) which since then have been competing with the public broadcaster Televisión Española SA on a nation-wide basis and with several free access TV stations on a regional basis. Telefónica, through Antena, 3 has a [between 25-30%] market share (taking into account advertisement revenue) and [between 20-25%] of audience share. As regards pay TV, most new entries have taken place within the last five years. The first pay TV channel operating in Spain was CANAL +, a part of the Sogecable group which operates since 1990, a pay-TV analogue terrestrial channel. Since 1995, a number of cable operators have been authorized to offer pay-TV services on a regional and local basis. Among these, are either companies controlled by Telefónica and independent operators such as Cableuropa and Agrupación de Operadores de Cable (AOC) which includes Cable i Televisió de Catalunya, Madritel, Supercable Andalucía, Euskaltel, Grupo Cable, Retecal, Telecable Asturias, Retena, Aragón de Cable and Cable de Canarias. Presently, cable operators have a market share of approximately [more than 10%]. In 1997, two new pay-TV operators (both based on digital and satellite technology) started operating in Spain: Canal Satélite Digital (part of the Sogecable Group), which has a [above 60%] market share and Vía Digital (Telefónica) with around [between 15-25%] market share. In May 2000 a new pay TV broadcaster, Onda Digital (based on digital terrestrial technology) which operates under the brand “Quiero TV” has started regular broadcasting operations and has a market share of [less than 2%]. Telefónica has been granted a cable TV licence but has not started to operate yet.
16. Given Telefónica's market shares, the vertical integration of Telefónica into the upstream market of TV production, through the acquisition of Endemol (with [15-25%] market share in Spain in the market for independent TV production), does not raise competition concerns. Some competitors have indicated that, through the acquisition of Endemol, Telefónica's and Canalsatélite digital's "collective dominant position" will be strengthened in the pay TV market. In this respect, it has to be remembered, as stated before, that Endemol's productions are not sold to pay TV broadcasters.
17. Furthermore, supplies of TV programmes to TV broadcasters will be guaranteed given the significant number of producers of TV programmes existing in Spain, some of them with market shares of 10%-15% such as Globo Media and market shares of 5-10% such as Europroducciones, Producciones 52, BocaBoca, and Pearson TV. In addition to that, there have been recent entries in this market. As an example it can be underlined that important players such as Europroducciones SA, BocaBoca and Pearson TV have entered the market during the last 5 years. On the other hand, around one third of TV programmes and TV channels bought by TV Spanish broadcasters is imported from foreign countries.
18. Finally some concerns were raised by third parties about the fact that the acquisition of Endemol by Telefónica might impede or hinder the participation of any other producer in Antena 3 programming. In this respect it has to be remembered that even if Telefónica disappears as a customer for Endemol's competitors, there is still a significant number of TV broadcasters in Spain which are potential buyers of programmes from independent producers. Apart from the demand coming from traditional players (Tele 5, public broadcasters, Canal Satélite digital) there is an expected new increasing demand of TV programmes that are

needed to elaborate TV channels which are purchased by new entrants in the market of pay TV (Quiero TV which started to operate in May 2000) and the emerging market of cable operators.

19. Therefore, it is considered that the merger will not give rise to the creation or strengthening of a dominant position.

IV ANCILLARY RESTRAINTS

20. The acquisition agreement envisages two employment and non-compete agreements to be concluded between Telefónica and the two main shareholders of Endemol: Mr de Mol and Mr Van den Ende. According to the acquisition agreement Mr de Mol will hold the position of [...] at Endemol at least until [...], accepting a non-compete obligation for the same period. As far as Mr Van den Ende is concerned, he will be appointed as [...] and will also refrain from competing with Endemol [...]. Nevertheless the non-compete obligation on Mr Van den Ende will not apply to feature films, Internet/e-commerce/new media and his present TV production Wilhelmina.

21. The Commission considers these restrictions as directly related and necessary to the implementation of the concentration as long as they are limited to a period of three years and to the activities and geographical area where Endemol was operating before the transaction.

IV CONCLUSION

22. 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,
Mario Monti
Member of the Commission