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***Case No IV/M.544 -  
Unisource / Telefónica***

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

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Article 6(1)(a) INAPPLICABILITY  
Date: 06/11/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.11.1995

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.544 - Unisource/Telefónica

Notification of 29.09.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. Unisource International NV (Unisource International) is a proposed joint venture between Unisource NV (Unisource) on the one hand, a company whose shareholders are PTT Telecom BV (the monopoly telecom operator in the Netherlands), Telia AB (the main Swedish telecom operator) and Swiss PTT (the monopoly telecom operator in Switzerland), and Telefónica, the Spanish telecom operator, on the other hand. The intention of the parties is to pool their experience, business and efforts in certain business areas, mainly value-added telecom services. After examination of the notification, the Commission has concluded that the notified operation falls outwith the scope of application of Council Regulation n° 4064/89.

**I. THE PARTIES**

2. Telefónica is the public telecommunications operator in Spain and is engaged directly and/or indirectly in national and international telecommunications networks and services.
3. The current structure of Unisource was created in 1993 when Swiss PTT joined with PTT Telecom and Telia. There had been an earlier agreement between Telia and PTT Telecom to pool their satellite services and later to create a international data communications company. The company is arranged into a number of different subsidiaries for specific service activities. These are:

- **Unisource Business Networks (UBN)** which has 1,208 employees and a turnover in 1994 of 388 MEcu;

- **Unisource Voice Services (UVS)** a business unit of UBN which offers voice services to multinational business customers. It represents 60/80 employees and a turnover of 0.2 MEcu (est. 1994);
- **Unisource Satellite Services (USS)** a subsidiary offering international satellite services. It has 25 employees and a turnover of 5.6 MEcu (est. 1991);
- **Unisource Card Services (UC)** a subsidiary offering personal and corporate post-paid calling card services. It represents 13 employees and a turnover of 3.9 MEcu (est. 1994);
- **Unisource Mobile (UM)** a subsidiary offering mobile services (provision + acquisition of licences). It represents 236 employees and a turnover of 0.8 MEcu (est. 1994);
- **Unisource Carrier Services (UCS)** a subsidiary dealing with synergies in international networks. It represents 70 employees and a turnover of 5.76 MEcu (est. 1994);
- **ITEMA** is a subsidiary the prime mission of which is to strengthen the ability of the EDP organisations of the Unisource shareholders to provide improved functionality and quality of IT-services at lower cost for internal use.

## **II. THE OPERATION**

4. The Unisource International shareholders will pool some of their businesses in value added telecom services. Telefónica will contribute its satellite services (VSAT - very small aperture terminal) business. Unisource will contribute UCS, ITEMA, UM, UC, the UVS business unit of UBN and USS. Unisource will also contribute UBN BV the holding company of the data communications businesses but not the domestic subsidiaries where the business is carried out.

## **III. ABSENCE OF CONCENTRATION**

### **A. JOINT CONTROL/ABSENCE OF JOINT CONTROL**

5. Unisource International will be jointly owned by Unisource (75%) and Telefónica (25%). The Unisource shareholding will be known as the A shares and Telefónica will hold the D shares.
6. The Unisource International structure of control is the following :
  - 1) The Supervisory Board
7. The General Meeting of shareholders will appoint a Supervisory Board which shall exercise supervision over the Management Board, in charge of the day-to-day business of Unisource International and over the general course of business in the joint venture.
8. The Supervisory Board will be composed of 12 members appointed by the shareholders : 9 for Unisource (divided into 3 for each of PTT Telecom (the A directors), Telia (the B directors) and Swiss PTT (the C directors)) and 3 for Telefónica

(the D directors). The board will have a chairman and three vice-chairmen, each of them representing one of the four telecommunications companies.

9. All resolutions of the Supervisory Board will be adopted by unanimity of the votes cast. However, as far as budget and business plan related to the data communications business are concerned, it is expressly stated in article 12 of the shareholders' agreement that :
  - the UBN budget and business plan will be adopted by the vote of the Supervisory Board members A, B and C (who represent Unisource);
  - the Telematica budget and business plan will be adopted by the vote of the Supervisory Board members D (who represent Telefónica).
10. This means that the two parent companies will decide separately on two key issues (budget + business plan) related to the data communication business of Unisource International. Moreover, there is no provision in the agreements that allow Unisource to impose its conditions on Telefónica on these issues. There is, therefore, no joint control at the Supervisory Board level of Unisource International for its data communications activities. There is joint control only for the remaining activities of Unisource International.

## 2) The Management Board

11. The Management Board will be appointed by the General Meeting of shareholders and will be the same as the management board of Unisource. Telefónica will not be represented at this level as a result of the operation. The Management Board will be entrusted with the day-to-day business of Unisource International.
12. Although there is no transfer of assets and no joint control as far as data communications business is concerned, the parties have entered into a management agreement in which it is agreed that Unisource International will coordinate the responsibility for the management and operations of the domestic UBN subsidiaries and Telematica in order to avoid duplications of resources and to coordinate services development in the data communications business area. This coordination achieved through the Management Board of Unisource International does not amount to joint control as explained above, in paragraph 10.

## **Conclusion**

13. In the light of the above information, Unisource International will only be jointly controlled for the non data communications areas of the business. As the parent companies retain separate arrangements for the data communications businesses, they are not jointly controlled notwithstanding the co-ordination of day-to-day management which is mentioned in the previous paragraph.

## **B. FULL FUNCTION JOINT VENTURE/NOT A FULL FUNCTION JOINT VENTURE**

14. As it is stated above Unisource International will receive from both shareholders their satellite service businesses and from Unisource, UCS, ITEMA, UM, UC, the UVS

business unit of UBN, USS and UBN BV. The domestic subsidiaries of UBN BV will not be contributed to Unisource International.

15. Unisource Carrier Service (UCS) is a subsidiary of Unisource which has been set up to exploit synergies in the international networks of the Unisource shareholders in order to reduce costs. Under the national laws of The Netherlands, Switzerland and Spain, PTT Telecom, Swiss PTT and Telefónica respectively are not presently permitted to assign their international networks and corresponding licences to UCS. Consequently, in the current situation, UCS will only perform the role of a management company for the international networks of the Unisource International shareholders themselves and not as Unisource International. Accordingly, the activities of UCS are not full function and therefore fall outside the scope of the Merger Regulation.
16. The primary activity of ITEMA (which is to be renamed Unisource Information Services) is to strengthen the IT operations of the Unisource shareholders in order to improve quality and reduce costs for the shareholders. Its secondary objective is to offer integrated IT solutions on the market. Most of the resources of ITEMA are hired on a secondment basis from the Unisource shareholders. On the basis that the primary purpose of the company is to provide services to the Unisource parents, and that most of the resources are provided by the parents, ITEMA is not in a position to act as an autonomous economic entity and cannot therefore be considered as a full function entity. Its operations therefore fall outside the scope of the Merger Regulation.

### **C. RISK OF CO-ORDINATION OF COMPETITIVE BEHAVIOUR**

17. For those activities which are jointly controlled and are full function it is necessary to assess the likelihood of co-ordination of competitive behaviour between Unisource and Telefónica.

#### ***Mobile telephony***

18. Unisource Mobile (UM), a subsidiary of Unisource, specialises in mobile service provision, is transferred to the joint venture. The Unisource shareholders and Telefónica, through its 100% subsidiary Telefónica Mobile, retain their domestic services. [...] <sup>(1)</sup> According to the parties, UM is active as a mobile service provider outside the countries of the Unisource shareholders where each of them remains active on its own account. However, Unisource has no licence on its own account in any country. The parent companies are investigating the possibility of transferring their licences to Unisource in their territories. A non-competition agreement between the four shareholders states that they will limit their offerings of their national mobile services to their respective national markets only. In 1994, UM acquired a retail organisation in Sweden for mobile equipment (GEAB).
19. UM will be a GSM network operator as are each of the parent companies in their own territory. One of the most important characteristics of a GSM network is that it enables the consumer to use the mobile phone widely across Europe as a consequence of roaming agreements between the different network operators. It is only the availability of roaming agreements that affects the consumer's use of mobile phones regardless of the country in which the subscription is taken out. This integration of previously national mobile phone markets is occurring quickly and an indication of this is the existence of mobile operators

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<sup>(1)</sup> Deleted business secret.

independent of the national telecommunications network provider offering services to consumers irrespective of location.

20. In addition, as UM has no licence yet, UM may acquire a licence from Telefónica or from one of the shareholders of Unisource since nothing prevents it from doing so and indeed the parent companies are exploring this possibility. In that event, the parent companies may have a strong interest in not competing with each other.
21. In the light of the above, and on the basis of the Omnitel decision<sup>(1)</sup>, it is clear that this operation will increase the likelihood for Unisource, Telefónica and the three parent companies of Unisource: PTT Telecom, Telia and Swiss PTT to co-ordinate their activities in the provision of GSM mobile telephone services through Unisource International. Because the shareholders of Unisource International retain their domestic services, they remain potential competitors, mainly within the framework of the roaming agreements as explained above. The creation of Unisource International does not remove this likelihood of competition between the parent companies. The non competition agreement for the non parent company territories shows the non-withdrawal of the parent companies from their domestic markets rather than a long-lasting withdrawal from the joint venture market.

#### *Card services*

22. Unisource Card Services (UC) is a subsidiary of Unisource, which specialises in personal and corporate post-paid calling card services. This subsidiary will be transferred to Unisource International. The Unisource shareholders and Telefónica currently offer post-paid calling cards in their respective territories. UC calling cards are only offered to customers who live outside shareholder home countries and Spain.
23. However, a subscriber of any of the four shareholders' card may use his card (or several cards of the different shareholders or of UC) all over Europe to the extent that the service provider has got freephone numbers in the different states. The availability of these freephone numbers is therefore the only constraint to the European wide use of calling cards in a similar manner to the roaming agreements in the mobile phone sector as mentioned above. Because they remain active in their respective domestic territories, parent companies may have therefore an interest in not competing with the joint venture or with each another. In that respect, there is a non-competition agreement between the four shareholders limited to marketing and distribution in respective national markets and in the UC territory. As for mobile services, this non-competition agreement shows that the parent companies remain potential competitors from their respective domestic territories.

#### *Voice services*

24. Unisource Voice Services (UVS) is a business unit of UBN. However, as the areas which are covered by the special separate voting arrangements referred to above are confined to the UBN Budget and Business Plan (which is clearly defined as the activities of the domestic UBN subsidiaries) these arrangements do not cover UVS. Therefore, UVS is subject to the joint control arrangements which apply to the non-UBN and Telematica areas of the joint venture.

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<sup>(2)</sup> Case No IV/M.538 - Omnitel of 27 March 1995.

25. UVS offers International Virtual Private Network services and other closed user group services on an European basis. According to the parties, 40% of its purchases were from the parent companies in 1994. Unisource is a partner in WorldPartners and is the continental European member of that grouping. This arrangement has been notified under Article 85. In the home territories of the shareholders, UVS services are distributed by the relevant Unisource shareholder whilst distribution outside the parent companies' home territories is carried out by the local UBN subsidiary.
26. The market for IVPN services is at least European and possibly global. The demands of a customer for IVPN services will determine which provider they will look to to provide the service. Depending on the company's location in different countries, the solution may be achievable through means other than a European or global service provider. National telecommunications operators may be able to offer comparable services on a bilateral basis by entering into bilateral agreements with the national public network provider. Therefore, a company may look to the parent companies as well as to other providers such as Unisource International for these services. Because they remain active in their respective domestic territory, the parents will therefore have an incentive to co-ordinate competitive behaviour between themselves through Unisource International. In addition, the parent companies will be a supplier of capacity to Unisource International for leased lines in their home territories and even abroad. This will further increase the scope for co-ordination.

#### *Satellite services*

27. Unisource Satellite Services (USS) offers value added communications services using satellite terminals based on VSAT technology. According to the parties, prior to the establishment of USS the Unisource parents had no satellite services of their own. After the transaction, the shareholders of Unisource International will have no comparable VSAT services outside their respective national markets as a result of a non-competition agreement between the parents of Unisource International. In the parent companies' home territories, USS services will be distributed by the parents themselves, elsewhere in Europe by the appropriate UBN national subsidiary and through distribution agreements in countries where UBN has no presence.
28. VSAT technology is used where fixed links are impractical or uneconomic or where there is a poor quality existing infrastructure. It can also be used instead of fixed lines in certain circumstances and is used in that way by companies with widespread distribution networks. USS targets at business customers in the automotive, banking and finance sectors as well as government, transport and retail operations and customers in Eastern Europe.
29. The non-competition agreement between Unisource and Telefónica covering VSAT services provides that the parents will distribute the VSAT services in their territories and will not offer a parallel product portfolio to Unisource International. This represents an effective withdrawal by the parents from VSAT activities. Though there is some overlap with services provided through fixed lines, VSAT services can be considered as a distinct product segment in their own right. Accordingly, there is no likelihood of the co-ordination of competitive behaviour in the provision of VSAT services between Unisource and Telefónica.

***Conclusion on likelihood of co-ordination***

30. In conclusion, therefore, there is a likelihood of co-ordination of competitive behaviour between the parent companies in the fields of mobile telephony, card services and voice telephony but not in the area of satellite services. In the light of this information and taking into account the notice on the distinction between concentrative and co-operative joint ventures<sup>(1)</sup> (and in particular paragraph 20 second sub-paragraph), there is a likelihood of co-ordination of competitive behaviour between the parent companies as a result of the operation. The notified operation cannot be therefore regarded as a concentration as such.

**CONCLUSION ON ABSENCE OF CONCENTRATION**

31. For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3(2) of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.
32. The Commission will treat the notification pursuant to Article 5 of Commission Regulation No 2367/90 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission,

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<sup>(3)</sup> OJ C 385 of 31.12.1994.