

EN

*Case No IV/M.673 -
Channel Five*

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 22/12/1995

*Also available in the CELEX database
Document No 395M0673*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject : **Case No. IV/M.673 - Channel Five**

Your notification of 21 November 1995 pursuant to Article 4 of Council Regulation No 4064/89

1. On 21 November 1995 the Commission received a notification of a proposed operation pursuant to Article 4 of a Council Regulation (EC) No. 4064/89 by which MAI plc, Pearson Television Ltd (Pearson), Compagnie Luxembourgeoise de Télédiffusion (CLT) and Warburg Pincus Ventures LP (Warburg Pincus) form a new company: Channel Five Broadcasting Ltd by way of purchase of shares.
2. Having examined the notification, the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

I THE PARTIES

3. MAI is a company with activities in media, financial services and market research. In particular, MAI controls two regional Channel 3 (ITV) franchises in the UK : Meridian and Anglia which serve the south and east of England respectively. These two companies also have considerable programme production activities which provide programming for both themselves and for broadcasting on the national ITV network. MAI also controls a television advertising sales house TSMS which sells advertising time on behalf of a number of Channel 3 franchise holders.

4. Pearson is involved in the production and distribution of television programmes through three subsidiary companies Thames Television, Grundy and ACI. It also has stakes in two satellite television channels UK Gold and UK Living which broadcast to the UK and has a joint venture with the British Broadcasting Corporation to provide two satellite channels worldwide BBC World and BBC Prime (which are not available in the United Kingdom).
5. 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. In the UK, CLT has a 15% shareholding in First Choice, a television production company as well as activities in the radio sector.
6. Warburg, Pincus is a Delaware, USA based limited partnership which is a private equity investment fund. It has no other media interests in Europe, though other associated investment entities have interests in magazine publishing, media buying and cable television in Europe. None of these interest constitutes a controlling interest.

II THE OPERATION

7. The operation concerns the formation of a company - Channel Five Broadcasting Ltd (C5B) - to operate the franchise for the fifth terrestrial free access television channel in the United Kingdom. The franchise was awarded on 27 October 1995 and the Independent Television Commission (ITC), which awarded the franchise and regulates the independent television sector in the UK, has required C5B to take up the licence before the end of 1995. The company is expected to begin broadcasting on 1 January 1997.

III ABSENCE OF JOINT CONTROL

Absence of *de jure* joint control

8. Immediately after the granting of the Channel Five licence, the shareholdings of the parent companies in C5B is expected to be as follows:

MAI	20%
Pearson	20%
CLT	32%
Warburg Pincus	28%

(rounded to nearest whole number)

Certain matters are subject to shareholder protection rights where each of the shareholders are obliged to ensure that all the shareholders with 15% or more of the shares agree. These matters include the acquisition of assets costing more than £1 million (approx 1.3 million ECU) and the appointment of the Chairman of the Company and its first chief executive.

Subsequent appointments of the chief executive and the approval of the budget are subject to different voting arrangements where 66% of the voting shares must be voted in favour in order for such matters to be approved. In the light of the shareholdings listed above, no shareholder will have veto rights over such decisions.

9. On the basis of the above information, the parties will not have *de jure* joint control over C5B.

Absence of *de facto* joint control

10. In their notification, the parties argue that there will be a strong common interest in the sense of the Commission's notice on the notion of a concentration⁽¹⁾. This notice states, in paragraph 32, that "*very exceptionally, collective action can occur on a de facto basis where strong common interests exist between the minority shareholders....*". The notice sets out certain criteria which indicate the existence or otherwise of such a strong common interest. These factors include the prior existence of links between the minority shareholders and the establishment of a new rather than an existing joint venture. There is a higher probability that the parents are carrying out a deliberate common policy in particular where each of the parents provides a vital contribution to the joint venture. By contrast, the greater the number of parent companies, the lesser the chance of *de facto* joint control being in existence.
11. In their notification, the parties only indicate one prior link between any of the shareholders before this operation. This is between MAI and Pearson, who both have a one-third shareholding in Three on Four Limited which produces live broadcasts of horse racing. However, in other areas MAI and Pearson are actually competitors on the programme production market and both have interests in television broadcasting, though on different market segments. The parties have indicated no area where there is a prior link between all four shareholders.
12. The parties point out that C5B is a newly created company with a single purpose. In addition, they point out that all the shareholders will contribute expertise to C5B, in particular in relation to broadcasting, television production and venture capital. They cite, for example, the activities of MAI in UK broadcasting and the experience of Pearson in television production as meaning that the agreement of each shareholder will be required to operate the company.

However, Warburg Pincus only bring a financial contribution to the joint venture, which cannot be considered to be a vital contribution. MAI bring expertise in the broadcasting sector through its ITV channels Meridian and Anglia. However, MAI does not contribute those channels to C5B, they are kept separate and will compete with C5B for viewers of and advertisers on free access television in the UK.

Each of MAI, Pearson and CLT have at least a theoretical possibility of supplying programmes to C5B. CLT is unlikely to do so given that most of its programmes will not be in English and it may not have the rights to offer to C5B in the UK. MAI and Pearson have the capability to supply programmes to C5B. However, according to the parties only a modest proportion of C5B's programmes will be purchased from MAI and Pearson. No long term supply agreements have been entered into between the parents and C5B as part of the operation. Under its licence application, C5B is committed to commission programmes from a large number of independent production companies. The presence of programme production companies as shareholders of C5B is not, therefore, vital to its operation.

(1) Commission Notice on the notion of a concentration - OJ C 385/02 of 31.12.94 page 5

13. In the light of the above information, MAI, Pearson, CLT and Warburg Pincus do not have a strong common interest which would create a situation of *de facto* joint control amongst all four of them.
14. Taking all the above factors into account, including both the legal and factual elements, the parent companies will not have joint control over C5B.

CONCLUSION

For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

The Commission will treat the notification pursuant to Article 5 of Commission Regulation No. 2367/90 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission