

***Case No COMP/M.3330 -
RTL / M6***

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

Article 6(1)(b) NON-OPPOSITION
Date: 12/03/2004

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COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 12-03-2004

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.3330 - RTL/M6
Notification of 13/02/2004 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 13.02.2004, the Commission received a notification for the acquisition by Bertelsmann AG (“BAG”, Germany) through RTL Group S.A. (“RTL”, Luxembourg) of sole control of Métropole Télévision S.A. (“M6”, France). Although RTL did not acquire any shares in M6, it has passively acquired a sole controlling interest in M6 as a result of Suez Lyonnaise des Eaux’ (“Suez”) sale of almost its entire share in M6 on 2 and 3 February 2004.

I. THE PARTIES

2. BAG is active in a variety of media activities: publication of books and magazines, music, television and related services in the media sector. BAG’s current principal shareholders are (i) the Bertelsmann Foundation (55.4%); (ii) Groupe Bruxelles Lambert (24.2%); and (iii) the Mohn Family (approx. 16.6%).
3. RTL is solely controlled by BAG² and is active in free-access television, television production, radio broadcasting and multimedia activities in various Member States.
4. M6 is mostly active in audiovisual activities in France, including operation of a nationwide terrestrial free-access channel and other activities in film production,

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as 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).

² See Commission Decision in case No COMP/M.2407 – Bertelsmann/RTL Group of 11.05.2001.

advertising, retail, Internet. It also jointly controls (together with TF1) TPS, a pay-TV satellite platform, and holds a stake in the Girondins de Bordeaux football club.

II. THE OPERATION

5. Before Suez' divestment, the two main shareholders in M6 were RTL (48.4%) and Suez (37.6%), who together hold joint control over M6³. On the 2 and 3 February 2004, Suez sold 29.2% of its shareholding in M6 to a large number of investors through a public placement, thereby keeping a stake representing less than 5% of M6 share capital⁴. As a result, Suez is expected to withdraw from the Supervisory Board of M6, except for one seat (out of 12).
6. Further to the divestment, RTL retains its 48.4% equity share in M6. However, its voting rights are still limited to 34%, following a decision of 6 January 2004 from the "Conseil Supérieur de l'Audiovisuel" ("CSA") amending the agreement under which M6 is authorised to broadcast in France. The main modifications are that the voting rights held by any shareholder or group of shareholders are limited to 34%, that the 34% cap will become void if the general statutory limitation of 49% of the French media law applying to holders of shares in all other French TV channels were abolished, that at least one third of the members of the Supervisory Board must be independent, and that the Supervisory Board will be empowered to remove any member of the Managing Board by a simple majority vote. These amendments to the agreement shall be incorporated in the by-laws of M6 at the next shareholders' meeting scheduled on 18.03.2004.

III. CONCENTRATION

7. Despite the fact that RTL has not acquired any additional shares in M6, the divestment of Suez's shares will lead to passive acquisition of sole control by RTL for the following reasons.
8. According to paragraph 14 of the Commission's notice on the concept of a concentration⁵, a minority shareholder may be deemed to have sole control on a de facto basis. This is the case when the shareholder is highly likely to achieve a majority at the shareholder's meeting, given that the remaining shares are widely dispersed. In such cases, the Commission has consistently based its assessment on participation in shareholder's meetings in previous years⁶.

³ As a result of the by-laws of M6 and of the agreement between the "Conseil Supérieur de l'Audiovisuel" and M6 of 24.07.2001 under which M6 is authorised to broadcast in France, the voting rights of both RTL Group and Suez were limited to 34% each.

⁴ Suez undertook to the French "Conseil Supérieur de l'Audiovisuel" –which notably supervises ownership of French TV channels- to keep a 5% share for at least the next three years.

⁵ Commission notice on the concept of a concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 5).

⁶ See, for example, Commission decisions in cases No IV/M.343 - Société Générale de Belgique/Générale de Banque of 03.08.1993, No IV/M.754 - Anglo American Corporation/Lonrho of 23.04.1997, and No IV/M.1157 Skanska/Scancam of 11.11.1998.

