

***Case No COMP/M.4417 -
TELECOM ITALIA /
AOL GERMAN ACCESS
BUSINESS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 28/11/2006

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.11.2006

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sir/Madam,

**Subject: Case No COMP/M.4417 - Telecom Italia / AOL
Notification of 20 October 2006 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 20 October 2006, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (“Merger Regulation”), by which Telecom Italia S.p.A. (“Telecom Italia”, Italy) acquires, within the meaning of Article 3(1)(b) of the Council Regulation, sole control of AOL’s internet access business in Germany (“AOL German Access Business”) by way of purchase of shares.
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 the EEA Agreement.

I. THE PARTIES

3. Telecom Italia is the parent company of the Telecom Italia Group, which is active in Italy and in the rest of the world in the telecommunications sector, and in particular voice telephony, mobile services and data transmission services (including dedicated

¹ OJ L 24, 29.1.2004 p. 1.

transmission capacity and access to internet network, as well as satellite communication services). In Germany, Telecom Italia carries out its activities in the telecommunications sector, and in particular in residential broadband access and voice telephony through its wholly owned subsidiary HanseNet Telekommunikation GmbH.

4. AOL provides online interactive services through a number of brands (for example, AOL, MapQuest, AIM, Moviefone, ICQ and Netscape) as well as internet access services in the U.S. and Europe. It is a [solely controlled] subsidiary of Time Warner Inc., a worldwide media and entertainment company. In Germany AOL provides internet access, both narrowband and broadband, and other internet related services, which are currently carried out through AOL Services Germany GmbH and a number of operational companies directly or indirectly controlled by the group's European holding, AOL Europe Sarl.

II. THE OPERATION

5. A binding agreement was entered into on 16 and 17 September 2006 by which Telecom Italia has agreed to acquire from AOL LLC and AOL Europe Sarl the AOL German Access Business. This will be achieved through the purchase of the entire share capital of (a) AOL Services Germany GmbH and (b) two newly created companies which will on completion own all the capital of AOL Deutschland GmbH & Co. KG.
6. The AOL German Access Business will result from the re-organisation of AOL's overall internet business in Germany with the aim of separating the internet access assets and liabilities from those related to other services offered by AOL in Germany which AOL will retain (mainly the online interactive, portal and content services and advertising services over the Internet).
7. Essentially, the AOL German Access Business will consist of the assets, customers and commercial agreements related to AOL's internet access activities in Germany as held at closing by AOL Deutschland GmbH & CO KG² and AOL Services Germany GmbH.
8. The rationale of the transaction is to allow Telecom Italia to further develop its operations in the broadband telecommunications sector in Germany. AOL will retain its activities relating to online interactive, portal and content services, in keeping with AOL's overall worldwide strategy. It will also continue to provide advertising services provided over the Internet, as well as a small legacy internet access (narrowband) service under the Compuserve brand³.

III. CONCENTRATION

9. As a result of the proposed operation, Telecom Italia will own and control the AOL German Access Business which will include the whole capital of AOL Deutschland GmbH & Co KG and AOL Services Germany GmbH. Thus, the proposed operation constitutes a concentration in the sense of Article 3(1)(b) of the Merger Regulation.

² Which will include all assets and liabilities currently held by other companies directly or indirectly owned by AOL, i.e. AOL Deutschland Online GmbH & CO KG and Netfin Online Verwaltungs GmbH (now renamed AOL Deutschland VW GmbH).

³ Which for technical reasons it is not possible to separate for the purposes of sale and which has a negligible and declining subscriber base.

IV. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Telecom Italia: EUR 29,919 million; AOL German Access Business: EUR [...] million)⁴. Each of them have a Community-wide turnover in excess of EUR 250 million (Telecom Italia: EUR [...] million; AOL German Access Business: EUR [...] 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. RELEVANT MARKETS

