COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.01.2001
SG(2000)D/285261

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sir/Madam,

Subject: Case No COMP/M. 2216-Enel/FT/Wind/Infostrada
Notification of 28 November 2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 28.11.2000 the Commission received a notification of a proposed concentration by which ENEL SpA ("ENEL"), France Telecom SA ("FT") and Wind Telecommunicazioni SpA ("Wind") propose to acquire joint control of Infostrada SpA ("Infostrada").

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89 as amended ("the Merger Regulation") and that the concentration does not raise serious doubts as to its compatibility with the common market and with the EEA agreement.

I. THE PARTIES

3. ENEL is the principal provider of electricity in Italy, involved in the generation, transmission and distribution of electricity. It is majority-owned by the Italian State holding 67.5% through the Treasury Ministry.

4. FT is the incumbent telecommunications operator in France, providing a full range of telecommunications services, primarily in France. It is majority-owned by the French State holding 55.7% of its capital.

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5. Wind is a JV controlled by FT and ENEL[1], holding 43.3% and 56.7% of its shares. Wind provides a full range of telecommunications services in Italy, including mobile and fixed line services, as well as Internet services.

6. Infostrada is a provider of fixed line telecom services, including public voice telephony, data transmission. It also offers Internet services such as internet access and portal services in Italy. Infostrada is wholly-owned by Mannesmann AG, which in turn is controlled by the Vodafone Airtouch Group.[2]

II. THE OPERATION

7. According to a share purchasing agreement (SPA) between ENEL and Mannesmann Investment BV, ENEL, with FT's consent, will acquire the whole of the issued share capital of Infostrada with the aim of merging Infostrada with Wind (see Article 2.1. of the SpA. Immediately after the acquisition (at the latest within […] months thereafter) Infostrada will be merged with Wind ("New Wind"; see Articles 2.1. and 3.1. of the SpA). Pending completition of the merger of Infostrada into Wind, Enel will manage Infostrada as if it had already been merged into the venture and Infostrada's management shall be substantially the same as Wind's.

III. CONCENTRATION

8. Joint control by ENEL and FT over "New Wind" will be established by a series of contractual obligation set out in the Supplemental Agreement ("SA") between ENEL, FT and Wind, amending the original Shareholders Agreement of 28 July 2000 between ENEL and FT. ENEL and FT will have to decide jointly on the strategic business decisions of New Wind. Wind is already active on the telecommunications market as an autonomous entity and so will New Wind. The operation therefore constitutes a concentration according to Article 3 (1) b of Council Regulation No 4064/89.

IV. COMMUNITY DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3]. Each of ENEL, FT and Wind 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 one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPATIBILITY WITH THE COMMON MARKET

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1 See Commission's decision of 22 June 1998, Comp/M.1074-DT/FT/ENEL/Wind; Deutsche Telekom left the JV in 2000.

2 See Commission's decision of 12 April 2000; Case Comp/M.1795

3 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. The parties' activities overlap to a minor extent in fixed line telecommunications services (voice telephony, data transmission and transmission capacity) and Internet services (Internet access and related services and portal services) in Italy.

A. Relevant product and geographic markets

Fixed telecommunications services

11. Both Wind and Infostrada are active in the provision of domestic and international voice telephony services (for private and business customers), data transmission services (primarily used by businesses) and in the provision of transmission capacity (leased lines). The Commission has in previous decisions[4] found that the provision of voice telephony services can be separated into three separate markets, the provision of local, long distance and international voice telephony serivices and that the relevant geographic market is national in scope. The Commission has also found that that there is a separate market for business data communications services and that the relevant geographic market is at least national in scope. [5]

12. The parties have submitted that in the present case both the data transmission services and voice telephony markets should be regarded as being national in scope (Italy). Given that even with the narrowest possible market definition, no competition concerns arise out of the proposed transaction on these markets the relevant market definitions can be left open (see further below).

13. 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. The Commission has in previous decision made no final conclusion as to whether there should also be made a distinction between dark fibre and optical fibre and/or narrowband and broadband (high speed) networks. The parties submit that the relevant market is the market for provision of transmission capacity in Italy. However, for the purposes of the current decision the relevant market definitions can be left open given that even with the narrowest possible market definition, no competition concerns arise our of the proposed transaction (see further below).

Internet access and related services

14. Both Infostrada and Wind are active as ISPs (Internet Service Providers) and provide Internet access and related services, and portal services. These activities can be divided into access services on the one hand and services directly related to access and the so-called portal services[6] on the other hand (based on e-commerce and on-line advertising). Access may be provided as dial-up access through modems or dedicated ("always on" private line) access.[7] Access services and related services could in principle be divided into the provision of access to residential customers and the

4 See *e.g.* the Commission's decision in case Comp/M.1439-Telia/Telenor.

5 *Idem*.

6 See Commission's decision in case Comp/JV.48-Vodafone/Vivendi/Canal+, 20.7.2000

7 See Commission's decision in case Comp/M. 2137-SLDE/NTL/MSCP/Noos

provision of direct/broadband Internet access to business customers. Furthermore, it could be argued that the provision of narrow-band services is a distinct market from broadband services. However, the Commission has so far left open the precise definition of Internet access services and related services markets. The parties submit that Internet access services and related services and portal should be considered to be national in scope. However, given that even with the narrowest possible market definitions, no competition concerns arise our of the proposed transaction the relevant market definitions can be left open (see further below).

Market for the supply of electricity

15. The Italian Authorities have informed the Commission that the proposed transaction threatens to strengthen a dominant position of Enel in a distinct market for the supply of electricity in Italy.[8] With regard to this market the case was therefore referred to the Italian antitrust authorities, by Decision of the Commission from 19 January 2001.

