

***Case No COMP/M.1760 -
MANNESMANN /
ORANGE***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 20/12/1999

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.12.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Madam/Sir,

Subject: Case No COMP/M. 1760 Mannesmann/Orange

Notification of 17.11.1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 17 November 1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ as last amended by Regulation (EC) No 1310/97² by which Mannesmann AG acquires, within the meaning of Article 3(1)(b) of the Regulation, sole control over Orange plc. At the time of the notification, the parties submitted an undertaking, the details of which were submitted on 9 December 1999.
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 EEA Agreement.

I. THE PARTIES

3. Mannesmann AG ("Mannesmann") is a German-based engineering and telecommunications company. Its core activities in the telecommunications sector relate to mobile and fixed line telephony. It has interests in joint ventures in France,

¹ OJ L 395, 30.12.1989, p.1, corrigendum; OJ L 257, 21.9.1990, p.13.

² OJ L 189, 9.7.1990, p. 1; corrigendum; OJ L 40, 13.2.1998, p. 17.

Spain and Austria and owns businesses in Germany, Italy, the United Kingdom and the USA.

4. Orange plc (“Orange”) is a UK-based telecommunications provider. Its core activity is the operation of the Orange mobile telephony network in the United Kingdom and the sale and marketing of Orange services in the United Kingdom and elsewhere. It has interests in joint ventures in Austria, Belgium and Switzerland and acts as a service provider for mobile telephony in France and Germany.

II. THE OPERATION AND THE CONCENTRATION

5. The operation involves the acquisition of sole control over Orange plc by Mannesmann by way of an offer of shares and cash to the existing Orange shareholders. The notified operation will therefore result in the acquisition of sole control in the meaning of article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The combined aggregate worldwide turnover of the undertakings concerned exceeds EUR 5 000 million (Mannesmann 19 065 million EUR, Orange 1 793 million EUR). The aggregate Community wide turnover of each party exceeds EUR 250 million (Mannesmann 13 382 million EUR, Orange 1 793 million EUR). They do not achieve more than two-thirds of their turnover in one and the same Member State. The operation has therefore a Community dimension.

IV. THE RELEVANT MARKETS

A. Relevant product markets

7. The notifying parties argue that the relevant product markets are the carrier market for mobile telephony and the market for distribution of mobile telephony including the sale of mobile telephone handsets. The carrier market means the market for operating a mobile telephony network whereas the distribution market refers to the sale of complete packages of mobile telephony products to end-customers.
8. The parties submit that their distinction is justified because the two markets involve different activities. On the carrier market, companies build and maintain networks which provide airtime. On the distribution market, companies sell packages of airtime and other services to end-users. The latter is served by two types of competitors: carriers themselves and so-called service providers which do not operate their own network. According to the parties, this distinction between carriers and distributors is recognised by German law in that it is necessary to obtain a licence to operate a mobile telephony network but it is not necessary to obtain a licence for distribution of mobile telephony services. This legal distinction makes it clear that service providers form part of a particular customer group for carriers and carriers are also suppliers of service providers.
9. The Commission has in previous decisions based its assessment on a market for mobile telecommunication services encompassing both GSM 900 and GSM 1800 and possibly also analogue platforms (cases M.1430 - *Vodafone/AirTouch* and M.1669 - *Deutsche Telecom/One2One*). The Commission has so far left open the question whether a further segmentation of the mobile telecommunications services

market into a market for business/residential customers; network operator/service provider is appropriate. However, the Commission has in case JV.26 Freecom/Dangaard found that the sale of handsets could be considered a separate product market.

10. During the Commission's investigation, the majority of respondents confirmed that the relevant product market is the market for mobile telecommunications services. However, a substantial number of respondents agreed in principle to the market definition proposed by the party, excluding however handsets in the distribution market. In any event, it is not necessary to reach a final conclusion on the relevant product market definition, as it does not affect the competitive assessment in this case.

B. Relevant geographic market

11. The notifying parties submit that both the carrier and distribution markets for mobile telephony is national. Although it is conceivable that the market is evolving towards one with wider than national scope given the increasing availability of technology such as roaming, the parties argue that given the current market conditions the relevant market is national.
12. The Commission has in earlier decisions (Case M.1430 – Vodafone/Airtouch) concluded that the relevant geographical market is national. The Commission's investigation confirmed that irrespective of the market definition chosen, the mobile telephony services market or the carrier and distribution markets, the relevant geographic market is still national in scope even though it may be a trend towards regional or European-wide markets in the future.

V. COMPETITIVE ASSESSMENT

United Kingdom market for mobile telephony

13. With the transaction, Mannesmann AG will acquire sole control of Orange, one of four licensed mobile telephony operators in the UK. Orange is active both as a network operator and a distributor of services. Mannesmann is currently not active in the UK mobile telephony market. Thus, irrespective of market definition chosen, no horizontal overlap arises as a result of the transaction.
14. Furthermore, it does not appear that the transaction would lead to a reduction in competition by the removal of a potential new entrant since Mannesmann cannot enter the UK mobile telephony market in the short term without an operator's licence. For the time being no frequencies are available for a fifth new GSM operator in UK market. The UK government has plans to auction five UMTS licenses next year and intends to reserve the majority of the frequencies to a new entrant. However, it cannot be certain that Mannesmann would obtain such a licence since a number of operators have already indicated that they intend to apply for a UMTS licence in the UK.
15. In the light of the above it can be concluded that the notified transaction, even with the narrowest possible market definition, does not lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the UK.

German market for mobile telephony

16. There is no indication that the notified transaction would create or strengthen a dominant position on the German market for mobile telephony irrespective of the market definition chosen despite the fact that both parties are active in Germany.
17. Mannesmann as a licensed mobile telephony operator is active both as a carrier and a distributor through its mobile subsidiary Mannesmann Mobilfunk jointly controlled with Vodafone/Airtouch. According to the figures provided by the parties, Mannesmann Mobilfunk has a market share of [40-50%] on the carrier market based on the number of subscribers. Its competitors in this market are T-Mobil (40-50% market share), E-plus (10-20% market share) and Viag Interkom (0-10% market share). Orange is only active in Germany as a service provider through Hutchison Telecommunications.
18. Using the market definition proposed by the parties the notified concentration therefore gives rise to a direct horizontal overlap on the distribution market. Mannesmann Mobilfunk has according to the parties an estimated market share of [20-30%] on the distribution market based on the number of subscribers. Hutchison Telecommunications has an estimated market share of [0-10%] in this market. The parties combined market share would thus amount to [30-40%]. The party's largest competitor on this market is T-Mobil with a market share of [20-30%]. Other competitors are Debitel [10-20%], E-plus [10-20%], Talkline [0-10%], Cellway [0-10%], Mobilcom [0-10%], D-Plus [0-10%], VICTOR VOX [0-10%], Drillisch [0-10%] and Viag Interkom [0-10%].
19. Given Hutchison's low market share and the large number of competitors in the Germany market, the Commission has concludes that the notified transaction would not lead to a creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in Germany.

Austrian mobile telephony market

20. Both Mannesmann and Orange are active in the Austrian market with shareholdings in two of the four licensed mobile operators in Austria; Orange in Connect Austria GmbH and Mannesmann in tele.ring through its 100% subsidiary Mannesmann Eurokom. Tele.ring currently provides fixed line telephony but will in the near future also operate a mobile telephone network in Austria.
21. In the notification Mannesmann offered an Undertaking to sell Orange's stake in Connect Austria to a third party, the details of which were submitted on 9 December 1999 (see below). Given that the resulting sale will remove any overlaps in the Austrian mobile telephony market it is not necessary to assess the impact the transaction may have had in the Austrian market without the offered undertaking.

French market for mobile telephony

22. Both Mannesmann and Orange are active on the French market, Mannesmann both in the carrier market and distribution market and Orange in the distribution market. Thus, with the market definition proposed by the notifying parties the notified transaction creates both an overlap and a vertical link in the French market.

23. Mannesmann is indirectly active in the carrier and distribution markets through its 15% interest in Cegetel, which in turn has an 80 % interest in Société Française de Radiotéléphonie, SFR, a French licensed mobile GSM operator. The remaining 20% of SFR is owned by Vodafone. SFR is jointly controlled by Vodafone and Cegetel. Cegetel itself is owned by Vivendi (44%), BT (26%), SBCI (15%) and Mannesmann Eurokom (15%).
24. SFR is the second largest mobile operator in the carrier market with an estimated market share of 36,3% based on the number of subscribers. The largest operator is France Telecom with a market share of 49,1%. The third mobile operator, Bouygues Telecom has a market shares of 14,6%³.
25. SFR has according to the parties an estimated market share of [20-30%] on the distribution market based on the number of subscribers. Orange is active in this market through Hutchison Telecommunications. Hutchison Telecommunications has an estimated market share of [0-10%] in this market. The combined market share of SFR and Hutchinson would thus amount to [25-35%]. Even if SFR and Hutchinson's market shares were ascribed to the parties, they would face competition in this market from France Telecom, with an estimated market share of [40-50%], followed by Bouygues Telecom with [10-20%]. There are also six other service providers with an estimated combined market share of [5-15%].
26. Given Hutchison's low market share it can be concluded that the notified transaction would not lead to a creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in France.

