

***Case No COMP/M.3764 -
BELGACOM /
SWISSCOM / JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 19/05/2005

***In electronic form on the EUR-Lex website under document
number 32005M3764***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19/05/2005

SG-Greffe(2005) D/202179

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.3764 – Belgacom / Swisscom / JV
Notification of 08.04.2005 pursuant to Article 4 of Council Regulation No 139/2004¹

1. On 08.04.2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (“the Merger Regulation”) by which the undertaking Swisscom Fixnet Ltd (“Swisscom”, Switzerland) acquires joint control of Belgacom International Carrier Services S.A. (“BICS”, Belgium) currently solely controlled by Belgacom S.A. (“Belgacom”, Belgium).

I. THE PARTIES

2. Belgacom is the incumbent telecommunications operator in Belgium where it provides a full range of telecommunications services, including wholesale and retail services, fixed and mobile telecommunications, voice and data services and Internet access. Belgacom is controlled by the Belgian State which owns 50% of its share capital.
3. Swisscom is the incumbent telecommunications operator in Switzerland where it provides a full range of telecommunications services, including wholesale and retail, fixed and mobile telecommunications, voice and data services and Internet access. Swisscom is controlled by the Swiss Confederation which owns 62.7% of its share capital.
4. BICS (also referred to as “the Joint Venture” hereafter) is a Belgian company created in 2005 through a spin-off of all Belgacom’s existing international telecommunications

¹ OJ L 24, 29.1.2004 p. 1.

carrier services activities and related assets. Prior to the proposed operation, BICS is a wholly-owned subsidiary of Belgacom.

II. THE OPERATION

5. Pursuant to a Subscription and Joint Venture Agreement signed on 22.02.2005, Belgacom and Swisscom have agreed that Swisscom will contribute all of its international telecommunications carrier services activities and related assets to BICS and will obtain in return 28% of the shares of the latter, Belgacom owning the remaining 72%.
6. Notwithstanding the unequal stakes of the parent companies, BICS will be jointly controlled by Belgacom and Swisscom. Indeed, under the Joint Venture Agreement, Swisscom will have veto rights relating to BICS' strategic decisions, including the approval of annual budget, business plan and major investments. As a result of the veto rights granted to Swisscom, Belgacom alone will not be in a position to determine the strategic commercial behaviour of BICS.
7. BICS will also be a full function joint venture as it will perform on a lasting basis all the functions normally performed by an autonomous economic entity. In particular, BICS will have its own dedicated management and staff as well as sufficient resources to carry out its business activities. In that respect, it should be outlined that BICS will control the international network facilities needed to carry out its business, including the so-called Points of Presence (PoPs). It is also worth mentioning that the Joint Venture Agreement states that a condition precedent for the closing of the proposed transaction is that "a fully operational billing system has been put in place", so that BICS is able to bill its customers. Finally, BICS' business plan foresees that it will only achieve a limited proportion of its turnover with its parent companies ([...] % in 2005, decreasing to [...] % in 2009).

III. CONCENTRATION

8. On the basis of the foregoing, the proposed transaction by which Swisscom acquires joint control over BICS constitutes a concentration within the meaning of Article 3(2) of the Merger Regulation.

IV. COMMUNITY DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion² (Belgacom: EUR 5.5 billion and Swisscom: EUR 7.7 billion). Each of Belgacom and Swisscom has a Community-wide turnover in excess of EUR 250 million (Belgacom: EUR [...] and Swisscom: EUR [...]), 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.

² 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).

V. COMPETITIVE ASSESSMENT

A. Relevant markets

A.1 Product markets

10. As indicated above, BICS will be active in the provision of international telecommunications carrier services. The Joint Venture Agreement stipulates that BICS will only provide these services to telecommunications operators and other service providers (such as notably mobile operators and incumbent and alternative fixed telecommunications operators) with the exclusion of end-users (such as MNCs for instance). Equally, the Joint Venture Agreement stipulates that BICS will only provide carrier services for international telecommunications with the exclusion of domestic calls and end-users connections. Thus BICS' scope of activities will be limited to the provision of international wholesale carrier telecommunications services.
11. According to the notifying parties, wholesale international telecommunications carrier services cover the provision of the following services on a wholesale basis :
 - International voice services (e.g. termination of voice traffic, reversed charge voice termination);
 - International wholesale data communication (e.g. telex and telepac billing services);
 - International wholesale capacity services (extended leased lines and international leased lines);
 - International managed data services (international Frame Relay, international ATM, etc.);
 - International wholesale mobile data products (International Signalling service, SMS-interworking, MMS-interworking, etc.).
12. The notifying parties are of the opinion that all international wholesale carrier services described above belong to one single relevant product market and that they should not be looked at on an individual basis. In this respect, the notifying parties rely on the finding of the Commission in case IV/35.617 – Phoenix / GlobalOne where it held: “Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer an array of services” (point 10)³.
13. The provision of the afore-mentioned international wholesale carrier services corresponds to “the market for carriers’ carrier services”. In previous Commission decisions⁴, this market has been defined as “comprising the lease of transmission capacity and the provision of related services to third-party telecommunications carriers and other services providers, with the most relevant of such services being

³ See also Commission Decisions in cases IV/JV.15 – BT/AT&T (points 75-76) and IV/M.1069 – WorldCom/MCI (point 15).

⁴ See in particular Commission Decision in case IV/JV.15 – BT / AT&T (point 75).

switched transit, traffic hubbing offerings and reseller services for service providers without their own international facilities”.

14. However, in previous decisions⁵, the Commission left open the possibility to breakdown the broad carriers’ carrier services market into several relevant product markets on the basis of each type of services provided. In particular, the Commission has identified a separate product market consisting in the provision of international voice carrier services on a country pair route, namely the UK/US route⁶. The rationale for such a separate market is that provision of direct voice carrier services could be looked at in terms of country pairs as services on a given route would not be substitutable with direct services provided on any other country pair route.
15. Therefore, the notifying parties have submitted a segmentation of the international wholesale carrier services market into three more narrowly defined markets: (i) the market for international wholesale voice services, (ii) the market for international switched data communication services, and (iii) the market for wholesale transmission capacity.
16. As regards the separate market for international wholesale voice carrier services, the notifying parties submit that due to technological evolutions subsequent to the Commission decisions where such a separate market for international voice telephony services was identified, direct (i.e. on a country pair)⁷ and indirect (via one or several third countries)⁸ international wholesale voice carrier services⁹ are becoming increasingly substitutable from a consumers’ perspective and that the use of an indirect route would not be more expensive than a direct route.
17. In any event, for the purposes of the present case, the question of whether it exists within the broad carriers’ carrier services market a distinct sub-market for the provision of wholesale voice carrier services on any country pair route can be left open as, under any conceivable market definitions, the proposed transaction does not raise any competition concerns. The same conclusion applies for any possible sub-markets resulting from the breakdown of the carriers’ carrier services market as proposed by the notifying parties.
18. Finally, in previous decisions¹⁰, the Commission also identified a separate market for the provision of wholesale top-level (or universal) Internet connectivity services. The notifying party does not discuss the existence of a distinct market for the provision of such services. In any event, Swisscom will not contribute its wholesale Internet connectivity business to BICS.

⁵ See in particular Commission Decision in case IV/JV.15 – BT / AT&T (point 88).

⁶ See in particular Commission Decisions in cases IV/JV.15 – BT / AT&T (point 84) and IV/M.856 - BT /MCI (II) (point 19).

⁷ Direct carrier telecommunications services include accounting rate system and International Simple Resale.

⁸ Indirect telecommunications carrier services include switched transit, dedicated transit, hubbing and re-origination services.

⁹ As explained above, BICS will only provide wholesale carrier services to other telecommunications providers with the exclusion of any retail services. Therefore, for the purposes of the present case, it is not necessary to take a position on the existence of separate markets for the provision of retail and wholesale voice carrier services.

¹⁰ See in particular Commission Decisions in cases IV/M.1068 - WorldCom/MCI and COMP/M.1741 – MCI WorldCom/ Sprint

A.2 Geographic markets

19. In line with previous Commission decisions¹¹, the notifying parties contend that the market for international wholesale telecommunications carrier services (i.e. the market for carriers' carrier services) and the other hypothetical markets resulting from the breakdown of this broad market (with the exception of the market for international voice carrier services – see below) are at least European-wide. For the purposes of the present operation, the question whether the market for international wholesale telecommunications carrier services or the other hypothetical markets resulting from the breakdown of this broad market are European-wide or wider can be left open as in both cases the proposed transaction does not raise any competition concerns
20. As for the separate market of international wholesale voice carrier services, the Commission held in previous decisions that: “two distinct geographic markets can be identified within any international route each comprised of the originating bilateral traffic from the countries concerned”¹². Since the parent companies of BICS only hold significant positions with respect to the inbound and outbound traffic from their respective home countries, the only country pair on which the proposed transaction might have an impact on competition is the Belgium-Switzerland route. Given that Switzerland is not member of the EEA, the Commission has no jurisdiction to assess the impact of the transaction in that country. However, that does not preclude the possibility for the Commission to assess the effects on competition of the proposed operation on: (i) outgoing traffic from Belgium to Switzerland and (ii) incoming traffic to Belgium from Switzerland, which both constitute potential relevant geographic markets.
21. Finally, in line with previous Commission decisions¹³, the notifying parties are of the opinion that the market for top-level Internet connectivity services is at least European-wide. For the purposes of the present operation, the question whether the market for top-level Internet connectivity is European-wide or wider can be left open as in both cases the proposed transaction does not raise any competition concerns

B. Competitive effects

B.1 Horizontal effects

22. Following the proposed transaction, BICS' share of the market for international wholesale telecommunications carrier services will remain below 15% at both European and world levels. The same applies for any possible sub-markets resulting from the segmentation of this broad market (with the exception of the hypothetical market for international wholesale voice carrier services on the Belgium/Switzerland route – see below).
23. On a hypothetical separate market for international wholesale voice carrier services on the Belgium/Switzerland route, BICS will hold following the proposed transaction a market share of [35-55]% for outgoing traffic from Belgium to Switzerland and [60-80]% for incoming traffic to Belgium from Switzerland. The proposed transaction

¹¹ See in particular Commission Decision in case IV/JV.15 – BT/AT&T (point 90).

¹² See in particular Commission Decisions in cases IV/JV.15 – BT/AT&T (point 92) and IV/M.856 - BT/MCI (II) (point 19).

¹³ See Commission Decision in case COMP/M.2648 – KPNQwest/Ebone/GTS (points 22-23).

does not lead to any accretion of market shares as far as incoming traffic to Belgium from Switzerland is concerned, and to only a minimal accretion of [0-10]% as far as outgoing traffic from Belgium to Switzerland is concerned. Indeed, BICS already handles all the traffic collected in Switzerland by Swisscom with a final destination in Belgium, whereas the traffic collected in Belgium by Swisscom with a final destination in Switzerland is only de minimis (roughly [...] minutes in 2004, as opposed to a total annual volume of voice traffic from Belgium to Switzerland amounting to [...] million minutes).

B.2 Vertical effects

24. As noted above, the proposed transaction will result in Swisscom contributing its international wholesale telecommunications carrier services business to BICS (prior to the proposed transaction, Belgacom already contributed its own international wholesale telecommunications carrier services activity to BICS). Both Swisscom and Belgacom will continue to operate their other respective lines of business in the fixed and mobile telephony and Internet retail access services.
25. Both parent companies will be customers of BICS' services in the course of their own businesses. The Joint Venture Agreement stipulates that BICS will provide its services to its parent companies at arm's length. It is also foreseen that BICS will be granted a volume commitment for certain categories of services and a right of last offer for certain other types of services from its parent companies. However, the proposed transaction will not result in any strengthening of BICS' position to such an extent that competition will be significantly impeded on any relevant market for the following reasons. First, prior to the proposed transaction both Belgacom and Swisscom were supplied by BICS or by the business that will be contributed to BICS in the case of Swisscom for a large proportion of their purchases of international wholesale telecommunications carrier services. Second, as indicated above, following the notified transaction, BICS will have only a limited share of the market for international wholesale telecommunications carrier services at both European and world levels (or any possible segmentation of this market, with the exception of the Belgium/Switzerland route). Third, as regards the Belgium/Switzerland route, there is no, or limited accretion of market shares (see above).
26. The Joint Venture Agreement also provides that Belgacom and Swisscom will be granted a most favoured nation clause from BICS. In light of the fact that BICS will only hold a limited share of the market for international wholesale telecommunications services (or of any possible sub-markets thereof, with the exception of the Belgium/Switzerland route), there is no risk that such a clause will result in any foreclosure effect. As regards the Belgium/Switzerland route, according to an independent consultancy firm (TeleGeography) there are in 2005 at least 19 operators¹⁴ that provide telecommunications carrier services to and from Brussels, so that there is no risk of foreclosure effect either.
27. In the course of the Commission's investigation, a third party submitted that the proposed transaction will result in the strengthening of BICS' already dominant position on the "market for transit of international incoming calls to Belgium". This hypothetical market would include the provision of transit services for internationally

¹⁴ Global Crossing, Telia-Sonera, Interoute, Colt, Infonet, France Télécom/Equant, Deutsche Telekom, KPN, BT, Telecom Italia, Telefonica, Cogent, AT&T, Sprint, Level 3, C&W, TDC, Tiscali and Versatel.

originated telecommunication traffic that terminates in Belgium. According to the submission, the additional traffic that Swisscom will bring to Belgacom is not de minimis and will therefore have a material impact on that market. Furthermore, the third party contends that the notified operation will increase Belgacom's ability and incentives to leverage its dominant position on the market for transit of international incoming calls to Belgium into the market for termination calls on mobile networks in Belgium. Indeed, the strengthening of BICS on the former market will give Belgacom additional means to impose on alternative mobile operators in Belgium unreasonable low termination rates for internationally originated calls.

28. Regardless of whether there exists a relevant market for transit of international incoming calls to Belgium, the Commission's investigation has revealed that the allegations set forth in the submission were unfounded for the following reasons. First, it should be outlined that in 2004 international incoming traffic to Belgium collected by Swisscom amounted to [...] million minutes. Given that the total international incoming traffic to Belgium for that same year can be estimated to amount to [...] billion minutes, Swisscom's traffic represents less than [0-10]% of the total international incoming traffic to Belgium. Second, prior to the proposed transaction at least [...] % of Swisscom's international incoming traffic to Belgium is already directly or indirectly handled by BICS¹⁵. Thus, additional international traffic that Swisscom will bring to BICS represents less than [0-10]% of the total international incoming traffic to Belgium. The proposed transaction will therefore not strengthen BICS' position on the hypothetical market for international incoming telecommunication traffic to Belgium to such an extent that it will have a material impact on competition. Consequently, Belgacom's ability and incentives to leverage its strong position on that hypothetical market into the market for termination calls on mobile networks in Belgium will remain unchanged following the notified concentration.

B.3 Co-operative effects

29. As mentioned above, upon completion of the proposed transaction both Swisscom and Belgacom will have exited the market for the provision of international wholesale telecommunications services, but will remain providers of domestic wholesale and retail, fixed and mobile telephony services and Internet access retail services, mostly in their respective home country. In addition, Swisscom will not contribute its wholesale Internet connectivity business to BICS.
30. Given that Swisscom's and Belgacom's respective telephony and Internet retail access businesses do not overlap to a significant extent in Belgium and Switzerland or any other EEA Member State, the proposed transaction will not strengthen Belgacom's and/or Swisscom's incentives to coordinate their competitive behaviour. For the same reasons, it can be inferred that BICS and Swisscom will not have incentives to coordinate their competitive behaviour as regards wholesale Internet connectivity. In any case, on this latter market, BICS' and Swisscom's respective shares are only minimal (less than [0-10]% and [0-10]% at the European level respectively).

¹⁵ [...] million minutes of Swisscom's direct traffic from Switzerland to Belgium is directly handed over by Swisscom to BICS in application of accounting rate system. As regards the [...] million minutes of Swisscom's international traffic that terminates in Belgium but that is not originated in Switzerland, it is handed over to carrier services providers other than BICS, but it is likely that a significant part of it is ultimately carried into Belgium by BICS as a result of agreements between BICS and these other carrier services providers.

VI. 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 the EEA agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission

signed

Neelie KROES

Member of the Commission