

EN

***Case No COMP/M.4442 -
CARPHONE
WAREHOUSE / AOL UK***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 07/12/2006

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 07.12.2006

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.4442 – Carphone Warehouse Group plc/AOL UK
Notification of 31 October 2006 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 31 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 The Carphone Warehouse Group PLC ("CPW") acquires within the meaning of Art. 3 (1) (b) of the Council Regulation, sole control of the whole of three entities and various assets that together comprise substantively all the UK Internet access business and residential fixed-line telephony business of the AOL Group ("AOL UK").
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. CPW is an independent retailer of mobile communications, with over 1,500 stores in 10 countries in Europe. As well as retailing mobile handsets and mobile connections, CPW is active in the supply of fixed-line telecommunication services to both business and residential customers. It also offers narrowband and broadband internet access services

¹ OJ L 24, 29.1.2004 p. 1.

to residential customers in the UK as well as in certain other EU and European countries.

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 the UK, AOL provides Internet access, both narrowband and broadband, and other Internet-related services.
5. AOL UK, which is being acquired by CPW, will result from the re-organisation of AOL's overall Internet business in the UK, [...].

II. CONCENTRATION

6. CPW is acquiring the whole of the UK Internet access business of the AOL Group, save for the legacy Compuserve narrowband access business which AOL is retaining. [...].

III. COMMUNITY DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion [...]. Each of them 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. RELEVANT MARKETS

8. The activities of CPW and AOL UK overlap in the field of (i) residential broadband and narrowband internet access and (ii) residential fixed-line telephony services.

Internet Access Services

Relevant product market

9. CPW and AOL UK are both active in the supply of Internet access services in the UK. Internet access services enable customers to access the Internet. In addition, Internet access service providers typically offer customers a range of related services and functions, such as allowing hosting of a website and the provision of email facilities. With the arrival of broadband connections, customers are also able to use the Internet and PSTN-based telephony simultaneously (broadband and telephony use different frequencies on the ADSL copper pair) and take advantage of services such as "Voice over Internet Protocol" ("VoIP"), which is an ancillary service to the provision of Internet access. VoIP services enable voice calls and messaging services to be provided over a broadband connection rather than over traditional telephone networks.
10. CPW provides a residential narrowband and broadband offering as well as a more substantial business broadband product. The former residential product is tailored to the needs of domestic customers (i.e. low subscription prices, less sophisticated functionality and higher contention ratios²).

² A 'contention ratio' describes the degree to which a customer is required to share connection infrastructure with other customers. For example, a 50:1 contention ratio means that a customer using ADSL

11. AOL UK provides both broadband and narrowband Internet access products targeted at residential customers only. The parties state that it is likely that a number of small business customers subscribe to its Internet access products, although AOL UK is unable to identify and disaggregate private/domestic household customers from smaller business customers (as it does not track this information). AOL is not active in the "dedicated access" sector³.

Customer segmentation – residential / business

12. In previous decisions⁴ the Commission distinguished three common forms of internet access (a) narrowband (dial-up service), (b) broadband (higher bandwidth services) and (c) dedicated access. The parties are both active in narrowband and broadband. As regards narrowband and broadband the question has arisen in previous cases whether these markets should be further segmented between residential and business customers. In earlier decisions⁵ the Commission took the view that such separate markets could be considered for residential and business customers. However in more recent decisions⁶ the Commission has taken the view that because of the increased accessibility of broadband it is no longer appropriate to differentiate between residential customers and small business customers without significant needs (hereinafter referred to as micro-business customers).
13. In the Wanadoo case⁷ this point was confirmed where the Commission drew a distinction between the provision of Internet access services to residential customers on the one hand, and business customers with significant needs on the other. There the market was defined as comprising Internet services to customers, consisting mainly of households, of internet access for a single terminal, with download speeds up to 512 k bits and upload speeds of 128 k bits. This market definition included both offerings based on ADSL technology and offerings based on cable modem technology. This customer segmentation reflected differences in price and functionality and technical specifications.

broadband technology may be required to share the equipment and bandwidth at his local BT exchange with up to 50 other users. Thus, a ratio of 20:1 involves a lesser degree of sharing and, in practical terms, means that a 20:1 subscriber will receive a higher download speed when the network is congested.

- 3 The 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. Dedicated access typically involves a leased line linking one point to the Internet and guaranteeing higher levels of security and performance.
- 4 See 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.
- 5 See Case No COMP/M.1838 *BT/Esat*, Decision of 27.3.2000; Case No COMP/M.2222, *UGC/LibertyMedia*; Case No COMP/M.2648 *KPNQwest/Ebone/GTS*, Decision of 16.01.2002).
- 6 See *Teledue/Versatel*; Comp /M.2803 – *Telia/Sonera*; M. 4417 *Telecom Italia /AOL* of 28 November 2006.
- 7 COMP/38.233 *Wanadoo Interactive* (16 July 2003), paragraph 171.

14. In line with these previous cases the parties propose that reference to "residential" customers should include all users who subscribe to Internet access products. In practice, such users comprise: domestic customers; and some small business customers (typically sole operators and home office users). These types of customer have substantially the same Internet access requirements, reflected in the fact that broadband offers addressed to residential and small business customers (such as sole operators or home office users) are substantially equivalent. They may slightly vary in connection speed (a small business being more likely to require higher bandwidth than consumers) although this difference is likely to narrow further with the advent of new services for residential customers, such as IPTV⁸, which require greater performance and higher bandwidth.
15. Conversely, the provision of Internet access to corporate clients (i.e. customers with 'significant needs') implies higher performance in terms of security, bandwidth (both upstream and downstream) and functionality. Larger corporate customers may require dedicated access (leased lines), as well as value-added telecommunications services. Other corporate customers may opt for the cheaper option of symmetric lines (SDSL⁹) coupled with VPN (virtual private network) technology¹⁰.

Broadband / narrowband

16. Both the Commission¹¹ and the UK's regulatory authority, Ofcom, have indicated in previous decisions that broadband and narrowband Internet access constitute two separate markets. A useful definition of "broadband" was proposed by Ofcom in its wholesale broadband sector review in 2004 where it concluded that broadband Internet access had three distinguishing features or functionalities which are not available, in practice, using narrowband Internet access and that as a group distinguish it as a higher quality service than narrowband Internet access:
- the service is always on (i.e. no dial up is required);
 - 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, perhaps using more than one access route; and
 - broadband has a faster downstream speed than a dial-up connection.
17. The parties explain that in the UK, as elsewhere, there is a progressive migration of customers from narrowband to broadband, as broadband offers superior service on

⁸ IPTV is the delivery of programming by video stream encoded as a series of IP packets.

⁹ Symmetric 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. AOL is not active in SDSL.

¹⁰ An encryption technology enabling to secure shared access as if it were a dedicated one.

¹¹ See, for example, COMP/38.233 *Wanadoo Interactive* (16 July 2003).

competitive terms¹². The services are also increasingly being bundled with other communications and/or television services by several operators.

18. However, as the proposed concentration does not give rise to any competition concerns on either basis, the question of whether broadband and narrowband constitute distinct markets can be left open. For the purposes of the present analysis therefore the assessment is based on the following relevant product markets:
- a. narrowband internet access to customers without significant needs (both residential and micro-business);
 - b. broadband internet access to customers without significant needs (both residential and micro-business).

Relevant geographic market

19. 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.¹³ 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* regulation¹⁴. For the purposes of the present case, therefore, the relevant geographic market can be defined as national, i.e. the United Kingdom.

Fixed-line Telephony Services

Relevant product market

20. In line with the Commission's Recommendation on relevant product and services markets within the electronic communications sector, and the results of the subsequent market reviews carried out by Ofcom, the notifying party considers that a distinction should be drawn between business calls and residential calls. Furthermore, the notifying party submits that in its 2003 review of the Commission's Recommendation, Ofcom concluded that the market for retail residential calls could be further segmented into different categories of calls including: (i) local; (ii) national; (iii) international; (iv) calls to mobiles; and (v) assisted calls, but considers this further distinction immaterial because call providers (including CPW and AOL UK) offer all call types while residential customers typically use each of these products.
21. However, the precise definition of the relevant market can be left open as, regardless of the frame of reference, the proposed notification will not give rise to any competition concerns in the fixed telephony sector.

¹² This evolution is mainly due to the widespread use of ADSL (Asymmetric Digital Subscriber Line) technology that enables fast data transmission over normal copper telephone lines, in addition to the competitive impact of communications services provided by the cable company NTL/Telewest.

¹³ See Case No. COMP/M.3914, *Teledue/Versatel, UGC/Liberty Media, Telia/Sonera*, cited above.

¹⁴ *Ibid.*

Relevant geographic market

22. The notifying party considers that the scope of the relevant geographic market for fixed telephony services is national, reasoning that this reflects the continuing importance of the role of national regulation in the telecommunications sector, the supply of upstream wholesale services on a national basis, as well as the fact that the pricing policies of telecommunications providers is predominantly national. This in line with the Commission's Recommendation. On this basis the Commission considers that, for the purposes of the present case, the relevant geographic market can be defined as national.

VI. COMPETITIVE ASSESSMENT

Internet access

23. The transaction gives rise to two affected markets. In the broadband market (as defined at para. 19 above) in the UK the merged entity's share would be [10-20]% (AOL: [10-20]%; CPW [0-10]%). This figure is well below that of a number of other leading players such as NTL / Telewest with [20-30]% and BT with [15-25]%. In addition there would remain also other strong competitors in the market such as Tiscali with [5-15]% and Orange Wanadoo with [5-15]%.
24. In the market for narrowband access the merged entity's share would be [10-20]% (AOL: [10-20]%; CPW: [0-10]%). However there would remain many other strong competitors in the market such as Orange Wanadoo with [10-20]%, Tiscali with [10-20]%, BT with [5-15]% and NTL Natwest with [0-10]%.
25. In the light of this market structure and the parties' market shares the proposed transaction does not raise serious doubts as to its compatibility with the common market.

Fixed-line telephony services

26. Both parties provide fixed-line telephony services to residential customers in the UK. However, AOL UK's activities in this sector are very limited and no affected market would arise as a result of the merger, considering that the overall increment to CPW's current [10-20]% share would be only [<5]%. A number of strong competitors are present in the market, including first and foremost incumbent BT, with a share of [55-65]% in minutes and [55-65]% in revenue, followed by NTL/Telewest with a market share of approximately [10-20]% in terms of minutes and [10-20]% by revenue.
27. Only on a narrow, segmented approach to market definition would the notified concentration give rise to one affected market, i.e. the supply of calls to international destinations. However, the increase in CPW's existing share would be minimal considering CPW's share by volume (minutes): [25-35]% and by value: [10-20]%, and AOL UK's share by volume (minutes): [<5]%; and by value: [<5]%.
28. Given the minimal incremental increase to CPW's existing share, and in light of the market structure, the proposed transaction does not raise serious doubts as to its compatibility with the common market.

VII. CONCLUSION

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