

*Case No IV/JV.2 -
ENEL / FT / DT*

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

Article 6(1)(b) NON-OPPOSITION
Date: 22/06/1998

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22 June 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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)(b) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No. IV/JV.2 - ENEL/FT/DT

Notification of 15 May 1998 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 15 May 1998, ENEL SpA ("ENEL"), France Télécom S.A. ("FT") and Deutsche Telekom AG ("DT") notified the Commission, pursuant to Article 4 of Council Regulation (EEC) No. 4064/89 [OJ L 395 of 30.12.1989, p. 1, corrigendum in OJ L 257 of 21.9.1990, p. 13; as last amended by Regulation (EC) No. 1310/97, OJ L 180 of 9.7.1997, p. 1, corrigendum in OJ L 40 of 13.2.1998, p. 17] (the "Merger Regulation"), of the creation of a joint venture company, Wind Telecomunicazioni SpA ("Wind") which is to provide a full range of telecommunications services in Italy in competition with the incumbent telecommunications operator, Telecom Italia, and other new market entrants.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES

3. ENEL is the principal provider of electricity in Italy, both to domestic and industrial users. The Italian State holds 100 % of the shares in ENEL through its Treasury Ministry. ENEL already owns and operates a telecommunications network along its electricity grid which it has been using until now for its own telecommunications needs.
4. FT is the main telecommunications operator in France, providing the full range of services including analogue and GSM mobile services. At present, 75% of its shares are owned by the French State whilst 22.5 % are held by the private sector and 2.5 % by employees of FT.
5. DT is the main telecommunications operator in Germany, likewise providing the full range of telecommunications services in Germany, including analogue and GSM

mobile services. The German State owns 74 % of its shares whilst the remaining shareholdings are widespread.

6. FT and DT have activities outside of their home markets. They do not, however, have any direct telecommunications activities in Italy, except through GlobalOne, the joint venture company which FT and DT have established (through their joint venture company Atlas) together with Sprint Corporation [See Commission decision of 17 July 1996, OJ L 239 of 19.9.1996, p. 57.] GlobalOne provides advanced telecommunications services to corporate customers. In 1997 it had a turnover in Italy of around [Deleted. Business secret.].

II. THE OPERATION

7. The three parent companies have created Wind for the purpose of offering a full range of domestic and international telecommunications services to business and residential customers located in Italy, combining mobile and fixed line telecommunications activities. Wind will use the telecommunications network of ENEL which will be extended and upgraded and leased to Wind. The joint venture company has already obtained the necessary licences to install public fixed telecommunications networks, to provide fixed line telecommunications services, to resell capacity and to provide packet switched data transmission. Wind has also applied for a licence to provide mobile telephony services using the DCS 1800 technology by lodging a bid with the competent Italian authorities. On 9 June 1998 Wind was selected as the successful candidate to whom this licence is to be granted. Wind had already obtained a licence to conduct experimental DCS 1800 services.
8. By its decision of 26 May 1998 the Commission granted the parties a derogation from the obligation to suspend the concentration laid down in Article 7 (1) of the Merger Regulation. This derogation was granted in order to facilitate Wind's meeting the deadlines and obligations imposed by the licences granted in the fixed line sector and in order to enable Wind to start building its networks. Wind was thus given permission to undertake several activities preparatory to its becoming active as a service provider (such as the installation of the networks and the conclusion of interconnection agreements).
9. The transaction notified consists of (a) the Shareholders' Agreement, (b) a Pooling Agreement between FT and DT, (c) a Backbone Lease Agreement between ENEL and Wind and (d) a General Agreement for the Provision of Services whereby the three parent companies agree to provide certain services to Wind. Furthermore, the parties contemplate an agreement whereby ENEL would outsource its telecommunications needs on an exclusive basis to Wind, and the appointment of Wind as the exclusive distributor of GlobalOne's services in Italy. Only the four agreements listed above have been notified and are therefore covered by this decision.