B. Competitive Assessment

16. The operation is largely of complementary nature and does not give rise to any affected markets: While Wind is primarily active in mobile telephony services, Infostrada's main field of activity is voice telephony: the bulk of its customers are fixed line customers. The proposed transaction therefore only leads to minor overlaps in the markets for fixed telecommunication services, internet access and related services and the provision of transmission capacity.

17. According to third parties, the proposed transaction would raise serious competition concerns in the market for supply of (national) telecommunications infrastructure and/or the national market for the provision of dark fibre, Internet services and the local loop. For the reasons set out below, the Commission has found that the proposed transaction neither creates or strengthen a dominant position on any of these markets.

Fixed Telecommunications services[9]

18. The parties will have combined market shares of less than 15% in any of the voice telephony segments. The market is dominated by the incumbent provider Telecom Italia who has between 70-90% in each segment. The same evaluation applies for data transmission services. In addition to Telecom Italia, several other operators also provide data transmission services on a nation-wide basis in Italy, including Albacom, e.Biscom, Tiscali, Colt and e-Planet. The proposed transaction therefore leads to neither the creation nor the strengthening of a dominant position in these markets.

Internet access and related services

19. The Italian Internet fast growing market with a huge number of suppliers and barriers to entry appear to be low. Infostrada is one of the largest ISPs in Italy with a market share close to Telecom Italia's. Infostrada provides portal services through Italia Online SpA (search engines, communities, news, etc.) and internet access services

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8 Request by the Autorità Garante according to Article 9 (2) a of the Merger Regulation from 20 December 2000.

9 Source: EITO and Databank (2000); market shares based on value.

(dial-up and dedicated access) through Libero, mainly to consumers. Libero also provides additional services such as e-mail and messaging.

20. Wind's market position in Internet access and related services is insignificant and it has only recently started to provide portal and Internet advertising services. Based on value the parties combined market share in any of the above mentioned segments would be below 15%. According to the parties, Telecom Italia has a market share almost twice as high as the parties. It is difficult to establish market shares in the different Internet markets based on the number of subscribers since the total number of subscribers might not correspond to the actual number of active clients. According to third parties, New Wind's market share in the different Internet markets if based on the number of subscribers would be slightly more important than its market share based on value. However, a competition problem would not arise given that there are a large number of other ISPs active on the Italian market, most importantly Telecom Italia and Tiscali.

Transmission capacity[10]

21. Wind and Infostrada can supply transmission capacity by providing complete circuits or, for customers connected to a Telecom Italia leased line, Wind or Infostrada can provide the national backbone while the local loop is provided by Telecom Italia. The customers of Wind and Infostrada are mainly alternative telecommunications operators in Italy.

22. Wind and Infostrada have concluded agreements for the use of the optical fibre backbone, respectively with ENEL and Ferrovie dello Stato (FS) respectively. Wind's transmission network is composed of a national backbone which has been installed along ENEL's electricity power lines, pursuant to an agreement between Wind and ENEL of 1998. In line with this agreement ENEL has leased its dark fibre backbone to Wind for […] years. The fibre optic backbone installed and leased to Wind is made up of [7,000-15,000] km of optical cable.[[11]] Infostrada's transmission network is composed of a national backbone which has been installed along the National Railway network, following an agreement between Infostrada and "Ferrovie SpA" of 7 April 1998. In line with this agreement Infostrada has an exclusive right of way along the piling supporting the electricity grid for trains and the option to install its own piling or to dig its own tubes along the railway siding.[[12]] Infostrada has installed its national backbone of [2,000-8,000] km. Considering the total length of Ferrovie's network of [10,000-20,000] km Infostrada has the possibility of extending its backbone by a

10 Source: Databank, EITO; Telecom Italia's annual report.

11 [In addition, Wind is currently extending its network.]

12 This agreement was approved by the Commission on 21 May 1999; see Case IV/37.181 "Infostrada-Ferrovie dello Stato". Ferrovie will not grant access to its infrastructure to a third party for telecommunications purposes until the completion of Infostrada's network. The installation of the network […] will substantially be completed by […]. In the meantime Infostrada agrees to allow third party access to the FS infrastructure in the exceptional cases where the railway would be the only possibility for installing a telecommunications network.

further [8,000-15,000] km[13] At present, New Wind holds a long distance transmission capacity of around [10,000-20,000] km.

23. The parties' combined market position in transmission capacity, whether based on the actual existing network (capacity) or on value (revenues of leased lines) would be much smaller than that of the leading operator Telecom Italia, who has market shares of around 85-90% based on revenue in this market.

24. In addition, there are also other operators which are currently installing several broadband fibre optic networks in Italy: Albacom (part of ENI group) is installing a network of 13,000 km; E.Via is installing a network of 8000 km; Autostrade SpA owns a network of several thousand km of fibre optic cables. Finally, also other operators including WorldCom, Colt, Metroweb and Acea Telefonica are currently installing their own networks. There are at present 55 licensed operators for leased lines in Italy. 7 operators have a public offer of leased lines (Infostrada, Albacom, Wind, Autostrade Telecommunicazioni, MCI Worldcom, COLT Telecommunicazioni, Metroweb).

25. Based on the above considerations it can be concluded that the proposed operation will not create or strengthen a dominant position on any of the telecommunication markets concerned.

VI. CONCLUSION

26. 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,

s*igned: Mario Monti*
Member of the Commission

13 [In addition, Infostrada is currently extending its network.]