

***Case No COMP/M.3411 -
UGC/NOOS***

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

Article 6(1)(b) NON-OPPOSITION
Date: 17/05/2004

*Also available in the CELEX database
Document No 304M3411*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.05.2004

SG-Greffe(2004) D/202122

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Dear Sir/Madam,

**Subject: Case No COMP/M.3411 - UGC / NOOS
Notification of 14/04/2004 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 14/04/2004, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89², as last amended by Regulation (EC) No 1310/97³, by which the undertaking MédiaRéseaux S.A, “MR”, the Netherlands (controlled by the group UnitedGlobalCom, “UGC”, USA and Suez S.A., “Suez”, France) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Noos, France by way of purchase of shares.

I. THE PARTIES

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).

² OJ L 395, 30.12.1989 p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13.

³ OJ L 180, 9. 7. 1997, p. 1; corrigendum OJ L 40, 13.2.1998, p. 17.

2. UGC is an international broadband communications provider of video, voice and Internet services with operations in 15 countries outside the US. UGC's networks reach approximately 12.7 million homes. As a result of the reorganization plan of United Pan-Europe Communications N.V. ("UPC"), UGC Europe acquired UPC in 2003. UGC is controlled solely by Liberty. Liberty is an international media, entertainment, technology and communications company.
3. UGC owns 100% of UPC, which a holding company that in turns owns 100% of MR. MR offers television, Internet access and telephony services to residential customers on its own cable network in approximately 450 communes across 56 departments in France, and has a telecommunications license to implement and operate telecommunications services in France.
4. Noos owns cable networks and provides cable television and Internet access services to residential and business subscribers in France. It is controlled by Suez, a French industrial group active in providing individuals and municipalities with solutions and services in the fields of energy and the environment in particular. Suez is in the process of selling its interests in the communications sector (it sold 29% of M6 last February and is currently selling its interest in the TV channel Paris Premier to M6).

II. THE OPERATION

5. Under a stock and loan purchase agreement dated as of March 15, 2004 between Suez, MR, UGC and UPC, MR will acquire 100% of the share capital and voting rights in Noos from Suez, as well as an outstanding intercompany loan between Suez as lender and Noos as borrower. Upon closing, Suez shall own class B shares in MR for a maximum of [] and UGC through its subsidiary (UPC) shall own a minimum of [] of MR's share capital.

III. CONCENTRATION

6. Under the above agreement, Suez is entitled to appoint one Director in the Board, initially consisting of five Directors as long as Suez holds more than 10% of MR's shares. However, Suez will not have joint control of MR, since only a very limited number of decisions, typical of those protecting minority shareholders, may require unanimity in the Board of Directors. In addition, UPC has a call option for all of the shares held by Suez in MR and Suez has a put option for these shares.
7. The operation is therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁴ (EUR [] for MR and EUR [] for Noos). Each of the undertakings above have a Community-wide turnover in excess of EUR 250 million (EUR [] for MR and EUR [] for Noos), but they do not each achieve more than two-thirds of their

⁴ 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.

aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

9. The notifying parties have identified a number of potential markets where they are active: (a) retail distribution of pay-TV channels; (b) TV distribution/communications infrastructure; (c) acquisition of audiovisual content; (d) voice telephony; (e) digital interactive television services; (f) Internet services and (g) triple play. According to the parties, the transaction will not result in a horizontal overlap leading to market shares above 15% in any of these potential markets.

a) Retail distribution of pay-TV channels

The notifying parties

10. In what regards retail distribution of pay-TV channels, the parties base themselves on past cases to define markets. In the Univeral/NTL decision⁵, the Commission found separate markets for the (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. Since Noos is not active either in (i) or (ii) and only operates in France, the parties contend that only the retail distribution of pay-TV channels to the final consumer in France could therefore be horizontally affected by the transaction. However, the parties argue, on the basis of past Commission's decisions⁶, that the pay-TV market in France comprises terrestrial, satellite and cable broadcasting and that there are no legal grounds for distinguishing between pay-TV markets on the basis of their mode of broadcasting.
11. Geographic market definition has been found in the Commission's practice to be national for television broadcasting or according to linguistically homogeneous areas⁷. In particular, in Vivendi/Canal+/Seagram⁸, the Commission found that the retail distribution of pay-TV in France is national. The notifying parties support this national geographic market definition for the retail distribution market of pay-TV channels, on the basis that satellite pay-TV operates on a national basis. They also point out that cable pay-TV is operated in France in local areas where only one player is active, so that there would be no overlap between UPC and Noos on the basis of local geographic markets.
12. In view of a single relevant market for pay-TV in France, the notifying parties submit that the pay-TV market is not affected, as the combined share of UPC and Noos is below 15%. However, they also acknowledge that if the Commission were to segment the retail pay-TV distribution market according to the technological means of broadcasting, there could be said to be a vertically affected market, as Noos would

