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Case No COMP/M.2137 - SLDE / NTL / MSCP / NOOS

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs

Subject: Case No COMP/M.2137 – SLDE/NTL/MSCP/NOOS

1. On 14 September 2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation No 4064/89 ("the Merger Regulation") by which NTL Inc. and Morgan Stanley Dean Witter Capital Partners IV, LLC and The Suez-Lyonnaise des Eaux Group acquire, within the meaning of Article 3(2) of the Merger Regulation, joint control of the full function joint venture Noos.

2. The Commission has concluded that the notified operation falls within the scope of the Merger Regulation 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. The Suez-Lyonnaise des Eaux Group ("SLDE") is mainly active in the area of energy, water, waste services, and communications. SLDE also has other activities (including construction services, financial and industrial services). Within the communication and media sectors, SLDE is active in cable TV distribution through its interests in Noos (which includes the cable networks of Lyonnaise Communications, Paris Cable and Auxipar in France), and Coditel (with cable networks in Belgium and Luxembourg). It also has interests in companies active in the provisioning of terrestrial free-to-air and satellite broadcasting and broadcasting programs. It has recently acquired a wireless local loop licence for the provision of voice telephony services in France.

4. NTL is a US based communications company active in the telecommunications, Internet and media sectors. The majority of NTL's activities take place in the United Kingdom. NTL operates residential and business telecommunications services and international carrier services. It also provides pay-TV (satellite and cable TV) services, Internet access and interactive services through its cable TV networks. In addition, NTL provides analogue and digital radio and TV broadcast transmissions, wireless network management and tower site rental services.

5. Morgan Stanley Dean Witter Capital Partners IV, LLP ("MSCP") is part of the Morgan Stanley Dean Witter Group ("MSDW"). MSCP is the general partner of three partnerships that are affiliated investment funds. Each of these investment funds makes equity investments in industrial and financial services companies, primarily in the United States and Western Europe.

6. Noos is a pre-existing JV company in which SLDE holds a 50.1% interest and France Telecom ("FT") holds the remaining 49.9% interest. Noos is active in (a) retail distribution of pay-TV programmes, (b) provision of Internet access and (c) voice telephony in France.

II. THE OPERATION

7. The Noos joint venture will be active in the areas of pay-Television (cable TV) broadcasting, Internet access and interactive services as well as voice telephony services. The current transaction follows the decision by SLDE and France Télécom ("FT") to reorganise their existing cable TV interests in France and the decision by FT to divest its interests in the reorganised companies.

8. Prior to the notified transaction, SLDE and FT controlled cable TV operations in Greater Paris through two undertakings, Lyonnaise Communications ("LC") and Paris Cable ("PC"). LC also controls cable TV operations in Cannes, Dijon and Epinal. In addition, SLDE operates other (municipal) cable TV networks through its subsidiary Auxipar and FT other cable networks through France Telecom Cable.

9. In the first step of the proposed transaction, FT will contribute to a special purpose company, Rapp.16, the network infrastructure operated by LC and PC. FT and SLDE will each contribute their respective interests in the special purposed company, LC, PC and Auxipar to the holding company Suez-Lyonnaise Télécom, that is 49.9% owned by FT and 50.1% owned by SLDE. The parties have agreed that the holding company will be renamed Noos S.A. In the second step of the transaction, FT will sell to NTL and entities controlled by MSCP its stake in Noos. NTL will directly acquire 27.0% and MSCP (through special purpose entities) 22.9%. SLDE will retain its initial 50.1% interest. Under the Share Purchase Agreement the two steps will occur simultaneously.

10. As a result of the transaction, Noos will include all of SLDE's and NTL's cable TV assets in France. In addition to the network infrastructure and related equipment FT will contribute to the JV, FT will sell to Noos a 20 year non-exclusive right to access FT's cable ducts in the franchise areas covered by the LC and PC network infrastructure being contributed to Noos.

III. CONCENTRATION

Joint control

11. The parties intend to close the transaction in two stages. The initial implementation will occur within 5 days after a clearance by the Commission. At this stage, a management committee will be set up in which SLDE, NTL and MSCP will each appoint a single representative. This committee will have immediate governance rights over Noos, and each of the parties will have a unilateral veto right over the adoption of Noos' two-year business plan, appointment of the president and director-generals and other key strategic decisions. The management committee will according to the Share Purchase Agreement be solely responsible for the operation of Noos until the final implementation stage and FT will not participate either directly or indirectly in the management committee and will not have access to commercially sensitive information regarding Noos after this initial implementation stage.

