

*Case No IV/M.1430 -
VODAFONE /
AIRTOUCH*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 21/05/1999

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.05.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sirs,

Subject: Case No IV/M.1430 – Vodafone/AirTouch

Notification of 06.04.1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 06.04.1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation No 4064/89 as amended (the ECMR) by which the UK undertaking Vodafone Group plc acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the American company AirTouch Communications, Inc.
2. On 28.04.1999, the parties submitted undertakings designed to eliminate competition concerns identified by the Commission, in accordance with Article 6(2) of the ECMR. In the light of these modifications, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 as amended 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. Vodafone Group plc (“Vodafone”) is a public holding company listed on the London and New York stock exchanges. It consists of a group of companies involved in the operation of mobile telecommunications networks and the provision of related telecommunications services, including data network operation, radio paging, satellite mobile communications and value added network services. Its principal business is the operation of cellular telecommunications networks in the UK, but it also has subsidiaries, associated companies and investments in 13 countries worldwide including France, Germany, Greece, the Netherlands and Sweden.
4. AirTouch Communications, Inc (“AirTouch”) is a wireless telecommunications provider listed on the New York stock exchange and operates a range of wireless services, including cellular paging and personal communications services and global satellite communications. Its main area of business is the operation of cellular networks in the United States, but it also has significant ownership interests in cellular

systems operating in 12 other countries, including Belgium, Germany, Italy, Portugal, Spain and Sweden.

II. THE OPERATION AND THE CONCENTRATION

5. The notified operation is structured as an acquisition of AirTouch by Vodafone, to be achieved by exchange of shares plus cash for existing AirTouch shareholders. AirTouch will become a wholly-owned subsidiary of Vodafone, which will be renamed Vodafone Airtouch plc.
6. The notified operation will therefore result in the acquisition of sole control within the meaning of Article 3(1)(b) of the ECMR.

III. COMMUNITY DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion¹ (Vodafone, EUR 3 569 million and AirTouch, EUR 6 716 million in 1998). Each of the undertakings have a Community-wide turnover in excess of EUR 250 million (Vodafone, EUR 3 285 million and AirTouch, [...] in 1998). Only Vodafone achieves more than two-thirds of its aggregate Community-wide turnover within the one and the same Member State (EUR 2 560 million in the UK in 1998). The notified operation therefore has a Community dimension. It does not constitute a cooperation case under the EEA Agreement.

IV. COMPETITIVE ASSESSMENT

A. Relevant product market

8. According to the parties, the narrowest relevant product market is the market for mobile telecommunication services, regardless of the technical standard used to provide such services. During its investigation, the Commission also considered the possibility of narrower product market segmentations such as analogue mobile telecommunication services, digital mobile telecommunication services (GSM 900 and DCS 1800) and customer-segmented mobile telecommunication services (eg business vs. private users).
9. During the Commission's market investigation, the vast majority of respondents confirmed the view that the relevant product market is the market for mobile telecommunication services encompassing both analogue and digital platforms. According to the parties, analogue services are still available in most Member States (with the exception of Greece and Luxembourg). However, according to figures provided by the parties, the share of subscribers to analogue services was less than 10% of total EU subscribers at the end of 1998 and is steadily declining. In some Member States – France, Belgium and Portugal – the number of analogue subscribers is already less than 1% of the total subscriber base. Most operators are planning to phase out such services in due course.

¹ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

10. Respondents also supported the view that, from the consumer's perspective, packages using the GSM 900 and DCS 1800 standards were readily substitutable for one another. The parties note that some operators do not even distinguish between GSM and DCS subscribers in their marketing statistics and revenue accounting systems. Moreover, a number respondents referred to the fact that dual-mode handsets were available, thus rendering the distinction between the two standards less of an issue for the consumer.
11. Operators typically offer a range of packages, some clearly targeted at business customers and others at private individuals. The parties maintain that in practice it is difficult to segment the market on this basis, since most customers use their handsets for both business and personal calls. In addition, by making use of pre-paid services, customers can avoid disclosing personal details to the operator, making it impossible to determine the origin of the customer or the purpose of any calls thus placed.
12. The Commission did not receive any substantive evidence in the course of its investigation to suggest that the product market should be segmented more narrowly than that proposed by the parties. However, the definition of the relevant product market in this case can be left open since the transaction as modified does not create or strengthen a dominant position on any definition of the relevant product market which could impede effective competition in the common market, the EEA or a substantial part thereof (as set out in the competitive assessment in section IV and the description of the modification to the proposal in section V below).

