JOINT VENTURES (BROADCASTING): THE HOLLAND MEDIA GROEP CASE

Subject: Joint ventures
Concentrations
Compatibility with the common market
Relevant market

Industry: Broadcasting, publishing
(Some implications for most industries)

Parties: RTL 4 SA
Veronica Omroep Organisatie
Endemol Entertainment Holding BV
Holland Media Groep
(See also paragraph 10 of the Judgment)

Source: Judgment of the Court of First Instance, dated 28 April 1999, in Case T-221/95 (*Endemol Entertainment Holding BV v Commission of the European Communities*)

(Note. Cases before the Court of Justice involving concentrations are rare enough to justify a report, however attenuated. In accordance with the current trend in the Court of First Instance, the judgment is long - over 200 paragraphs, - and the text below is highly selective.

This was a challenge to the Commission's decision to refuse to clear a proposed concentration. The challenge failed. A refusal is relatively rare: fewer than 2% of the cases notified to the Commission each year are considered by the Commission to be "incompatible with the common market". Three legal issues predominated in the judgment: the relevant market for the purposes of the case; the market shares of the parties; and the degree of control exercised by the parties within the meaning of Article 3(3) of the Mergers Regulation. On the first of these points, the Court had to examine broadcasting practices to determine the identity of the relevant market and concluded that the Commission's assessment had been correct. On the question of the market share, the Court upheld the Commission's view that the market share was over 50%, calculated in two different ways, that competitors held relatively small market shares and that there would be a strengthening of the dominant position as a result of the concentration. As to the degree of control exercised by the parties, the Court confirmed, on the basis of the rules proposed under the agreement between the parties, the Commission's view that Endemol, Veronica and RTL exercised control over Holland Media Groep.)

Facts

[Paragraphs 1 to 8 are omitted]

9 By Decision 96/346/EC of 20 September 1995 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.553 — RTL / Veronica / Endemol) (OJ 1996 L 134, p. 32; hereinafter "the contested decision"), which was adopted under Article 8(3) of Regulation No 4064/89, the Commission declared the concentration in the form of the creation of the joint venture Holland Media Groep to be incompatible with the common market.

10 The parties to that concentration were Compagnie Luxembourgeoise de Télédiffusion SA (hereinafter "CLT"), NV Verenigd Bezit VNU (hereinafter "VNU"), RTL 4 SA (hereinafter "RTL"), Endemol Entertainment Holding BV (hereinafter "Endemol") and Veronica Omroep Organisatie (hereinafter "Veronica").

11 CLT is a broadcasting company incorporated under Luxembourg law which is involved in radio, television, publishing and related businesses in various national markets.

12 VNU is a company incorporated under Netherlands law which is involved in the publishing of consumer media, professional media and data banks. It holds stakes in broadcasting companies, including an indirect minority shareholding of 44.4% of the Belgian commercial broadcaster VTM and an indirect 38% shareholding in RTL.

13 RTL is a company incorporated under Luxembourg law which supplies television and radio programmes, partly in Dutch. Those programmes are broadcast by CLT which holds - directly or indirectly - 47.27% of RTL's share capital. CLT ultimately controls RTL, which in turn held 51% of the shares in Holland Media Groep (hereinafter "HMG").

14 Veronica is an association established under Netherlands law which, until 1 September 1995, operated in the Netherlands television and radio market as a public broadcasting organisation. It was one of the four public broadcasting organisations whose programmes were broadcast on the public channel Nederland 2. On 1 September 1995 Veronica left the public broadcasting system to become a commercial television channel.

15 Endemol is a company incorporated under Netherlands law which was created in 1994 by the merger of JE Entertainment BV and John de Mol Communications BV. The centre of Endemol's activities is in the Netherlands, but it has businesses elsewhere in Europe. Its principal business activities are the production of television programmes, the operation of television studios, the exploitation of television formats (that is to say, original programme concepts which can be copied), the production and exploitation of theatrical programmes and the organisation of events.

16 For the purpose of the concentration, Veronica and Endemol set up Veronica Media Groep (hereinafter VMG'), a company incorporated under Netherlands law in which they respectively held 53% and 47% of the share

capital. VMG held 49% of the shares in HMG.

17 The objective of the concentration was to create HMG, whose business was the packaging and supply of television and radio programmes broadcast by itself, CLT, Veronica or others to the Netherlands and Luxembourg. All radio and television activities of the parties intended for the Netherlands were transferred to HMG. The assets transferred by RTL included the television channels RTL 4 and RTL 5, the assets related thereto and its rock music radio channel. RTL also assigned to HMG the benefit of CLT's broadcasting licence (the "concession"), its business consisting of the supply and packaging of radio and television programmes (mainly in Dutch) to be broadcast in the Netherlands and Luxembourg, and its 50% shareholding in IPN SA, the advertising agency which sells advertising time for the RTL 4 and RTL 5 television channels. The assets transferred by Veronica and Endemol included the Veronica television channel and related assets, and Endemol's radio activities (that is to say, its Holland FM Radio channel).

18 Endemol and HMG had also entered into a production agreement for a period of 10 years, corresponding to HMG's production needs for its three channels. Under that agreement, Endemol undertook to cover 60% of HMG's needs for Dutch-language productions. HMG agreed in return to buy from Endemol 60%, by value, of its needs for specific programmes. In addition, HMG was granted a right of first refusal with regard to new television programme formats and stars launched, bought or discovered by Endemol.

22 On 20 September 1995 the Commission adopted the contested decision, declaring that the agreement to create the joint venture HMG was incompatible with the common market because the concentration would lead to the creation of a dominant position in the television advertising market in the Netherlands and to the strengthening of Endemol's dominant position in the market for independent Dutch-language television production in the Netherlands, as a result of which effective competition in the Netherlands would be significantly impeded.

23 The Commission simultaneously invited the parties to propose, within a period of three months from notification of the contested decision, appropriate measures for restoring effective competition in the market for television advertising and independent Dutch television production in the Netherlands ...

The relevant market

106 Before considering the Commission's definition of the relevant market, it should be observed that the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer a discretion on the Commission, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary

margin implicit in the provisions of an economic nature which form part of the rules on concentrations (Joined Cases C-68/94 and C-30/95, *France and Others v Commission*, paragraphs 223 and 224).

107 In the present case, the Commission defined the market correctly, in that it concluded that the independent production of Dutch-language television programmes was a separate market from the market for in-house productions of the public broadcasters.

108 First, programmes produced by independent producers can be substituted only in part for programmes produced by the public broadcasters. The public broadcasters produce themselves, for the most part, the programmes essential to their role as public broadcasters and the low-value filler programmes. By contrast, it is not disputed that the applicant, which is by far the most important independent producer in the Netherlands, is much stronger in the field of big entertainment programmes, which account for 35% of its production. According to the figures provided by the Commission, which the applicant has not contested, its hourly production costs are 42% higher than those in the rest of the market, a fact which clearly shows that its programmes have a different profile.

109 Second, although certain programmes produced by the public broadcasters are sold on the international market, those sales have no effect on the Netherlands market. The applicant concedes that, so far as concerns the Netherlands market, the in-house production of the public broadcasters is essentially intended for their own use. There is thus no direct competition between the in-house production of the public broadcasters, whose programmes are not, as a rule, offered to other broadcasters in the Netherlands market, and the programmes produced by the independent producers which are offered on that market.

110 Third, the Commission could reasonably conclude that a public broadcaster was generally not in a position to choose whether to produce a programme itself or to commission it from an independent producer.

111 On the one hand, the applicant has not refuted the Commission's argument that public broadcasters with significant in-house production activities have made substantial investment for that purpose, having, in particular, taken on the necessary production staff, a major element in the cost of producing a programme. In those circumstances, it was reasonable for the Commission to conclude that if public broadcasters were to increase significantly the number of commissions placed with independent producers, to the detriment of their in-house production, they would nevertheless have to bear the cost of their in-house production capacity without obtaining a return on the investment made in terms of programmes produced. Such a policy would not be commercially feasible, at least not in the long run.

112 On the other hand, the Commission's argument that, because of their

substantial investment, the public broadcasters have no choice but to produce their programmes themselves is not invalidated by the fact that certain broadcasters have only very modest production departments, because it is clear that such broadcasters, lacking means of production themselves, must therefore commission programmes from independent producers ...

Market share

129 It is appropriate to consider at the outset the method used by the Commission for calculating the applicant's share of the market for independent Dutch-language television production in the Netherlands.

130 First, the Commission was right to calculate the market shares of the various producers by reference to the value of programmes and not the number of hours produced. The applicant has not disproved the results of the Commission's investigation, which showed that the hourly value of television productions ranged from NLG 30,000 to NLG 300,000. In those circumstances, market share can be validly calculated only on the basis of value and not volume.

131 Second, the Commission's calculation of the applicant's market share is reasonable. It is clear from the written replies given by the Commission to the Court that the Commission had sent questionnaires to 84 independent producers, not only 75 as stated in the pleadings. Those 84 producers were all the producers referred to in the Handbook other than the applicant itself. According to notes made during the investigation of the case, the Commission received written information from 29 producers, which related, inter alia, to the number of hours of television programmes produced in 1994 and to the value in guilders of those programmes. It also obtained information by telephone from 37 other producers on those two matters. It thus received replies from 78% of the 84 producers. It then estimated the value of the hours produced by the 18 producers for which it had no information, on the basis of the information supplied by other producers with a similar number of employees. Finally, it took into account the data provided by the applicant itself in order to calculate the size of the total market and the market share held by the applicant.