Relevant product market

11. Telecom Italia and the AOL German Access Business are both in the business of providing retail internet access services. Internet access at the retail level involves the provision of a telecommunications link which enables a customer to have access to the internet. In addition, internet access service providers usually provide their customers with a range of related services and functions such as allowing the hosting of a website and the provision of email facilities.
12. Telecom Italia provides, through Hansenet, three forms of internet access as follows: (a) dial-up service (“narrowband”) (b) higher bandwidth (“broadband”) services and (c) dedicated access. Its core business consists of the provision of broadband DSL access services, while provision of dedicated access and narrowband access is less significant. The AOL German Access Business provides both narrowband and broadband internet access, but does not provide dedicated access services. Telecom Italia and AOL’s offers include ancillary services to the internet access (such as, for instance, email services and, as regards AOL, voice over IP services).
13. In previous decisions in this sector the Commission has distinguished three common forms of internet access (a) dial-up service, (b) higher bandwidth services and (c) dedicated access⁵. Whereas in earlier decisions⁶ the Commission took the view that distinct markets could be considered for residential and business customers, in recent decisions the Commission has taken the view that the demands of residential customers and business customers without any significant needs are converging as a result of the introduction of broadband internet access technologies⁷.

⁴ 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).

⁵ E.g. Case No. COMP/M.3914 - *Teledue/Versatel*, decision of 7 September 2005. See also Explanatory Memorandum to the Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁶ See Case No COMP/M.1838 - *BT/Esat*, decision of 27.3.2000; Case No COMP/M.2222 - *UGC/LibertyMedia*, decision of 24.04.2001; Case No COMP/M.2648 - *KPNQwest/Ebone/GTS*, decision of 16.01.2002.

⁷ See *Teledue/Versatel*; Comp /M.2803 – *Telia/Sonera*, decision of 10.07.2002 as amended on 27.09.2006 [amended decision not yet published].

14. In a recent decision under Article 81 EC Treaty the Commission defined the market for internet service where internet service providers offer customers, consisting mainly of households, internet access for a single terminal, with download speeds up to 512 k bits and upload speeds of 128 k bits⁸. This market definition included both offerings based on ADSL technology and offerings based on cable modem technology.
15. The Commission also took the view in that decision that high-speed internet access for residential customers must be distinguished from high-speed internet access for business customers. This reflected the higher prices and higher functionalities associated with this type of customer. Technical specifications were sometimes tailored to the customer, which is impossible on the mass market. Also there were a greater variety of solutions than in the case of residential customers given the costs involved. Leased lines, wireless local loop and satellite transmission were not realistic options for residential customers, given the costs involved, but they were viable in the case of business customers.

Narrowband/broadband

16. Since AOL is not involved in dedicated access, only the narrowband and broadband markets are potentially affected by this proposed transaction.
17. An Ofcom⁹ report in this sector concluded that broadband internet access had three distinguishing features or functionalities which are not available, in practice, using narrowband access and which as a group distinguish it as a higher quality service than narrowband access:
 - a. the service is always on (no dial-up required);
 - b. it is possible to use both voice and data services simultaneously, where they are provided together (for example over the same access route), or separately using more than one access route; and
 - c. broadband has a faster downstream speed than a dial-up connection.
18. The parties submit that at present, the internet access market is evolving very quickly. They submit that in Germany, as elsewhere, there is a progressive migration of customers from narrowband to broadband, as broadband offers superior service on competitive terms. They point also to the statistics showing that customers are less interested in narrowband and operators are less willing to invest in it - the AOL German Access Business' narrowband subscribers fell by approximately [15%-25%] between 2004 and 2005.

Residential/business

19. The notifying party proposes a market segmentation in line with the Commission's decision-making practice between on the one hand customers whether residential or business, who do not have "any significant needs" and on the other hand "business customers" who have substantial requirements in terms of speed and security. Business customers without any significant needs" may be termed, for ease of reference SOHO

⁸ Comp /38.233 *Wanadoo Interactive* (17 July 2003).

⁹ See Ofcom wholesale broadband sector review of 2004.

(small office-home office). These customers' needs may vary slightly in terms of connection speed - small businesses being more likely to require higher bandwidth than consumers. Conversely, provision of internet access to bigger corporate clients implies much higher performance in terms of security and bandwidth (both upstream and downstream). These kinds of customers generally require dedicated access (leased lines), as well as value-added telecommunications services. However, given that leased lines are costly, corporate customers may opt for the cheaper option of symmetric lines (SDSL¹⁰) coupled with VPN technology (virtual private network), *i.e.* an encryption technology enabling to secure shared access as if it was a dedicated one.