III. CONCENTRATION

Joint control

10. ENEL will hold 51 % of the shares in Wind. FT and DT will each hold 24.5 % of the shares. The Board of Directors of Wind will consist of nine members. ENEL appoints five and FT and DT will appoint two directors each. ENEL intends to create a subsidiary through which it will hold its share in Wind. FT and DT intend to establish a joint venture company (“DT/FT Holding”) to which they will transfer their shareholdings in Wind. These transactions will however not alter the balance of control in Wind.
11. Decisions of the board of directors of Wind are taken by a majority of its members. However, certain matters listed in Section 6.8 of the Shareholders’ Agreement require the approval of at least six directors. These include the approval of the business plan and the budget as well as of amendments to these documents, the appointment of the chief executive officer and other members of senior management, the approval of the technology or architecture of Wind’s telecommunications network and the approval of any application or bid for any fixed line and/or mobile licence and any proposal to accept the terms and conditions of such licence.
12. It follows that decisions regarding key strategic commercial matters thus need the approval of ENEL and at least one other shareholder. In their Pooling Agreement FT and DT have agreed to ensure that the votes of their representatives on the board of Wind will always be cast in unison. As a consequence, decisions on the matters referred to in the preceding paragraph require the approval of all three shareholders of Wind. Wind is therefore jointly controlled by ENEL, FT and DT.

Full-function entity

13. Wind has been granted by the Italian authorities the licences necessary to build and operate both a fixed line and a mobile telecommunications network. It will provide a full range of telecommunications services in Italy. Wind will be able, on the basis of a contract entered into initially for a duration of [Deleted. Business secret] years, to use the existing telecommunications network of ENEL which will be upgraded and extended such as to cover [Deleted. Business secret] km reaching [Deleted. Business secret] cities and to have national coverage. The company has a fully paid up capital of Lit. 200 billion (ECU 104 million) and its board of directors has approved to increase the share capital to [Deleted. Business secret]. Wind will have its own management and its own workforce which is expected to grow from [Deleted. Business secret] at the end of 1998 to around [Deleted. Business secret] in 2002. The Shareholders’ Agreement provides for a duration of [Deleted. Business secret] years. Wind will thus perform, on a lasting basis, all the functions of an autonomous economic entity.

IV. COMMUNITY DIMENSION

14. The combined aggregate worldwide turnover of ENEL (ECU 18.8 billion), FT (ECU 22.9 billion) and DT (ECU 33 billion) exceeds ECU 5 billion. The aggregate Community-wide turnover of each of these companies is more than ECU 250 million. The three 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.

15. The notified operation does not constitute a concentration to which the co-operation procedure provided for in Articles 57 and 58 and Protocol 24 of the EEA Agreement applies.

V. RELEVANT PRODUCT MARKET

Fixed line telephony

16. It is the Commission's established practice to consider the relevant product markets as being the markets for domestic and international voice and data telecommunications services, with a segmentation between the voice market (in which both private households and business customers participate) and the data market (primarily used by business), and further segmentation into domestic and international markets. In addition, as Wind will dispose of a telecommunications network, the further market of resale of transmission capacity has to be considered as relevant. As in past decisions, however, the precise product market delimitation in this case can be left open since even on the narrowest possible definition the proposed transaction does not create or strengthen a dominant position (see cases IV/M.570 - TBT/BT/Tele Danmark/Telenor of 24 April 1995 and IV/M.1025 - Mannesmann/Olivetti/Infostrada of 15 January 1998).