132 The Commission thus did not err by stating in the contested decision that the applicant's market share was "clearly more than 50%".

133 Furthermore, the Commission has demonstrated in its reply to one of the Court's written questions that, even though it had to include an estimate of the value of the programmes produced by a producer which was among the 29 which had replied in writing but which had failed to supply the necessary figure, that would not have altered its estimate of the applicant's market share, which would still have been clearly more than 50%.

134 It is necessary to examine next whether the Commission was right to

conclude that, in this case, the applicant held a dominant position in the relevant market. According to settled case-law, a particularly high market share may in itself be evidence of the existence of a dominant position, in particular where, as here, the other operators on the market hold only much smaller shares (Case 85/76, *Hoffmann-La Roche v Commission*, paragraph 41; Case C-62/86, *Akzo v Commission*, paragraph 60; and Case T-30/89, *Hilti v Commission*, paragraphs 91 and 92).

135 The Commission found, on the basis of its investigations, that the second most important producer held a market share of between 5% and 10%, four other producers each held market shares of between 2% and 5%, and the five other largest producers each held market shares of between 1% and 2%, while all the other producers held a market share of less than 1% each. In those circumstances, the Commission did not manifestly err in its assessment when it concluded that the applicant held a dominant position in the relevant market.

136 The Commission also referred to the applicant's further strengths which gave it a position far superior to that of its competitors. The Court will consider those other factors in turn.

137 First, so far as concerns the applicant's preferential access to foreign formats, the applicant has not refuted the Commission's argument that it was in a strong position because of it its capital base, which enabled it to purchase programmes by entering into output deals. As the Commission explained at the hearing, it is easier for a producer to obtain the necessary formats when it has already signed a contract with a broadcaster for a specified volume of programmes. Contrary to the applicant's submission, that explanation is not invalidated by the fact that the contract generally does not specify the content of the programmes. The fundamental point is that the producer already has a contract with a broadcaster guaranteeing that it will be able to produce a certain number of hours of programmes.

138 As regards formats in general, the applicant has not disputed that in 1993/94 it produced half of the most popular non-sports entertainment programmes and that 24 of those 28 programmes were based on a format. In those circumstances, the Commission's conclusions are not affected either by the fact that a third of the programmes produced by the applicant in 1994 were not based on a format or by the fact that, according to the applicant, broadcasters, and not itself, owned other popular formats.

139 The Commission was also correct in its assertion that the applicant had produced more than 60 programmes based on foreign formats in the three years preceding the concentration, as was demonstrated by the list which the applicant had itself submitted to the Commission as an annex to its reply of 14 July 1995 to the Commission's request for information of 7 June 1995, and is included in Annex 11 to the application. It is clear from that list that the figure of 38 programmes mentioned by the applicant in fact refers to the number of foreign formats used during that period and not to the number of programmes

produced on the basis of those formats.

140 Nor could the Commission ignore the opinion of other producers, of broadcasters and of other private channels, which had considered that the applicant owned a large number of the most popular Dutch formats and enjoyed preferential access to foreign formats.

141 Second, the applicant's statement that a large number of television personalities are either linked to broadcasters or freely available to anyone is not sufficient to refute the Commission's assessment that it had a high number of the most popular Dutch television personalities under contract. So far as concerns the opportunities for those personalities to appear elsewhere than on television and the fact that the applicant has its own agency for stars, even if, as the Commission acknowledges, those are not important factors in establishing the applicant's dominant position, it cannot be ruled out that they may strengthen its position in the market to some extent.

142 Third, as regards activities outside the Netherlands, the applicant has not refuted the Commission's argument that the applicant's large-scale activities outside the Netherlands may strengthen its position in the Netherlands market, given that its subsidiaries give it preferential access to the international market and increase the resources of the group as a whole.

143 Fourth, the other facts put forward by the applicant do not substantiate its argument. While it is true that other companies entered the Netherlands production market during the years preceding the concentration, the applicant has not disproved that those new entrants needed an established partner in that market, at least initially. As regards the alleged boycott of the applicant by certain public broadcasters following the announcement of HMG's creation, it is to be observed that, as the applicant itself states, the applicant supplied 88.2% of its production in 1994 to the channels Veronica, RTL 4 and RTL 5, and it was therefore not unreasonable for the Commission to conclude that such a boycott would have only minor significance.