VI. SUBMITTED UNDERTAKINGS

27. Both Mannesmann and Orange were prior to the transaction active in the Austrian mobile telephony market with shareholdings in two of the four licensed mobile operators in Austria. Given the direct overlap, Mannesmann offered at the time of the notification of the transaction an Undertaking to sell its shareholding in Connect Austria.
28. Under the terms of the Undertaking Mannesmann has undertaken to use its best endeavours after the Commission's decision to cause the other shareholders in Connect Austria to agree to the sale of the shares in accordance with the Articles of Association in Connect Austria. In the event that Mannesmann obtains the necessary consent of the other shareholders to sell the shares, Mannesmann undertakes to sell the shares no later than [...] from the date of the Commission's Decision, or in case the necessary [...] consent is obtained later [...], no later than [...] after such agreement has been secured. In the event that Mannesmann cannot cause the other shareholders to agree to a sale [...], Mannesmann has undertaken to sell the shares by [...]. An independent Trustee will be appointed to monitor the viability and saleability of the divestment assets in accordance with the undertaking, and ensure that the rights of Mannesmann has as a shareholder in Connect Austria are exercised on an arm's lengths basis until completion of the sale. Mannesmann will, in addition, ensure that confidential information relating to Connect Austria is not

³ Figures provided by the parties from Financial Times, Mobile Communications, 1 October 1999.

divulged to tele.ring and vice versa. Provisions are included for the Trustee to provide written reports on progress with the discharge of the Trustee's mandate. Furthermore, in the event that the shares have not been sold within the time periods set out in the undertaking, the Trustee will acquire irrevocable rights to step in and take control of the sale process in order to ensure the divestment of the shares takes place within the agreed periods.

29. The text is as follows:

Mannesmann hereby offers the following commitments ("the Undertaking") with respect to the above-referenced notification:

I. The Divestiture:

1. In order to achieve clearance of the merger, Mannesmann undertakes to sell or cause to be sold all participations in Connect Austria held by any member of its group ("The Shares"), on the terms and conditions set out below.
2. The Shares consist of an interest of 17.45% in Connect Austria, which will be transferred to one or several unconnected and independent from Mannesmann purchasers (collectively "The Purchaser"). The European Commission has to approve The Purchaser proposed by Mannesmann.
3. Mannesmann will cause all steps to be taken to ensure that the benefits and burdens of all contracts relating to the shares will be transferred, assumed or assigned to The Purchaser.

II. Timing

4. Without prejudice to the powers of the Trustee and/or the European Commission as set out below, Mannesmann will [...] after the Commission's decision use all reasonable efforts to cause the other shareholders to agree to the sale of The Shares in accordance with [...] the Articles of Association of Connect Austria. If such agreement cannot be secured immediately Mannesmann undertakes to seek an agreement at least [...] until [...].
5. In the event that Mannesmann obtains the necessary [*..substantial majority..*] consent pursuant to [...] The Articles and the other shareholders in Connect Austria agree to the sale of the Shares, Mannesmann undertakes to sell, after the prior approval of the Commission, the Shares to the Purchaser and Mannesmann undertakes to enter into a legally binding sales contract with The Purchaser no later [...] from the date of the Commission's Decision or, in case the necessary [*..substantial majority..*] consent is obtained later in the period up to [...], no later than [...] after such an agreement has been secured.
6. In the event that Mannesmann cannot cause the other shareholders in Connect Austria to agree to the sale of the Shares as set out in paragraph 4 above, and is, therefore, prevented from selling The Shares [...] Mannesmann shall be obliged to sell The Shares [...], according to the procedure as set out in [...] The Articles.
7. It is understood that the terms of the sale will be subject to all requisite regulatory and other approvals and the identity of the Purchaser will be subject to the prior approval of the Commission. Mannesmann will ensure that legal title to the shares is transferred no later than [...] after all such approvals have been obtained and the above periods have elapsed.
8. In the cases of paragraphs 5 and 6 above Mannesmann shall be entitled to and shall require the Trustee to have due regard to the commercial interests of Mannesmann and in particular its interest to achieve a purchase price compatible with the due market value of The Shares.

