

***Case No IV/M.1132 -
BT / ESB***

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

Article 6(1)(b) NON-OPPOSITION
Date: 19/05/1998

*Also available in the CELEX database
Document No 398M1132*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.05.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M. 1132 - BT/ESB/AIG

Notification of 15.04.1998 pursuant to Article 4 of Council Regulation N/ 4064/89

1. On 15.04.1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) N° 4064/89 by which British Telecommunications plc ("BT"), the Electricity Supply Board of Ireland ("ESB") and the American International Group ("AIG")¹ intend to create a new joint venture ("Newco") in order to provide a range of telecommunications products and services to customers in Ireland. Newco will be jointly controlled by BT, ESB and AIG.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) N° 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. BT's principal activity is the supply of telecommunications services and equipment. BT is active internationally, notably in Europe through its joint venture, Concert. Concert provides value added and enhanced business telecommunications services to multinational companies. BT is the exclusive distributor of concert outside the Americas.

¹ Each of the companies via a number of controlled subsidiaries.

4. The ESB is engaged in the generation, distribution and supply of electricity within Ireland. In addition to this core business, it is active both in Ireland and internationally in the engineering and consultancy services.
5. The AIG "is an American based global insurance/financial services company and an investment advisor.
6. Newco will provide a range of telecommunications products and services to customers in Ireland.

II THE OPERATION

7. BT will hold 50 % of the shares in Newco; the remaining 50% of the shares will be held by Nimby Close Limited ("ESBIT"). The shares in ESBIT are held by ESB Industrial holdings ("ESBI"), a wholly owned subsidiary of the ESB, and AIG Irish Telecommunications Limited, a majority owned subsidiary of AIG. ESBI holds 60% of the shares in ESBIT: AIG Irish Telecommunications Limited holds the remaining 40%.

III COMMUNITY DIMENSION

8. The operation has a community dimension. The joint world-wide turnover of the undertakings concerned exceeds ECU 5,000 million (BT: 17,822 MECU, ESB: 1,405 MECU, AIG: 33,846 MECU). The aggregate EC-wide turnover of at least two of the undertakings concerned exceeds ECU 250 million (BT: [...]²MECU, ESB: [...]² MECU , AIG: [...]² MECU), but they do not achieve more than two-third of their aggregate Community-wide turnover within one and the same Member State.. The notified operation has therefore a community dimension, but does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

IV CONCENTRATION

A) JOINT CONTROL

9. The Board of Newco shall consist of six Directors. Three will be appointed by BT and three by ESB. Of the three ESB appointees, one will be nominated by AIG. The chairman will not have a casting vote. It is provided that voting within the Newco Board is to be by simple majority with the exception of the Business plan and Annual Budget and Operating Plan, which must be adopted unanimously. In addition to that , following the internal arrangements between ESB and AIG, in their capacity as shareholders of ESBIT, ESB and AIG will participate in the management of Newco and in the adoption of its strategic commercial decisions on a consensus basis. Therefore, Newco will be jointly controlled by BT, ESB and AIG as each of these companies will have veto rights related to strategic decisions on the business policy of the joint venture.

² Deleted, business secrets

B) FULL FUNCTION JOINT VENTURE

10. Newco will perform on a lasting basis all the functions of an autonomous economic entity. It will be run as an independent business, with its own corporate entity and branding, on an arm's length basis vis-à-vis the shareholders, with adequate management and qualified staffing. The parents will transfer their activities in the Irish telecommunications market to Newco. ESB will provide access to certain parts of ESB's infrastructure including parts of its digital microwave network and electricity ducts and overhead powerlines. BT will transfer the existing business of BT Worldwide (Ireland) ("BTWW") in Ireland to Newco.
11. Therefore, the operation is a concentration pursuant to Article 3 (2) of the Merger Regulation.

V COMPATIBILITY WITH THE COMMON MARKET

A) RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

12. There are no affected markets within the meaning of Form CO as a result of the present operation. Newco will operate in the Republic of Ireland and it will initially concentrate on the provision of telecommunications services to business customers, the provision of domestic leased circuits, international private leased circuits and sophisticated billing. In later phases Newco will offer value added services such as premium rate service and free-phone, as well as public voice telephony (when regulation allows).
13. For the assessment of the present operation it is not necessary to define the relevant and geographic markets, since even on the narrowest definitions, it will not give rise to the creation or strengthening of a dominant position.

