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Case No COMP/M.2565 - PPC / WIND / JV

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 28/11/2001

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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

Subject: **Case No COMP/M.2565 – PPC/Wind/JV**
Notification of 26 October 2001 pursuant to Article 4 of Council Regulation No 4064/89[1]

1. On 26.10.2001, the Commission received a notification of a proposed concentration by which the undertakings Public Power Corporation SA ("PPC"- Greece) and Wind Telecomunicazioni SpA ("Wind"- Italy) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of a newly created joint venture, the Dutch-based holding company NHV ("NHV").

2. The Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market.

II. THE PARTIES AND THE OPERATION

3. PPC, the national electrical utility in Greece, is present in the Greek markets for generation, transmission and distribution of electricity. It also operates a number of lignite mines in Greece. PPC is wholly owned by the Greek State, although an initial public offering is expected in the near future.

4. In turn Wind is a full-function joint venture currently controlled by the Italian Enel SpA ("Enel") and the telecommunications operator France Télécom SA ("FT")[2]. Wind provides a full range of fixed and mobile telecommunications services in Italy.

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[1] OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17), hereafter the "Merger Regulation".

5. With the proposed transaction PPC, through its 100% subsidiary PPC Telecommunications SA ("PPCT"), and Wind will set up a Dutch-based holding company (NHV) jointly controlled by both parents. NHV that will be active in the Greek telecommunications markets through a vehicle company, Evergy SA ("Evergy), which holds a telecommunications licence (Local Multi-point Distribution System or LMDS licence) and is currently participated by PPC. Evergy will provide a broad range of telecommunications services, i.e. fixed telephony, business data communications, Internet access services and sale of transmission capacity.

III. THE CONCENTRATION

Joint control

6. As provided for by the Framework and Shareholders Agreement, Wind will hold 50% plus one share of NVH and PPC will have a stake of 50% minus one share in the joint venture. Following the planned transaction, NVH will acquire, with the financial contributions of the parents, 100% of Evergy, being its sole shareholder and having control over the whole of it. As already mentioned, Evergy is currently participated by PPC and will be the vehicle company through which the parents will be present in the Greek telecommunications markets. In this context and for the purposes of the present case, it will be referred to as "the joint venture".

7. The adoption of strategic business decisions in Evergy will require the agreement of the two parent companies, PPC and Wind being therefore granted veto rights and having the possibility to exercise, both of them, a decisive influence vis-à-vis the commercial behaviour of the company concerned.

8. The appointment of Evergy's management will be equally distributed between PPC and Wind, with the two companies having consultation rights in relation to the respective nominees. It will be for PPC to appoint the chairman and vice-chairman of the Board, with Wind having management control rights.

9. In the light of the above it can be concluded that Evergy will be jointly controlled by the parent companies.

Full functionality

10. The joint venture will be provided with all the tools which are necessary for the performance, on a lasting basis, of the functions of an autonomous economic entity, i.e. day-to-day management, finance, staff and assets.

11. In the framework of the resources to be contributed by the parent companies,

(a). the telecommunications licences to be granted to PPCT (network and voice telephony licenses) in the near future will be transferred to Evergy, which holds as well a LMDS license for the exploitation of a fixed wireless telecommunications network and the provision of the corresponding services;

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2 See cases IV/JV.2 – Enel/FT/DT and COMP/M.2129 – Enel/FT/Wind.

(b). the joint venture will have exclusive access to the fibre backbone network to be built up by PPC alongside its existing electricity grid. Such a network will be illuminated by Evergy and used for the provision of telecommunications services in downstream markets. Furthermore it can be concluded from the "Backbone Agreement" entered into by the parent companies, that exclusivity will be also granted as to the use, by Evergy, of PPC's rights of way for the deployment of certain telecommunications facilities.

12. In the light of the above considerations it can be deemed that Evergy will constitute a full function entity on a lasting basis.

III. COMMUNITY DIMENSION

13. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3]. Each of PPC 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.

IV. COMPETITIVE ASSESSMENT

Markets involved in the concentration

14. According to the notifying parties, the relevant product markets concerned by the present operation would be (i) the fixed telephony services; (ii) the business data communications; (iii) the Internet access services and (iv) the sale of transmission capacity.

15. With regard to the geographic scope of the markets identified above, the parties consider it to be national, and when doing so they refer to the Commission's previous practice according to which the factors to be taken into account would be (a) the extent/coverage of the network, as well as the customers that can be reached and whose demands may be met economically; (b) the legal and regulatory framework.

16. In respect of the exact definition of the various markets involved in the concentration, it must be noted that for the purposes of the present transaction the exact scope of the various markets involved in the concentration can be left open, since the concrete way of delimiting the product and geographic relevant markets will not affect the competitive assessment of the proposed operation.

Affected markets and context of the operation

17. With regard to the horizontal dimension of the case, according to the information provided by the parties the planned transaction will not give rise to any horizontally affected market within the meaning of section 6 of Form CO, since neither PPC nor Wind or Enel are present in any of the markets concerned by the proposed transaction.