9. In the present case, the CSA has limited RTL's voting rights to 34%, even though RTL owns 48.39% of M6's shares. M6 itself holds 0.91% of its shares without any voting rights. The remaining 50.7% of shares and votes are widely dispersed among a large number of small shareholders⁷.
10. Under such circumstances, it is almost certain that RTL will achieve a majority of votes cast at future shareholders' meetings. It is indeed very unlikely that enough small shareholders will participate in these meetings to account for the majority of the votes cast. The Commission found that in the years 2001, 2002 and 2003, only a limited proportion of the small shareholders were represented⁸. In addition, it is very unlikely that a sufficient number of small shareholders will coalesce to reach a majority of the votes cast in future shareholders' meeting. These small shareholders are widespread and most of them only hold a limited amount of shares, which make any coalition extremely difficult to form. Moreover, the incentives of small shareholders to participate in future shareholders' meetings and to coalesce will be reduced following Suez' divestment. Indeed, under the previous shareholding structure -where Suez and RTL both had 34% of the votes- a coalition of a limited number of small shareholders could possibly have an influence on the balance between the two main shareholders, while, under the new shareholding structure, virtually all minority shareholders should coalesce to achieve a majority.
11. Following Suez' divestment, RTL will be able to determine the strategic and commercial behaviour of M6 through its majority in the Supervisory Board. A shareholders' meeting will be held on 18.03.2004 to incorporate in the by-laws of M6 the changes required by the CSA and to appoint new members of the Supervisory Board. [...] .
12. Based on the above, it can be concluded that the notified transaction results in Bertelsmann acquiring via RTL sole control of M6 within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

13. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁹. Each of BAG and M6 have a Community-wide turnover in excess of EUR 250 million ([...]) but BAG does not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

⁷ Amongst these small shareholders, the largest are Suez (5%), [...]. The remaining [...] are widely dispersed among institutional and private investors.

⁸ [...].

⁹ 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.

V. COMPETITIVE ASSESSMENT

Relevant Markets

14. The notifying party argues that there are no affected markets by the transaction. However, it has listed a number of relevant product and geographic markets where M6 and/or BAG are active: free-TV; pay-TV; commercialisation and exploitation of special interest TV channels¹⁰; home-shopping on the market for retail activities; acquisition of TV contents; independent television programme production; sale of advertising space; publishing of magazines; video rental and distribution of films to theatres; Internet services and music recording.
15. In terms of geographic market definition, even though the parties recall the Commission's past practice pointing towards national markets, they leave the exact definition open. In cases COMP/M. 2211 - Universal/NTL of 20.12.2000 and COMP/M.2050 – Vivendi/Canal+/Seagram of 13.10.2000, the Commission found that the markets concerned were national. On the evidence before it, that is also likely to be the case here.
16. However, the exact market definitions can be left open in the present case, since even on the narrowest market definition conceivable, no competition concerns could arise.

Impact of the transaction

17. At the outset, it should be outlined that the passive acquisition by RTL Group of sole control in M6 does not have any impact on the structures of the various relevant markets, since RTL already had (joint) control over M6 before the operation. Moreover, most markets are not affected by the transaction, even by taking the most restrictive approach.
18. Since M6 is only active in France, and since the relevant markets are at least national, the assessment of the transaction should focus on the French markets.
19. As regards free-TV in France, the notifying party submits that it is only active in that country (via RTL Group) through its participation in M6 and RTL 9. It also contends that RTL Group does not control RTL9, since it only holds a 35% stake, against 65% for the other shareholder, Groupe AB. Bertelsmann also argues that RTL9 and M6 are not active in the same relevant market, as RTL9 only broadcasts in Luxembourg and in Lorraine while M6 does not have a special advertising window that could compete with RTL9 offerings. Even if M6 and RTL9 were considered as active in the same relevant market, their combined market share would only be [10-15%] in terms of audience and [20-25%] in terms of advertising, against [30-35%] and [45-55%] respectively for TF1, and [35-40%] and [15-20%] respectively for France Télévisions. Although this market could then be considered to be affected by the transaction, the change from joint control to sole control will have no impact on the competitive market structures and M6 will continue to be faced with important competitors.
20. As for pay-TV in France, the notifying party submits that it is only active in that market through M6's 34% share in TPS, the operator of one of the two French satellite

