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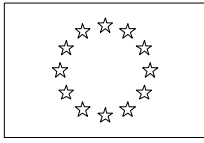
***Case No IV/JV.12 -
ERICSSON / NOKIA /
PSION / MOTOROLA***

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 22/12/1998

*Also available in the CELEX database
Document No 398J012*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.1998

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) PROCEDURE

To the notifying parties

Dear Sirs,

Subject: Case No IV/JV.12 – ERICSSON / NOKIA / PSION / MOTOROLA (SYMBIAN II)

Notification of 20 November 1998 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 20 November 1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 [OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; as last amended by Regulation (EC) No 1310/97, OJ L 180, 9. 7. 1997, p. 1, corrigendum in OJ L 40, 13.2.1998, p. 17.] by which Motorola, Inc. (“Motorola”) would acquire joint control in Symbian Limited (“Symbian”). As a result of the operation, Motorola, Telefonaktiebolaget LM Ericsson (“Ericsson”), Nokia Corporation (“Nokia”) and Psion PLC (“Psion”) would jointly control Symbian.
2. Having examined the notification, the Commission has concluded that the notified operation does not fall within the scope of the Merger Regulation.

I PARTIES

3. Ericsson, Nokia and Motorola are all active in developing, manufacturing and marketing advanced systems and related terminals for wired and mobile telecommunications. Psion is a UK corporation that develops, engineers, manufactures and markets handheld portable computers and software.
4. Symbian is an existing joint venture, incorporated in the UK, created earlier this year by Psion, Ericsson and Nokia for the purpose of developing, marketing and licensing an operating system (based on the so-called “EPOC 32” software platform) for mobile digital data systems, primarily for use in wireless information devices (“WIDs”)

[Wireless information devices combine computing and telecommunications functions in one handset].

II THE OPERATION

5. Symbian, which was previously known as Psion Software PLC, is jointly controlled by Ericsson and Nokia, which each hold 30% of its shares, and Psion which holds 40%. This joint venture was declared compatible with the common market under Article 6 (1) (b) of the Merger Regulation in a Commission decision of 13 August 1998 (case IV/JV.6 *Ericsson/Nokia/Psion*).
6. By means of the notified operation, based on a Subscription Agreement and Shareholders' Agreement (collectively "the Agreements") dated 29 October 1998, Psion, Nokia, Ericsson and Motorola propose to add Motorola to Symbian as a shareholder. Under the terms of the Agreements, Symbian will issue shares of Symbian in a number exactly equal to that held by Nokia and Ericsson, so that upon closing the shares of the Parties will be approximately as follows: Psion 30.77%, Ericsson 23.08%, Nokia 23.08% and Motorola 23.08%.
7. Although the joint venture will now have four shareholders, Clause 3.4. of the Shareholder's Agreement envisages the admission of further shareholders [deleted business secret]. It is possible that ultimately, the joint venture could go public.

III ABSENCE OF CONCENTRATION

Absence of *de iure* joint control

8. Pursuant to clause 8.3 of the notified Shareholders' Agreement the appointment and removal of Directors, approval of the annual business plan and budget, appointment of the Chief Executive and Chairman and admission of further shareholders require a vote of 67% of the shares.
9. The proposed transaction will involve a change in the structure of control of Symbian. Before the entry of Motorola, Symbian was jointly controlled by Ericsson, Nokia and Psion. Each of these companies had unilateral veto rights on the strategic decisions of Symbian. As a result of the proposed transaction none of the four shareholders will have the power to block unilaterally any key decisions such as appointment of the CEO and the approval of the annual business plan and budget.
10. In order to ensure joint collective action, the Parties could have entered into a legally binding pooling agreement ensuring that they would act together in exercising their voting rights on the Board of Directors and also as shareholders in General Shareholders Meetings. However, there is no legally binding agreement between the parties that they will act together in exercising their voting rights to control the joint venture.
11. Consequently, the Parties will not have *de iure* joint control over Symbian.

Absence of *de facto* joint control

A. De facto joint control between all four Parties

12. A common interest between all four Parties could be demonstrated by the fact that the purpose of Ericsson, Nokia and Motorola, as actual or potential manufacturers of wireless information devices, and of Psion, as a developer of the technology for the operating systems used in such devices, is to establish, within Symbian, the EPOC operational system as a *de facto* standard for and to stimulate a development of a mass market for WIDs.
13. The Commission's notice on the notion of a concentration [Commission Notice on the notion of a concentration - OJ C 385/02 of 31.12.94 page 5] 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.
14. Although it is likely that the Parties to Symbian will vote together given their common interest to develop an industry standard, it cannot be excluded that the four Parties will not always vote together on strategic matters. First, in their notification, the parties have indicated no area where there is a prior link between the four shareholders. Second, the notification does not indicate any commonality of interest between Psion and the other parties. Indeed the notification states that Ericsson, Nokia and Motorola, who will be incorporating the operating system designed by Symbian in wireless information devices, may have interests which differ from those of Psion whose activities relate to computer hardware and software. Third, it should be noted that the number of shareholders in Symbian is increasing from three to four, and the *de iure* joint control which had been confirmed in the Commission's previous decision no longer exists. Furthermore, it is the declared intention of the Parties to allow a number of additional manufacturers to become shareholders in Symbian. Fourth, it cannot be established that each of the parent companies is providing Symbian a contribution which is vital for its operation.

B. De facto joint control between Ericsson, Nokia and Motorola

15. In their notification, the Parties state that Ericsson, Nokia and Motorola, who will be incorporating the operating system designed by Symbian in a new product, may have interests which differ from those of Psion and that it is unlikely that Ericsson or Nokia would have agreed to surrender their unilateral veto rights had they not been of the view that there was commonality of interest between themselves and Motorola.
16. Although Ericsson, Nokia and Motorola may admittedly have interests which are different from those of Psion, they have not provided sufficient evidence that this difference would amount to a commonality of interest between the three of them. Even if it can be admitted that as potential buyers of Symbian's operating system they may have certain interests in common, there are no further indications that these three shareholders will always vote together on key issues. Indeed, as potential competitors of each other in the downstream market for WIDs, which is in a nascent state, their interests in the operation of the Symbian

joint venture may diverge, depending on the evolution of their respective positions on that downstream market.

17. In view of the above considerations, there does not appear to be sufficient evidence of such strong commonality of interests either between Ericsson, Nokia, and Motorola or between these three shareholders and Psion which would allow the Commission to establish de facto joint control. Paragraph 35 of the Notice states that, *“the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control.”*
18. Taking all the above factors into account, including both the legal and factual elements, it can not be established that the parent companies have joint control over Symbian.

IV CONCLUSION

19. 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.
20. The Commission will treat the notification pursuant to Article 5 of Commission Regulation (EC) 447/98 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,