B. Relevant geographic market

13. According to the parties, the relevant geographic market for mobile telecommunication services is national. This reflects in part the fact that networks tend to have national coverage and the prevailing national licensing and regulatory frameworks. However, given current trends in technical standardisation, the increasing availability of roaming facilities and concentration of ownership, the Commission considered whether the geographic market might be wider than national, in particular whether specific regional markets (ie pairs of contiguous Member States) might exist in particular circumstances.
14. Most operators have roaming agreements with operators in other countries whereby they are able to offer their subscribers the ability to use their existing handset on a foreign network. The handset user remains a subscriber to the home network. This would in theory allow a customer to subscribe to an operator based in another country, thus suggesting that the market is wider than national. However, the parties maintain that the additional costs for customers to roam permanently, ie subscribe to an operator of another country, currently render this option unattractive. This view was confirmed by the majority of respondents who commented on this issue.
15. There are a number of additional costs involved for roaming subscribers. Operators charge premium rates for calls made whilst roaming (rates may be similar to standard international rates but are often higher), and do not usually offer cheaper off-peak rates to subscribers whilst roaming. A customer placing a call to a roaming subscriber from within the same country will be charged an international rate. The roaming subscriber will also incur an additional charge each time a call is received whilst using the visited network. Moreover, according to third party respondents, operators are increasingly offering subscription packages with airtime "bundled" into them, and these are proving popular with customers. But bundled airtime cannot be spent on calls made whilst roaming on a foreign network. There may in addition be a loss of functionality whilst roaming. Voicemail facilities, for example, may be inaccessible.

16. The parties produced a number of price comparisons between pairs of Member States (eg Belgium/Netherlands, UK/Ireland etc) to demonstrate this proposition. According to their figures, the price of a one minute peak or off-peak call (for tariffs aimed at both business and private subscribers) made from a mobile network in which a subscriber is roaming (ie a visited network) to fixed network in the same country as that in which the subscriber is roaming (eg a call from an Austrian subscriber roaming in Germany which terminates on a fixed network in Germany) is considerably higher than it would be if the caller subscribed to a mobile network in the country in which the call is being made, in the vast majority of cases. In several cases such a call would be over 200% more expensive. Similarly, a one minute peak or off-peak international call, again made by a roaming subscriber, but in this case terminating on a fixed network in the country where the subscriber's home network is based (eg a call from an Austrian subscriber roaming in Germany but terminating on a fixed network in Austria) would also prove substantially more expensive in the vast majority of cases than if the same call were made by a subscriber to a mobile network in the country where the call originated. This evidence would seem to demonstrate that regional geographic markets which are wider than national do not currently exist.
17. In the light of the above arguments, the Commission concluded that, given the current conditions in the mobile telecommunications sector, the relevant geographic market for this investigation is national.

C. Assessment

Market shares

18. The following table lists the market shares for the main operators providing mobile telecommunications services in the EEA (except Iceland and Liechtenstein), together with Vodafone/Airtouch ownership interests. Assuming that the markets for mobile communications are national there are only two EEA states in which an overlap arises, namely Germany and Sweden. Therefore, no competition concerns arise in any of the other EEA states.

Market shares² for the main mobile telecommunications operators in the EEA (except Iceland and Liechtenstein) and Vodafone/Airtouch EEA interests

