

***Case No COMP/M.3355 -
APOLLO / JP MORGAN /
PRIMACOM***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 15/06/2004

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15/06/2004

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

**Subject: Case No COMP/M.3355 – Apollo/JP Morgan/PrimaCom
Notification of 07/05/2004**

1. On 7 May 2004, the Commission received a notification by which the undertaking Apollo Investment Fund V L.P, Apollo Management V L.P. (both together "Apollo", USA, and J.P. Morgan Chase & Co. ("JP Morgan", USA) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of PrimaCom Management GmbH ("PrimaCom", Germany) by way of purchase of shares.

I. THE PARTIES

2. PrimaCom operates a cable network for the transmission of broadcasting signals and partly for the provision of internet services on the German market as well as to a minor extent on the Dutch market. While being active on the local level providing end costumers with broadcasting signals (so-called cable network level ("NL") 4) in West Germany, PrimaCom's main focus is in East Germany. In Leipzig, PrimaCom operates a big, state-of-the-art cable head-end from which customers in that area are served. 828,000 households are served by PrimaCom, out of which [...] are located in Hessen. Out of these, 573,000 households (including [...] in Hessen) are supplied independently from a NL3 provider, i.e. with signals captured by the cable head-end in Leipzig or by other cable head-ends operated by PrimaCom. Insofar, it acts as an integrated NL 3/NL 4 operator. The most important minority shareholder of PrimaCom (24.9%) is United Pan-

Europe Communications N.V., ("UPC", The Netherlands). The parties submit that PrimaCom is not controlled by UPC.

3. Apollo is a private equity investment group that controls the cable TV network operator iesy Hessen GmbH & Co. KG ("iesy"), which operates the former Deutsche Telekom AG ("DTAG") broadband network on the NL 3 and partly also on NL 4 in Hessen. Iesy provides TV transmission services via cable to approximately [...] end-customer homes in Hessen, which are either directly served by iesy's NL 3 or via an integrated NL 3/NL 4 network. Apollo has agreed to sell its shares in iesy to Kabel Deutschland GmbH. This concentration has been notified to the Bundeskartellamt on 20 April 2004.
4. JP Morgan is a global financial services firm [...].

II. THE OPERATION

5. Through the notified operation, JP Morgan acquires 40% of the shares of BK Breitband Kabelnetz GmbH ("BK Breitband"), a company newly established by Apollo. [...] The acquiring Parties will acquire substantially all of the assets [...] in exchange for [...]. According to a Stockholders Agreement entered into by Apollo and JP Morgan, these two parties will jointly control BK Breitband and thus indirectly PrimaCom. The transaction consequently leads to the establishment of joint control by Apollo and JP Morgan over PrimaCom. Other creditors may acquire non-controlling interests in BK Breitband.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (EUR [...] million for Apollo, [...] million EUR for JP Morgan and EUR [...] million for PrimaCom). Both Apollo and JP Morgan have a Community-wide turnover in excess of EUR 250 million. [...] The notified operation therefore has a Community dimension.

IV. RELEVANT MARKETS

7. Since the sale of iesy to KDG is not yet completed, the Commission based its analysis on the presently existing ownership of iesy by Apollo. In consequence, the present transaction concerns (a) the market for transmission of broadcasting signals, (b) the market for the provision of TV and radio signals to NL 4 operators ("signal delivery market"), and (c) the market for the provision of TV and radio signals to end customers ("end customer market"). To a minor degree, the market for broadband Internet access and markets for TV content can be considered as concerned markets.
8. Because of the historical development of the structure of cable distribution, there are four levels of supply network in Germany. Level 1 corresponds to the studio installations and is owned and operated by the broadcasting stations. Level 2 is the backbone network including the cable head-end. Level 3 corresponds to the cables running from the cable head-end to the boundary of a given plot of land. Level 4 is the network infrastructure between such boundary and the junction boxes of TV households. It involves the in-house wiring and the cable connecting various households on one real estate, for example in an apartment building.

9. NL 3 operators capture the signals from satellites on cable head-ends and transmit them over their networks. For these transmission services, the bigger NL 3 operators, which operate the former DT broadband cable network (including iesy) receive a "feeding-in fee"¹ from the broadcasters. The signals are provided - in exchange of a "signal delivery fee" - to NL 4 operators (which in turn transmit the signals to end customers), and to end customers (housing associations or households directly connected to their network). This leads to the definition of the following relevant markets:

