

***Case No COMP/M.2222 -
UGC / LIBERTY MEDIA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 24/04/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.04.2001

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.2222 – UGC / Liberty Media
Notification of 16 March 2001 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 16.03.2001, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (“the Merger Regulation”) by which the American undertaking Liberty Media Corporation (“Liberty”) acquires within the meaning of Article 3(1)(b) of the Council Regulation joint control of the American undertaking UnitedGlobalCom, Inc (“United”) by way of purchase of shares and transfer of assets. United is currently solely controlled by its founding members (“the Founders”).
2. The Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

3. **Liberty** is an international media, entertainment, technology and communications company. In Europe, Liberty holds (via its wholly-owned subsidiary Liberty Media International, Inc. (“LMI”)) interests in a number of companies, including the UK cable operator Telewest Communications plc, the Irish cable operator Chorus, the French pay-TV programming company Multithématiques SA. It also holds an interest in Discovery Communications, which operates a number of thematic television channels across Europe

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).

and in News Corporation Limited whose subsidiary Sky Global Networks, Inc has a stake in BSkyB.

4. Liberty is a wholly-owned subsidiary of AT&T Corporation (“AT&T”), but has a substantial degree of managerial autonomy from AT&T as a result of its corporate governance arrangement with AT&T.² AT&T’s Liberty Media Group common stock is listed in the New York Stock Exchange as separate tracking stock designed to reflect the economic performance of the Liberty businesses and assets. On 15 November 2000, AT&T announced plans to spin off Liberty subject only to a favourable tax ruling.
5. **United** is an international cable operator. In addition to controlling United Pan-Europe Communications, NV, (“UPC”), United has operations in the Asia/Pacific region and in Latin America. United provides multi-channel television services in 23 countries worldwide and telephony and Internet/data services in a growing number of countries in which it is present. It is listed on the Nasdaq National Market.
6. **UPC** is a European communications company owning and operating a group of communications networks, primarily in Europe. It provides cable television, telephony, high-speed Internet access and programming services in 17 countries across Europe and in Israel. UPC has a minority stake in SBS Broadcasting which operates general interest commercial TV channels funded by advertising. Its shares are listed on the Amsterdam Stock Exchange and on the Nasdaq National Market.

II. THE OPERATION AND CONCENTRATION

7. As a result of the proposed operation which is structured to occur in three phases LMI will acquire about 81.7% of the voting rights and 43.2% of the economic rights in United. The voting and economic rights of the Founders will be diluted to 8.6% and 4.9% respectively. Until 2003, eight board members will be appointed by the Founders and four board members will be appointed by LMI. Beginning 2003, the Founders and LMI will nominate four board members each with the remaining four being nominated by the United board (as comprised immediately before the nomination of the new board members in 2003).
8. Pursuant to a Standstill Agreement until 25 June 2010 (subject to earlier termination in certain events), [...]. Upon expiry of the Standstill Agreement (or earlier termination), Liberty will have the possibility to exercise sole control over United.
9. LMI has veto rights with respect to *inter alia*, [...]. LMI’s veto rights taken together with its 81% voting rights and 43% economic rights confer upon it the ability to exercise decisive influence over United jointly with the Founders until the expiry of the Standstill Agreement when Liberty will have the possibility to exercise sole control.

III. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³. Each of Liberty and United have a Community-wide turnover in

² See also Case IV/M.1252 AT&T/TCI, Commission Decision of 4.12.1998.

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

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. RELEVANT MARKETS

A. Telephony and Internet related services

Voice telephony

11. The Commission has in previous decisions found that there are distinct markets for the provision of voice telephony services to subscribers and that the provision of such services can be divided into local, long distance/national and international services. The relevant geographic markets have been found to be national in nature.⁴ As the assessment of the current transaction does not raise serious doubts irrespective of the market definition chosen for such services, the question on how to define the market(s) for such services can be left open (see further below).

Internet access

12. The Commission has in previous decisions found that there is a distinct market for the provision of Internet access and it has indicated that a distinction could be made between dial-up access via a personal computer (PC) modem and dedicated (private/leased lines) connections. It could be possible that a distinction may be made between the provision of dial-up services to residential and business customers.⁵ The Commission found in the *Vizzavi* decision⁶ that Internet access provided over access mechanisms with different transmission, display and usage characteristic notably mobile handsets, set-top boxes, and PCs, may also constitute separate markets. The Commission has found that existing access markets are essentially national in scope due to the necessity for local loop access and the availability of free-phone/local call rate numbers to the nearest point of presence (POP) and the existing regulatory framework.⁷
13. The market investigation has indicated that a distinction could be made between access services offered to different subsets of customers and, in particular between on the one hand large businesses and residential and smaller businesses on the other. A number of respondents to the Commission's market investigation have also submitted that for the provision of access to residential and smaller business a distinction may be possible between the provision of dial-up/narrowband access provided over normal telephony lines and high-speed/always-on (sometimes referred to as broadband Internet access) access to the Internet via an upgraded cable network or an upgraded telephony network

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 COMP/M.1439 Telia/Telenor, Commission Decision of 13.10.1999, para. 121.

⁵ See Case COMP/M.1838 – BT/Esat, Commission Decision of 27.3.2000, para. 7.

⁶ Case COMP/JV.48 – Vodafone/Vivendi/Canal+, Commission Decision of 20.7.2000.

⁷ Case COMP/M.1439 Telia/Telenor, *supra*, para. 126.

connection, a so-called DSL (digital subscriber line) connection. The speeds offered and the “always-on” capabilities of these technologies give consumers increased choice of services and permanent access to the Internet. Furthermore, from a demand side point of view high-speed cable and DSL Internet access are according to these respondents generally directly substitutable to subscribers. Irrespective of the product market definitions the market investigation has indicated that the relevant market is still to be considered national or possibly more narrow (the relevant cable franchise area).

14. However, for the purposes of the current transaction it is not necessary to decide on the relevant market definitions given that irrespective of the definition(s) chosen the proposed transaction does not raise serious doubts for the provision of these services.

Broadband / triple-play services

15. It has been argued by some respondents to the Commission’s investigation that there is a distinct market for the provision of broadband services provided over cable networks. An upgraded cable network is the only network that would be able to provide simultaneously broadcast TV (analogue and digital), high-speed data in both directions (therefore high speed Internet access), interactive TV services and telephony. DSL networks would not be able to provide all of such services. It could therefore be argued that upgraded cable networks have a competitive technological and commercial advantage over other digital delivery systems in the near future as regards the provision of a "triple play" of digital services to their subscribers. Whilst this may be an accurate description of the technical capabilities of an upgraded cable network, it does not address the issue of consumer demand, in particular whether there is a distinct demand for such a combination of services that would allow a cable operator to target particular consumers. Whether the provision of “broadband” services or triple play services provided over cable network constitute separate markets can in any event be left open given that the proposed transaction does not give rise to any competition concerns as regards such services.

Portals, Internet advertising and content

16. The Commission found in the *Vizzavi*⁸ decision that there is a distinct market for portals. A portal serves as a gateway through which consumers and businesses can access a range of online services and the wider Internet. As such competition between portals is based on attractiveness and functionality (i.e. content, commerce, connectivity etc.). Portals may be distinguished conceptually as having either a broad (horizontal) focus or narrow (vertical) focus. The Commission also confirmed in the *Vizzavi* decision that there was a distinct market for the provision of Internet advertising.⁹ Furthermore, the Commission confirmed that the provision of paid-for content (games, special news services etc.) on the Internet constituted separate markets from the Internet advertising market.¹⁰ The relevant geographic markets for the

⁸ See further the Case No COMP/JV.48 – Vodafone/Vivendi/Canal+ (“Vizzavi”), *supra* in particular para. 47 ff.