EEA state	Operator	Market share	Vodafone/Airtouch interest	
Austria	Mobilkom Austria	65-70%		–
	Maxmobil	25-35%		–
Belgium	Belgacom Mobile	65-75%	Airtouch	25.0%
	Mobistar	25-35%		–
Denmark	Tele Danmark Mobil	55-65%		–
	Sonofon	35-45%		–
	Telia Danmark	0-10%		–
	Mobilix	0-10%		–
Finland	Sonera	65-75%		–
	Radiolinja	25-35%		–
	Telia Finland	0-10%		–
France	France Télécom	45-55%		–
	SFR	30-40%	Vodafone	20.0%
	Bouygues Télécom	5-15%		–
Germany	T-Mobil	35-45%		–
	Mannesmann Mobilfunk	40-50%	Airtouch	34.8%
	E-Plus	10-20%	Vodafone	17.2%
	Viag Interkom	0-5%		–
Greece	Panafon	50-60%	Vodafone	55.0%
	Stet Hellas	30-40%		–
	Cosmote	5-15%		–
Ireland	Eircell	70-80%		–
	Esat Digifone	20-30%		–
Italy	Omnitel	25-35%	Airtouch	17.8%
	Telecom Italia Mobile	65-75%		–
Luxembourg	P+T	70-80%		–
	Millicom	20-30%		–
Netherlands	PTT Telecom	60-70%		–
	Libertel	30-40%	Vodafone	70.0%
Norway	Telenor	70-80%		–
	Netcom	20-30%		–
Portugal	TMN	40-50%		–
	Telecel	40-50%	Airtouch	50.9%
	Optimus	0-10%		–
Spain	Telefónica Móviles	65-75%		–
	Airtel	25-35%	Airtouch	21.7%
Sweden	Telia Mobitel	50-60%		–
	Comviq	25-35%		–
	Europolitan	10-20%	Airtouch Vodafone	51.1% 20.0%
United Kingdom	Cellnet	25-35%		–
	Vodafone	30-40%	Vodafone	100.0%
	One2One	10-20%		–
	Orange	10-20%		–

² Market shares calculated on the basis of subscriber numbers. Data provided by the parties from the publication *FT Mobile Communications* (December 1998).

Germany

19. In Germany, AirTouch has a [30-40]% interest in Mannesmann Mobilfunk which, through its subsidiary D2, is the market leader with a share of some [40-50]% in the German market. Vodafone has a 17.2% shareholding in E-Plus, which has a [10-20]% share of the German market. The second largest operator is T-Mobil, a subsidiary of Deutsche Telekom, with a share of [35-45]% of total subscribers, the balance being held by the latest arrival on the market, VIAG Interkom.

Joint control of D2

20. AirTouch holds [25-35]% in Mannesmann Mobilfunk directly through AirTouch (Europe) Dienstleistungs- und Beteiligungs-KG and [0-10]% indirectly through its [45-55]% share in Mannesmann Mobilfunk Beteiligungsgesellschaft, which holds [5-15]% in Mannesmann Mobilfunk. The remaining [55-65]% is held by Mannesmann AG.
21. Most decisions are taken by majority voting among the members of the Shareholders Committee, which is made up of [...] members – [...] nominated by Mannesmann and [...] by AirTouch. However, key decisions such as the adoption of budgets, the business plan [...] require unanimity. [...]. Moreover, [a majority] shareholder vote is required [for certain other strategic decisions].
22. Both Airtouch and Mannesman are able to exercise decisive influence over Mannesmann Mobilfunk – and hence D2 – through their respective powers to block any action determining the strategic commercial behaviour of the joint venture, ie they have joint control.

Joint control of E-Plus

23. There are two other shareholders in E-plus besides Vodafone – O.tel.o has 60.3% and Bell South owns 22.5%. As with Mannesmann, all strategic decisions are taken by a shareholders committee. Management needs the prior consent of the shareholders committee for all measures of “special legal or commercial importance outside of the ordinary course of business”. The shareholders committee consists of [...] members, [...] appointed by each of BellSouth and Vodafone, the other [...] by o.tel.o. Any resolution requires [...] members to vote in favour.
24. Under this structure, none of the shareholders are able to secure a sufficient majority to determine E-Plus’s strategy. As majority shareholder, o.tel.o is however able to exercise negative control. Bell South and Vodafone [...]
25. In addition, any increase in the share capital requires the consent of each of the current shareholders. This would thus confer negative control on Vodafone in its own right in a situation where one or more of the other shareholders in E-plus wished to raise equity to finance new investment. This is particularly important in view both of the new frequencies (DCS 1800) and new licences (UMTS), which will shortly be auctioned in Germany and will require large capital investment, and of the specificity of this industry characterised by relatively short technological cycles. Vodafone is thus able to exercise decisive influence and hence joint control within the meaning of the ECMR.