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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.

18. Furthermore although FT, one of Wind's parents, is active in one of the relevant markets, i.e. the Greek market for business data communications, through its subsidiary New Equant[4], that presence can be considered as *de minimis*, since New Equant's share in the above-mentioned market is [less that 5%]. Finally, it should be mentioned that FT's second presence in the Greek telecommunications sector, through the operator Panafon, is not related to any of the markets involved in the concentration, but to a different market, the mobile telephony services, its stake being certainly limited ([less than 5%] of the shareholding capital).

19. As to the vertical aspects of the operation, it transpires from the information provided by the notifying parties that there exist no technically affected markets within the meaning of the Merger Regulation, given that (a) PPC's business activities are not upstream or downstream of a product market where any other party to the concentration is active; (b) Wind and Enel are not present in the Greek telecoms sector and FT, although indirectly present (mobile telephony and data services, as already mentioned), has no presence in any product market which could be vertically linked to those product markets where any other party to the concentration may be present.

20. In the light of the above, the parties conclude that the proposed operation does not give rise to any horizontal or vertical overlap.

21. Furthermore they stress the fact that the transaction will take place within a particular context : the recent full liberalisation of the Greek telecommunications market, with the joint venture having a pro-competitive effect on the provision of the services constituting its business activities.

22. In that respect and with regard to the current situation of the fixed telephony sector in Greece, the parties indicate that although this market was opened *de iure* at the beginning of this year, there is a *de facto* monopoly, with the incumbent operator (OTE) controlling 100% of the market concerned. According to PPC and Wind, it is expected that operators currently providing data and mobile telephony services, as well as utilities, will become an alternative to OTE, entering the market and offering a wider choice to end users.

23. As to the Greek market for business data communications, the parties state that OTE's position is significantly strong, with a 90% market share. Consequently, although there are a certain growing number of players competing with the incumbent, the joint venture would face a *quasi monopolistic* environment.

24. In relation to the provision of Internet access services, it transpires from the information submitted by PPC and Wind that it is an incipient market in Greece, with a remarkable fragmentation as to the number of suppliers. In this context OTE's subsidiary (OTENET) would hold a relatively significant market share, but would not be the leading player.

25. With regard to the sale of transmission capacity, the parties indicate that this market is expected to grow substantially in the near future, this expansion being linked to the liberalisation of the fixed telephony services and the increase of Internet utilizationutilisation. The competitive environment would be very similar to that of the business data communications : OTE would currently control nearly the whole of the

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4 See case COMP/M.2257 – France Télécom/Equant.

market, a limited number of players competing with the incumbent. Furthermore, PPC and Wind indicate that there are a number of telecoms operators (for example mobile operators) and companies operating in sectors like water, gas, railways, oil, highways, etc., that have begun to deploy or plan to deploy (in some cases alongside their existing infrastructures) alternative networks that will be available to current and potential competitors of the joint venture.

26. In the light of all of these considerations, the parties state that the proposed operation will be of benefit to the customers, since Evergy will be the first competitor in the market for fixed telephony, whilst reinforcing the nascent level of liberalisation with regard to the remaining markets where the joint venture will be present.

27. The market investigation launched by the Commission has confirmed the assertions of the parties as to (i) the *de facto* monopolistic position of the incumbent in the Greek market for fixed telephony; (ii) OTE's dominance in the markets for business data communications and sale of transmission capacity; (iii) the existence of reasonable and viable alternatives (vis-à-vis both OTE and Evergy) in relation to the construction of fibre optic networks for the provision of services in the downstream markets where the joint venture will be present; and (iv) the potential benefits to the customers, who have expressed a positive view on the entry of a new player.

Co-operative effects of the joint venture

28. According to the parties, the proposed operation does not lead to any competition concerns in terms of co-ordination aspects. Neither PPC nor Wind or Enel are or will be present in the Greek telecommunications sector. In addition, they will not compete in any downstream or upstream markets, or in any neighbouring market linked to the telecommunications market in Greece. PPC and Wind are present in different product and geographic markets. Furthermore, the markets where PPC and Enel operate are not sectors upstream, downstream or related to the joint venture's market. With regard to FT's presence in the Greek telecoms markets, the parties note that it would not lead to any competition concern since, as already mentioned, the share of its subsidiary New Equant in the market for data services accounts only for [less than 5%]. Moreover, the financial stake of the French operator in the mobile telephony provider Panafon is limited to [less than 5%] of the shareholding capital.

29. In the light of the above, it can be concluded that the present transaction will not lead to the creation or strengthening of a dominant position. From a structural standpoint, the operation does not give rise to any competition concern. The joint venture will be a new entrant in the recently liberalised Greek telecommunications market, with customers having a new choice vis-à-vis the incumbent operator and a few other existing players.

30. The present assessment is without prejudice to any other possible assessment under Article 81 of the EC Treaty, in particular as far as the agreements on the rights of use of the backbone are concerned.

V. CONCLUSION

31. 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

(signed)
Mario MONTI
Member of the Commission