Mobile telephony

17. Wind intends to install and operate a mobile telecommunications network using the DCS 1800 standard which operates within the 1800 MHz bandwidth. This standard differs from the GSM (Global System for Mobile Communications) standard which operates within the 900 MHz bandwidth (see case IV/M.618 - Cable & Wireless/VEBA of 16 August 1995). Networks using the DCS 1800 standard require a denser system of transmitters and rather aim at local or regional users. Furthermore, a DCS 1800 telephone cannot log into a GSM network. A dual mode handset is needed to interface between the two standards. The number of international roaming agreements (which are widespread for GSM networks) is still rather limited for DCS 1800 networks. According to a recent study, on 1 March 1998 there were around 46.1 million subscribers of GSM systems and somewhat more than 4.1 million subscribers of DCS 1800 networks in Western Europe. The price for a GSM subscription tends to be higher than a DCS 1800 subscription.
18. These factors led the Commission to conclude in 1995 in its decision in the Cable & Wireless/VEBA case that there were strong indications that systems such as DCS 1800 form a separate market which is different from GSM. However, according to the parties there are indications that this conclusion may no longer be valid. For instance, dual mode mobile handsets which allow the user to use both frequencies by switching automatically from one to the other are already available on the market. On the other hand the Commission has recently considered [Letter from the Commission to the Italian Government of 27 March 1998] the emerging market of local mobile telephony services in Italy, in which GSM, analogue mobile telephony, DCS 1800 and DECT would compete at local level (main cities). However, the definition of the relevant product market may be left open since, on the basis of the assessment set out below, 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 even if DCS 1800 services were to be considered as constituting a separate market.

VI. RELEVANT GEOGRAPHIC MARKET

19. The scope of the relevant geographical market in telecommunications is determined
- (a) by the extent and coverage of the network and the customers that can economically be reached and whose demands may be met; and
 - (b) by the legal and regulatory system.

Fixed line telephony

20. Having regard to the licensing and regulatory framework for the provision of domestic and international basic voice and data services in Italy, the geographic market for these services must be regarded as being national in scope. The same conclusion has to be drawn with regard to the market for the resale of transmission capacity. For enhanced international services the market is global in scope.

Mobile telephony

21. In its decision in the Omnitel case (case No. IV/M.538) adopted in 1995, the Commission concluded that in view of the degree of substitutability between subscriptions taken out in different member states there was an increasing trend towards a European market for GSM service provision. The parties in the present case submit that this conclusion does not take sufficient account of the substantial differences still existing between the cost of a domestic mobile call and the cost of an international mobile call which in their view reduce any cost-based incentive to seek out subscriptions in other member states. The parties therefore suggest that the relevant geographical market in the present case is national in nature.
22. As mentioned above, the Commission has considered the possible emergence of a local market for mobile services in Italy. However, in the present case the definition of the relevant geographical market for mobile telephony may be left open since, on the basis of the assessment set out below, 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 even on the narrowest definition of the market.

VII. COMPETITIVE ASSESSMENT

A Dominance

Fixed line telephony

23. Wind will be a new entrant on the markets for domestic and international voice and data telecommunications services in Italy. None of its parent companies has been active on these markets so far. Wind will have to compete with the incumbent telecommunications operator, Telecom Italia, which until 1 January 1998 had a monopoly over public voice telephony in Italy and a number of other new entrants on these markets including Albacom (a joint venture between British Telecom, ENI and

others) and Infostrada (a joint venture between Mannesmann and Olivetti). Wind expects that its market share will grow to [Deleted. Business secret] % by the year 2007.

24. With regard to enhanced international services the same conclusions apply. Wind is a new entrant on that market and thus does not have a share of the market yet. It is true that FT and DT have been active on this market, mainly through GlobalOne. However, the latter company is not dominant in this market where several other major competitors like Concert are active and the concentration will not change this.
25. Wind will be able to use ENEL's existing telecommunications network which will be extended and upgraded. Although this network represents an important asset, the present transaction will not create a dominant position on the market for the resale of transmission capacity. ENEL has so far used its telecommunications network only for internal purposes and has thus not been active on that market. Telecom Italia will continue to be by far the most important company on this market. There is no indication that the concentration would result in a joint dominant position of Telecom Italia and Wind on this market. Furthermore, new entrants like Infostrada retain the possibility to build their own networks and enter the market for the resale of transmission capacity.

Mobile telephony

26. As to mobile telephony, the same conclusions would apply as to fixed line telephony if the market was to be considered as being national in scope and covering all kind of mobile services. Wind is a new entrant and will (assuming that DCS 1800 and GSM services are part of the same market) have to compete with the companies already active on that market, that is to say Telecom Italia Mobile and Omnitel Pronto Italia. Wind expects that its share of the Italian market will grow to [Deleted. Business secret] % by the year 2007. FT and DT are active on the market for mobile telephony in France and Germany respectively and have a (hitherto limited) presence in other member states apart from Italy. If the market were to be considered as being EC-wide or even extending across the whole of western Europe, the combined market share of FT and DT (calculated on the basis of the number of subscribers) would still be less than 15 %. The concentration would thus not result in the creation of a dominant position on either the Italian or the western European market. The conclusion of any future roaming agreements between Wind and its parent companies FT and DT would not affect this conclusion.
27. In case DCS 1800 services were to be considered within the emerging market of local mobile services, Wind would have to face competition from operators offering DECT services, as well as GSM and analogue services at "local" tariffs. If however DCS 1800 services were to be considered as a separate market and if only Italy were to be considered as the relevant geographical market, Wind would for the time being be the only company capable of offering these services in Italy. However, it has to be pointed out that this situation would not be the result of the concentration as such but would spring from the decision of the Italian authorities to award only one licence for the provision of such services in Italy.
28. The concentration will therefore 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 or a substantial part thereof.

B Co-ordination of competitive behaviour

29. 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 85 (1) and (3) of the EC Treaty. In order to establish a restriction of competition in the sense of Article 85 (1) of the EC Treaty, 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 its effect.

1. Definition of candidate markets for co-ordination

30. According to Article 2 (4) (2) 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. Only the relationship between FT and DT needs to be considered in this context. After having leased its telecommunications network to Wind for a period of at least [Deleted. Business secret.] years, ENEL cannot be regarded as a competitor on any of the markets to be considered in the following.

(a) Fixed line telephony

31. In so far as domestic and international voice and data telecommunications services are concerned, neither ENEL nor FT or DT are active on the Italian markets. In view of the substantial investments in Wind which the parties have already made or will have to make, it is unlikely that they would enter these markets on their own in the future. This is reflected by their agreement not to compete with each other on these markets.
32. FT and DT are active on the markets for domestic and international voice and data telecommunications services in France and Germany respectively. In view of their geographical proximity and their importance to Italy (Germany and France are the two most important countries for Italy in terms of bilateral traffic; in 1997 for example, bilateral traffic between Italy and Germany alone amounted to around [Deleted. Business secret] minutes) these markets may be considered as closely related markets which fall to be assessed under Article 2 (4). Both DT and FT hold a strong (if not dominant) position in these markets in its respective country. FT has so not so far expanded its operations to Germany to any important degree since it sold its shares in Info AG in the context of the Atlas/GlobalOne transaction. Neither has DT entered the French markets to any noticeable degree. FT and DT could be considered as (at least) potential competitors on the French and German markets. However, in view of the assessment below it is not necessary to decide this question.

33. In so far as advanced international services are concerned, FT and DT will remain active in Italy through GlobalOne. This market therefore has to be considered under Article 2 (4).

(b) Mobile telephony

34. In so far as mobile telephony services are concerned, FT and DT will be - depending on the definition of the relevant geographical market chosen - either actual competitors of Wind or at least active in a neighbouring market closely related to the Italian market. It is therefore necessary to assess whether there is any co-ordination between FT and DT in this regard.

2. Assessment under Article 2 (4)

35. There are no clear indications which would allow the conclusion that the creation of Wind has the object of co-ordinating the competitive behaviour of FT and DT on any of the markets to be considered here.

36. The following considerations appear to be relevant when examining whether the creation of Wind will have the effect of co-ordinating the competitive behaviour of FT and DT.

