

***Case No COMP/M.2925 -
CHARTERHOUSE / CDC
/ TELEDIFFUSION DE
FRANCE SA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/11/2002

*Also available in the CELEX database
Document No 302M2925*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15/11/2002

SG (2002) D/232676/232677

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.2925 – Charterhouse/CDC/TDF
Notification of 11.10.2002 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 11.10.2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (“Merger Regulation”) by which the undertakings Charterhouse Capital Limited (“CCL”) of the United Kingdom, Caisse des Dépôts et Consignations (“CDC”) of France controlled by the French state and CDC Equity Capital belonging to the group CDC Ixis Private Equity which is part of the CDC group of France, will acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Télédiffusion de France S.A. (“TDF”) of France by way of purchase of shares. TDF is currently wholly owned by France Telecom of France.
2. After examination of the notification, 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 and with the EEA Agreement.

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).

I. THE PARTIES

3. **CCL** is the parent company of a group which provides equity capital and fund management services. The CCL group was formed when Charterhouse Development Capital Holdings Limited, now a subsidiary within the CCL group, was purchased by its management from the HSBC group in June 2001.
4. **CDC** is a special company under French law established under Article L 518-1 of the French financial and monetary code. It is active *inter alia*, in service and support for local development in France including the rollout of broadband networks, saving funds and social housing and, indirectly through subsidiaries, in banking and finance and life insurance. One of the investments controlled by the CCL group and the CDC group is Cegelec. The acquisition of Cegelec by CCL and CDC was the subject of Case No COMP/M.2459 *CDC/Charterhouse/Alstom Contracting*.² Cegelec is a provider of *inter alia*, electrical installations, site and building automation, telecom infrastructures, and facility management.
5. **France Telecom** is the incumbent telecommunications operator in France. It provides a wide range of telecommunications services to residential, professional and large business customers, primarily in France. The principal businesses of the France Telecom group are the provision of public fixed-line voice telephony services, leased lines, data transmission services, mobile telecommunication services, telecommunication equipment sales and rentals, cable television and television broadcasting services and information services. The French State has a majority shareholding (56.35%) in France Telecom.
6. **TDF** provides over-the-air and wireless services to broadcasters and telecom operators and owns and operates terrestrial infrastructure used for the transport of TV, radio and telecom signals. TDF's services include the design, installation, management and maintenance of broadcasting and wireless networks, and the provision of production, post-production and play-out services. In the EEA, its primary focus of activity is in France but it is also active in Spain and Finland. TDF is currently a wholly-owned subsidiary within the France Telecom group.

II. THE OPERATION

7. Following completion of the transaction, TDF will be wholly-owned and controlled by Topco, through its wholly-owned subsidiary Newco. Upon completion of the transaction, CCL will own [30-35]% and CDC will own [25-30]% of the shares and voting rights in TDF. France Telecom, via its wholly-owned subsidiary Cogecom, will retain [35-40]% of the shares and voting rights. France Telecom will therefore be the largest single shareholder in TDF. According to the notifying parties, France Telecom has retained a significant shareholding in TDF because of the legal requirement laid down by paragraph 1 of Article 51 of French Law no. 86-1067 relating to freedom of communication dated 30.09.1986, as amended, which provides that the French State shall hold directly or indirectly, the majority of the share capital of TDF. In combination with State-owned CDC, this requirement is fulfilled.

² Commission decision of 19.06.2001.

8. Pursuant to the clause 2.4.3(a) of the Shareholders' Agreement, all shareholder decisions regarding TDF will require a [...] % majority, except for matters set out in Schedule 7 to the Shareholders' Agreement, which require [...]. No one investor will have more than [...] % of the shares. Therefore, no single shareholder will have control at the Shareholders' meeting (ignoring "Schedule 7 matters"). "Schedule 7 matters" do not amount to strategic commercial veto rights (but simply minority protection rights) and on this basis these rights would not give rise to control.
9. Pursuant to clause 2.1 and 2.2.1 of the Shareholders' Agreement Topco will be managed by a Directorate under the supervision of the Board. The Board will have the power to appoint and remove the members of the Directorate, determine their respective powers and shall supervise the management of the Directorate. Pursuant to clause 2.2.5 of the Shareholders' Agreement, all decisions of the Board will require a majority of at least [...] %. Such decisions include approving the budget of TDF.
10. There will be [...] Board members, appointed as follows: France Telecom – [...]; CDC (including CDC Equity Capital) – [...]; and CCL – [...]. Both CDC group and CCL group will therefore have [...] % of the votes and the ability unilaterally to block a decision of the Board (the remaining board members would only have a combined [...] or [...] % and would therefore be unable to pass Board resolutions on their own).
11. Both of CDC and CCL will therefore be able to block Board decisions relating to TDF (which decisions include the budget). Therefore, the structure of the Board's control of TDF appears to be a [...] joint venture structure, with CDC and CCL capable of exercising such control. Although France Telecom will continue to be able to influence the affairs of TDF, CDC and CCL will have joint control at Board level and therefore joint control of TDF.

III. CONCENTRATION

12. The proposed operation is therefore a concentration within the meaning of Article 3(1) of the Merger Regulation.

IV. COMMUNITY DIMENSION

13. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (CCL: EUR [...] million; CDC: EUR [...] million; TDF EUR 782.39 million). Each of them have a Community-wide turnover in excess of EUR 250 million (CCL: [...] million; CDC: [...] million; TDF: [...] 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.

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.

V. COMPATIBILITY WITH THE COMMON MARKET

Relevant product markets

14. As noted above, CCL and CDC jointly control Cegelec. Since both TDF and Cegelec have activities in site research and acquisition of sites for mobile telephony operators, and site installation and upgrade of mobile telephony sites, the proposed concentration will have an impact on these activities. The proposed operation brings about a vertical relationship between TDF's site hosting activities and Cegelec's installation and upgrade activities upstream. Given CDC's activities in the financing and support of local development in France including the rollout of broadband networks,⁴ the concentration might impact upon the emerging market for wireless broadband infrastructure.

1. Site research and site acquisition for mobile telephony infrastructure

15. The notifying parties identify a single relevant product market for site research and site acquisition. According to the notifying parties, this market consists on one hand, of the identification of suitable sites for the transmission of wireless telephony signals as well as of the provision of a cost estimate and a site study setting out the technical specifications, and on the other hand, of the acquisition of the right to use a site by way of leasing or purchasing agreements. Site acquisition is frequently conducted by construction companies.

16. The issue as to whether the market may be further segmented may be left open since on the basis of all alternative market definitions considered the proposed operation would not lead to the creation or strengthening of a dominant position.

2. Site installation and upgrade of sites for mobile telephony

17. According to the notifying parties, site installation and upgrade of mobile telephony sites comprise one single relevant product market, because both of these activities enable sites to be used for the installation of wireless telephony transmission. Site installation involves civil works such as the erection of towers and antennae; buildings to house equipment and the installation of electricity supplies for wireless telephony transmission sites. An upgrade involves the improvement of these facilities on an existing site.

18. For the purposes of this decision, the issue of whether the market may be segmented into separate markets for installation and upgrade may be left open since on the basis of both alternative market definitions considered the proposed operation would not lead to the creation or strengthening of a dominant position.

3. Site hosting

19. According to the notifying parties, site hosting services consist of the provision of sites and/or space on sites for hosting wireless telecoms and/or communications network equipment used in the transmission of wireless telecoms or over-the-air signals. In the view of the notifying parties, separate relevant product markets for site hosting may be

⁴ Broadband refers to high capacity technology enabling high speed transmission of data.

distinguished according to the type of service hosted (e.g., telephony, broadcasting and broadband).

i. Site hosting for mobile telephony equipment

20. According to the notifying parties, the market for site hosting for mobile telephony equipment includes all kinds of sites on which it is possible to mount telecommunications transmission equipment, e.g., roofs of houses, terraces, bell towers, or water towers. In the view of the notifying parties, the customers for site hosting are mobile telephony operators. The notifying parties consider supply is possible by tower companies, mobile operators and non-telecommunications operators (e.g., highway companies, utilities, and railway companies). Mobile telephony sites may be shared between several operators.
21. Since the telephony equipment generally belongs to the mobile operator, the role played by the site provider is usually limited to providing hosting services. The Commission notes that the French Conseil de la Concurrence (*Avis Nr. 02-A-04 of 11.04.2002* confirmed by the Decision of the French Ministre chargé de l'Economie 26.04.2002), recently defined a relevant product market for site hosting more narrowly than the market definition suggested by the notifying parties. In the *Avis*, the Conseil de la Concurrence determined that the relevant product market comprised only pylons for mobile telecommunications, and excluded, *inter alia*, urban sites on roofs/balconies, water towers and non-specialised locations (e.g., churches and motorways)..
22. However, for the purposes of this decision, the issue of whether the market may be defined more narrowly or widely may be left open since on the basis of both alternative market definitions considered the proposed operation would not lead to the creation or strengthening of a dominant position.

ii. Site hosting for broadband over the air infrastructure

23. According to the notifying parties, there are two alternative ways of introducing broadband access infrastructure to an area without coverage: fibre optic solutions and an over-the-air broadband. Fibre optic solutions are cables laid underground. Over-the-air broadband involves the wireless transmission of signals. This may be done by installing new pylons or by upgrading existing pylons. According to the notifying parties, it is also possible to use a mixed fibre optic/over-the-air solution. The Commission notes that there are technical differences between fibre optic and over-the-air solutions.⁵ According to the notifying parties, TDF is not and does not plan to be active in providing broadband access. TDF could be potentially active in the hosting of sites on which over-the-air broadband antennae may be installed. This may be considered as upstream activity to the provision of broadband access.
24. The Commission's market investigation broadly confirmed the views of the notifying parties. In particular, the responses confirmed that a fibre optic solution is the most economic way of providing broadband access because of its higher capacity. In

⁵ The notifying parties identify for example, the following differences : (i) fibre optic cables have a far higher capacity than over-the air solutions, (ii) fibre optic cables provide substantial long-term possibilities for future expansion; and (iii) fibre optic cable has a longer operational life, and lower maintenance costs.

addition, fibre optic solutions may cause less environmental damage compared with wireless solutions which entail the building of new sites.

25. However, for the purposes of this decision, the issue of whether the market comprises both sites for over-the-air solutions and fibre optic solutions or whether they comprise separate markets may be left open since based on either definition, the proposed operation would not lead to the creation or strengthening of a dominant position.

Relevant geographic markets

26. According to the notifying parties, the relevant geographic market for all to the above-mentioned product markets is France, since the necessary infrastructure must be located in France. In addition, the notifying parties submit that the majority of suppliers are active all over France.
27. The Commission's market investigation broadly confirmed the view of the notifying parties. In addition, the Commission notes that all of these activities are subject to a national regulatory environment. For the purposes of the present decision, the Commission assumes that the relevant geographic market is national.

Competitive assessment

Horizontal overlaps

28. As noted above, on completion of the proposed concentration TDF and Cegelec will be under the common control of CDC and CCL. The proposed transaction therefore gives rise to some limited horizontal overlaps.

Site research and site acquisition for mobile telephony infrastructure

29. According to the 2001 value estimates of the notifying parties, the combined market share of TDF⁶ and Cegelec was [5-10]%. Competitors in these segments have higher market shares for the same period than the combined entity; for example: GTIE/Graniou has [20-30]%, Tibco has [15-20]%, ITA-Telecom has [15-20]% and SPIE has [10-15]%. Therefore, the horizontal overlap does not give rise to any competition concerns.

Site installation and upgrade of sites for mobile telephony

30. For 2001, the combined value market share of TDF and Cegelec was an estimated [0-5]%. The integration of TDF increases Cegelec's market share by less than [0-5]%. Therefore, this horizontal overlap does not give rise to any competition concerns.

Vertical links

31. The proposed operation brings about a vertical relationship between TDF's site hosting activities and Cegelec's activities in site research and acquisition as well as in site installation and upgrade.
32. As shown above, the combined market shares of TDF and Cegelec on the upstream segments for site research and acquisition as well as site installation and upgrade are

⁶ Including supplies to Orange Telecom, a wholly-owned subsidiary of France Telecom.

respectively [5-10]% and [0-5]%. According to the broad market definition proposed by the notifying parties for the provision of pylon sites for hosting mobile telephony equipment, TDF's 2001 value market share was [10-15]%. On the basis of the market definition of the *Avis* of the Conseil de la Concurrence comprising only pylons for mobile telecommunications, TDF's 2001 market share was an estimated [60-70]% (including Bouygues Telecom sites acquired in 2001). However, given that the combined shares of TDF and Cegelec on the upstream segments for site research and acquisition as well as site installation and upgrade are so minimal, there is no risk of foreclosure on these upstream segments.

33. One of CDC's public missions under the mandate of the French State is the financing of the development of broadband infrastructure in France. According to the notifying parties, this task foresees extension of broadband access to 25% of the population of France, in particular in rural areas. On account of the low population density in rural areas, private operators do not have sufficient incentives to invest in broadband infrastructure in these areas. In July 2001, the French government provided a mandate to CDC to invest €230 million of its own funds over a five year period and to provide loans to CTs at preferential rates up to a total of €1,500 million, known as the "CIADT" initiative.
34. As confirmed by the Commission's market investigation, broadband solutions may be developed using fibre optic, over-the-air solutions or mixed solutions. According to the notifying parties, TDF is not active in any of these areas. However, given TDF's existing network it could be a potential entrant to the segments for over-the-air or mixed broadband solutions or for the hosting of the corresponding sites.
35. Some third parties commented that TDF or Cegelec might obtain a competitive advantage over rivals owing to CDC's access to information and involvement in funding projects of the CTs. The allegation was that CDC, through participation in various phases of the projects of the CTs, would (i) obtain advance disclosure of information relevant to forthcoming CT projects which it would pass to TDF or Cegelec in order to prepare bids for such projects; and (ii) could influence decisions of the CTs to select TDF or Cegelec as the preferred contractor for deployment of such projects.
36. At the date of notification, forty-two CIADT projects had reached the feasibility study (i.e., during which a consultant will recommend a technical solution) phase and only five projects had reached the deployment phase (i.e., implementation of the project). Of these forty-two projects, only one adopted an over-the-air broadband solution and one a mixed solution. The Commission's investigation revealed that, in the case of the latter the broadband element was marginal. According to the notifying parties, all forty-two projects are likely to fulfil the public procurement thresholds pursuant to French law (i.e., EUR 90,000).
37. According to the notifying parties, TDF is not involved in site hosting for broadband access and is unlikely to enter the fibre optics market. Therefore TDF's involvement in broadband access could only relate to over-the-air broadband. The Commission's investigation confirmed that the CTs, did not consider it likely that CDC would be able to influence their decision as to choice of contractor nor that CDC could make provision of funding conditional upon selection of TDF.
38. Even assuming that CDC could influence the award of sub-contracts in favour of TDF and Cegelec, it appears that the impact of such behaviour could only be extremely

limited. According to the notifying parties, over-the-air broadband will only be used in mountainous areas where it is difficult and expensive to lay cable and in remote rural regions where the population density is too low to justify the high investment in a fibre optic solution. Even on the assumption that each *departement* in question will use TDF's existing sites, the impact in terms of market value will be *de minimis*.⁷ Even if the CTs select the existing sites of TDF for over-the-air broadband access, the concentration will not prevent competitors of TDF from operating their sites. TDF's competitors will still be able to offer other services such as radio, and the emergent digital terrestrial television ("DTT") and digital radio ("DAB") services to inter alia, mobile operators, broadcasters and CTs. In addition, even if they are unsuccessful bidders for any of the CIADT projects, the Commission has no indication that the concentration will prevent them from participating in future tenders. On this basis, the Commission concludes that no significant, if any, foreclosure effect will arise.

39. Some third party comments alleged that the acquisition of control by CDC and CCL is likely to facilitate TDF's access to capital funding. They claim that TDF would use this funding to upgrade its infrastructure and to improve the quality of the services it offers. In this way it is argued TDF would strengthen its allegedly dominant positions in several markets. Moreover, TDF would be able to finance more easily its entry into the markets for the provision of DTT broadcasting network services and broadband network services and thereby extend its position to these markets. The Commission has assessed the impact of the proposed concentration on TDF's financial situation.
40. The Commission notes that it cannot be excluded that TDF's financial situation might improve as a result of its integration with the triple-A credit rated CDC. However, at least as far as the present case is concerned, financial strength could only contribute, in combination with other elements, to the creation or strengthening of a dominant position as a result of which competition will be significantly impeded. As outlined above, the horizontal and vertical effects of the concentration are not indicative of any creation or strengthening of a dominant position. Therefore, even if TDF's financial situation were to be improved following the change of control, there are no indications that it could lead to the creation or strengthening of a dominant position on any existing or emerging market.

VI. CONCLUSION

41. 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.

⁷ The notifying parties estimate that for the next three years, 10 out of the 50 mountainous *departements* in France, will engage in projects which to some extent, involve over-the-air technology, each requiring 10 sites. On the assumption that each *departement* uses TDF's existing sites at an average rental cost of EUR [...] p.a. and assuming that TDF's market share is [...], TDF's revenue from this activity for three years would be EUR [...]. Assuming TDF were to hold a [...] market share [...] TDF's revenue would not exceed EUR [...]. Of the [...] existing CIADT projects to date, only two have involved partial over-the-air solutions. TDF has not been involved in either project. Assuming the same incidence of over-the-air broadband solutions for the three remaining years of the CIADT programme and assuming that TDF will be involved in such projects, its revenue would be [...].

For the Commission