⁵ Case COMP/M.2211 Universal Studio Networks/De Facto 829 (NTL)/Studio Channel Ltd of December 20, 2000

⁶ Decision in case IV/36.237 TPS I of 3 March 1999; and decision in COMP/JV.57 TPS II of 30/04/2002

⁷ See for instance decision in case COMP/M.2876 Newscorp/Telepiu of April 2, 2003

⁸ Decision in case COMP/M.2050 Vivendi/Canal+/Seagram id October 13, 2000

have a market share above 25% on the market segment for pay-TV distribution by cable in France, and Liberty and UGC are active on the market for the supply of programming to pay-TV distributors.

The Commission

13. First of all, it is worth reminding that the media and telecom sectors are fast moving industries and that the Commission's practice in these sectors has resulted in diverse appraisals of the relevant market definitions in the retail distribution of pay-TV. In particular, some decisions have considered that different broadcasting modes for the retail distribution of pay-TV may correspond to separate markets⁹. Elements such as technical conditions, geographic or regional conditions, factual and legal obstacles to the installation of satellite dishes, lock-in effect of the set-top box, and distinctive marketing strategies were in particular mentioned.
14. To that extent, the Commission investigated, in the present case, whether the retail market of cable pay-TV constituted a distinct separate market or if it was part of a broader market including pay-TV via terrestrial, cable, satellite and possibly ADSL broadcasting modes. This was deemed necessary because of the substantial market shares that UPC and Noos would have on a hypothetical cable pay-TV retail market (more than [35-45%]) and because of recent implementation of the European communication package that induces further regulatory changes in France¹⁰.
15. The investigation found some elements pointing in the direction of distinct markets for pay-TV markets according to the broadcasting modes in France. First of all, the pay-TV offers, in terms of number of channels, tend to be different for terrestrial, satellite, cable and ADSL. Cable operators offer the largest variety of channels in France, because among the leading French satellite operators, TPS does not distribute most channels of its rival, CanalSatellite and reciprocally.¹¹. Another difference relates to must-carry channels (public channels and local channels) that cable operators must offer to their customers. Finally, satellite dishes offer the possibility to receive channels not provided by cable providers, notably some Arab-language channels.
16. Technological differences were also identified during the investigation. Broadcasting standards may vary between cable and satellite networks (DVB-C and DVB-S respectively) and decoders (and crypting) are different for pay-TV operators. Cable operators in France often still use analogical technology, which allows for fewer channels, but can be transmitted to several plugs in the house, while satellite operators have numeric technology and transmit only to the plug connected to the satellite dish. In addition cable operators have the possibility to provide combined offers for TV,

⁹ See for instance: decision IV/M.469 MSG Media Services of 9 November 1994 and decision IV/M.490 Nordic Satellite Distribution of 19.07.1995 and *Market definition in the media sector: a comparative analysis*, Bird & Bird, December 2002

¹⁰ See for instance loi 2003/165 of 31/12/2003 relative aux obligations de service public des télécommunications et à France Télécom and Projet de loi N° 1548 -, modifié par le Sénat, relatif aux communications électroniques et aux services de communication audiovisuelles of the French Parliament

¹¹ Pay-TV per ADSL is only starting in France and some retailers (notably Free TV) have complained in front of the French Competition Authorities about their inability to have access to all channels.

radio, Internet and telephony as well as interactive services, which satellite providers cannot.