Fixed line telephony

37. As mentioned above, DT and FT have already so far (at least since the Atlas/GlobalOne transaction) not competed strongly with each other in their respective home countries despite the possibilities to do so which the liberalisation of the telecommunications sector has created. The two companies have, through their joint venture Atlas, entered into a joint venture with Sprint Corporation (GlobalOne) for the purpose of providing advanced telecommunications services which has already been mentioned. The lack of competition on their respective home markets in the past therefore appears to stem from a deliberate choice on the part of these companies. It is not possible to claim with the requisite degree of certainty that such lack of competition (if it were to continue in the future) would be the result of the creation of Wind.

38. The fact that both FT and DT will in the future be able to route (if they so wish) their traffic with Italy through the network of Wind may give the two companies certain advantages over their competitors. However, there is no indication that this would result in a co-ordination of the competitive behaviour of these two companies.

39. Neither is there a causal link between the creation of Wind and any co-ordination of the competitive behaviour of FT and DT in so far as advanced international services are concerned. Any such co-ordination would be the result of the creation of Atlas/GlobalOne which was approved of by the Commission in 1996 (see Cases No. IV/35.337 and 35.617).

Mobile telephony

40. In so far as mobile telephony is concerned, the possibility that the creation of Wind will entail a risk of co-ordination between DT and FT appears remote, given that the

market shares of the two companies are rather modest (virtually nil on the Italian market and less than 15 % on the EC market).

41. It follows that in the present case there is no likelihood that the creation of the joint venture company would lead to a co-ordination of the competitive behaviour of the parent companies on the market of the joint venture or on other closely related markets and it is therefore not necessary to establish a causal link between the creation of the joint venture and the behaviour of the parent companies outside the joint venture on the mobile market(s).

VIII. ANCILLARY RESTRAINTS

42. The notifying parties have identified four restrictions in their agreements which they consider to be directly related and necessary to the implementation of the concentration:

- the non-compete obligation contained in Sections 14.1 and 14.2 of the Shareholders' Agreement: According to these provisions, the parties and the affiliates and subsidiaries accept not to compete with Wind, either directly or by providing meaningful support or assistance to any other person. In the event that one party terminates the agreement or sells its share in Wind, this obligation shall continue for one year or, in certain cases, three years, following such termination or sale. To the extent that the parent companies agree not to compete with Wind in the initial Territory as defined in Section 1.1 of the Shareholders' Agreement (i.e., Italy San Marino and the Vatican State), the non-compete obligation can be considered to be directly related and necessary to the implementation of the concentration as long as a shareholder retains a controlling shareholding in the company. Any extension of the non-compete obligation to geographical areas where Wind may in the future decide to do business is not ancillary to the concentration. The non-compete obligation cannot be regarded as ancillary either in so far as it binds the party concerned after the termination of the agreement or after it has sold its share in Wind. Lastly, to the extent that the non-compete obligation should have to be interpreted as extending to the granting of rights of way with regard to its electricity grid by ENEL to third parties it could not be regarded as ancillary to the concentration;
- the backbone lease agreement whereby ENEL leases its backbone to Wind for a period of [Deleted. Business secret] years can be considered to be an integral part of the transaction, as described above in paragraph 14. However, this conclusion only applies to the use of the telecommunications network of ENEL, both existing and still to be built. To the extent that the said agreement should have to be interpreted as preventing ENEL from granting rights of way with regard to its electricity to third parties without the consent of FT and DT, such exclusivity in favour of Wind could neither be regarded as an integral part of the concentration nor as an ancillary clause;
- the general agreement for the provision of services provides that Wind will receive certain consultancy services in the telecommunications sector from DT and FT on an exclusive basis until the end of the year [Deleted. Business secret], after which it can be terminated by any party. To the extent this agreement includes a restriction of competition, it can be considered to be directly related to and necessary for the implementation of the concentration, because it will ensure that Wind is receiving

the necessary technical advice and expertise from two major telecommunications companies to ensure its rapid and effective entry into the Italian market.

Although the Shareholders' Agreement refers to the parties' intention to negotiate an Outsourcing Agreement whereby ENEL would acquire its telecommunications requirements from Wind, the notification does not include even a draft of such an agreement, so that it can not be covered by the present decision.

IX. CONCLUSION

43. 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.
44. 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,