12. The final implementation stage will involve the two simultaneous steps (step 1 and step 2) described above. At this final stage, which according to the parties is likely to occur only a few days after the initial implementation stage, FT should have obtained the necessary authorisations from the municipalities for the assignment of FT's concessions for the operation of the LC and PC cable networks to Rapp.16. If FT fails to obtain the necessary authorisation by this stage, FT is under a best efforts obligation to contribute them to Rapp.16 as soon as possible after this date.

13. As a result of the transaction, the JV will be jointly controlled by SLDE, NTL and MSCP.

Full Function Joint venture

14. Noos will be comprised of all of SLDE's and NTL's cable TV and related assets and operations in France, and will continue to perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Article 3(2) of the Merger Regulation: Noos will (i) own the cable assets and concessions being transferred to it by SLDE and FT (as well as by NTL), (ii) have its own management for its day-to-day operations, (iii) have access to its own financial resources, and (iv) generate most of its business with suppliers and customers who are unaffiliated to its parents.

IV. COMMUNITY DIMENSION

15. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion[1] […]. Each of SLDE, NTL, MSCP and Noos have a Community-wide turnover in excess of EUR 250 million […], but they do not achieve more than two-thirds of their aggregate Community-wide turnover within

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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, p.25). 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.

one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

A. RELEVANT MARKETS

16. The JV is active in the provision of (a) retail distribution of pay-TV programmes (b) Internet access and portal services, (c) voice telephony services and (d) supply of (cable) network infrastructure. 1G Networks, which NTL shall contribute to Noos, is also active in retail pay-TV distribution and has plans to launch Internet access and voice telephony services by 2001 in France, with all three services offered over its network infrastructure (triple-play).

Pay-Television

17. The Commission has in previous decisions held that there is a separate market for pay-TV (without distinguishing between analogue or digital pay-TV), which is distinct from free-access television, financed by advertising or through state contributions[2].

18. The Commission has in some decisions considered the relevant geographic market for pay-TV to be national, in particular for cultural reasons, language barriers and differing regulatory regimes.[3] Other decisions have left open the possibility of television markets across language zones.[4] However, given that the proposed transaction does not give rise to any competition concerns the exact product and geographic market definition can be left open in this case (see further below).

Internet access

19. Access to the Internet involves connecting a customer to a network running the Internet Protocol (IP). Access may be provided as dial-up access through modems or dedicated ("always on" private line) access.

20. In the *Telia/Telenor*[5] decision, the Commission made a distinction between dial-up and dedicated Internet access but it left open whether dial-up and dedicated access constituted separate product markets. In the *BT/ESAT*[6] decision it emerged that within the provision of Internet dial-up access residential and business customers could possibly be regarded as constituting two separate product markets.

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[2] Case No. COMP/JV.37 – B SKY B/Kirch Pay TV, 21.3.2000), Case COMP/IV.M993 – *Bertelsmann/Kirch/Premiere*, 27.5.1998.

[3] See Cases No. IV/M.469 – *MSG Media Services*, 9.11.1994; B*ertelsmann/Kirch/Premiere*, and Commission Decision *BiB*, 15.9.1999.

[4] Case No. IV/M.553 – RTL/Veronica/Endemol, 5.6.1996

[5] See *supra*.

[6] Case COMP/M.1838 BT/Esat, 27.3.2000

21. The Commission found in the *Vodafone/Vivendi/Canal+ (the Vizzavi joint venture)* decision[7] that Internet access provided over access mechanisms with different transmission, display and usage characteristics, notably WAP mobile handsets, set-top boxes, and PCs, constitute separate markets. The Commission also found that the Internet access markets for access via PCs and set-top boxes are essentially national in scope due to the necessity of local loop access and the availability of freephone/local call rate numbers to the nearest point of presence for the former and that licenses to operate cable networks are awarded on a national basis for the latter.

22. Noos estimate that its market share based on number of customers is less than [0-10%] of the total number of Internet subscribers in France. In any event, given that neither NTL or MSCP are presently active in France as a provider of Internet access services there is no horizontally affected market created as a result of the proposed transaction irrespective of the market definition chosen. Thus, the relevant market definition can be left open.

Voice Telephony Services

23. The Commission has in previous decisions[8] considered that the product market for fixed switch telephony services comprises three separate product markets: local, long distance and international telephony services. These three markets were considered to be national in scope[9]. However, it is not necessary to determine the exact market definition in this case as Noos has a minimal presence in the voice telephony service market corresponding to less than [0-10%] of the total voice telephony subscriber base in France. Moreover, there is no existing overlap between the parties' activities in this sector, neither MSCP nor 1G Networks currently provides voice telephony services in France. Thus, there is no horizontal overlap created as a result of the proposed transaction on this market in France irrespective of the market definition chosen and the relevant market definition can therefore be left open.

