

***Case No COMP/M.1954 -
ACS / SONERA
VIVENDI/XFERA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 31/07/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.07.2000

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.1954 - SONERA VIVENDI / XFERA

Notification of 29.06.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 29.06.2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which the undertakings ACS Telefonía Móvil SA, a wholly owned subsidiary of the Spanish undertaking ACS Actividades de Construcción y Servicios SA (ACS), Sonera Holding BV, a Dutch subsidiary of Sonera Corporation (Finland) (SONERA) and Vivendi Telecom International belonging to the French group Vivendi (VIVENDI) acquire within the meaning of Article 3(1)(b) of Council Regulation (EEC) No 4064/89 joint control of the Spanish undertaking XFERA. The new joint venture, XFERA has been granted a licence in Spain for the exploitation of the third generation UMTS² mobile telecommunications.
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' ACTIVITIES AND THE OPERATION

ACS is a Spanish group whose activities are divided into three main business areas: construction, services and concessions.

SONERA provides a wide range of telecommunication services to residential and business customers, primarily in Finland. Sonera's major lines of business include mobile communications services, fixed line domestic and international voice services, data and media

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

² Universal Mobile Telecommunications system.

communications, equipment sales, and new services. Sonera currently generates 95% of its current revenues from sales to customers in Finland.

3. VIVENDI's main activities are divided within the following divisions: utilities, construction and property and communications (telecommunications, publishing, multimedia, and audio-visual activities with a world-wide scope).

On January 2000 ACS, SONERA and VIVENDI together with other founding shareholders (ACESA, MERCAPITAL, MANNESMANN³ and ACF), created the XFERA consortium with the purpose to submit a joint bid for a B2 mobile telephony license in Spain, in order to set up a UMTS network. XFERA was granted a licence for the establishment of the necessary public network on March 2000. The formalisation of the licence has taken place on April 18, 2000. On January 12, 2000, ACS, SONERA and VIVENDI (the parties) together with ACESA, MERCAPITAL, MANNESMANN and ACF, executed a shareholders agreement in order to govern their relationship with XFERA and the operations thereof.

II CONCENTRATION

Joint control

4. According to the shareholders agreement, the parties will hold the majority (62,5%) of the shares of XFERA (ACS 20%, SONERA 15% , VIVENDI 27,5%). Decisions at the General Shareholders Meeting shall be adopted by simple majority, except for certain major issues which shall require the approval of shareholders representing at least 70% of the share capital [...]. The parties may appoint 9 of the members of the board of directors which is composed of 14 plus the Chief Executive Officer (CEO). At the board of directors level, decisions shall be adopted by simple majority. However, the favourable vote of at least 10 directors is required for the adoption of resolutions addressing qualified matters (such as the business plan and the annual budget). The parties shall also unanimously propose the CEO that shall be finally appointed by the Board of directors. However, once the parties have made a proposal in this respect, all the directors shall vote at the board in favour of the person so nominated. The parties shall appoint the members of the Executive Committee which shall propose the adoption of the main decisions. The Executive Committee shall propose the appointment of the key managers, which together with the CEO, shall be responsible for the day to day management of XFERA.

Therefore the parties will be in a position to exercise decisive influence on the commercial policy of XFERA: they must reach a common understanding in determining the commercial policy of XFERA and have the power to co-determine the structure of the management of XFERA. Accordingly, the XFERA consortium will be jointly controlled by ACS, SONERA and VIVENDI.

³ Mannesmann's stake in Xfera was held through its subsidiary Orange Plc. However, as a result of the operation between Vodafone, Airtouch and Mannesmann AG (see Commission Decision in case M.1795 *Vodafone/Airtouch/ Mannesmann*), Orange plc has been acquired by France Telecom.

Full function joint venture

XFERA is a full-function joint venture within the meaning of article 3(2) of Council Regulation (EEC) 4064/89, performing all the functions of an autonomous economic entity on a lasting basis.

The granting by the Spanish Authorities of a licence to XFERA will allow it to establish and operate its own mobile network. According to the Shareholders Agreement subscribed by all the shareholders, XFERA shall provide a full range of UMTS mobile telecommunications services in Spain. XFERA will have its own management dedicated to its day-to-day operations, it shall be provided with sufficient financial resources by its shareholders to perform its business activities and shall hire its own personnel to carry out its tasks.

Furthermore, the Shareholders Agreement provides for a duration for the entire life of XFERA. XFERA will, thus, perform on a lasting basis, all the functions of an autonomous economic entity.

III COMMUNITY DIMENSION

5. The combined aggregate worldwide turnover of ACS (2 700 million EURO), SONERA (1 848.6 million EURO) and VIVENDI (41 600 million EURO) exceeds EURO 5 billion . The aggregate Community-wide turnover of each of at least two undertakings concerned is in excess of 250 million EURO (ACS 2 535 million EURO, VIVENDI 33 643 million EURO) and the undertakings concerned 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

UMTS is a recently developed technological standard for mobile telephony services, which enables a whole range of improvements over previous GSM-technology-based standards in terms of multimedia applications and global mobility and coverage, all of which constitute the so called "third generation" of mobile telephony services. UMTS will enable computer and phone users to be constantly linked to the Internet as they travel and as they roam, having the same set of capabilities irrespective of their precise destination. It is envisaged that XFERA will be able to provide the following range of services: communication services (voice telephony currently available over GSM technology, video services, messaging services, internet access), information and commerce services, entertainment services and business services

The parties submit that the relevant product market is the market for mobile telephony services and that the geographical scope is national. Indeed, while current technical standards already allow the provision of mobile telephony services Europe-wide and ultimately even globally, national legal frameworks and costs would suggest that the relevant geographic market remains national. In accordance with XFERA's proposed pricing structure voice mobile telephony tariffs applicable to international and domestic calls are expected to present substantial differences. The results of the Commission's enquiry are in line with the parties' views.

The Commission, in its Vodafone Airtouch / Mannesman decision⁴ did not take a position on the product and geographic definition of the UMTS. Given that, in the present case, under any possible product and geographic market definition, the position of the new entity would not be significant, definitions can be left open as well.

At present, mobile telecommunications licences have been awarded in Spain to the following operators:

a) with regard to analogue mobile telephony, TELEFÓNICA (the Spanish incumbent operator) is active through "Telefónica Móviles S.A." using the trademark "Moviline".

b) As far as second generation mobile telephony services are concerned (i.e.: using GSM mobile telephony standards), three licences have been granted by the Spanish Authorities to TELEFÓNICA ("Telefónica Móviles S.A." using the trademark "Movistar"), AIRTEL and AMENA (which belongs to Retevisión, the second⁵ global telecommunications operator in Spain)

c) In relation to UMTS mobile telephony services, four licences have been granted to previous operators of GSM mobile services and the fourth one to XFERA.

Accordingly, XFERA will be a new entrant in the market for mobile telecommunication services in Spain and the concentration will not lead to the creation or strengthening of a dominant position. During the market investigation carried out by the Commission no concern was shown related to the creation of the joint venture. In these circumstances, the concentration is considered to be compatible with the common market.

V ANCILLARY RESTRAINTS

Technical assistance and service agreement

The shareholders agreement provides for the conclusion of [...] agreements [...] between XFERA and SONERA, MANNESMANN and VIVENDI, and, if appropriate, any other of the parent companies. To the extent this provision would entail a restriction of competition, it should be considered ancillary to the concentration when applied to the parent companies whilst they have joint control, for a period of [...] years, since it constitutes an element inherent to the successful functioning of XFERA.

Exclusivity, non-compete restrictions and confidentiality

Each parent company of XFERA, including any parent company of their respective groups, has agreed not to compete with XFERA in the mobile telecommunications services sector in Spain [...]. Moreover, the parent companies of XFERA have committed to keep confidential any information and know how related to the transaction [...]. This confidentiality provision shall survive for [...] years after the termination of the shareholders agreement.

⁴ COMP M. 1795

⁵ the first is Telefónica

The Commission considers these restrictions as directly related and necessary to the implementation of the concentration and hence to be covered by this decision for a period of three years.

VI CONCLUSION

6. 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