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*Case No IV/M.566 -
CLT / Disney / Super
RTL*

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

Article 6(1)(b) NON-OPPOSITION
Date: 17/05/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.05.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.566 - CLT/Disney/SuperRTL

Notification of 10.4.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. This operation concerns the acquisition by The Walt Disney Corporation, Burbank/ USA (TWDC), through its affiliate Disney Television (Germany), Inc., of a 50 % stake in RTL Club GmbH & Co. KG ("RTL Club"), an indirectly owned subsidiary of Compagnie Luxembourgeoise de Télédiffusion, Luxembourg ("CLT").
2. After an 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 its compatibility with the common market and the EEA agreement.

I THE PARTIES AND THE OPERATION

3. CLT is active in the television and radio broadcasting sectors, with holdings in TV and radio stations in various European countries. Moreover CLT operates in the fields of the production and licensing of TV programmes and has activities in the press sector.
4. TWDC is active worldwide in the production and licensing of TV programmes and films, licensing of its characters to manufacturers, as well as operating theme parks in the United States, Japan and Europe. It operates retail stores and is active in publishing books, magazines and music.
5. RTL Club will be the operator of a new German TV station. It will broadcast a new specialised family-oriented TV programme by cable and satellite in Germany under the name "Super RTL" or "Disney Channel". It has recently obtained a licence under German media law.

6. The operation involves the acquisition of a 50 % stake in RTL Club by TWDC, through its wholly-owned subsidiary Disney Television (Germany), Inc. The other 50 % will be held by CLT Multi Media GmbH ("CMM"), a wholly owned subsidiary of CLT.

III CONCENTRATION

Joint control

7. RTL Club will be jointly controlled by CLT and TWDC. The Articles of Association of RTL Club Fernsehen GmbH & Co KG provide that a 60 % majority is generally required for ordinary resolutions adopted by the partners, while for certain strategic decisions (annual budget, agreements on marketing and programme supply, etc.) a 75 % majority is required. Certain other matters even require unanimity.

Autonomous economic entity

8. The joint venture will perform all the functions of an autonomous economic entity. It will have its own staff, sufficient financial resources and assets and will acquire all necessary licences in its own name. As to the technical transmission of the broadcast, the joint venture will use the technical facilities of CBC Cologne Broadcasting Center, which is a joint venture between CLT and UFA (controlled by Bertelsmann). This technical arrangement will, however, be operated on an arm's length basis.
9. The parent companies will, together with IP Multimedia Deutschland GmbH (Havas Group), establish another joint venture, to be notified under national (German) competition law. This joint venture will act as exclusive agent for the sale of TV advertising time on SuperRTL. However, according to the Service Agreement between RTL Club and IP Multimedia, RTL Club will determine the sales and price policy and will have control of each advertising order. All advertising time will be sold in the name and for the account of RTL Club, which will thus virtually manage this part of its business.

Absence of scope for co-ordination of competitive behaviour

(a) Free access TV/ free TV advertising market

10. CLT holds stakes in two German TV stations, a 49.9% stake in RTL plus and a 24.0% stake in RTL 2. TWDC does not hold any stakes in European free access broadcasting stations, apart from a 25% equity participation in GMTV, a national breakfast television service in the UK. TWDC is only entering the German free access TV market through Super RTL. Apart from Super RTL, TWDC is not active in the German TV market, and in the light of the scope of the joint venture and the licence agreements on TWDC's and CLT's programmes (see No 26), it is not likely that TWDC would launch another children oriented channel in a market which is, as set out below, characterized by a relatively broad range of family and children oriented programmes. There is thus no significant risk of TWDC and CLT co-ordinating their competitive behaviour.

(b) Film production/television rights

11. TWDC as well as CLT are active in the market for production and licensing of TV programmes. CLT, however, is only involved in that market to a small extent (see below No. 23). Both parties have simultaneously entered into a comprehensive licensing agreement, regarding rights to TV programmes owned by TWDC. This agreement provides for [...] ⁽¹⁾. If there were to be a risk of co-ordination, it is likely to arise from this licensing agreement and not from the joint venture itself.
12. Therefore, there is no scope for coordination of the competitive behaviour between CLT and TWDC through Super RTL.

IV COMMUNITY DIMENSION

13. The concentration has a Community dimension. The combined aggregate worldwide turnover of TWDC and CLT in 1994 exceeded 5,000 million Ecu (8.174,9 million Ecu for TWDC and 2.479,5 million Ecu for CLT). The aggregate Community-wide turnover of each of at least two of the undertakings is more than 250 million Ecu. In addition, the parties do not achieve more than two-thirds of their Community-wide turnover in one and the same Member State.

V COMPETITIVE ASSESSMENT**Relevant product market**

14. Super RTL is a free access TV programm financed by advertising revenue. The relevant product markets are therefore to be defined as the market for advertising in television broadcasting as well as the market for licensing of film rights and TV programmes. The parties have indicated that they do not plan to transform Super RTL into a pay TV programme.
15. As to further submarkets, a separate market for advertising in children-oriented programmes does not appear to exist at the present time but may be developing in the future. *Premiere 2*, a German pay TV channel has already acquired a broadcasting licence and is likely to start its children's programming at the end of the year. Another free access channel *Nickelodeon* is in the process of applying for such a licence. However, in the present TV broadcasting market almost all private and public TV stations dedicate a certain portion of their daily programming to family and children's audiences. They would therefore compete with pure children programmes.
16. The same question of further segmentation arises for the market for licensing of film rights and TV programmes. It can, however, be left open if there are markets for children's programmes and for advertising in children-oriented programmes, since this would not change the competition assessment.