Triple play

24. It could be argued that upgraded cable networks may have a competitive technological and commercial advantage over other digital delivery systems in the near future as regards the provision of a "triple play" of digital services to their subscribers. The triple play consists of interactive digital TV, high speed Internet access and telephony. Whether, in the evolution of services based on digital technology, this cable triple play of services will constitute a separate market can be left open given that the proposed transaction does not give rise to any competition concerns. In particular neither party is currently providing such triple play in France. […].

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7 Case COMP/JV.48 - *Vodafone/Vivendi/Canal+*, 20.7.2000

8 See in particular Commission Decision *Telia/Telenor*, of 13.10.1999

9 *idem.*

Portal services

25. In the *Vodafone/Vivendi/Canal+* decision, the Commission found that the provision of Internet portal services constitutes a separate market.[10]. The Commission also found in the decision that there is an emerging pan-European market for horizontal portals providing WAP based (through mobile phones) access. As regards other forms of Internet portals, the Commission noted that national markets may be appropriate for certain internet-related activities, but that they may also be increasingly European.

26. Noos currently provides Internet portal services to its existing Internet subscribers. But, neither 1G Networks nor MSCP currently provide such services […]. Thus, the transaction does not lead to the creation of any horizontal overlap in this market. The definition of the relevant market can consequently be left open.

Supply of Network Infrastructure

27. In the *BiB* decision, the Commission identified a distinct market for customer access infrastructure for telecommunications and other services which included the traditional copper network (public switched telephony network, PSTN) and the cable networks of cable operators. The relevant market was considered to be national in scope. In the *Telia/Telenor* decision the Commission found that there are three distinct markets for the supply of network infrastructure (retail and wholesale) for customer access: local loop infrastructure, national infrastructure and international infrastructure irrespective of whether the relevant network was a cable TV network or a traditional copper network. The three markets were also considered to be national in scope.

28. For the purpose of the current decision the relevant market(s) definition can be left open given that even with the narrowest possible market definition, no competition concerns arise out of the proposed transaction.

COMPETITIVE ASSESSMENT

Horizontal overlaps

Pay-Television

29. Pay-TV services can be delivered in France via terrestrial transmission, by satellite and by cable. The main suppliers of pay-TV services in France are the Canal+ group (which includes CanalSat (satellite), Canal+ (terrestrial) and NC Numericable (cable)), TPS and Noos. Canal+ is the dominant provider with around [60+-70%] of the market, followed by TPS with an estimated market share of around [0-10%][11]. The combined market share of Noos and 1G Networks is well below 15%[0-10%]. Therefore, it can be concluded that the proposed transaction would not lead to the creation or strengthening of a dominant position in this market in France.

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[10] See *supra*.

[11] *Source:* Avicam and NTL internal estimates

Supply of Network Infrastructure

30. Neither party to the transaction is active in the wholesale supply of network infrastructure to third parties. However, both 1G Networks and Noos are active in the provision of retail access to its network infrastructure in their respective franchise areas. Nevertheless, only Noos is currently providing end-user (retail) access to consumer together with its provision of voice telephony service. […]. As stated above, Noos has an estimated [0-10%] of the voice telephony market in France.

31. The Commission has, as stated above, in previous decisions found that the relevant market for the supply of network infrastructure (irrespective of the segment) is national in scope. However, neither 1G Network nor Noos provides any network infrastructure access outside their respective franchise areas. Even assuming that the relevant geographic market is the franchise area, the parties face competition from other network infrastructure providers, in particular France Telecom ("FT"), in the retail supply of network infrastructure in these areas. FT is a provider through its PSTN (public switched network) of local, national, and long distance networks across the whole of France. Furthermore, taking this narrow market definition, the proposed transaction would not lead to any horizontal overlap. Even assuming *arguendo* that the relevant market is the national market for the provision of cable TV infrastructure, the parties are faced with a number of significant competitors such as FT through FT Cable, Canal+ (Numbericable), TPS, and UPC which are all providers of network access in their respective franchise areas.

32. Given the above, it can be concluded that the transaction does not lead to either the creation or strengthening of a dominant position in these markets. This has also been confirmed by the Commission's market investigation.

Vertical integration

33. Neither NTL nor MSCP are active in any telecommunications, media or other markets in France that is vertically upstream or downstream from the markets in which Noos is active. NTL has media content activities outside France (UK and Ireland). However, the English language content is not supplied to NTL to pay-TV distributors in France. Even assuming a future vertical relationship in France, NTL's English content would according to the figures provided by the parties, represent less than 25% of the total wholesale supply of content for pay-TV in France.