9. Mannesmann further undertakes:
- (a) without prejudice to paragraph 18(b) below, not to divulge any proprietary confidential information relating to Connect Austria and received in or in relation to its capacity as shareholder of Connect Austria to tele.ring or any of its shareholders or officers.
 - (b) not to divulge any proprietary confidential information relating to tele.ring and received in or in relation to its capacity as shareholder of tele.ring to Connect Austria or any of its shareholders or officers.
10. Immediately upon Trustee's appointment Mannesmann shall cause any member of the bodies of Connect Austria appointed by Orange to be replaced by the Trustee or representatives of the Trustee. Mannesmann shall refrain for a period [...] from the Commission's decision from appointing the above mentioned Orange appointees to any body of tele.ring.

III. Trustee

11. A Trustee will be appointed according to the provisions set out below. The Trustee will act as a representative of Mannesmann in Connect Austria. The Trustee will take care of the financial interests of Mannesmann in Connect Austria but will be prohibited from forwarding any market related information (except those financial data which would normally be made available to shareholders in a publicly listed company) and/or commercially sensitive information. (including but not limited to business projects and strategies of Connect Austria) to Mannesmann.

Appointment of the Trustee

12. Mannesmann shall propose to the Commission, within [...] after the Commission's Decision, the names of at least two individuals or institutions, independent from Mannesmann, with the necessary experience and competence in the field of telecommunications, either of whom Mannesmann considers appropriate to be appointed as a Trustee.
13. The Commission shall have the discretion, not to be unreasonably exercised, to approve or reject one or both of the names submitted. If only one name is approved, Mannesmann shall appoint or cause the individual or institution concerned to be appointed as Trustee. If more than one name is approved, Mannesmann shall be free to choose the Trustee to be appointed from among the names approved.
14. If all the names submitted are rejected, Mannesmann will submit the names of at least two further such individuals or institutions within [...] of being informed of the rejection. If more than one further name is approved, Mannesmann shall be free to choose the Trustee to be appointed from among the names approved. If only one name is approved, Mannesmann shall appoint or cause the individual or institution concerned to be appointed as Trustee.
15. If all further names are rejected by the Commission, the Commission shall nominate a suitable Trustee which Mannesmann will appoint or cause to be appointed. In such case, The Trustee shall be an investment bank or accountancy firm of international standing.
16. As soon as the Commission has given approval to one or more names submitted, or nominated a Trustee to be appointed, Mannesmann shall appoint or cause the Trustee concerned to be appointed within [...] thereafter.
17. The Trustee may be removed by Mannesmann with the prior approval of the European Commission in the event that the Trustee has not acted in accordance with the provisions of this undertaking or any other good cause. Regarding the appointment of a new Trustee the same procedure applies as described above.

Functions of the Trustee

18. Immediately upon the Trustee's appointment Mannesmann shall enter into a mandate with the Trustee whose terms shall have previously been agreed with the Commission and which shall include the functions as set out hereunder:
- (a) to represent Mannesmann in all bodies of Connect Austria and particularly
 - (i) to vote The Shares in Connect Austria in the financial interest of Mannesmann until legal title to The Shares has been passed to the Purchaser,
 - (ii) to appoint and instruct a sub-representative,

(i) and (ii) always being subject to the duties and obligations of Mannesmann or members of its group imposed by law and pursuant to all agreements in connection with the holding of the Shares and in particular the rights and obligations resulting from shareholder agreements and the Articles of Association of Connect Austria and
 - (b) to inform Mannesmann about non-market related data in the sense of paragraph 11 above, commercially non-sensitive data and decisions relevant to Mannesmann's shareholding in Connect Austria.
 - (c) to monitor the maintenance of the viability and saleability of The Shares in accordance with this Undertaking, and to ensure that the rights Mannesmann has as a shareholder in Connect Austria are executed on an independent arm's length basis consistent with their status, until their divestment to the Purchaser;
 - (d) to monitor the satisfactory discharge by Mannesmann of the obligations entered into in this Undertaking;
 - (e) to inform and advise the Commission as to the adequacy of the procedure for selecting the Purchaser and as to the conduct of the negotiations;
 - (f) to inform and advise the Commission as to whether prospective Purchasers with whom Mannesmann is or intends to negotiate are likely to satisfy the Commission's requirements as set out in the Commission's Decision.
 - (g) to inform and advise the Commission as to whether the agreements with the Purchaser will properly provide for a divestiture of The Shares as provided for herein.
 - (h) to provide written reports to the Commission about the Trustee's mandate, identifying any respects in which the Trustee has been unable to discharge his mandate. Such reports shall be provided at regular [...] intervals commencing one month after the date of his appointment, or at such other time(s) or time periods as the Commission may specify.
 - (i) The Trustee shall be entitled to cause Mannesmann to break off negotiations if it appears to the Commission that the negotiations concerned are being conducted with a unsuitable purchaser who does not satisfy the criteria set out in the Commission's decision.
19. The Trustee's mandate as set out above shall not be extended or varied in any way by Mannesmann, save with express written consent of the Commission. Any instruction or request to the Trustee from Mannesmann which conflicts with the Trustee's mandate will be considered null and void.
20. After either [...] have elapsed from the date of obtaining a [*substantial majority*...] consent pursuant to [...] The Articles or after [...], the Trustee's mandate shall be extended and deemed to be extended in order to enable him to carry out, at the Trustee's discretion, the additional functions set out hereunder, and he shall be deemed to have such powers, including all powers of attorney, as are required to enable the discharge of his additional functions as the Trustee, at his discretion, considers necessary.

In the event of conflict with the discharge of any of the functions in the Trustee's mandate as set above, and the additional functions referred below, the Trustee shall give priority to the discharge of these additional functions.

The additional functions are as follows:

- (a) after either [...] have elapsed from the date of a [*substantial majority*.] consent pursuant to [...] The Articles or after [...], the Trustee may decide that it is necessary in order to achieve compliance with the Undertakings, to submit to the Commission a proposal of the divestiture under control of the Trustee. The Commission will, as soon as reasonably practicable approve the proposal or indicate any changes that it may require:
- (b) the Trustee provides in its reports, or as soon as negotiations are entered into with a potential purchaser, the Commission with sufficient information to enable it to decide on the suitability of such purchaser according to the criteria set out in the Commission's Decision;
- (c) the Trustee submits to the Commission for approval, within due time to ensure compliance with the Undertaking, an agreement for sale of the Shares to a suitable purchaser who satisfies the criteria set out in the Commission's Decision;
- (d) the Trustee directs the carrying out of all such steps as may be required to complete the pre-emption and tag-along procedure and transfer of legal title by the final date.

21. In the event that the Shares have not been sold within the time period specified in paragraphs 5 or 6 above, Mannesmann undertakes to immediately give the Trustee an irrevocable mandate to find a purchaser for all of The Shares [...]. Mannesmann undertake to provide the Trustee with all reasonable assistance and information necessary for the execution of such sale and shall be kept informed by the Trustee of all negotiations regarding finding a purchaser for The Shares.

22. The Trustee will provide Mannesmann with all reasonable assistance required to ensure compliance with the Undertaking. In addition to the specific obligation set out in paragraph 20, Mannesmann will always provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant documents accessible by the Trustee, as he may require in carrying out his mandate and to pay reasonable remuneration for his services as agreed in an engagement agreement.

IV. Miscellaneous

23. This Undertaking is governed by German Law.

24. The Undertaking is subject in all respects to the general duty of trust and good faith and to the terms of all agreements relating to the Shares, in particular shareholder agreements and the Articles of Association.

25. The Commission may on its own initiative or at the request of the Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this undertaking.

30. The Commission will in determining whether any proposed purchaser is suitable, take into account the prospective purchaser concerned (i) appears to possess the status and resources necessary to acquire the shares, (ii) is independent of the Seller, (iii) can be shown not have relevant and significant connection with the Seller, and (iv) has, or reasonably can obtain, all necessary approvals for the purchase from the relevant competition and regulatory authorities in the European Community and elsewhere.

31. Due to the undertaking, no horizontal overlaps will exist as a result of the notified concentration in Austria. Thus, it can be concluded that no competition concerns arise as a result of the notified transaction in Austria.

VII. CONCLUSION

32. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89 subject to the condition of full compliance with the undertakings set out in paragraph 29 of this decision.

For the Commission,

signed by
David BYRNE
Member of the Commission