17. Moreover, the market investigation showed that access to satellite or cable pay-TV rarely overlaps in France. In rural or scarcely populated areas, cable networks are generally not installed, due to the high costs of setting up a cable network, so the customers receive pay-TV services only through satellite. In urban areas, on the contrary, buildings are most of the time connected to cable pay-TV and there are barriers for customers wishing to install a satellite dish (urbanity rules, or difficulties to agree between co-owners of buildings).
18. Conversely, the investigation also identified elements pointing towards a unified market for all pay-TV broadcasting modes. First, it appears that consumers for pay-TV are first and foremost interested in specific contents. Satellite pay-TV providers (Canal+ and TPS) have more than 70% of the total pay-TV market and they have shaped the marketing strategies of pay-TV distribution in France, offering packages using all types of broadcasting modes, so that cable operators have largely followed their marketing strategy. The broadcasting mode is thus only relevant in so far as it affects the price and range of programming. Then, even though satellite pay-TV requires installing a dish, and may be more cumbersome than choosing cable pay-TV when one's building is already connected, it appears that the connection costs are not so far apart. Cable pay-TV retailers also require activation fees, while satellite providers often provide the dish for free so that only installation costs have to be paid by customers. Similarly, and even though pricing structures may differ, it appears that the final price paid by consumers are not very dissimilar for satellite and cable pay-TV providers.
19. Moreover, the investigation gave some indications that the new regulatory framework, which is going to ease the activity for cable pay-TV operators, as well as the development of pay-TV via ADSL, which also connects urban areas –to the contrary of satellite- may blur the differences between broadcasting modes in the future.
20. However, it is not necessary for the Commission to conclude on the exact market definition, since the proposed concentration will not lead to any competition problem, whatever the market definition would be. The investigation confirmed that the relevant geographic market was most likely national, but the exact market definition can also be left open for the purpose of the present decision, since the proposed concentration will not lead to any competition problem, whatever the geographic market definition would be.
21. On the basis of a French pay-TV market for all broadcasting modes, the combined entity will have less than 15% market shares (around [0-10%], against Canal+ group with around [65-75%], [0-10%] for TPS and [0-10%] for France Telecom. On the basis of a French cable only pay-TV market, combined market shares for Noos and UGC would reach [] in revenues and [] in volume. On that possible market, France Telecom Cable and NC Numéricâble would still have a substantial position, having each around [15-25%] market shares.
22. In addition, the market investigation showed that these two companies were strong competitors to Noos and UPC, not only from their substantial positions in cable pay-TV, but also from their strong positions in other neighbouring markets. In that respect, it is worth reminding that pay-TV, Internet and telephony are offered through the

same channels and are often promoted through combined packages. NC Numéricable is part of Vivendi Group and vertically integrated within the leading pay-TV operator Canal+, which holds around 70% of the total pay-TV market. Canal+ is active in content providing and in other neighbouring markets (e.g. Internet content) and provides content to Noos and UPC France. The other important competitor to the merging parties in cable pay-TV, France Telecom Cable, is part of France Telecom, the leading telecom operator and Internet provider in France. Through its subsidiary Wanadoo, France Telecom is the leading ADSL operator in France and has a partnership with TPS for television through ADSL. It also benefits from additional sales outlets in comparison to the other cable operators, thanks to its own sales network..

23. Moreover, even on the basis of a hypothetically distinct cable pay-TV market, the merged entity will not be in a position to foreclose pay-TV content providers. The market investigation showed that pay-TV content providers made only about 20% of their sales with cable operators against 80% for satellite operators and that cable pay-TV needed to provide a full range of TV channels in order to be attractive to consumers. In addition, and even though the new entity may improve its bargaining power, content providers generally viewed positively the concentration, because they considered it could generate efficiencies and improve the penetration of cable pay-TV in France.

b) TV distribution/communications infrastructure

24. The parties argue that communications infrastructure encompassing cable, satellite, digital terrestrial television and telecommunications networks constitutes one single and separate relevant market in France. On that basis, the merging parties would have a market share of [10-20%].
25. As discussed above, there may be reasons for a distinct market for cable TV, where the notifying parties would have around [40-50%] market shares. However, the exact market definition can be left open, since no competition concern would arise, whatever the market definition retained.
26. As previously explained, the merged entity will still face powerful competitors, notably France Telecom on a cable TV infrastructure market. France Telecom was in charge of building cable networks in France during the 1980s; it masters the 1G technology still used by the cable operators and continues to offer maintenance services and communication equipments to cable operators in France. In addition, market players consider that the operation will generate efficiencies (economies of scale and innovation) for the cable networks in France, which would benefit consumers.

c) Other markets

27. In what regards the acquisition of audiovisual content, it is not necessary to precisely define the market definition for the purpose of the present decision, as UPC and Noos only have a limited market presence and lag far behind Canal+ and TPS, which are vertically integrated in pay-TV content and hold rights over premium content, such as sport and major film studios.

28. Concerning voice telephony, Internet services, and triple play, it is not necessary to define precisely the market definition for the purpose of the present decision; the transaction will not lead to substantial overlaps or high market shares. In addition, strong competitors are in place like France Telecom, the leading market player in France for these services.
29. In what regards digital interactive television services, the Commission considered the possibility that it may constitute a separate market¹². The market investigation found elements indicating that it is a complementary product to pay-TV rather than a substitute of it, and may thus constitute a distinct market. In addition, it appeared that the softwares used for interactive TV applications (API) may constitute a distinct market. Liberty controls OpenTV, one of the APIs in the market, currently used by UPC and Noos. However, the exact market definition can be left open, since no competition concerns would arise whatever market definition would be retained. The merged entity will still be faced with strong competition, notably from Canal+, for interactive television services and from NDS, through its MediaHighway API.
30. In conclusion, the proposed concentration does not lead to serious doubts as to its compatibility with the common market.

VI. CONCLUSION

31. 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

(Signed)

Mario MONTI
Member of the Commission

¹² See decision in case COMP/JV.37 BSKyB/Kirch Pay TV of March 21 2000