Competition concerns

26. There are currently four operators on the German market for mobile telecommunications. The merged entity would have joint control in two of the four operators in the German market, D2 and E-Plus, which together command a [50-60]% share of the market. The only other large player in the market is T-Mobil, a subsidiary of Deutsche Telekom, with a market share of [35-45]% on the basis of figures provided by the parties. The fourth German operator, VIAG Interkom, is a fledgling operator which only launched its service in October 1998 and commands a market share of just [<5]%.
27. The market for provision of mobile telecoms services in Germany is – as in other Member States – regulated at national level. This necessarily restricts entry to the market, since all operators must first gain a licence from the national regulator. The national regulator’s ability to award new licences is in itself restricted by the limited amount of available radio frequencies.
28. The presence of T-Mobil makes it unlikely that the newly combined entity would be able to achieve single dominance in the market. Nevertheless, it would have decisive influence and joint control within the meaning of the ECMR over two of the main three players, who together enjoy a combined share of [50-60]% of the market. In addition, the proposed operation, by creating a structural link between two of the three main market operators in Germany would create a duopolistic market situation, accounting for almost 100% of a market which has considerable barriers to entry and in which information is readily available to customers and competitors who wish to make pricing comparisons. It cannot be ruled out at this stage that these factors could lead to anti-competitive parallel behaviour.
29. In the absence of the modifications to the proposal offered by the parties (see below), the operation would have raised doubts serious enough to warrant the opening of proceedings in accordance with Article 6(1)(c) of the ECMR.

Sweden

30. In Sweden, AirTouch and Vodafone have holdings of 51.1% and 20.0% respectively in Europolitan, which has a 14.6% share of the Swedish market. According to figures provided by the parties, this shareholding overlap, which does not lead to any increase in market share, and to any modification in the nature of control over this company, leaves the combined entity in third place behind the two leading players, Telia Mobitel and Comviq, and hence does not give rise to any competition concerns.

V. MODIFICATIONS TO THE PROPOSAL

31. In order to remove the concerns raised by the operation, Vodafone submitted a divestment undertaking in the form of a proposal for modification of the operation in accordance with the terms of Article 6(2) of the ECMR. This undertaking involves the divestment of Vodafone’s entire 17.2% stake in E-Plus.

32. Under the terms of the undertaking the parties have a period of [...] within which to complete the Divestment. An independent Trustee will be appointed to monitor the viability and saleability of the divestment assets in accordance with the undertaking, and ensure that the rights Vodafone has as a shareholder in E-Plus are exercised on an arm's length basis until completion of the sale. Provisions are included for the Trustee to provide written reports on progress with the discharge of the Trustee's mandate. Vodafone will, in addition, ensure that confidential information relating to E-Plus is not divulged to Mannesmann Mobilfunk and vice-versa. If Vodafone has not effected a sale within [...] of this Decision, the Trustee will acquire powers to step in and take control of the sale process in order to ensure the divestment takes place within the agreed period.
33. [Text of divestment undertaking removed for reasons of commercial confidentiality.]
34. The Commission will:
- (a) use its best endeavours to inform the Seller, as soon as reasonably practicable and within 14 working days of the Seller contacting the Commission (i) as regards the suitability of any proposed purchaser(s) (ii) if it agrees with a representation made by the Seller that discharging a certain Additional Function is unnecessary or not in accordance with the Mandate and (iii) if and to what extent the Trustee has found the Seller, in one of the Trustee reports or otherwise, not to be able to discharge its mandate;
 - (b) in determining whether any proposed purchaser is suitable, take into account whether the prospective purchaser concerned (i) appears to it to possess the status and resources necessary to acquire the Divestment Assets, (ii) is independent of the Seller (iii) can be shown not to have relevant and significant connection with the Seller and (iv) has, or reasonably can obtain, all necessary approvals for the purchase from the relevant competition and regulatory authorities in the European Community and elsewhere.
35. The divestment would have the effect of removing any competition concerns which might otherwise have resulted from the overlap on the German market between the activities of E-Plus and D2. In a subsequent market test conducted by the Commission, none of the third parties consulted voiced significant objections to the substance of the planned divestment.

VI. CONCLUSION

36. The Commission has concluded that the undertakings are sufficient to address the competition concerns raised by this concentration. Accordingly, it has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,