B) ASSESSMENT

14. At present and until 1 January 2000, under Irish Law, Newco is not entitled to offer public voice services in Ireland³. Therefore, Newco's activities for the immediate future will be concentrated on the provision of services to the business community in Ireland.
15. The telecommunications market in Ireland is characterised by the near monopoly position of Telecom Eireann. Telecom Eireann has an exclusive right to provide public voice telephony services subject to Community liberalisation legislation.
16. Competitors in the Irish telecommunications market include ESAT, which is planning a fixed network with the Irish national transport company, CIE. In addition, TCL, provides national and International Direct Dial (IDD) voice services to corporate

³ Commission decision of 27 November 1996, OJ, L41/8, concerning the additional implementation period requested by Ireland for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications market.

sectors. Stentor is targeting the Irish international telecommunications market for corporate customers.

17. The creation of Newco is a pro-competitive development in the Irish telecommunications market which will bring further competition to the incumbent operator. Newco's entry to the Irish market does not prejudice the opportunities for market entry by others. The necessary infrastructure made available to Newco by the ESB is equally available from other sources as demonstrated by ESAT Telecom's joint venture with CIE (the Irish national transport company) or the availability of the infrastructure of Bord Gais (the Irish Gas Board).
18. Therefore, it is excluded any creation or strengthening of a dominant position as a result of the present operation.

VI ANCILLARY RESTRICTIONS

19. The parties have notified a number of possible restrictions included in the Joint Venture Agreement and certain of the other agreements bringing about the concentration. In the opinion of the parties these possible restrictions would be either an integral part of the operation or ancillary to the concentration within the meaning of the Commission's Notice regarding restrictions ancillary to concentrations. These notified possible restrictions are the following:

A. Clause 3 of the Joint Venture Agreement sets out that for so long as they hold a participating interest of 5% or more in Newco, and for 12 months after ceasing to hold such an interest, the parties shall not directly or indirectly undertake business in Ireland which falls within the scope of Newco's business.

20. The Commission does not consider necessary and directly related to the concentration the restriction for the parent companies not to compete with Newco for so long as they hold a participating interest of 5% or more in Newco. However, to the extent that the non-compete obligation set out in clause 3 of the Joint Venture Agreement would be limited to the situation where the parent companies enjoy a controlling stake in Newco, the non-compete clause would aim at expressing the reality of the lasting withdrawal of the parents from the market assigned to the joint venture. Therefore, this decision only covers this non-compete clause for so long as the parent companies hold a controlling stake in Newco.

B. Clause 28 of the Joint Venture Agreement sets out that if, in the first two years following Newco's launch of its International Private Leased Circuits ("IPLC") Product, Newco obtains business for its IPLC product in Ireland from a "BT customer", as a result of BT introducing such a customer to Newco, then Newco will pay BT a "finder's fee" for introducing the "BT customer" to Newco. The amount payable as a "finder's fee" is calculated by reference to the deemed prevailing market price for an Irish IPLC at the relevant time. Newco's obligations are subject to a maximum total limit of IR£ [...] ⁴ and to a proviso that is not contrary to Newco's economic interest.

⁴ Deleted, business secrets

21. Clause 28 is aimed at encouraging the development of Newco's IPLC business, the clause is limited to the start-up period of the joint venture and it preserves its economic interests. Clause 28 is a method of facilitating the establishment of Newco in the Irish market as a viable competitor of Telecom Eireann, which is so far overwhelmingly dominant in the Irish market for the provision of in-territory IPLCs. Consequently, in so far as this clause 28 is a restriction of competition, the Commission considers it directly related and necessary to the implementation of the concentration.

