

***Case No COMP/JV.23 -
TELEFONICA /
PORTUGAL TELECOM /
MEDI TELECOM***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 17/12/1999

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EUROPEAN COMMISSION

Brussels, 17.12.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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)b DECISION

To the notifying parties,

Dear Sirs,

Subject: Case No COMP/JV.23 – Telefónica/Portugal Telecom/Médi Telecom
Notification of 17 November 1999 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 17 November 1999, Telefónica InterContinental S.A.(hereinafter referred to as “TICSA”)and Portugal Telecom Internacional SA (hereinafter referred to as “PTI”) notified the Commission, pursuant to Article 4 of Council Regulation (EEC) No. 4064/89, a transaction by means of which they acquire joint control over “Médi Telecom”, a company created under Moroccan Law.
2. The conclusions of the preliminary examination of the notification are that the operation falls within the scope of the Merger Regulation and that it does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. PARTIES

3. Telefónica S.A. (hereinafter referred to as “Telefónica”) provides a full range of telecommunications services to business and residential customers. TICSA is the investment vehicle of Telefónica in the non-Spanish or Portuguese speaking countries. TICSA’ activity is currently focused on business opportunities for the provision of telecom services in Europe and the Mediterranean area.
4. PTI provides a full range of telephony services to business and residential customers. PTI holds interests of the Portugal Telecom Group in companies situated in Africa, Asia, Europe and South America.

5. Médi Telecom has been formed to build and operate a GSM cellular mobile telecommunications business in Morocco. It will be the second operator in the provision of those services in direct competition with the incumbent operator, which is so far the only player authorised in that market. The provision of Médi Telecom mobile telecommunication services is to be restricted to the territory of Morocco.

II. THE OPERATION

6. Under the notified transaction, TICSА and PTI acquire respectively 34,5% of the shares of Médi Telecom. The remaining shareholder structure of Médi Telecom is as follows: BMCE (Moroccan bank) 6,67%, RMA (Moroccan insurance company) 6,67%, Al Wataniya (Moroccan insurance company) 6,66% and Holdco (subsidiary of the industrial Moroccan group AKWA) 11%.
7. The parties and BMCE, RMA, Al Watanya and Holdco signed a Shareholders Agreement on 16 April 1999 (JV Agreement) pursuant to which they set forth their common interest to jointly bid for a license to be granted by the Moroccan Government for the establishment and operation of GSM cellular mobile telephone services in that country.

III. CONCENTRATION

Joint Control

8. As set out above, TICSА and PTI control equity stakes of a total of 69% of Médi Telecom.
9. The JV Agreement provides that Médi Telecom affairs shall be managed by a Board of Directors composed of a maximum of [...] Directors appointed by the General Assembly. The right to nominate a member to the Board of Directors shall be conferred to any party having a minimum of [...] of equity stake in Médi Telecom. TICSА and PTI will appoint a minimum of [...] Directors each for the Board of Directors. The Chief Executive Officer of Médi Telecom shall be designated by TICSА and PTI for approval at the Board of Directors and shall also act as Vice Chairman of the Board of Directors.
10. As a rule, the board and the operating committee will decide by [...]. However, certain decisions such as the approval of the annual budget, of the annual business plan and of any revision of that plan - require the majority of votes or the favourable votes of two-third of the members represented at such Board of Directors [...], including the positive vote of at least one of the Director nominated by TICSА , PTI and Group BMCE.
11. In the event that a common position cannot be reached among the shareholders, either in the Board of Directors or in the General Assembly, due to the exercise of Group BMCE veto rights (i.e. complete deadlock), the JV Agreement provides for a submission of the matter to the arbitration of the [...] (ICC) or for the selling of the equity stake of Group BMCE to TICSА and PTI , who will then either buy or sell it or reconsider the vote. These deadlock procedures, taken together with the provisions identified in the previous paragraph give TICSА and PTI veto rights over these strategic decisions.

12. In addition, the collective action of TICSА and PTI is assured since there is a strong common interest between the Parties that will lead them to carry out a deliberate common policy within the framework of their decisions in Médi Telecom. TICSА and PTI will operate Médi Telecom through the execution of a Management Agreement, between them and Médi Telecom and will provide technical assistance to that company under a Technical Services Agreement. As a result of TICSА and PTI's majority shareholding, and by means of the Management Agreement, the two companies can exercise joint control.

Full-function entity

13. Médi Telecom will perform all functions of autonomous economic entity since it will have its own management team dedicated to its day-to-day operations and its own resource, including finance, workforce, and assets in order to conduct its business activities within the area of the Kingdom of Morocco as provided for in the JV Agreement.
14. The JV intends to operate on a lasting basis. It has been incorporated for an indefinite duration and its dissolution is restricted to the extreme cases foreseen in company law. According to the obligations assumed by the Parties pursuant the terms of the GSM license, Médi Telecom will operate the second GSM mobile network in Morocco for a minimum initial period of fifteen years, with the possibility to renew the license for additional periods of five years thereafter.
15. Furthermore, TICSА and PTI are not allowed during the first four years to reduce their shareholding in Médi Telecom other than through the exercise of an option in respect of 8% of the shares.

IV. COMMUNITY DIMENSION

16. The combined aggregate world-wide turnover of TICSА (€17.465 billion) and PTI (€ 2.474 billion) exceeds € 250 million. The undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation.

V. RELEVANT PRODUCT MARKET

17. Médi Telecom has been licensed to provide GSM mobile telecommunications services in Morocco. According to the parties, the product market is the market of mobile telecommunications services using the GSM standard. The Commission has considered the product market for mobile telecommunications services in several previous decisions, including the market of mobile telecommunications system using the GSM standard¹ and possibly also analogue platforms². In previous cases, the possibility of a future segmentation into business and residential customers was also considered. However, the definition of the relevant product market may be left open since, regardless of the product market definition used, the concentration would not

¹ E.g.: *Cases No. JV.4 Orange/Viag JV.7 Telia/Sonera/Lietuvos. IV/JV.9 Telia/Sonera/Motorola/Omnitel.*

create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part thereof.

VI. RELEVANT GEOGRAPHIC MARKET

18. The scope of the relevant geographical market in telecommunications is determined by the extent and coverage of the network and the customers that can economically be reached and whose demands may be met on the one hand and the legal and regulatory system on the other hand.
19. Under the terms of the licence granted to Médi Telecom, the provision of GSM services is to be restricted to the territory of the Kingdom of Morocco. The Commission has in earlier decisions³ found evidence that given the current market conditions in the mobile telecommunications sector the relevant geographical market is still national, though the definition of the geographic market can be left open since the concentration would not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part thereof.

VII. COMPETITIVE ASSESSMENT

A. Dominance

20. Médi Telecom operates only in Morocco which is outside the EEA. The Commission is not therefore competent to make a competitive assessment of the creation or strengthening of a dominant position on market solely in this country. Even if the product market is defined more narrowly as suggested above and/or the geographic market is defined as all the countries which use the GSM standard for mobile telephony, the concentration would not result in the creation or strengthening of a dominant position on any of the markets referred to above as a result of which effective competition would be significantly impeded in the common market, the EEA or a substantial part thereof.

B. Co-ordination of competitive behaviour

21. Pursuant to Article 2 (4) of the Merger Regulation, to the extent that the creation of a joint venture has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 81 (1) and (3) of the EC Treaty. In order to represent a restriction of competition within the meaning of Article 81 (1), such co-ordination must be likely and appreciable and results from the creation of the joint venture. In order to establish a restriction of competition in the sense of Article 81(1) EC, it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture, be it as its object or effect.

² E.g.: *Cases No. M.1430 Vodafone/Air Touch and M.1669 Deutsche Telecom/One2One.*

³ E.g.: *Cases No. JV/IV.4 Orange/Viag and M.1430 Vodafone/Airtouch.*

Co-operation Framework Agreement between Telefónica and Portugal Telecom

22. [...], well before the establishment of Médi Telecom, Telefónica and Portugal Telecom have entered into a framework agreement for the purpose of developing a joint strategy for investments and expansion into telecommunications markets outside the EEA, in particular in South America and in the Magreb countries.
23. Under that agreement the parties agreed also to reciprocally take a participation in the capital share of each other (Telefónica acquired 3.5% of the capital share of Portugal Telecom and the latter 1% of the capital share of the Spanish operator). This cross participation enables the companies to be represented in each other shareholder's executive boards. Within the framework provided by the agreement, concrete actions between the two companies will be decided on a case by case basis. The agreement, which is valid for an unlimited period of time, does not preclude either of the parties to conclude separate agreements with third parties.
24. That framework agreement was notified⁴ to the Commission on 11 November 1997 under Council Regulation (EEC) No. 17/62. The result of the Commission's examination of that agreement did not revealed the existence of any grounds under Article 81(1) for further action on the part of the Commission in respect of the notified agreement. This position took into account that the Parties clarified the fact that, under the terms of the notified agreement, Telefónica and Portugal Telecom will not modify the way and conditions of their respective international telephony traffic, either from America and/or the Magreb countries to Europe or within the Iberian peninsula. It also took into account the fact that the notified agreement did not foresee any concrete actions in Spain and/or Portugal and that any co-operation agreement for doing so had to be notified to the Commission separately.

Possible markets for co-ordination

25. According to the second paragraph of Article 2(4) of the Merger Regulation, the Commission shall, when making the said appraisal, take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.
26. Telefónica and Portugal Telecom have not been so far active in the Moroccan telecommunications market. They have agreed in the JV Agreement (Art. 13) that Médi Telecom will be their sole and exclusive vehicle for the performance of telecommunication services in Morocco.
27. However, Telefónica and Portugal Telecom are active in almost, if not all, the markets for telecommunications services in Spain and Portugal respectively. In view of their geographical proximity and their importance to Morocco, these markets may be considered as closely related markets which fall to be assessed under Article 2(4). Both Telefónica and Portugal Telecom hold a strong (if not dominant) position in these markets (most of the markets for telecommunications services) in their respective countries. Telefónica has so not so far expanded its operations to Portugal

⁴ E.g.: *Case No. IV/36.754 Telefónica/Portugal Telecom* - See OJEC n° C 385 of 19 December 1997.

to any important degree⁵. Neither has Portugal Telecom entered the Spanish markets to any noticeable degree. Telefónica and Portugal Telecom could be considered as (at least) potential competitors on the Spanish and Portuguese markets. However, in view of the assessment below it is not necessary to decide this question.

28. In so far as mobile telephony services are concerned, Telefónica and Portugal Telecom will be either actual competitors of Médi Telecom or could at least be potential competitors on markets which could be considered to be neighbouring markets closely related to the Moroccan market.

Assessment under Article 2 (4)

29. Here, there is no reason to believe that the creation of this joint venture has as its object or effect the co-ordination of the competitive behaviour of TICSА and PTI. These two parties have not competed strongly against each other to date, but this was already the case before the current operation was undertaken. A general co-operation agreement between the parties was notified to the Commission in 1997 and, after examining it, the Commission did not consider any further action necessary under Article 81(1). Therefore, if the parties have not been competing strongly until now, it is for reasons other than the current operation. In addition, the current operation is very small in proportion to the parties' other operations, so it will not determine the parties' behaviour on other markets. There is therefore no causal link between the current operation and any lack of competition.

VIII. ANCILLARY RESTRAINTS

30. The notifying parties have identified two restrictions in their agreements which they consider to be directly related and necessary to the implementation of the concentration:
- Article 13 of the JV Agreement contains a non-compete obligation [...].
 - Article 12.2 of the JV Agreement foresees the execution of a Management Agreement and a Technical Services Agreement between Médi Telecom and TICSА and PTI.
31. The first of the obligations referred to above would, if it constitutes a restriction of competition, only have an impact on competition outside the EEA and therefore outside the scope of the Commission. It follows that the non-competition clause has effects only in Morocco, and the Commission must declare that is outside his competence without further observations.
32. With regards to the second obligation, it has been agreed that TICSА and PTI will operate Médi Telecom using the most qualified specialised human resources, through the execution of a Management Agreement, between them and Médi Telecom. Equally, TICSА and PTI may provide additionally, directly or indirectly, technical assistance to Médi Telecom on competitive basis according to a Technical Services Agreement between the three companies. This clause, which will ensure that Médi Telecom is receiving the necessary technical advice and expertise from two major

⁵ The Portuguese telecommunications market will not be fully liberalised until 1 January 2000

telecommunications companies to ensure its rapid and effective entry into the market, can be considered directly related and necessary to the implementation of the joint venture.

IX. CONCLUSION

33. In the light of the above, the proposed transaction does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.
34. The Commission therefore 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 (EEC) No. 4064/89.

For the Commission,