Transmission markets

10. On the demand side of this market, broadcasters, i.e. public and private broadcasters, including Pay-TV stations, demand the transmission of their signals in order to reach as many end customers as possible. Cable operators, and possibly also direct-to-home satellite operators and the operators of terrestrial transmission networks act as suppliers. The parties are of the view that there is one overall transmission market which encompasses in particular transmission by cable, direct-to-home (DTH) satellite and (digital) terrestrial transmission. In previous decisions, the Commission has taken the view that, at least in Germany, the transmission via cable constitutes a separate market². In more recent decisions³, the question has been left open. The question of the correct definition of the product market does not need to be decided in the present case, given that the concentration does not raise competition concerns even if the market is restricted to the transmission via cable. If a separate market for the transmission via cable is defined, this market would be defined geographically in such a way that each cable network constitutes a separate geographic market, given that those customers who are connected to a specific network can only be reached through that network. The situation is similar to that on termination markets in other areas of telecommunications, where single network markets are defined, having regard to the fact that users connected to a particular network can only be reached through that network. In order to attract the advertising industry to place commercials in their programs, a maximum scope of customers has to be covered by the broadcasters. The same is true for Pay-TV broadcasters, and for public broadcasters, which depend on a maximum technical reach in order to fulfil their public mandate in an optimal way. This corresponds to the view that the regional networks are complementary to each other. Broadcasters require transmission through every single network without being able to substitute one for the other. This results in the narrowest possible market definition. If other transmission modes were to be considered as belonging to the same product market, the relevant market would probably be national in scope as the operators of satellite and terrestrial networks operate nation-wide. Such a market definition would be based on the view that different networks can be seen as substitutes. However, a decision does not need to be taken in this procedure, as no competition concerns arise even on the basis of a narrow market definition.

Signal delivery market

¹ « Einspeiseentgelt »

² See in particular Decision of 27/05/1998 in the Case M.1027 – Deutsche Telekom Beta Research, par. 20.

³ Cf. referral decision in the Case M.3271 – KDG/ish, par. 14.

11. On this market, NL 3 cable operators supply NL 4 cable operators with broadcasting signals. NL 4 operators regularly have to connect to their regional NL 3 network to receive signals. They can, however, vertically integrate by building up own head-ends to receive the TV and radio signals directly over satellite instead of using the NL 3 network of the relevant regional operator provided that their number of customers reaches a critical mass. From a geographical point of view, the market is regional, covering the scope of the relevant network. In the present case, the relevant market encompasses Hessen, given that iesy's network covers the whole of that region. To a certain extent, an NL 3 operator can deliver signals to an NL 4 operator located outside the scope of its network. However, the construction of a transmission line would be necessary to that effect, and the delivery of broadcasting signals over a long distance is not economically viable. However, an exact definition of the geographic market is not necessary in this case, given that the concentration does not give raise to competition concerns on this market even on the assumption of the narrowest possible market definition, i.e. on the basis of a geographical market definition covering Hessen only.

End customer market

12. On the end customer market, NL 4 operators (including NL 3 operators acting as integrated NL 3/NL 4 operators deliver signals to end customers, who can be individual customers or housing associations acting for their tenants. With regard to the delivery of signals to housing associations, the companies compete for "permission contracts"⁴ with these housing associations. These contracts usually have a duration of 10 - 15 years⁵. Competitors are (1) the NL 3 operator itself, (2) NL 4 operators which receive the signals from the regional NL 3 cable operator, and (3) other cable operators which have or build their own cable head-ends. According to the parties, DTH satellite transmission and digital terrestrial television belong to the same market. Here, again, a final decision is not necessary, as the concentration does not lead to competition concerns even if based on a narrow, "cable-only", market definition. With regard to the geographical market definition, for the purposes of this decision, the market analysis is based on an assumed regional market encompassing Hessen, given that iesy is not active outside this area. The only market definition under which the merger could possibly lead to the creation or strengthening of a dominant position is the regional one. As will be shown, even then no competition concerns arise from the merger. On the basis of a wider market definition, iesy's market position would be less important, and competition concerns could be excluded *a fortiori*.

⁴ « Gestattungsverträge »

⁵ To take into account the depreciation period for the building of the in-house network and the connection of this in-house network to the network of the cable operator.

V. COMPETITIVE ASSESSMENT

Transmission markets

13. On the assumption of a narrow market definition that restricts the relevant market to the respective network⁶, iesy would enjoy a dominant position already before the merger. The market share would be 100% by definition, corresponding to [...] households in Hessen. Similarly, PrimaCom would achieve a market share of 100% on different geographic markets (corresponding to [...] households), located principally in Eastern Germany, especially around Leipzig, where PrimaCom operates its main cable head-end. However, PrimaCom does not have feed-in agreements with any major broadcasters, but only with some smaller providers and receives feeding-in fees only from these smaller providers. The market power balance between cable network operator and broadcaster depends on several factors, including legislation on must-carry rules, the interest of the programmes offered for the customers, and the number of households connected to the network. This explains that PrimaCom, as a smaller network, [...], whereas iesy, as a bigger network operator and part of the former DT network, [...]. It cannot be said, however, that the additional reach due to the combination with PrimaCom's network is such that it would result in a significant strengthening of the already existing dominant position of iesy or another impediment of effective competition. The same applies *a fortiori* if a wider market that includes other modes of transmission is defined.
14. The concentration can only lead to overlaps if a nation-wide market is defined. Under the assumption of such a national transmission market, in line with the parties' position, there would be an overlap between iesy's activities in Hessen and PrimaCom's activities (primarily) in Eastern Germany. However, under such an assumption, other network operators, including Kabel Deutschland GmbH ("KDG"), which operates cable networks in 13 German *Bundesländer*, would have to be considered as competitors, and a dominant position after the merger (or any other form of significant impediment to effective competition) would have to be excluded; the combined market share would be well below 10%. Around 20.6 million households receive cable TV in Germany. On the basis of [...] million households served by iesy, and [...] million households served by PrimaCom, this would lead to a market share of [5-10]%. The most important player on this market would be by far Kabel Deutschland GmbH with a market share of well over 40%. If the market share is calculated on revenue basis, the combined market share would be even smaller, given that, as mentioned above, PrimaCom does not receive feeding-in fees from any of the major broadcasters. If other transmission modes (DTH satellite and terrestrial transmission) are included into the market, the market volume would consist of 36.8 million German TV households, and the market share would be around [0-5]%.

Signal delivery market

15. The merger will not lead to overlaps on the signal delivery market. In Hessen, iesy is the only supplier. It supplies signals to NL 4 operators for around [...] households, including [...] households where PrimaCom is the NL 4 operator. With respect to these [...] customers who receive their signals from iesy as NL 3 operator and PrimaCom as NL 4

⁶ See above par. 10.

operator, the concentration leads to a vertical integration and insofar to a reduction of the market volume. PrimaCom does not provide TV or radio signals to NL 4 operators but only provides own end customers with signals obtained from an own head-end. The merger does therefore not lead to a reduction in the number of possible suppliers to NL 4 operators. Consequently, it cannot be expected that the merger will change iesy's position in the affected market.

End customer market

16. In Hessen, 1.354 million households receive cable TV, [...] million of which are directly or indirectly supplied over iesy's NL 3 network. Iesy has direct customer relations to [...] households in this area. PrimaCom delivers TV signals to [...] customers in Hessen. [...] of them are connected to PrimaCom's own head-end; the other [...] receive, as mentioned above, signals from iesy as a NL 3 operator via PrimaCom's NL 4 network. In the end customer market, PrimaCom obtains accordingly a "market share" of [0-5]%, with iesy being the clear market leader with [40-45]% and Bosch, EWT and TeleColumbus following with market shares between 4% and 6% each. The rest (35%) is highly fragmented and consists of small local NL 4 operators or housing associations.
17. Iesy's position in the end customer market in Hessen will not be significantly affected by the merger. Insofar as PrimaCom acts as a mere NL 4 operator (i.e. with respect to the [...] households that are served by PrimaCom with signals from iesy), the concentration will only have minor effects. The merger will have no effects for the residual validity period of the permission contracts with the housing associations. After the expiry of the permission contracts with the housing associations, the regional NL3 operator (i.e. iesy) and the NL 4 operators active in that region compete for the new permission contract. PrimaCom is only one of several similarly small competitors to iesy in Hessen. It moreover suffers from severe financial problems and does in consequence not impose a significant constraint on iesy. The same conclusion applies with regard to PrimaCom's position as an integrated NL 3/NL 4 operator. In Hessen, only [...] households (around [0-2]% of all cable households in Hessen) are connected to such an integrated network of PrimaCom. Consequently, the competitive constraint stemming from PrimaCom as an integrated network operator in Hessen is negligible.
18. With respect to PrimaCom's activities in other German regions than Hessen, i.e. East Germany including the Berlin area where the bulk of PrimaCom's activities are located, the concentration will not lead to negative consequences, as the acquirer is not active here as a cable operator. On the contrary, the concentration will provide PrimaCom with the necessary financial strength to compete against the incumbent NL 3 operator in those areas, Kabel Deutschland GmbH ("KDG"). In the Netherlands, no negative competitive effects are to be expected, as the acquirer is not active there.

Other markets

19. Other markets are not affected to a significant degree by the notified transaction. This is true for the markets for broadband Internet access and for the markets for TV content. With respect to the market for Internet access, both iesy's and PrimaCom's presence on the market are de minimis; the strong market position of Deutsche Telekom with its DSL product (market share of 92% according to the parties) remains unaffected. The same is true for the market for broadcast content: Apollo/iesy does not procure such rights, and

PrimaCom does so only to a very limited extent (and for use in East Germany, i.e. in regions where iese is not active). In any case, the public and private broadcasters have a much stronger position on the demand side of this market than PrimaCom.

VI. CONCLUSION

20. 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 139/2004.

For the Commission,
(signed) Mario Monti
Member of the Commission