C. The Infrastructure Agreement between ESB and Newco sets out Newco's rights over ESB's infrastructure. These provisions fall into three categories pertaining to microwave capacity, underground ducting and overhead powerlines.

a) Microwave capacity

22. Newco will have the exclusive right to use the microwave capacity for a period of [...] years. It is provided for an extension of this term for a further period of [...] years, subject to negotiation by the parties.
23. A microwave radio system is similar to other carrier transmission systems such as cable and coaxial line but with the conductor path between repeaters replaced by radio (air) path.

b) Underground ducting

24. Newco will have the exclusive right to use for [...] years, underground ducting which Newco has nominated for use in Newco's business and to install, maintain and operate Fibre, sub-ducting and/or other equipment in the specified ducting. However, after [...] years from the commencement day ESB shall be entitled to offer any ducting that has not been nominated by Newco, to Newco or third parties, including Newco's competitors.

c) Overhead powerlines

25. Newco will have the exclusive right to install, maintain and operate optical fibre cable along certain overhead powerlines of ESB for a period of [...] years. This right of exclusivity is subject to Newco nominating such lines within [...] years from commencement day. Following the expiry of the [...] years period, ESB is entitled to exploit the Overhead Powerlines and any other overhead powerlines not nominated by Newco for telecommunications purposes including the carriage of third parties fibre or telecommunications services but ESB must first offer Newco the right (at competitive rates) to place fibre on the Overhead Powerlines.
26. The notifying parties submit that the Infrastructure Agreement is an integral part of the concentration. According to the parties the rights ESB gives to Newco constitute the contribution of ESB to the joint venture and the joint venture would never have come into existence without the Infrastructure Agreement. The parties explain that, ideally, Newco would have wished to purchase the infrastructure needed for its

⁵ Deleted, business secrets

business from ESB. However, the sale by ESB of part of its infrastructure to Newco is not legally possible under Irish Law. The parties request the Commission to equate the Infrastructure Agreement to a transfer of ownership.

27. The Commission concludes that the exclusive rights referred to above which are related to the access by Newco of ESB's underground ducting and overhead powerlines amount to an exclusive right of access to certain parts of ESB's infrastructure for which the necessity has not sufficiently been justified by the parties. The "rights of way" of third parties to lay down their own telecommunications cables could be prevented. Therefore, the decision does not cover these exclusive rights.
28. On the contrary, with regard to the exclusive right given to Newco to use the microwave capacity for the economic life of the microwave network, Newco's rights are confined to the microwave capacity, it has no rights over the sites or any other structure (including towers), or the equipment through and on which capacity is transmitted. ESB retains the right to exploit all such sites, structures and equipment in the future and consequently third parties could have the opportunity of having access to these parts of ESB's infrastructure. These rights are justified and are covered by the present decision to the extent that the rights of way of third parties to the physical structure of ESB's microwave network are preserved.

D. The parties have notified as either integral or ancillary to the concentration a number of provisions included in a "draft [...] agreement" and in a "draft of [...] Agreement". [...] ⁶. The draft character of these agreements does not allow the Commission to take a decision on the nature of provisions which could still be re-negotiated by the parties. Therefore, these draft agreements are not covered by the present decision.

E. The parties have notified as ancillary to the concentration an arrangement called "Select Services Proposal" ("the Proposal") which will not, in their view, result in any restriction of competition. Under the proposal, BT proposes to Newco to deliver Newco's international wholesale voice traffic outside Ireland on terms at least as favourable as Newco may obtain from other providers of international wholesale voice services in Ireland for similar routes and volumes of traffic. If Newco is able to obtain better prices from another operator, then it may ask BT to match the lower prices. If BT is unable to do so, the Newco is free to take its traffic elsewhere.

29. The Proposal does not place any binding obligations on Newco to use BT's international wholesale voice services. The Proposal could be used by Newco to achieve least-cost routing of traffic originating in Ireland which is bound for an international destination. Consequently it allows the future development of Newco's business at a lower cost. Insofar that this is a restriction it would be directly related and necessary to the implementation of this concentration.

VII CONCLUSION

30. 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

⁶ Deleted, business secrets

functioning of the EEA Agreement. This decision is adopted in application of Article 6 (1)(b) of Council Regulation (EEC) N° 4064/89.

For the Commission,