⁹ See also Case No COMP/JV.1 – Telia/Telenor/Schibsted, Commission Decision of 27.05.1998 and Case No COMP/JV.11 – @Home Benelux BV, Commission Decision of 15.09.1998.

¹⁰ See also Case No IV/m.973 – Bertelsmann/Burda/HOS Lifeline, Commission Decision of 15.09.1998.

different products were left open but were essentially considered national in nature (see further the *Vizzavi* decision) except for certain emerging pan-European markets. The notifying parties have submitted that Internet advertising, e-commerce and Internet content are separate although inter-linked markets. However, they dispute that there is a distinct market for portals and claim that the market situation is better analysed in terms of a single Internet advertising market.

17. Overall the Commission's investigation has indicated that there are distinct markets for the provision of Internet advertising, portals and particular types of paid-for content and that the relevant markets should often be considered national in scope. A number of respondents also submitted that for some services the market may be wider than national in scope depending on the services and/or content offered.
18. For the purposes of the current decision, it is not necessary to determine the definition of the relevant markets given that irrespective of the definitions chosen the proposed transaction does not raise serious doubts (see further below). The relevant market definition(s) can therefore be left open.

B. Pay-television and related services

19. In its recent decision, Universal/NTL,¹¹ the Commission found there to be three separate markets for: (i) production and supply of TV programming; (ii) wholesale supply of pay-TV channels to pay-TV operators and (iii) retail distribution of pay-TV channels to the final consumer (be it via cable, direct to home ("DTH") satellite or digital terrestrial television ("DTT")). The Commission has also found that the geographic scope of (i) may be divided linguistically (e.g. Dutch language production) or nationally as the case may be. As for (ii), the Commission has found that the geographic scope of the market may be considered as national in scope due to national variations. As for (iii), the Commission has so far left open the geographic scope of the market, which may be national or sub-national. It is not necessary to decide this point in this decision since the proposed concentration does not in any event raise any competition concerns. The parties have also identified the market for the TV distribution infrastructure, encompassing cable, DTH and DTT and telecommunications networks.¹² In *Telia/Telenor*, the Commission suggested that the geographic scope of such a market may be either national or regional although it left the point open. Similarly, in this case, it is not necessary to determine the precise geographic scope of the market for TV distribution infrastructure since the proposed concentration does not raise any competition concerns.

¹¹ See Case No COMP/M.2211, Commission Decision of 20 December 2000, not yet published.

¹² They rely in this respect on Case No COMP/M.1439 – *Telia/Telenor*, Commission Decision 13 October 1999.

V. ASSESSMENT

A. Telephony and related services

Voice telephony

20. Both Liberty and UPC are active in the provision of fixed-line voice telephony services to residential and business customers in the EEA. However, irrespective of the market definitions chosen the proposed transaction does not lead to any affected markets for the provision of these services and the combined market shares would, according to the information provided by the parties, be well below 15%. Furthermore, the parties are faced with a number of significant competitors for such services in their respective areas of activity. It can therefore be concluded that the proposed transaction does not lead to either a creation or strengthening of a dominant position, irrespective of the market definition chosen, for such services.

Internet access

21. Both Liberty and UPC are today active in the provision of Internet access, including broadband/high-speed access. Liberty provides narrowband/dial-up access and broadband/high-speed access in the UK (through Telewest) and Ireland (through Chorus and indirectly through Internet Ireland). UPC however does not offer access or connectivity in either of these countries. Thus, there is no overlap in the activities of the parties and as a result no horizontally affected markets for such services. The proposed transaction will thus not lead to either a creation or strengthening of a dominant position for the provision of such services.

Broadband / triple-play

22. The proposed transaction does not lead to any overlaps in the activities of the parties for the provision of broadband/triple-play services offered over their respective cable networks. Liberty is today providing such services in the UK and Ireland. UPC also provides such services however it does not provide them either in the UK or Ireland. Thus, even if it was presumed that a cable operator would have an incentive to foreclose its competitors' access to its network the proposed transaction would not significantly alter the current situation given that these services are already offered by Liberty (through Telewest and Chorus) and UPC over their respective cable networks. Given this, the proposed transaction would not lead to either a creation or strengthening of a dominant position for the provision of such services.