20. The parties argue that the blurring of the distinction between small business and residential customers is reflected in the design of the parties' offers to customers. In the case of Hansenet, its customer base is divided into residential, micro-business and business. Micro-business customers represent a negligible share of Hansenet's client base ([0%-5%] of the total residential and micro-business subscribers) and buy internet access services equivalent to those offered to residential customers (ADSL or dial-up). They may opt for more than one access connection, occasionally in a package with voice services on ISDN voice lines. Business customers are provided with a package of higher performance internet access, including either leased lines (where technically available in the areas where Hansenet has its own network infrastructure) or highest bandwidth lines (generally SDSL lines) coupled with VPN services and other more sophisticated IP services. Moreover, the lack of residential/micro-business distinction is confirmed by the market analysis of the German Network Agency (BnetzA) of the market for broadband access for large business customers¹¹.
21. The AOL German Access Business offers broadband internet access services generally to the public, without targeting one specific category (residential or business). It is only active in the provision of consumer focussed internet access services and its contracts are standard for each customer. Its customer base can be split as follows: [...] singles, [...] couples without children, [...] families, [...] senior without children. Although these services may be taken by small business customers, the AOL German Access Business does not offer a product tailored to small businesses and the large majority of the customers for each of its packages will be consumers. AOL does not differentiate between different customers by size or type and its product is available to anyone that wishes to subscribe to the service. Its broadband offers only differ in terms of connection speed. Finally, the AOL German Access Business is not active in the provision of dedicated access or any of the services typically addressed to business customers as provided by Telecom Italia and as described above.
22. Telecom Italia submits therefore that broadband offers addressed to residential and small business customers are substantially equivalent and that segmentation between residential and small business customers in relation to broadband is not possible.

¹⁰ Symmetrical Digital Subscriber Line. Upstream bandwidth is of the same size as the downstream. This is a valuable feature of the offer for business customers, which makes SDSL a valid and cheaper alternative to leased lines.

¹¹ Page 61 of the "Broadband access for large business customers, market definition and market analysis of Market N°12 for the recommended market of the EU Commission, 12 January 2006". The BnetzA finds that demand from private and small and middle-sized undertakings for DSL connections is similar.

23. The question of whether the broadband market should be further segmented between residential and small business customers can be left open in this case, as in any event AOL does not provide a separate service to such customers and Hansenet's service to such customers represents only [0%-5%] of the total residential and micro-business subscribers.
24. For the purpose of the present analysis, it is proposed therefore to base the assessment on the following relevant product markets: (i) provision of internet access (both broadband and narrowband) to "small" (residential and micro-business) customers; (ii) or alternatively provision of broadband internet access only to "small" (residential and micro-business) customers; (ii) and the provision of narrowband internet access only to "small" (residential and micro-business) customers.

Relevant geographic market

25. In its former decisions, the Commission has consistently held that the relevant geographic markets for internet access were essentially national. This is mainly due to the necessity for local loop access and availability of free-phone/local call rate number to the nearest point of presence (POP) as well as the existing regulatory framework.¹² This market definition has been confirmed in the Explanatory Memorandum to the 2003 Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation¹³. In the case of Germany, in particular, the German Network Agency has consistently held that the internet access market at wholesale level is national. Furthermore, it has recently held that the retail mass internet access market is national in nature¹⁴. For the purposes of the present case therefore the relevant geographic market can be defined as national.

VI. COMPETITIVE ASSESSMENT

26. According to the parties, in a combined market for broadband and narrowband (as defined at paragraph 24 above) their market share would be [10%-20%]. In the market segment for narrowband access AOL has a share of approximately [5%-15%] while Telecom Italia has a negligible presence – approximately [0%-5%].
27. The only affected market is the market for broadband access (to small customers) where the merged entity's share would be [10%-20%]. This figure is well below that of the leading player T-Online (Deutsche Telekom) with [40%-50%] and close to that of one other player, United Internet, with [10%-20%]. There would remain also other competitors in the market such as Arcor with [5%-15%] and Freenet with [5%-10%].
28. In the light of this market structure and the parties' market shares it is not expected that the proposed transaction will have a significant impact on competition.

VII. CONCLUSION

¹² See Case No. COMP/M.3914, Teledue/Versatel, UGC/Liberty Media, Telia/Sonera, cited above.

¹³ Ibid.

¹⁴ Page 64 of the "Broadband access for large business customers, market definition and market analysis of Market N°12 for the recommended market of the EU Commission, 12 January 2006".

29. 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 (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission