

***Case No COMP/M.1838 -
BT / ESAT***

Only the English text is available and authentic.

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

Article 6(2) NON-OPPOSITION
Date: 27/03/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.03.2000
SG (2000) D/102641

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

Subject: Case No COMP/M.1838 - BT/ESAT

Notification of 14 February 2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 14 February, the Commission received a complete notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ ("the ECMR") as last amended by Regulation (EC) No 1310/97², according to which British Telecommunications plc ("BT") acquires, within the meaning of Article 3(1)(b) of the Regulation, sole control of the Esat Telecom Group plc ("Esat").
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation 4064/89 and does not raise serious doubts as to its compatibility with the Common Market and the functioning of the EEA Agreement.

I. THE PARTIES

3. BT is a supplier of telecommunications services and equipment, primarily in the UK. BT also has a presence in Ireland through its subsidiary Ocean Communications Ltd ("Ocean"), which offers a portfolio of fixed telecommunications and Internet access services.

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

² OJ L 180, 9.7.1997,p.1; corrigendum, OJ L 40, 13.2.1998, p.17.

4. Esat is a provider of data, Internet and voice services in Ireland. Esat operates also in the Irish mobile telephony market through Esat Digifone, the second mobile operator in Ireland. Esat holds 50.5% of Esat Digifone's share capital, the remaining 49.5% being held by the Norwegian telecommunications company Telenor.

II. THE OPERATION AND THE CONCENTRATION

5. The notified concentration involves the acquisition of sole control of Esat by BT, by means of an offer announced on 11 January 2000. This acquisition will result in the acquisition of joint control over Esat Digifone, the second GSM mobile operator in Ireland. The concentration will have a significant impact on distribution of global telecommunications services in Ireland.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³. The undertakings concerned 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. COMPATIBILITY WITH THE COMMON MARKET

Internet dial up access

7. In Telia/Telenor⁴ the Commission identified a demand for the supply of Internet access services and distinguished between dial up and dedicated access. From the demand point of view these types of access appear to constitute two separate product markets. Dial up access is targeted at residential and business (i.e. small and medium enterprises) customers, while dedicated access is requested mainly by large corporate customers. In the present case both Ocean and Esat provide dial up Internet access services in Ireland, but only Esat provides dedicated access services in Ireland. It emerged in the course of the market investigation that within dial up access it could be possible to distinguish between residential and business dial up access, the latter being provided on the basis of more sophisticated dial up mechanism. In the present case it is unnecessary, however, to establish whether residential and business dial up access constitute two separate relevant product markets since the transaction would not give rise to competitive concerns in this area even on the basis of the narrowest market definition.
8. It is a common view that the geographical market for ISP dial up services is essentially national based on the need for a local loop service. In Telia/Telenor⁵ the Commission concluded that this characteristic limits the extent to which existing access markets

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

⁴ Case IV/M.1439 Telia/Telenor.

⁵ Supra.

could be wider than national. This conclusion is also valid in the present case where the relevant geographical market will be held to be the Republic of Ireland.

9. According to the parties' best estimates, as a result of the transaction their combined market share, in terms of number of customers, in the Internet dial up access market would be [30-40]% ([10-20]% Esat + [15-25]% Ocean); the largest market player would be the incumbent Telecom operator Eircom with a market share of [45-55]%, the remaining [0-10]% being in the hands of other ISPs.
10. In the face of the above market shares, the Commission has examined whether market conditions in Ireland lend themselves to the emergence of a duopoly consisting of Eircom and the merged entity and concluded that this is not the case for the reasons set out below.
11. Market shares in the Irish market for dial-up Internet access are not stable, but have been fluctuating significantly over the last months, mainly as a result of the introduction of subscription free offerings. Within the following two years the market is expected to be further transformed as a result of new entry, and in particular with new Internet offerings by Cable TV companies and digital TV.
12. Demand for Internet access products in Ireland is currently doubling every six months and is expected to continue at this rate for some time.
13. Internet access products do not appear to be homogeneous, there is a range of subscription based and subscription free products with different pricing mechanisms adapted to the different customers' needs. The introduction of the cable TV's and digital TV's products, which have been referred above, will further increase the range of products available.
14. Technological developments are one of the main characteristics of the Internet sector and are expected to continue in the future.
15. According to the parties barriers to entry are very low as new ISPs can purchase wholesale Internet access. This view is contrasted by a complainant who maintains that market position can currently be built only through high marketing costs and by providing a high quality of service. It is, however, unnecessary to decide on this point given that, as seen above, existing conditions prevailing in the Irish market do not seem conducive to oligopolistic parallel behaviour.
16. In the light of the above, it can be concluded that the transaction will not lead to the creation or strengthening of a dominant position in the Irish Internet dial up market.

Distribution of global services in Ireland

17. In the course of the investigation the Commission found evidence of the existence of a market for the distribution in Ireland of pan-European or global end to end network services, which include managed data networks, frame relay services, voice virtual private networks including call centre services. While the production of global services has a global dimension the distribution of these services may have a narrower/national dimension. Global service providers require a national presence and often appoint independent local distributors with their own network for handling traffic in that market (e.g. Global One has appointed Esat as its exclusive distributor for Ireland, and

Infonet distributes through a subsidiary of Esat and through Eircom, see below). The distributor sells the global service provider's products nationally and supports the same products that are sold abroad for use in that national market. Therefore, the effects of the transaction on the distribution of global services will be analysed at the national level.

18. According to a complainant the main market players in Ireland are Concert with a market share of 41%, Sita/Equant with 18%, Global One and Infonet with 9% each, Unisource with 18%, and MCI Worldcom with 0.5%. BT has not provided market share figures contradicting those put forward by the complainant. As a result of the proposed transaction the distribution of Concert's and Global One's products, accounting for approximately 50% of the Irish market, will come under the direct influence of the new entity. The products of Concert, which is controlled by BT, are exclusively distributed by Ocean in the Irish market; Esat is the exclusive distributor of Global One's products in Ireland. The new entity will also distribute Infonet's product in Ireland since the latter has entered into a distribution agreement in Ireland with PostGEM, a subsidiary of Esat (Eircom is the other distributor of Infonet's products in Ireland). The Commission considers that as a result of the transaction the combined entity is likely to become the dominant distributor of global telecommunications services in Ireland. Therefore, based on the current facts, it appears that the transaction could lead to the creation and/or strengthening of a dominant position in the market for the distribution of global telecommunications services in Ireland. The Commission has thus reached the conclusion that the proposed concentration raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

Control over the UK/Ireland route

19. The Commission has in the past considered that the provision of international voice telephony services on a certain route can be considered as the relevant market.⁶
20. According to a third party as a result of the transaction BT would enjoy a dominant position on the UK/Ireland route since it could use its position in the adjacent UK market (including Northern Ireland) to leverage the position of Esat/Ocean in the Republic of Ireland's market. In particular, through the acquisition of Esat BT would have acquired direct end to end connectivity between the UK and Ireland for corporate customers using leased lines to connect to Esat's network. Moreover, BT will be able to cross subsidise the UK/Ireland route.
21. The Commission has carefully examined the issue of the possibility for the combined entity to offer end-to-end connectivity to business customers on the UK/Ireland route and concluded that the transaction will raise no competition doubts in this respect. Eircom, the incumbent operator in Ireland, is by far the strongest market player in terms of leased lines, on the basis of revenues.⁷ Therefore, it seems highly improbable that the merged entity will be able, at least in the near future, to challenge Eircom's supremacy as the main provider of leased lines. More specifically, the business

⁶ See Case IV/M.856, BT/MCI II, in (1996) OJ L336/1.

⁷ According the Irish telecommunications regulator, the ODTR, in December 1999 Eircom had 95% of the leased lines revenues in Ireland, Decision Notice D15/99, "Significant Market Power in the Irish Telecommunications Sector", December 1999).

customers to which Esat could directly connect to its backbone (i.e. those businesses that lie within sufficient proximity to Esat's fibre optic "rings") are the only ones to which the merged entity could offer end-to-end connectivity. Esat's directly connected customers represent, in terms of revenues, only [15-25]% of the addressable business customers (i.e. the possible businesses which could be directly connected to Esat's backbone). Therefore, even if one took into consideration only the addressable business customers market the concentration would be unproblematic.

22. In addition, the Commission considers that Eircom and other suppliers of leased lines in Ireland could replicate the end-to-end connectivity offered by the combined entity. In 1998 Eircom set up a subsidiary in the UK (Eircom UK Ltd) which is specifically targeted at business customers. Eircom could thus provide end-to-end connectivity for these companies between Ireland and the UK.
23. In relation to undersea cable capacity, the Commission considers that no competition law concerns would arise as a result of the transaction; Esat has an interest in [...] and BT in [...] of the currently existing estimated [...] fibre pairs, the others being owned by Cable & Wireless, NTL and Eircom. According to the parties' best estimates, their [...] fibre pairs account for a maximum combined [0-10]% of the current available cable capacity (measured in STM – synchronous transmission mode- systems).
24. Therefore, the transaction raises no serious doubts as to its compatibility with the common market in respect of the UK/Ireland route.

Mobile telephony

25. The Commission has in previous decisions identified a separate product market for mobile telephony services having national geographical dimension.⁸
26. According to a third party, Cellnet -BT's mobile telephony subsidiary- and Esat Digifone -Esat's mobile subsidiary- could offer preferential roaming rates to high value customers. As a result of the lower roaming rates Cellnet's revenues would be reduced, but Digifone's revenues would be increased through winning large corporate customers from Eircell, which will more than offset the losses incurred in the UK. The Irish competitors will not be able to replicate such an offer by negotiating similar roaming agreements with UK operators. For a UK operator with no interest in the Irish operator's profitability reduced roaming rates would only mean reduced revenues.
27. The Commission found that the proposed deal will not rise competition concerns in the relevant mobile market for the following reasons. First, it is to be borne in mind that as a result of the transaction BT with 50.5% would have only joint control over Esat Digifone, together with Telenor which will continue to hold the remaining 49.5%. In order to introduce a roaming free area or reduce roaming rates, BT would need to obtain Telenor's agreement by convincing it that this move would benefit Esat Digifone, rather than BT alone. Telenor, which has no interest in BT's profitability, might be opposed to such a reduction in roaming rates which might result in reduced revenues and thus affect Esat Digifone's profitability. Some other operators could also, under certain conditions, create a free roaming area between Ireland and the UK

⁸ E.g. see Telia/Telenor, ante.

unilaterally. For example, the UK mobile operator Orange has applied for the third mobile license in Ireland and is currently in litigation in relation to its bid. If Orange wins and obtains the third license it would also have mobile operations in the UK and Ireland, replicating the BT/Esat situation. Moreover, unlike BT, Orange would have sole control over its UK and Irish networks and would face no obstacles to the merger of the two. It is also worth mentioning that Eircell has recently bid for a license in the UK, which, if successful, would enable it to offer a free roaming area within the UK and Ireland.

28. As regards other parties' interest in replicating the actions of BT/ESAT, the Commission found that the UK mobile market, being the neighbouring market, has a significant influence on the Irish market given the high level of movement of persons between the two countries. For the Irish mobile operators subscribers to UK operators represent a significant part of their incoming roaming revenues (e.g. for Eircell they represent more than half of their total incoming roaming revenues). For the UK mobile operators subscribers to Irish operators are considerably less significant as a source of revenues in proportion to their total incoming roaming revenues. Therefore, it could be argued that the UK operators could not have the same interest as the Irish ones in replicating the cheaper roaming rates offered by the merged entity. It cannot, however, *a priori* be excluded that the other UK mobile operators would have a certain incentive and the capability of replicating, e.g. by means of contractual arrangements, the integrated BT/Esat's network. However, if UK customers were to switch to BT/Esat because attracted by their cheaper roaming conditions, the other UK mobile operators would be losing UK customers, and thus revenues; second they would be losing the revenues they are currently making from their customers roaming in Ireland as this would also go to the merged entity. It could not be excluded that the UK mobile operators might have an interest in reacting even if only Irish customers were to switch network. If the Irish competing operators' customers moved to BT/Esat they would then be on the integrated BT/Esat's network and all the roaming revenues that the UK operators received when those customers roam in the UK would be lost to the merging parties.
29. In this context, it is worth mentioning that there are four licensed mobile operators in the UK: Orange, Cellnet, Vodafone and One-to-One. Some of these operators have already expressed the view to the Commission that in the situation described above they would have an incentive to come to an agreement with an Irish operator to match or better the roaming conditions offered by the new entity.
30. Therefore, the Commission has reached the conclusion that the proposed merger will not lead to the creation or strengthening of a dominant position in the mobile telephony market.

V. MODIFICATION TO THE PROPOSAL

31. In order to remove the competition law concerns raised by the transaction, BT submitted on 6 March 2000 a proposal for modification of the operation in accordance with the terms of Article 6(2) of the ECMR. The proposed undertakings, which relate to distribution of global telecommunications services in Ireland, are as follows:

- a) BT undertakes to grant the Global One companies the right to terminate ("the right") the exclusive distribution agreement between Global One and Esat with immediate

effect and without penalty such that Global One would then be in a position to appoint a new exclusive distributor if they so desire.

b) Should Global One decide not to exercise the right, BT undertakes that Esat would disclaim all rights of exclusivity it has in respect of the distribution of Global One products, provided that the Global One companies permit Esat Telecommunications Ltd and its related companies to deal in, distribute and support Concert and BT products and services without restriction.

c) In the event that the Global One companies do not accept the provisions set out above, BT undertakes that Esat will invoke its right to terminate the exclusive distribution agreement with immediate effect.

d) BT undertakes that on the expiry of the distribution agreement between Infonet and PostGEM, on 31 December 2000, no steps will be taken to renew, extend or replace same, and more specifically that PostGEM will give written notice to Infonet, in accordance with that Agreement, that the automatic renewal shall not take effect.

32. The proposed undertakings should open up the Irish market for the distribution of global services to competition by increasing the number of market players or strengthening the position of the other existing Irish distributors. The termination of the contract or of the exclusivity with Global One should enable the latter to appoint a new exclusive distributor or at least another distributor in addition to the new entity. The termination of the contract with Infonet should either strengthen the position of Eircom, which is the other distribution of Infonet's products in Ireland, or result in the appointment of another distributor, should Infonet decide to replace the new entity with somebody else. These undertakings will considerably reduce the overlap brought about by the concentration insofar as they will break and/or significantly weaken the distribution relationship between Esat and the global providers. Therefore, the Commission is of the opinion that the commitments are sufficient to remove the serious doubts identified by the Commission.

VI. CONCLUSION

33. As a result of the undertakings given by the parties and set out in Annex I, the notified transaction does not raise serious doubts as to its compatibility with the common market. Therefore, subject to full compliance with these undertakings, the Commission has decided not to oppose the notified concentration and declare it compatible with the common market and the functioning of the EEA Agreement.

For the Commission
Mario Monti
Member of the Commission

ANNEX: BT UNDERTAKINGS

1. BT undertakes with effect from the date of closing of its acquisition of Esat Telecom Group plc, to grant the Global One companies the right to terminate the National Partner Agreement dated 15th April 1999 ("NPA") by and between Global One Communications Services BV, Global One Communications Ltd and Esat Telecommunications Ltd, with immediate effect and without penalty such that Global One would then be in a position to appoint a new exclusive distributor if they so desire.
2. Should the Global One companies decide not to exercise the right provided in paragraph 1 above, BT undertakes that with effect from the date of the closing of its acquisition of Esat Telecom Group plc, Esat Telecommunications Ltd would disclaim all rights of exclusivity it has in respect of the distribution of Global One Products, as defined under the NPA, provided that the Global One companies permit Esat Telecommunications Ltd and its related companies to deal in, distribute and support Concert and BT products and services without restriction.
3. In the event that the Global One companies do not accept the provisions of paragraph 1 or 2 above, BT undertakes that, with effect from the date of closing of its acquisition of Esat Telecom Group plc, Esat Telecommunications Ltd will invoke its right to terminate the NPA with immediate effect.
4. BT undertakes that on the expiry of the Infonet Services Agreement, dated 1 January 1996, between Infonet Services Corporation ("Infonet") and PostGEM Ltd. on 31 December 2000, no steps will be taken to renew, extend or replace same, and more specifically that PostGEM Ltd. will give written notice to Infonet, in accordance with that Agreement, that the automatic renewal shall not take effect.