

***Case No COMP/M.1863 -
VODAFONE / BT /
AIRTEL JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 18/12/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.12.2000
SG(2000)D/

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Subject: Case No COMP/M.1863 - VODAFONE/BT/AIRTEL

Notification of 16.11.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 16.11.2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ “the Merger Regulation” by which the British undertakings Vodafone Group Plc (formerly Vodafone Airtouch Plc) and British Telecommunications plc change the quality of control over the Spanish undertaking Airtel Móviles S.A. (Airtel) by way of purchase of shares and a contract of management.

THE PARTIES

2. Vodafone Group Plc (“Vodafone”) is a holding company of a group of companies which is involved in the operation of mobile telecommunications networks and the provision of related telecommunications services, including data network operation, radio paging, satellite mobile communications and value added network services. It has mobile operators subsidiaries which are in eight EU Member States and has interests short of sole control in operators in three others. Several of those operating companies also carry out some Internet-related activities, such as the provision of WAP portals.
3. British Telecommunications Plc (“BT”) provides a wide range of communications and Internet services including fixed line voice telephony and data services, value added services and mobile telephony services to residential and business customers. Its main activities are in the United Kingdom. BT is also active internationally through its

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

Concert joint venture with AT&T. BT is active in mobile telecommunications joint ventures in France, Germany, Ireland, Italy, the Netherlands, the United Kingdom and Spain.

4. Airtel Móviles S.A. (“Airtel”) is a full function joint venture that operates in the mobile telecommunications services market in Spain. It was awarded a GSM license in Spain in 1995 and began operations in October 1995. In January 1999, Airtel was also awarded a fixed line service license. Airtel introduced an internet offering in June 1999, through its Navegalia mobile internet portal. Airtel was awarded a UMTS licence in March 2000.

THE OPERATION AND CONCENTRATION

Background

5. On 23 April 1998, five shareholders representing 56% of the voting rights in Airtel, signed an Alliance Agreement which, amongst other things, pooled their voting rights and established rules for voting in Airtel’s board and shareholders’ meetings. According to the Agreement, Vodafone holds 38.8%, BT 28.8%, Acciona 19.41%, Inversiones Fersango/Torreal 8.98% and Corporación Financiera Alba 4.52% of the Alliance votes. The Agreement provides that certain decisions require qualified majority of at least [...]% of the Alliance votes. All other matters not explicitly listed, require a simple majority of 50.01% of the Alliance votes. The Agreement can be terminated at the option of any Spanish shareholder ² at any time after the date on which BT and Vodafone control more than 50% in aggregate of the issue shared capital of Airtel. Either BT or Vodafone may also terminate in such circumstances but only if 3 years have elapsed from the signature of the agreement.
6. [...] Given that Acciona had sufficient votes under the Alliance Agreement to block any qualified majority matter the Commission concluded in Case IV/JV.3³ – *BT/Airtouch/Grupo Acciona/Airtel* that [...] as a result of the Alliance Agreement, Airtel was jointly controlled by BT, Airtouch (now Vodafone) and Acciona.

Change of quality of control in Airtel

7. Due to a number of agreements entered into between Vodafone and the other shareholders in Airtel, Vodafone will acquire a majority of the shares of Airtel.

Shareholders Agreement of 9 June 2000 between Vodafone and BT

8. Even though Vodafone may acquire as much as 75.12% (i.e. all shares except BT’s) of the shares in Airtel, due to a new Shareholders Agreement between BT and Vodafone, BT will continue to have joint control of Airtel (see further below). The Shareholders Agreement also provides that every time, after the completion of a purchase of Airtel shares, Vodafone holds [...]% or more of the issued share capital in Airtel and provided that the Alliance Agreement has been terminated⁴, BT has the option to purchase from

² Acciona, Torreal and Corporación Financiera Alba

³ Commission decision of 8 July 1998.

⁴ Section 12 of the Alliance Agreement provides that the Agreement can be terminated at the option of any of Acciona, Fersango and Alba at any time after the date of which BT and Vodafone own and control more

Vodafone those Airtel shares it holds in excess of [...]% (in some limited cases in excess of [...]).

Appointment of the Board and Governance Rights

9. Different rules about governance apply as Vodafone's and BT's stakes in Airtel alter. Vodafone has already entered into an agreement with some of the shareholders to obtain their 43.5% shareholding in Airtel. Upon completion of the transfer of these shares Phase 1 of the Shareholders Agreement is triggered. From the Phase 1 Completion date, Vodafone and BT will appoint no less than 5 directors each to Airtel's board while the remaining shareholders (as long as they retain any Airtel shares) will appoint a maximum of 4 directors. Board decisions on all matters, strategic or otherwise, will require the favourable vote of the majority of the Directors. BT and Vodafone will thus jointly control Airtel. If BT and Vodafone are unable to agree on any issue which is the subject of a decision of the Board or of the shareholders meeting and no resolution is found, it is agreed that the parties will vote in the board or shareholders meeting so as to maintain the *statu quo* in relation to Airtel.
10. From the date from which Vodafone, directly or indirectly, owns [...]% or more and BT first, directly or indirectly, (a) owns [...]% or more of Airtel shares, or (b) could have owned more than [...]% or more of the Airtel shares had BT exercised its options granted under the Shareholders Agreement but did not do so the Phase 2 Completion date is triggered⁵. As from the Phase 2 completion date, the Shareholders Agreement *inter alia* stipulates that each of Vodafone and BT appoints an equal number of directors of not less than 5 each. The remaining shareholders will appoint 3 directors. Furthermore, for certain reserved matters, such as the approval of the business plan, approval of the annual budget, any fundamental change in the scope of the business of Airtel, any application by Airtel for licenses to operate fixed networks, and any acquisitions, disposals, or creation of encumbrances by Airtel which exceed Ptas 5 billion (30 million EURO) will require the agreement of the majority of Vodafone and BT directors at Board level and the mutual agreement of BT and Vodafone in the case of shareholders' decisions. BT will therefore continue to have joint control of Airtel even after the Phase 2 Completion Date.
11. As a result of the above, only BT and Vodafone will jointly control Airtel and both will thus improve their quality of control over Airtel as regards strategic business decisions. For other decisions Vodafone's and BT's control over Airtel will remain unchanged.

COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁶. Each of Vodafone and BT have a Community-wide turnover in

than 50% in aggregate of the issued share capital of Airtel. Either BT or Vodafone may also terminate in such circumstances but only if three years have elapsed from signature of the Agreement.

⁵ Under the Shareholders Agreement, the earliest possible date for the triggering of Phase 2 will be at least 12 months from the phase 1 completion date.

⁶ 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

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.

COMPETITIVE ASSESSMENT

Dominance

13. Airtel is active in the provision of mobile telephony services in Spain. In this connection, Airtel has a mobile Internet portal, the "Navegalia portal". Airtel is also a provider of fixed line telecommunications services (voice, data and dial-up internet access) in Spain. There is an overlap in the fixed line services of Airtel and BT subsidiaries in Spain. BT's subsidiary BTTel is active in the Spanish market as a fixed line service provider and internet service provider (ISP). However, Airtel and BTTel supply less than 5% of fixed telecommunications services in Spain. Furthermore, BTTel and Arrakis, another BT subsidiary, and Airtel all provide dial-up internet access in Spain. Also on this market the parties combined market share account for less than 15% of the market. Neither Vodafone or BT is active in the mobile telecommunications market in Spain other than via Airtel.
14. The transaction does not give rise to any increase in market shares in the Spanish mobile telephony market(s) or any affected markets. For the purposes of the assessment of the present case, the definition of the relevant markets can therefore be left open.

Co-ordination of competitive behaviour

15. Both BT and Vodafone are active on markets that are neighbouring to that of the joint venture. In the first Airtel decision the Commission found that there was no clear indication that the transaction would have as its object the co-ordinating the competitive behaviour of BT and Vodafone on any of the markets where they are both present. Furthermore, it was not possible to claim with the required degree of certainty that the situation would have the effect of co-ordinating the competitive behaviour of BT and Vodafone, which had, up to then, acted independently in mobile telephony despite the fact that they were both already shareholders in Airtel⁷. Given that now only BT and Vodafone will control Airtel, the Commission has assessed the possible impact the change of quality of control may have on the competitive behaviour of BT and Vodafone in markets where both are active or on other closely related markets.
16. Vodafone and BT are active as mobile telephony operators in the United Kingdom, the Netherlands, Germany, Italy and France. As mobile telephony operators they provide mobile telephony services, that may include WAP portals⁸. They also provide wholesale roaming services to foreign network operators, wholesale airtime to domestic service providers, and national roaming to mobile network operators within the same state. In

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.

⁷ See Airtel decision at paragraphs 23-26

⁸ See further Case COMP/JV.48 Vodafone/Vivendi/Canal+, Commission decision of 22.07.2000

addition, they may provide interconnection to their networks (call termination in the mobile network and call origination of mobile calls).

17. Although it has been argued by both the parties and some third parties during the Commission's investigation that the provision of wholesale roaming does not constitute a separate market from mobile telephone services, the Commission believes that there are distinct wholesale markets for roaming which are national in scope. The provision of wholesale roaming to foreign mobile network operators satisfies primarily a demand by foreign mobile network operators whose main objective is to enable them to offer their own subscribers a seamless service, not limited to the territory in which they have their own physical network⁹. In addition, downstream there is a demand from users to be able to use their mobile phones while outside their home countries without having to acquire a new SIM card, or to enter into another subscription. This demand appears to be distinct from national roaming, airtime provision, indirect access through carrier pre-selection (i.e. call origination) or pre-selection.
18. Nevertheless, irrespective of the market definitions chosen, the Commission's investigation has given no indication that the current transaction would have the object of co-ordinating the competitive behaviour of BT and Vodafone on any of markets where they are both active or on any closely related markets. Furthermore, the investigation has not shown that the change of quality of control in Airtel will have the effect of co-ordinating the competitive behaviour of BT and Vodafone through Airtel.

ANCILLARY RESTRAINTS

19. Clause 16 of the shareholders agreement signed by Vodafone and BT provides that in Spain the parties shall not, and shall cause its affiliates not to, directly or indirectly, join, participate in (including as a member of any governing, administrative or management body), invest in or own any interest in, any person, company joint venture or other entity (other than Airtel) that owns, operates or pursues a business that provides (or intends to provide) any wireless or mobile telecommunications service in Spain. To the extent that a similar provision was considered as directly related and necessary for the implementation of the concentration by the Commission in its decision of 8.7.1988 (case J.V.3 BT Airtouch/Grupo Acciona/Airtel) for a period of five years, the Commission can consider it as ancillary for the present concentration until 07.07.2003.
20. As regards clause 16 of the Shareholders' Agreement considered by the parties as ancillary to the concentration, the Commission believes that it is not directly related and necessary for the implementation of the concentration since Airtel is a well established company and its absence does not imply that the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciable longer period or with considerable higher difficulty.

⁹ See the Commission's Working Document on the sector enquiry into roaming at: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/roaming/working_document_on_initial_results.pdf

CONCLUSION

21. 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,