⁽¹⁾ Business secret

Relevant geographic market

17. TV advertising markets remains mainly national or regional, due to linguistic, cultural and regulatory barriers, even if technical advances and an increasing importance of transmission by satellite may lead to a gradual internationalisation of TV markets. The joint venture will operate in Germany, and got its licence from the German media authority.
18. While it may as the parties have indicated become more and more common to grant film licences for the entire European continent including the possibility of sublicensing for single countries, the market for licensing of film rights also tends to be national which is, in the present case, confirmed by the limitation of the programme of Super RTL and the underlying licences to the German territory (see below No. 26).
19. Since the operation does not raise serious doubts as to the compatibility with the common market the question of the precise relevant geographic market can be left open for both markets.

Compatibility with the common market

(a) The market for TV advertising

20. Market share is calculated by means of measuring of advertising revenue. Audience shares can be used as a secondary measure, since the revenue for advertising and the prices for advertising spots entirely depend on the share of audience for a channel or for a certain programme.
21. TWDC has no presence on the German free access TV market. Therefore, the concentration will not lead to an overlap in market shares.
22. As mentioned above, CLT is a (minority) shareholder of RTL plus and RTL 2. These German channels achieved market shares of [...] ⁽²⁾ for RTL plus ⁽³⁾ and [...] ⁽⁴⁾ for RTL 2 in 1993. Super RTL is according to the parties expected to achieve [...] ⁽⁵⁾ within the next three years. This estimation appears reasonable as the German TV advertising market is expected only to grow slowly after rapid growth in past years. The parties argue that the market shares of RTL plus, RTL 2 and Super RTL are not attributable to CLT, since CLT only holds minority shareholdings in RTL plus and RTL 2 and that it would not control these channels. This question, however, can be left open here for several reasons. The German TV advertising market is marked by a competitive structure, at least with regard to the Kirch Group and public broadcasters. The main competitors are SAT. 1 (26,7%), PRO 7 (13,9 %), ARD (9,2%) and ZDF (7,7%). The launch of Super RTL will therefore not significantly strengthen the position of CLT. In addition, RTL plus and RTL 2 had a combined audience share of about [...] ⁽⁶⁾ while four other channels achieve shares between 15 and 20%. Furthermore, Super RTL will through its family-oriented

⁽²⁾ Business secret - 35-40%

⁽³⁾ Net turnover. On the basis of gross turnover, the share was 35,4% and fell to 31% in 1994; net turnover figures for 1994 are not available.

⁽⁴⁾ Business secret - less than 5%

⁽⁵⁾ Business secret - less than 5%

⁽⁶⁾ Business secret - 20-25%

programme only address a certain segment of the audience. These circumstances are likely to prevent the creation or strengthening of a dominant position on the German market for advertising in television broadcasting.

(b) Film production/television rights

23. TWDC is active in the field of film production and licensing. CLT is also involved to this field, but to a very limited extent. Figures on the total market volume in Germany are hardly available, but in relation to the German broadcasters' programming budgets for 1993 and according to estimations given by the parties, it can be said that the shares of TWDC and CLT are both distinctly below 5 %.
24. While the joint venture will have access to the stock of films of TWDC (see no. 26), there will be sufficient supplies of film and TV rights for other channels from different sources. As set out in the Commission's decision "MSG Media Service" of 9.1.1994 (O.J. 1994 L 364/1, No. 76), the Kirch Group is the leading German supplier of feature films and entertainment programmes for television. Kirch has at its disposal a stock of about 15.000 movies of all types and 50.000 hours of television programmes and has also extensive production activities in this area. Major competitors like Columbia and Warner Brothers are also active on the German market.
25. For these reasons, the concentration will not create or strengthen a dominant position of the new entity in the licensing market.

VI ANCILLARY RESTRAINTS

1. Licence Agreement

26. As mentioned above, the parties have entered into a licence agreement by which Buena Vista International, a wholly-owned subsidiary of TWDC, gives CLT the right and obligation to license motion pictures and TV programmes produced or acquired by the affiliates of TWDC. [...]⁽⁷⁾
27. The parties consider the whole of the Agreement to be ancillary to the creation of the joint venture. [...]⁽⁸⁾ Even though the provisions of the Licence Agreement which apply to Super RTL directly might be considered as ancillary to the concentration, the Licence Agreement as a whole cannot in its present form be considered directly related and necessary to the concentration as the Agreement goes beyond licensing programme rights to the joint venture alone. Consequently, this agreement cannot be considered as ancillary to the concentration within the meaning of Article 8 (2) of the Regulation.

2. Non-competition clause

28. The agreements the parties have entered into contain a non-competition clause relating to [...]⁽⁹⁾ channels in the German language or through the acquisition of an equity interest

⁽⁷⁾ Business secret

⁽⁸⁾ Business secret

⁽⁹⁾ Business secret

in a company which broadcasts such a channel within the next three years. In the absence of such a non-competition clause, CLT or TWDC could acquire a controlling stake in another children oriented channel. This non-competition clause appears to be related and necessary to the implementation of Super RTL and is thus ancillary to the concentration.

VII CONCLUSION

29. Based on the above information, the concentration will not create or strengthen a dominant position as a result of which effective competition will be significantly impeded in the common market or in a substantial part of it.

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30. 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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission