

*Case No IV/M.779 -  
Bertelsmann / CLT*

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 07/10/1996

*Also available in the CELEX database  
Document No 396M0779*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 07.10.1996

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying parties**

Dear Sirs,

**Subject** : Case No IV/M.779 - Bertelsmann / CLT

Notification of 04.09.1996 pursuant to Article 4 of Council Regulation No 4064/89

1. On 04.09.1996 the Commission received a notification of a proposed concentration pursuant to Article 4 of the Council Regulation (EEC) No 4064/89 by which Bertelsmann Aktiengesellschaft (Bertelsmann) and Audiofina S. A. (Audiofina) will concentrate their radio and television business in a newly created joint-venture called CLT-UFA.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

**I. THE PARTIES**

3. Bertelsmann is a major German media group active in particular in the following fields: publishing of books and magazines, book club, publishing and distribution of music and records, radio and television-related activities. These activities have been carried out, up to the present date, through Bertelsmann's subsidiary UFA Film-und Fernseh-GmbH (UFA).

4. Audiofina is a Luxembourg based holding company of which the major asset is its participation in Compagnie Luxembourgeoise de Télédiffusion (CLT), of which it controls directly and indirectly approximately 97%. CLT is mainly present in the radio and television-related sectors. Audiofina is solely controlled by Groupe Bruxelles Lambert (GBL).

## II. THE OPERATION

5. Following the transaction, CLT-UFA will be [...] <sup>(1)</sup> owned by Bertelsmann, [...] <sup>(2)</sup> by Audiofina and [...] <sup>(3)</sup> by Fratel A. Fratel A will in turn be a 50/50 joint-venture between Audiofina and Bertelsmann.
6. The operation includes a Formation Agreement signed by the parties to which are annexed several documents.

## III. CONCENTRATION

### *Joint control*

7. No decision can be taken at the level of CLT-UFA's [...] <sup>(4)</sup> and [...] <sup>(5)</sup> without the agreement of both Bertelsmann and Audiofina. Therefore, CLT-UFA will be jointly controlled by Bertelsmann and Audiofina.

### *Full-function entity formed on a lasting basis*

8. CLT-UFA will continue the activities performed to date by CLT on the one hand and UFA on the other. It will receive all the television and radio licences currently held by CLT and UFA and will employ its own staff. It will have its own technical and financial resources. The Shareholders' Agreement will not terminate before [...] <sup>(6)</sup> and Fratel A and CLT-UFA are of an unlimited duration. Therefore, CLT-UFA will be a full-function entity formed on a lasting basis.

### *Absence of coordination*

9. All Bertelsmann and Audiofina's activities related to radio and television (including free-access television, pay-television, radio broadcasting, television production activities and television rights and licences) will be transferred to the joint-venture. Consequently, the parents of the joint-venture will be active on these markets only through the joint-venture. Therefore, the creation of CLT-UFA will not lead to the coordination of the competitive behaviour of its parents.
10. The operation is therefore a concentration within the meaning of Article 3(1) of the Regulation.

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#### IV. COMMUNITY DIMENSION

11. The combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 billion (Bertelsmann: ECU 10.969 billion). The aggregate community-wide turnover of the two undertakings concerned is more than ECU 250 million (Bertelsmann: ECU 7166 million; GBL: 2738 million). The two undertakings concerned did not achieve more than two thirds of their community-wide turnover within one and the same Member State. Therefore, the concentration has a Community dimension.

#### V. COMPATIBILITY WITH THE COMMON MARKET

##### A Relevant product markets

12. The activities of CLT and UFA are broadly related to the following areas:

- (i) free access tv
- (ii) pay tv
- (iii) tv productions
- (iv) tv rights / licences
- (v) free access radio

1. Free access tv

13. Free access tv comprises free access broadcasting of television programming, funded wholly or partially by advertising. There is, therefore, a relevant product market for tv advertising where the broadcasters compete for advertising revenues. In so far as pay tv programs are also partially financed by advertising, these activities may also be included in the market for tv advertising. However, the parties operate, for the time being, a pay tv channel only in Germany where no significant mixed-financed pay tv exists to date.
14. The market for tv advertising must be distinguished from advertising through other media, in particular through the print media. The consumers targeted through the various types of advertising as well as the technique employed and the prices in terms of targeted consumers differ considerably. Although there may be fluctuations between the several types of media, tv advertising and advertising in print media are, therefore, distinct markets<sup>(7)</sup>.
15. It can be left open if there is, in the strict economic sense of this notion, a market for viewers where the tv broadcasters compete against each other for audience shares. In any event, the audience shares in tv broadcasting are a determinant factor for the success of the broadcasters in the tv advertising market and have, therefore, to be assessed at least in the context of this market<sup>(8)</sup>.

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<sup>(7)</sup> Commission decision RTL / Veronica / Endemol OJ nr. L 134/32, 5.6.96, para. 23

<sup>(8)</sup> Commission decision RTL / Veronica / Endemol para 17, 20

## 2. Pay tv

16. While in the case of advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay tv there is a trade relationship between the programme supplier and the viewer as subscriber. Although the distinction between free-access tv and pay tv may become blurred over time with the emergence of digital bouquets combining free-access and pay tv channels. Pay tv constitutes, therefore, for the time being a separate relevant product market where the pay tv broadcasters compete for subscribers<sup>(9)</sup>

## 3. Tv productions

17. With respect to tv productions, a distinction has to be made between in-house productions produced by broadcasters and used for captive use and productions commissioned by a broadcaster to a producer. Only the latter are offered on a market and the relevant product market has, therefore, be limited to tv productions which are not used for captive use<sup>(10)</sup>

## 4. Tv rights / licences

18. As regards the acquisition and licensing of tv rights, a distinction can be made between film and other fiction rights on the one hand and sport rights on the other. Sport programs covering widely popular sports or major international events are often able to achieve high audience ratings and are generally considered to be particularly suited to carrying advertisements, as reflected by the amount of sponsorship involved. The tv rights for sport events must be acquired in advance of the event, but their attractiveness may change considerably depending on the actual participation and success of teams or participants appealing to national or regional audiences. Sport rights have, therefore, specific features as compared with film and other programme rights. For the purposes of the present case, it can, however, be left open whether or not there are separate relevant markets since even on the basis of a narrow market definition the proposed concentration would not lead to the creation of a dominant position. For the same reason, it can also be left open whether or not there are separate relevant markets for free access tv rights and pay tv rights.

## 5. Free access radio

19. As regards free access radio, the situation is similar to that of free access tv. There is a relevant market for radio advertising. It is not necessary to decide whether there is a relevant market for radio broadcasting since the audience share has to be taken into account, in any event, in the assessment of the position of the broadcasters in the advertising market.

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<sup>(9)</sup> Commission decision MSC Media Service, OJ nr. L 364, 31.12.94, p. 1, para 32, 33

<sup>(10)</sup> Commission decision RTL / Veronica / Endemol, para. 24, 88, 89

## **B Relevant geographic markets**

### 1. Markets related to tv broadcasting

20. Although in certain niche markets there are already programs broadcast throughout Europe, tv broadcasting still generally takes place on national markets. This is true for both free access and pay tv. As already outlined in several decisions of the Commission<sup>(11)</sup>, the national character of tv broadcasting is mainly due to different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets (e.g. the structure of the market for cable networks). Correspondingly, the markets for tv advertising are also national markets since tv advertising is directed to the area where the tv broadcasters have their main audience.
21. The markets for tv productions may be sometimes broader and comprise a particular language region, although there are situations where even in a given language region the markets are, however, limited to each of the countries in this region<sup>(12)</sup>. The situation is similar with respect to the markets for tv rights. Although the demand for a large part of these rights is EC wide or even world-wide, in particular for international sport events, art movies, film and sport, rights are normally granted for one specified country or language region. In the present case, there is no need for an exact delineation of the geographic markets for tv productions and tv rights. The assessment would not change if Austria were to be included in the respective markets in Germany and the French-speaking region of Belgium were to be included in the markets in France.

### 2. Free-access radio

22. For similar reasons as for the tv markets, the market for radio advertising is at least limited to a specific country. Moreover, it could be considered that there are distinct regional markets within one country since numerous radio stations are essentially directed to a specific region. This question can, however, be left open. On the basis of a regional market definition, there would be only an overlap between CLT and UFA in one region in Germany where the concentration would, however, not lead to the creation of a dominant position.

## **C Effects of the concentration**

23. As regards the geographic markets where CLT and UFA are active, the proposed concentration is to a great extent complementary. There is only a significant overlap in Germany. However, the most important activity of CLT and UFA in the German tv sector, the channel RTL, is already a joint venture between the two parties.

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(11) e.g. MSG Media Service para. 46, RTL / Veronica / Endemol para. 25, Kirch / Rlichemont / Multi Choice / Telepiu (Case No. IV/M. 584) of 5.5.1995, para 17

(12) RTL / Veronica / Endemol para. 25

1. Germanya) Free-access tv

24. In Germany, there is a relatively high number of free-access tv channels. They can be mainly grouped into the channels of the public broadcasters ARD and ZDF, the channels linked to CLT and UFA and the channels linked to the Kirch group. CLT and UFA hold a share in RTL of 47,9% and 39,1% respectively. Furthermore, CLT has a share of 24,9% in RTL 2 and 50% in Super RTL. UFA has a share of 24,9% in VOX. The Kirch group holds a share of 43% in SAT 1 and a share of 24,5% in the sports channel DSF. A major participation in SAT 1 is held by the publishing group Springer in which in turn Kirch has a significant shareholding. Mr. Thomas Kirch, the son of the owner of the Kirch group, has a share of 24,5% in PRO SIEBEN AG which runs the channels PRO 7 and Kabel 1.

25. The audience shares of the different tv broadcasters were in 1995 as follows:

## Public broadcasters:

ARD (First programme)	14,6%
ARD (Third programme)	9,7%
ZDF	<u>14,7%</u>
	39,0%

## Channels linked to CLT / UFA:

RTL	17,6%
RTL2	4,6%
Super RTL	1,1%
VOX	<u>2,6%</u>
	25,9%

## Channels linked to the Kirch Group:

SAT1	14,7%
DSF	1,3%
PRO 7	9,9%
Kabel 1	<u>3,0%</u>
	28,9%

Others	6,2%
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The market shares in tv advertising were in 1995 as follows:

## Public broadcasters:

ARD (all programmes)	4,8%
ZDF	<u>5,4%</u>
	10,2%

## Channels linked to CLT / UFA

RTL	30,9%
RTL2	5,1%
Super RTL	0,3%
VOX	<u>1,8%</u>
	38,1%

## Channels linked to the Kirch Group:

SAT 1	25,6%
DSF	1,1%
PRO 7	21,0%
Kabel 1	<u>2,4%</u>
	50,1%

Others 1,6%

(based on advertising revenues excluding agency commissions)

26. On the basis of these market shares, there is no indication that CLT / UFA would enjoy a dominant position on the German tv advertising market. Given that RTL is already a joint venture of CLT and UFA, there is only a small increase in market shares for the channels linked to CLT / UFA through VOX (1,8%). With a total market share in tv advertising of around 38%, the CLT / UFA group will, however, be faced with the strong position of the channels linked to the Kirch group which have together a market share of around 50%. Even if SAT 1 / DSF and PRO 7 / Kabel 1 were to be seen as completely independent competitors, they would each have a sufficiently strong position to exclude the assumption of a dominant position of CLT / UFA. In this context, it has also to be taken into account that Kirch is the leading German supplier of feature films and entertainment programmes for television. Even if CLT and UFA were to strengthen their position in the acquisition of tv rights through the proposed joint venture, CLT / UFA would, however, probably not achieve a stock of movies and television programmes which could be comparable to that of Kirch. There is also no indication that there could be in the future a collective dominance of the channels linked to CLT / UFA and those linked to the Kirch Group. Although both groups reach together a market share in tv advertising of around 88%, the record of the market shows that there is effective competition between the players on this market. There is no indication that this would change as a result of the creation of the proposed joint venture. This view was confirmed by major advertisers asked by the Commission.

