

***Case No COMP/M.1650 -
ACEA / TELEFONICA***

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

Article 6(1)(b) NON-OPPOSITION
Date: 01/12/1999

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01.12.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 COMP/M.1650 – ACEA/TELEFONICA

Notification of 27 October 1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 27.10.1999, the Commission received the notification of a proposed concentration pursuant to Article 4 of Council Regulation No 4064/89, by which ACEA S.p.A. (“ACEA”), an Italian public utility company, and Telefonica Intercontinental SA (“Telefonica”), a Spanish subsidiary of Telefonica SA, intend to acquire joint control within the meaning of Article 3(1)(b) of the Regulation of the undertaking Mineraria del Trasimeno S.p.A. (“SMT”), which is currently a wholly-owned subsidiary of ACEA.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. ACEA is a public utility company controlled by the Municipality of Rome. It is active in the production, transmission and sales of electricity, the provision of district heating services and the supply of electric energy to public lighting systems; moreover, it operates in the field of abstraction, distribution, and sale of drinking water and other water and in the collection and treatment of waste water.

4. Telefonica belongs to the Telefonica group, which is a telecommunication operator providing a full range of telecommunication services including fixed-line voice and data, mobile, value added and Internet access services for business and private customers, media and entertainment. Telefonica is also present in the export and import market for national and international telecom products, the provision of telecommunications engineering services and the sale or transfer of technology.
5. SMT is a wholly subsidiary of ACEA. It used to be active in the mining and electrical industry, but subsequently abandoned and become dormant. In 1998, it obtained licences from the Italian Ministry of Communication authorising it to operate in certain telecommunication fields.

II. THE OPERATION

6. The notified operation consists in the creation of a joint venture in the telecommunication sector between Telefonica and ACEA through the acquisition by Telefonica of an equity stake up to 49% of SMT from ACEA, which will continue to hold the remaining 51%.
7. The joint venture will be active in the telecommunication field, in particular it will build and operate a telecommunication network in Rome and resell network capacity to third parties. It will also provide local fixed-line telephone services in the same area.

III. CONCENTRATION

Joint Control

8. The Board of Director of the joint venture will be composed of seven members - of which four appointed by ACEA and three appointed by Telefonica – and will adopt its decision by simple majority.
9. However, according to Clause 11.5 of the Joint Venture Agreement, the fundamental decisions regarding the strategic commercial behaviour of the joint venture (such as the strategic plan, business plan, the budget, approval of human resources policy, and approval of any expenditure or investment for an amount exceeding [...]) will be taken by a qualified majority (five favourable votes) of the Board of Directors.
10. Furthermore, the Board of Directors may appoint an Executive Committee, to which it may delegate activities and matters within its competence, including fundamental or essential ones as defined in Clause 11.5 of the Joint Venture Agreement. The Executive Committee will be composed by the Chairman (proposed by ACEA and approved by Telefonica), by the Chef Executive Officer (proposed by Telefonica and approved by ACEA) and two vice-chairmen (appointed by the Board of Directors). The Executive Committee will adopt its decision with a majority of $\frac{3}{4}$ of its members.
11. Therefore, for the aforementioned reasons the joint venture will be jointly controlled by ACEA and Telefonica.

Full Functionality

12. The joint venture will have the availability of sufficient autonomous financial resources and assets to operate its activities on a lasting basis. In particular, it already possesses the licences to operate the telecommunication activities and already owns sufficient

infrastructures (with particular regard to the amount of cables, [...]) needed to perform its activities.

13. On the basis of the foregoing, it can be concluded that the joint venture will operate on a lasting basis and will perform all the functions of an autonomous economic entity. Therefore, the notified operation is a concentration within the meaning of Article 3(1) (b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

14. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (ACEA [...] million Euro and Telefonica [...] million Euro). Each of ACEA and Telefonica have a Community-wide turnover in excess of EUR 250 million (ACEA [...] million Euro and Telefonica [...] million Euro), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

V. COMPETITIVE ASSESSMENT

A. Relevant Product Markets

15. The joint venture will operate in the telecommunication sector with particular regard to the provision of voice telephony services, data transmission services, the resale of network capacity to third parties, Internet and related telecommunication services. In previous decisions concerning the telecommunication market, the Commission has held it is possible to subdivide this market into several distinct product markets (Case IV/M.1439 Telia/Telenor and Case IV/M.1025 Manesmann/Olivetti/Infostrada). However, in the present case, even in the narrowest possible market definition, the transaction would not lead to any competition concern, and therefore the precise market definition can be left open.

B. Relevant Geographic Market

16. As previously held in several decisions (Case IV/M.975 Albacom/Bt/ENI/Mediaset and Case IV/M.1025 Manesmann/Olivetti/Infostrada), the geographic market for some services in the telecommunication sector has a national dimension. In the present case, due to the geographic dimension of the licences, the geographic market could be defined even as local, but even in this narrowest possible definition, the transaction would not present any competition concern. It is therefore not necessary to take a definitive view on the exact geographic dimension of the relevant markets.

C. Assessment

17. In the present case, the transaction does not result in any horizontal or vertical overlap. Nor does the transaction give rise to any other competition concerns. In fact, as the Italian telecommunication market has just recently been liberalised, Telecom Italia remains, by far, the market leader and it is active in all the segments where the joint venture will operate (for example, in the fixed line voice telephony where Telecom Italia holds a market share over 90%). Moreover, the joint venture, being a new entrant, will have in the short-term a negligible market share in the markets where it is active. Furthermore, the growth rate of the Italian telecommunication markets is today one of the highest in Europe (around 18%). From the supply point of view, this growth is

reflected by an increased number of new entrants (around 30 operators have been granted licenses to operate in certain telecommunications markets).

18. Hence it is considered that the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of it.

VI. ANCILLARY RESTRAINTS

19. The parties require that one clause be considered as directly related and necessary to the implementation of the proposed operation. Their request is indicated here below.
20. Clause 24.1 of the Joint Venture Agreement contains a non-competition clause, according to which the parties consider SMT as their sole vehicle for the provision of telecom services in the Rome province, so long as they hold their shareholding in SMT.
21. The parties argue that this clause is directly related and necessary to the proposed operation for two sets of reasons essentially: the obligation would reflect the lasting withdrawal by the parties from the market assigned to the joint venture, and it would protect the joint venture during its start-up period.
22. To the extent that the above clause is designed to allow the joint venture to operate during its start-up period of activity, it is considered that the clause can be considered as directly related and necessary to the implementation of the proposed operation for a period of [...].

VII. CONCLUSION

23. 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 (EEC) No 4064/89.

For the Commission,
(Signed)