144 Nor has the applicant shown in what way the Commission was wrong in considering that Kindernet and Euro 7 would be very low budget channels, inasmuch as Kindernet planned to concentrate mainly on children's daytime programmes and Euro 7 was in essence to be a news and documentary channel, and that their production requirements would therefore be relatively insignificant in value. Furthermore, the programmes produced by the applicant are of no interest to Euro 7. Nor has the applicant disputed that Veronica's programme budget was almost three times the budget of SBS.

145 Moreover, the applicant has not proved that the Commission was wrong in considering that most of the additional demand for Dutch-language productions would come from Veronica, which would need programmes for four and a half days of extra broadcasting - while the public broadcasters would have to fill only two and a half days - following Veronica's departure as a public

broadcaster. Since the applicant was already Veronica's main supplier, it was also reasonable for the Commission to conclude that most of Veronica's additional programming would be supplied by it.

146 In view of all of the foregoing, the Commission correctly defined the relevant market and the applicant's share of it, and was right in concluding that the applicant held a dominant position in that market.

147. This argument must accordingly be rejected as unfounded ...

Acquisitions leading to "control"

159 Under Article 3(3) of Regulation No 4064/89, control is constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking.

160 In the light of the considerations of fact and law in this case, the Commission was correct in concluding that VMG (Veronica and the applicant) and RTL exercised joint control over HMG.

161 Under the merger agreement, the most important strategic decisions had to be approved by the general meeting of shareholders before being put before the managing board. Those decisions covered, in particular, the strategy of HMG, the three-year business plan and annual budget, important investments, the overall programming concept and the appointment and dismissal of the programme directors and of the Director/Secretary-General.

162 In accordance with clause 3.4 of the merger agreement, issues submitted to the general meeting had to be decided by consensus. The agreement of RTL and VMG had therefore to be sought for all those decisions and, if a consensus could not be obtained, a period of 15 days was laid down during which the representatives of RTL and VMG had to use all endeavours to reach such a consensus. Only after those two stages could a final decision be adopted by simple majority vote, when RTL, with 51% of the voting rights, had a majority.

163 Furthermore, the shareholders' committee, which took decisions by unanimous vote, had to give its prior approval to certain decisions of the managing board which went beyond what is necessary to protect the interests of a minority shareholder. Thus, a decision changing substantially the profile, positioning or programming format of any of the three channels could only be taken unanimously. The same was true of a decision creating a new channel which would compete directly with one of the three existing channels. Accordingly, those aspects of HMG's strategy and of its overall programming concept were necessarily subject to unanimous agreement between RTL and VMG.

164 It follows that the Commission could reasonably conclude that RTL and VMG had joint control over HMG, having regard to the provisions of the merger agreement. It is therefore unnecessary to consider the applicant's arguments concerning RTL's alleged exclusive control and the Philip Morris judgment.

167 The Commission did not err in its assessment by concluding that, because of the structural link created between the parties to the concentration and the joint control which the applicant was therefore to exercise with RTL over HMG, in agreement with Veronica, the applicant had henceforth ensured a vast market for its production. Without that structural link it would have been realistic to envisage the possibility of other producers providing a much larger proportion of HMG's additional programme requirements. It was not possible for any other producer in the Netherlands to benefit from a guaranteed outlet for its productions nor to influence a broadcaster's programme acquisition policy. That conclusion could only be reinforced by the terms of the production agreement (see paragraph 18 above).

168 Furthermore, the parties themselves had stated that the supply relationship linking the applicant to RTL and Veronica was a major factor in determining the image of RTL 4, RTL 5 and Veronica and that it would be equally important for the success of HMG. They had also acknowledged that the purpose of the concentration was partly to enable the applicant to reduce the risk to which it was exposed in producing new programme formats, in that the concentration would ensure that the applicant's income from the new formats was maximised. It was therefore reasonable for the Commission to conclude that the applicant would provide its most promising programmes or those of proven appeal to HMG, to the detriment of other broadcasters.

169 In those circumstances, the Court finds that the applicant has not proved that the Commission exceeded the limits of its discretion or that it manifestly erred when it concluded that the effect of the concentration would be to strengthen the applicant's dominant position in the market for independent Dutch-language television production in the Netherlands and that effective competition in the market would thus be significantly hindered.

170. It follows that this argument must be rejected and, therefore, that the application must be dismissed in its entirety. □

The Commission has adopted a Regulation which partly extends the validity of its group exemption Regulation in the air transport sector, Regulation EEC/1617/93. Agreements on joint planning and scheduling and on joint operations are rare and will no longer be covered. The investigation into passenger tariff consultations and slot allocation will continue so that the Commission can decide whether an exemption is still appropriate in the future. The Commission has decided to extend the application of the Regulation to these two issues until June 2001. Source: Commission Statement IP/99/362 of 31.5.1999.