b) Pay tv

27. UFA has a stake of 37,5% in the pay tv channel, Premiere. The other shareholders are Canal + with a stake of 37,5% and Kirch with a stake of 25%. Premiere which is jointly-controlled by its shareholders was until July 1996 the only pay tv supplier in Germany and has around 1.2 million subscribers. In July 1996, Kirch launched the digital pay tv channel, DF 1, which envisages to achieve 200.000 subscribers by the end of the year. In contrast, CLT and UFA have informed the Commission that they abandoned at present their previous plans to launch the digital pay tv channel, Club RTL.



28. Even if, despite the new digital activities of Kirch and the expected significant change in the conditions of competition following the emergence of digital tv, a dominant position of Premiere were to be assumed, this position would not be strengthened by the proposed concentration. Since CLT has no pay tv activities in Germany, there will be no increase in market shares. Furthermore, CLT can not be seen on its own as a potential competitor. The previous plans of CLT to enter the German pay tv market through its participation in MMBG, a proposed joint venture for services related to digital tv, and through the development of Club RTL, were all related to digital pay tv. Furthermore, these plans were not directed to launching a digital programme on a stand alone basis, but only in cooperation with the other parties, in particular UFA. Given the high investment which is necessary for launching digital pay tv and the risks to be taken, it is hardly conceivable that CLT could be a potential competitor on its own. This is also evidenced by the fact that the planned digital activities of CLT in France will be carried out in a cooperation together with TF1, France 2, France 3, France Télécom and La Lyonnaise des Eaux.

c) TV productions

29. The German market for tv productions, excluding in-house production for captive use, is estimated to amount to a value of around DM 2.5 billion in 1995. The turnover in tv productions achieved by UFA amounted to DM [...] <sup>(13)</sup>. The production activities of RTL in Germany amounted to a value of around DM [...] <sup>(14)</sup>. It has to be assumed that the greater part of these productions were for captive use. In any event, the combined share of CLT / UFA would be less than [...] <sup>(15)</sup>. The market leader in German tv production is the Kirch group. The proposed concentration will, therefore, not lead to the creation of a dominant position.

d) Tv rights / licences

30. Television rights are partially acquired by traders or agencies from the owners of the rights (e.g. movie companies, sports associations) and then licenced to the broadcasters. Partially, these rights are directly acquired by broadcasters from the owners.

31. UFA achieved in 1995 with the trade of tv rights for sport events a turnover of DM [...] <sup>(16)</sup> and in fiction programming a turnover of DM [...] <sup>(17)</sup>. A part of the turnover achieved by sport rights was related to sales outside Germany. CLT did not achieve any turnover in the trade of sports rights. The turnover of the licencing of film rights to broadcasters outside the CLT group amounted to DM 30 million in the whole of Europe.

32. It is estimated that the total value of sports rights in Germany amounted in 1995 to DM 700 - 800 million. Taking into account that the sales by UFA were partially related to broadcasters outside Germany, the market share of UFA lies in the order of [...] <sup>(18)</sup>. The leading agency for sport rights in Germany is ISPR

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(13) Deleted as business secret; below 300 million

(14) Deleted as business secret; below 100 million

(15) Deleted as business secret; between 10% and 20%

(16) Deleted as business secret; below 300 million

(17) Deleted as business secret; below 50 million

(18) Deleted as business secret; between 20% and 30%

which is a joint venture of Kirch and Springer. It cannot be assumed that UFA would have a dominant position on the basis of separate market for the licensing of sport rights.

33. With respect to the licensing of film rights, by far the leading trader of film rights in Germany is the Kirch group which had already in the past a portfolio of 15.000 feature films and 50.000 hours of tv programming. Kirch's position has been recently even more strengthened as a result of major output-deals with the U.S. movie companies Columbia, MCA and VIACOM. As far as direct licence agreements between broadcasters and movie companies are concerned, RTL entered into major output-deals with Warner Bros and Orion. However, these deals have to be seen as creating a certain counterbalance to the strong position of Kirch.

e) Free-access radio

34. On a nation-wide basis, the German radio stations in which CLT and UFA hold significant participations have a combined market share of [...] <sup>(19)</sup>. On a regional basis, there is only an overlap in the region of Berlin / Brandenburg where CLT operates the radio station 104,6 and UFA has a minority participation in Berliner Rundfunk. The combined market share in tv advertising in this region is around [...] <sup>(20)</sup>. There are, however, other strong competitors in this regional market which have market shares between 12% and 24%. Furthermore, the market shares of the main players were not stable over the last years. It cannot be assumed that the proposed concentration would lead to a dominant position even on the basis of the definition of a regional market comprising Berlin and Brandenburg.

2. Other European markets

35. In the tv and radio markets outside Germany, there is no overlap between CLT and UFA since the activities of UFA are limited to Germany. Furthermore, given the position of CLT in the other European markets where it has participations in tv broadcasters, it cannot be assumed that there is on any of these markets a dominant position which could be strengthened by the combination of the resources of Bertelsmann and CLT.
36. In France, assuming that M6 is jointly controlled by CLT, the market share of CLT with the channels M6 and RTL9 amounts to around 17%. These channels are i.a. faced with the competition by TF1 which belongs to the Bouyges group and is, therefore, backed by large financial resources.
37. On the assumption that there is a regional market for tv advertising in Belgium which is limited to the Belgian French speaking tv channels, CLT would have in this market a share of 69,7% through its channels RTL TVI and Club RTL. However, there is a certain competitive pressure from the French channels TF1, France 2 and France 3 which achieve in prime time together an audience share of more than 30% in the French speaking region of Belgium, as compared with around 25% for the CLT channels. Advertisers aiming to reach the French and the French speaking Belgian audience can', therefore, also use to a significant extent the French tv channels. Furthermore, the advertising market of the Belgian French speaking

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<sup>(19)</sup> Deleted as business secret; between 13% and 17%

<sup>(20)</sup> Deleted as business secret; below 40%

channel was until 1 October 1996 regulated by the *Communauté française de Belgique* in the way that the advertising time of the channels had to be sold through the same agent and the proceeds of the sales were allocated between the channels according to an *arrêté* of the *Gouvernement de la Communauté française*. In any event, on the assumption that CLT has a dominant position on the regional tv advertising market in the French speaking region in Belgium it cannot be assumed that this position would be appreciably strengthened by the combination of the resources of Bertelsmann and CLT.

38. In Luxemburg, RTL Télé Letzebuerg has a share in tv advertising of 5%.
39. In the Netherlands, HMG is the clear market leader in tv advertising. However, as outlined in the Commission's decision of 17.07.1996 in the RTL/Veronica/Endemol case, the dominant position resulting from the creation of HMG has been removed as a result of the modification of the HMG joint venture.
3. Overall evaluation of the concentration on a Community level
40. Some competitors have argued that the proposed concentration, resulting in the creation of the leading European tv broadcaster in terms of tv channels, would lead over time to a strong or even dominant position of CLT / UFA throughout Europe. The argument was put forward that, even in the absence of a significant overlap and an addition in market shares, the possible synergies resulting from the concentration and in particular the increase in buying power for tv rights resulting from the combination of the resources of Bertelsmann and CLT would confer major competitive advantages on CLT / UFA. The Commission considers, however, that given the position of CLT / UFA on the different markets as outlined above and the fact that normally tv rights are not, for the time being, acquired on a European-wide basis, but essentially for national markets, the mere combination of resources and possible synergies is not sufficient to establish a dominant position in the foreseeable future.
41. The evaluation of the concentration on a European level could be different if CLT / UFA by entering the digital tv market were to be, as one competitor suggested, in the centre of a network of strategic alliances of all the major European players. However, apart from the fact that the parties abandoned at present their plans of entering the digital tv market, the various alliances which are currently envisaged have to be assessed on their merits when they are subject to a competition examination. In the framework of such an examination, possible links to CLT / UFA and its overall position would have to be taken into account.

## V CONCLUSION

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