34. SLDE on the other hand is through its controlling interest in Paris Première (a provider of broadcasting programs in France) active in a vertically related market to the JV. SLDE also has a non-controlling interest in the French channel M6. Thus, a possible vertically affected market could be created by the transaction since the 1G Networks are added to the JV. However, given that 1G Network's market share on the total pay-TV subscriber base in France is less than [0-10%], that Paris Première's and M6's operations represent much less than 25% of the wholesale supply of content for pay-TV and that the parties face a number of significant competitors in these markets in France, the proposed transaction does not lead to either the creation or strengthening of a dominant position in these markets.

V. ANCILLARY RESTRAINTS

35. The Parties submit that the commercial restrictions included in the Share Purchase Agreement and the Term Sheet of the Shareholders Agreement cannot be dissociated from the creation of Noos without undermining its existence and purpose. As such, the Parties consider that these restrictions fall outside of the scope of Article 81(1) of the EC Treaty and do not require the treatment as ancillary restraints. In case the Commission takes a different view, the Parties submit that the restrictions are directly related and necessary to the implementation of the proposed transaction.

36. Section 7.1. of the Share Purchase Agreement contains “conduct of business” pre-closing covenants on SLDE and FT designed to preserve the full value of the assets being transferred to Noos pending final implementation of the notified transaction. These *inter alia* include obligations on FT to contribute the relevant networks to Rapp.16, the SLDE shall contribute all its assets to the JV, the financing of investments etc. These convenants aim at effecting the proposed concentration as such and thus constitute an integral part thereof.

37. Section 13 of the Share Purchase Agreement contains a confidentiality obligation upon the signing and closing of the transaction for all parties except for FT, for which the confidentiality obligation should apply from signing until the third anniversary of the closing of the transaction. The Commission does not consider such agreements in normal circumstances to be restrictive of competition, but to the extent that any residual element of this clause might be restrictive of competition, it can be considered as an ancillary restriction necessary to enable the purchaser take over the full value of the business purchased.

38. Annex B to the Share Purchase Agreement contains a model contract (*Modèle de Contrat de Génie Civil*) under which FT will grant to Rapp.16 a 20-year non-exclusive right to access to FT’s infrastructure (*e.g.* ducts) which is not being contributed to Noos. This agreement will enter into force at the final implementation phase, scheduled to occur by March 2001, at the latest. This agreement is indispensable for the commercial viability of Noos’ cable operations and to the extent that it is restrictive of competition, this does not go beyond what is technically justified for the operation of Noos’ cable networks.

39. The Shareholders Agreement Term Sheet provides for a non-compete arrangement under which NTL, SLDE and MSCP undertake to conduct through Noos all their activities in the business of providing residential CATV, broadband Internet or fixed line telephony serviced in the franchise area presently serviced by Noos. There is no restriction on the parties introducing digital services over other delivery systems such as satellite or digital terrestrial. This non-competition arrangement was agreed for […].

40. The non-competition arrangement is subject to the following exceptions:

(1) If a party identifies or is offered participation in a business providing CATV, broad band Internet or fixed line telephony services in the residential market

within a franchise area serviced by Noos, Noos shall have a right of first offer over such business;

(2) The non-compete and the right of first refusal do not cover SLDE's proposed minority participation in a wireless local loop consortium, existing businesses or investments of any party, and (a) any subsequently acquired "minority interest" (defined as any interest of no more than 50% in voting rights or by value and which is not the largest interest in the entity) of any party in any entity or business where the reasonable judgement of the acquiring shareholder Noos would not have been able or permitted to complete such acquisition or participation or (b) any interest which at any time represents less than Euro 20 million of revenues on an annual basis of the relevant party in a business (other than CATV) providing broadband Internet or fixed line telephony services in the residential market within a franchise area serviced by Noos;

(3) If in respect of any "minority interest" acquired after Closing, any party subsequently acquires more than 50% in voting rights or by value of the relevant entity, Noos shall have a period of 6 months thereafter to require the relevant party to sell its entire interest in the relevant entity to Noos at the fair market value thereof;

41. The current non-compete clause will ensure that Noos will be attributed the full value of the business being transferred. Furthermore, it will protect the assets and investments being transferred to Noos and it will not hinder the parties to compete with each other and/or the joint venture outside the franchised area or for services not provided by the joint venture.Finally, to successfully compete in the CATV industry the joint venture requires a high level of technical expertise and a significant long-term investment in network infrastructure for which it relies on its parents. This contribution in turn requires the parents' firm commitment to the joint venture. Given the features of the relevant markets and the uncertainties of their development in the near future such firm commitment is necessary for longer than the usual start-up period. For these reasons the non-compete is considered to be directly related and necessary for the implementation of the operation and hence covered by this decision for a duration of [3-10] years.

VI. CONCLUSION

42. 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.

43. 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 EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission