

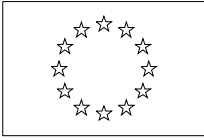
***Case No COMP/M.1553 -
FRANCE TELECOM /
EDITEL / LINCE***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 30/07/1999

*Also available in the CELEX database
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.07.1999

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Sirs,

Subject: Case No IV/ M. 1553 – France Telecom/ EDITEL/ LINCE

Notification of 28.06.1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 28/6/99 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89, as amended by Council Regulation (EC) No 1310/ 97 by which the undertakings France Telecom S.A (“FT”) and Editel, S.L (“Editel”) on behalf of Banco Santander Central Hispano, S.A (“BSCH”), Ferrovial telecomunicaciones S.A (“Ferrovial”) and Multitel Cable S.A (“Multitel”) acquire within the meaning of Article 3 (1) (b) of the Merger Regulation joint control of Lince Telecomunicaciones SA (“Lince”).

I. THE PARTIES AND THE OPERATION

2. FT is a telecommunications operator, active primarily in France. FT is engaged in practically all aspects of voice, image and data transmission including mobile and voice telephony.
3. Editel is a holding company created under Spanish law to facilitate the participation of its shareholders in the Lince joint venture. The shareholders of Editel are BSCH, Ferrovial and Multitel. BSCH is made up of Banco Santander and Banco Central Hispano and is the ultimate parent company of an international banking and financial group that operates through a network of offices in Spain, Europe and South America. Grupo Ferrovial is one of Spain’s leading diversified construction companies and is active in large scale civil work projects, industrial activities, transport infrastructure concessions, housing development, car park operator, urban services. Multitel provides consulting services to cable telecommunication companies, cable systems management services and telecommunication services.

4. Lince is a Spanish telecommunications company, which was set up last year by FT. In July 1998 Lince obtained the third license to provide fixed voice telephony in Spain and started its operations in December 1998. Lince has planned to offer a full range of fixed telecommunications services in Spain.
5. The operation will involve the acquisition within the meaning of Article 3 (1) (b) of the Merger Regulation of joint control over Lince.

Joint control

6. According to the Shareholders' Agreement, both parent companies will be able to exercise decisive influence over Lince although they do not own equal shares in the joint venture (France Telecom owns 69% of Lince and Editel owns 31%, and within Editel, BSCH 's stake is 51%; Ferrovial's 24, 5% and Multitel's 24,5%). Lince's board of directors consists of [...] members, [...] appointed by France Telecom and [...] three by Editel. According to the Shareholder's Agreement, strategic decisions such as the approval of the budget, business plan and strategic plan require [...] votes at the Board of Director's meeting. This means that neither France Telecom, [...], nor Editel, [...], can take decisions unilaterally. Alternatively, either party has veto power over the most important strategic decisions of the joint venture.

Autonomous full function entity operating on a lasting basis

7. Lince has been granted a licence to provide fixed voice telephony in Spain and is already operating in the Spanish market; its aim is to provide a full range of services to both business and residential customers. According to the Shareholder's Agreement, Lince will take all actions required to obtain the necessary licences to achieve this aim. Lince has management dedicated to its day-to-day operations, and sufficient resources including finance and staff in order to conduct on a lasting basis its business activities. The joint venture, therefore, carries out all the functions normally carried out by companies operating in this field.

III. COMMUNITY DIMENSION

8. France Telecom and Editel have a combined aggregate world-wide turnover in excess of EURO 5000 million (France Telecom: [...], and Editel [...]). Each of them has a Community-wide turnover in excess of EURO 250 million (France Telecom: [...] in Western Europe, excluding France, and Editel: [...]). The parties do not achieve more than two-thirds of their Community-wide turnover in the same Member State. The notified operation therefore has a Community dimension.

III. Compatibility with the common market

Relevant product and geographical markets

9. The parties identified a number of markets where the transaction might have a certain impact on competition. These are
 - i) *Local loop telephone services.* This covers the provision of local telephone networks and related services allowing final users access to the telephone network when they want to originate calls and for telephone companies to terminate calls to their intended

recipients. This market includes dial up access to Internet service providers (ISPs). This geographical scope of the market has been described as national.

ii) Operator access to local loop network (interconnection). The geographical dimension of this market is, according to the parties, national.

iii) Business data communications. From the demand point of view this market can be described as services provided by one supplier who can meet voice and data handling requirements between different operational business locations that may be situated in more than one country. The geographic dimension of this market depends on the coverage of the parties' network.

iv) ISP services, i.e. connectivity to the Internet at large. According to the parties, this market is national in scope.

v) Global telecommunications services, i.e. customised combinations of a range of existing telecommunications services. The parties consider that the relevant geographic market for these services is world-wide or at least EEA-wide.

10. In the present case it is unnecessary to define the relevant product and geographical markets more precisely as the transaction does not raise any competition problems even under the narrowest market definitions.

Competitive assessment

11. In general, the present transaction does not create any competition concerns given the very limited extent of Lince's operations. Lince is a new entrant on the Spanish telephony sector where it is facing competition from much larger and well established companies, such as Telefonica and Retevision. The parents do not have other significant interests in that sector, consequently the overlaps of their activities in the different markets are negligible.
12. In particular, on the market for *local loop telephone services*, the parties estimate that Lince's market share amounts to approximately [$<5\%$]. Lince has very limited local infrastructure, only indirect access and no local loop network of its own. As regards FT, its presence in the voice telephony sector in Spain is also very marginal. FT holds a minority interest giving it joint control, together with Deutsche Telecom and Sprint, over Global One España which is active on that voice telephony market. However, its share of that market is well below [$<5\%$]. Editel has no controlling shareholdings or interests in telecommunications companies.
13. As to the market for *business data communication*, Lince's market share is below [$<5\%$]. FT, through its subsidiary Viafax, would also have less than [$<5\%$]. FT's jointly controlled subsidiary Global One offers data transmission services to multinational companies, but its market presence, with a market share below [$<5\%$] is not very significant. Editel has no controlling shareholdings in telecommunications companies.
14. On *Internet services*, Lince reaches [5 – 15%] of the market due to its recent acquisition of the Internet provider CTV/Jet. FT, through GlobalOne, has a market share well below [$<5\%$]. Editel has no controlling stakes in any Internet service providers.
15. As regards *global telecommunications services*, Lince's current activities are virtually inexistent. Catalana de Telecomunicaciones, a company offering value-added services

and in which Lince has purchased a 65% interest, does not currently offer value-added services commercially to private undertakings, but will start only as of October 1999. Currently, its activities are limited to providing services to the Catalonian Government. Therefore Lince's share is currently very small, less than [$<5\%$]. France Telecom's only involvement in this market is through Global One. It has a market share of less than [$<5\%$] in the Spanish market and of [$<5\%$] in the EEA.

IV. Ancillary restraints

16. The parties have agreed that, on one hand, the services they will provide to Lince in the areas of their respective expertise will be granted on terms at least as favourable as those which they offer to third parties. On the other hand, the parties will also have preferential rights to provide services to Lince in the areas of their respective expertise. FT will provide various technical services upon request by Lince on an as-needed basis and at arm's length. This assistance will be provided through a separate Technical Assistance Agreement of a five year duration. Moreover, FT and/or Global One will provide Lince with a global offer for the transit of incoming and outgoing traffic and Lince will give preference to this offer provided its terms are competitive. The parties consider that the main purpose of these provisions is to ensure that Lince maintains supply links with the parents under market conditions and benefit from the parents' advice and expertise to permit its rapid and effective entry into the Spanish market. Therefore, these provisions, to the extent they entail a restriction of competition, and are aimed to protect the joint venture can be considered as ancillary to the concentration as they constitute an element inherent to the successful functioning of Lince. On the contrary, the preferential supply rights are beneficial to the parents, conferring them secured outlets for their services. This preferred supply status is not necessary for the functioning of the joint venture, and thus cannot be considered as ancillary to the concentration.

17. The parties have agreed not to compete in Spain with Lince :

- (i) for the duration of their shareholders' agreement and
- (ii) one year after the termination of the shareholders agreement or
- (iii) after one of the parties has ceased to be a shareholder.

Moreover, in the event of breach of the shareholders' agreement by one of the parties [...], the non competition obligation will remain in force for the defaulting party for two years [...]. The latter non-compete clause aims to avoid that any of the parties would breach the shareholders' agreement [...]. The parties consider that it is justified to prevent the breaching party from passing on to competitors sensitive information on Lince's operations and business strategy, and the know-how and goodwill developed by Lince. Disclosure of such information would certainly be detrimental to Lince and jeopardise its existence on Spanish domestic market, where this company is a new entrant and has to face competition from much larger players. The same reasoning justifies the non compete clause under (iii), as also in this case the remaining shareholders face the risk that the exiting shareholder divulges business secrets to competitor. However, there is no reason why the non-competition clause for breach of contract should have a longer duration than that for cessation of a parent as a shareholder. Given the fact that the parties have considered that 1 year suffices in case of cessation the same duration should apply in case of breach of contract. As regards the non competition clause under (i), the Commission considers

that it can be considered as ancillary to the concentration as it may be necessary to protect the parents' investment in the joint venture from free riding. This clause aims to prevent the parents from competing with Lince by taking advantage of their privileged access to know-how or goodwill generated by the joint venture. For the same reasons the non-competition clause under (ii) can be considered as ancillary to the concentration if Lince would not cease to exist as a result of the termination of the shareholders' agreement. On the contrary, if Lince ceased to exist after the termination of the shareholders' agreement the non-compete clause under (ii) could not be applied. Such a clause would lose its very justification once Lince has ceased its operations

V. Conclusion

18. In view of the above the Commission has decided not to oppose the notified operation, and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6 (1) (b) of Council Regulation No 4064/89, and Article 57 of the EEA Agreement.

For the Commission,