¹⁰ Special interest channels are TV channels that broadcast and sometimes produce programs focusing on a specific theme (e.g. music, sports, news, etc.).

digital platforms for the distribution of pay-TV programmes. According to Bertelsmann, M6 jointly controls TPS together with TF1. TPS holds a [10-15%] share of the French market for pay-TV (which represents a [30-35%] share of an hypothetical French market for pay-TV via satellite). RTL is not active in pay-TV other than through M6, since neither M6 nor RTL 9 operates as pay-TV broadcasters themselves. The French market for pay-TV is therefore not horizontally affected by the proposed transaction. Bertelsmann, via RTL Group and M6, provides content for the two French pay-TV platforms through special interest channels, but it does not hold a share of that upstream market above [23-28%] . (see para.22).

21. Regarding the French market for sale of advertising space on TV, M6, through its wholly-owned subsidiary M6 Publicité, holds a market share in the range of [20-25%] (against more than 50% for TF1). RTL group is not active on that market.
22. M6 is active on the market for the commercialisation and exploitation of special interest TV channels in France, via Téva, Fun TV, M6 Music ([0-5%] of cumulated audience share). It also holds shareholdings in Paris Première, TF6, Série Club and TPS Star ([5-10%] of cumulated audience share) ¹¹. RTL9 is also present on this market with an [5-10%] audience share. In the widest possible sense, the combined market share could therefore be as high as [15-20%] on this market. Again, there remains a number of significant competitors, like Lagardère ([10-15%] market share), TF1 ([10-15%] market share) and Vivendi Universal ([5-15%] market share) in a rather fragmented market. The change from joint to sole control of BAG in M6 will therefore not raise any competitive concerns
23. In what regards the acquisition of TV contents, neither M6 nor RTL 9 does primarily focus on the broadcasting of premium films or sport events. RTL Group is active in the trading of sports rights licensing through Sportfive¹². But despite their existing links with BAG, M6 and RTL9 rather focus on non-premium TV content, like series and entertainment programs and M6 has acquired very limited contents from BAG/RTL Group ([...]). There are no reasons why the transaction would change BAG's incentives to favour M6's acquisition of TV content, given that its participation in M6 remains unchanged. There is no risk either that the transaction would incentive M6 to favour BAG in the acquisition of TV contents from the latter. Indeed, it will not be in M6's interest to pay TV content from BAG more than the applicable market price, because it has to compete with other larger free-TV channels (TF1 and France Télévisions) for the acquisition of such content from other TV content producers. As far as sports broadcasting rights are concerned, M6 admittedly owns a football club "Girondins de Bordeaux". However, since under French law, football clubs do not own the broadcasting rights of the competitions in which they take part, M6 cannot be regarded as active on the market for the sale of TV broadcasting rights for sports.
24. RTL Group and M6 are also both active on the French markets for home shopping, video rental, film distribution to theatres, Internet advertising and independent television programme production but their combined market share remains below 10%.

¹¹ M6 had 10.66% of Paris Première and has set to acquire the rest of the shares from Suez. French competition authorities are currently reviewing this proposed acquisition. In any case, Paris Première has an audience share of less than 2% and it is included in the maximum 19% of cumulated audience share that M6 would hold.

¹² Commission Decision in case No COMP/M.2483 Canal+/RTL/GJCD/JV of 13.11.2001.

25. Finally, BAG is also active in several other media markets in France (magazine and book publishing, music recording and distribution, Internet content) where M6 has no or only a negligible presence
26. In light of the foregoing, it clearly appears that the change from joint to sole control of M6 by BAG, via RTL Group, will not have any adverse effect on competition.

VI. CONCLUSION

27. 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
(Signed)
Franz FISCHLER
Member of the Commission