Portals, Internet content and advertising

23. The investigation has shown that the proposed transaction will not lead to any horizontally affected markets irrespective of the market definition chosen for the provision of portals, Internet content and Internet advertising.
24. Irrespective of this it has been argued by some third parties that cable operators may have a competitive advantage over telecommunications operators in that they can provide high-speed/broadband services over the incumbent telecommunications operator's network (due access obligation on the latter) yet are not required to provide

access to their broadband networks to any third party. Thus, the cable operators can provide broadband portals over both their own respective networks and over the incumbent telecommunications operator's network. This would, according to this argument, have a significantly distorting effect on competition for broadband services in general and portal services in particular. However, the proposed transaction will not change the pre-merger conditions. Thus, given that the proposed transaction would not lead to any affected markets, irrespective of the market definitions chosen, and that the investigation has not shown that the parties' possibility to foreclose access to their networks is significantly altered by this transaction, it can be concluded that for the provision of portals (whether defined as narrowband and/or broadband), Internet advertising and content respectively the proposed transaction does not lead to either a creation or strengthening of a dominant position.

B. Pay-television and related services

Production and supply of TV programming

25. According to the parties, their activities on this market are insignificant due to the fact that they do not have any significant sales of TV programming to third parties within the EEA. Liberty's joint venture Discovery generated EEA-wide revenues in 1999 in the region of [...] from the sale of TV programming to third parties. As for Liberty's remaining interests in the production of TV programming (be it in-house production or commissions) notably through Telewest/Flextech and Multithematique, these are not sold on to third parties but are packaged for wholesale distribution downstream as pay-TV channels to pay-TV operators which is considered below. Liberty also has a minority stake in News Corporation which in turn has EEA-wide activities in the licensing of TV programming to third parties through its affiliates Fox Entertainment Group, Fox Kids Europe, and Fox Sports International. News Corporation's EEA-wide revenue from the supply of TV programming to third parties for the year ended 30 June 2000 was in the range of between [...], the bulk of which was derived from the licensing of film rights. The likely competition effects of this vertical link is considered further below. The vast majority of UPC's programming (which is bought in with a small proportion being commissioned) is not sold on to third parties. Moreover, according to UPC, SBS Broadcasting in which UPC holds a minority stake has very little content of its own (local news only). Thus, the Commission concludes that the addition of UPC's activities in this market to those of Liberty as a result of the proposed transaction would not result in the creation or strengthening of a dominant position.

Wholesale supply of pay-TV channels to pay-TV operators

26. According to data from the parties of their revenues and estimated market shares on this market (including Liberty's interest in News Corporation and its subsidiaries but excluding UPC's interest in SBS Broadcasting since according to UPC it is not a pay-TV channel provider), the only EEA country where the parties' activities overlap to produce combined market shares exceeding 15% is Portugal ([...] - UPC ([...]%) and Liberty ([...]%). However, the increase in market share as a result of the transaction is not appreciable. Thus, the Commission concludes that the addition of UPC's activities in this market to those of Liberty as a result of the proposed transaction would not result in the creation or strengthening of a dominant position.

Retail distribution of pay-TV channels to the final consumer

27. Liberty is active in this market in the UK via Telewest and in Ireland via Chorus. By contrast UPC is not active on the retail pay-TV markets in the UK or Ireland. It is only active on the EEA pay-TV market in Austria, Belgium, France, Germany, the Netherlands, Norway, and Sweden. Consequently there is no horizontal overlap between the parties' activities on any of these markets. Moreover, the proposed concentration does not change UPC's existing market shares on the market for retail distribution of pay-TV channels to the final consumer which would be the same even without the merger and therefore the proposed transaction does not lead to the creation or strengthening of a dominant position on this market.

Potentially vertically affected markets

28. Following the proposed transaction, the new entity will be active either directly or indirectly (mainly through Liberty's stakes in the companies listed in paragraph 25 above), in all of the above-mentioned markets. In the course of the Commission's market investigation, third parties did not raise any concerns regarding the vertical links thus created between the markets for the production and supply of TV programming and the wholesale supply of pay-TV channels to pay-TV operators. Nevertheless, the Commission's attention was drawn to the potential foreclosure effects derived from Liberty's links to News Corporation and its proposed acquisition of UPC particularly with respect to the markets for the wholesale supply of pay-TV channels to pay-TV operators and retail distribution of pay-TV channels to the final consumer.
29. According to data from the parties of their revenues, Liberty and UPC's estimated market shares on the markets for wholesale supply of pay-TV channels to pay-TV operators (including Liberty's interests in News Corporation and its affiliates such as BSkyB) and retail distribution of pay-TV channels to the final consumer, the following may be potentially vertically affected: Austria where UPC has between [20-30]% (cable, DTH and DTT) and [25-35]% (cable alone) of the retail supply of pay-TV based on revenue (the figure for cable only rises to [35-45]% if we consider subscribers);¹³ the Netherlands, where as a result of acquisition UPC recently achieved a market share in excess of between [15-25]% (cable, DTH and DTT) and [15-25]% (cable only) of the retail supply of pay-TV based on revenue (the figure for cable only rises to [30-40]% if we consider subscribers);¹⁴ and Norway where UPC has between [20-30]% (cable, DTH and DTT) and [30-40]% (cable alone) of the retail supply of pay-TV based on revenue (the figure for cable only rises to [35-45]% if we consider subscribers).¹⁵ According to figures supplied by the parties, the potential vertical overlap resulting from the proposed concentration in terms of Liberty TV content is sufficiently low (less than [0-10]% even if one takes into account News Corporation

¹³ Based on 1999 figures.

¹⁴ Based on 2000 figures.

¹⁵ Based on 1999 figures.

and its affiliated companies)¹⁶ so as not to raise any competition concerns in those countries.

30. Moreover, the Commission market investigation indicates that it is commercially unlikely for UPC to give preferential access to any News Corporation pay-TV content (including BSkyB) because:
- (a) according to BSkyB, its activities outside the UK and Ireland are very limited - they essentially offer one news channel Sky News (out of their wide portfolio of content) in Norway, the Netherlands and Sweden where UPC is active;
 - (b) according to UPC, News Corporations content does not match UPC's programming profile. This is evidenced [...].
 - (c) in any event, according to UPC, News Corporation's EEA-wide channels are insufficient to meet UPC's requirements, so that any potential foreclosure effect would be insufficient to significantly affect the ability of other third party pay-TV channel providers to access UPC's platform since:
 - (i) for premium movie channels Fox Entertainment is only in the second tier of the top ten movie houses and is unlikely to have a market share of more than 10% in any EEA Member State;
 - (ii) for children's programming, Fox Kids is only broadcast for a few hours each day and must be complemented by other content from competitors such as TNT Cartoon, and the Children's Channel; and
 - (iii) for sports programming, Fox Sports do not have rights to any premium sports content within the EEA, but rather they hold licensing rights to sports with very limited appeal, which tend to be broadcast in late-night filler programmes.¹⁷

TV distribution infrastructure

31. In the EEA, UPC has cable networks in Austria, Belgium, France, Germany, the Netherlands, Norway, and Sweden. Liberty is active in the market through Telewest and Chorus' networks in the UK and Ireland respectively. Thus, the proposed concentration does not result in any national or regional overlap in the parties' activities in TV distribution infrastructure.

¹⁶ Although, according to Liberty, its stake in News Corporation is not sufficient to give it any material influence on the commercial conduct of that company in the licensing of its content.

¹⁷ According to data supplied by News Corporation, their activities in the licensing of sports in the EEA is sufficiently low as to be insubstantial.

VI. 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 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
Mr. Mario Monti