EN

Case No COMP/M.3920 - FRANCE TELECOM / AMENA

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 24/10/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party :

Dear Sir/Madam,

Subject: **Case No COMP/M.3920 - France Télécom / Amena**
Notification of 19/09/2005 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 19/09/2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation No 139/2004 (the Merger Regulation) by which the undertaking France Télécom SA (France Télécom) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the mobile telecommunication activities of Auna Operadores de Telecomunicaciones (Amena) by way of purchase of shares.

I. THE PARTIES

2. France Télécom is a French telecommunication group that provides a large range of telecommunication services, including public fixed-line voice, leased lines and data transmission services, telecommunications equipment sales and rentals, television, broadcasting and information services. Through its wholly-owned subsidiary Orange S.A. (Orange), France Télécom provides mobile telecommunication services in

[1] OJ L 24, 29.1.2004 p. 1.

several European countries but not in Spain. The main shareholder of France Télécom is the French Government, which holds directly or indirectly 35% of the shares, while 62% of the shares are publicly traded.

3. Amena comprises the mobile market telephony services of Auna Operadores de Telecomunicaciones[2]. Amena operates only in Spain.

II. THE OPERATION

4. Before the transaction Auna Operadores de Telecomunicaciones will divest its subsidiaries and participations in companies which do not operate in the mobile telephony market. Orange and France Télécom España will then acquire 80% of the remaining parts of Auna Operadores de Telecomunicaciones (Amena: the mobile telephony activities). The transaction includes the corresponding economic and voting rights. No minority shareholder will have the right to veto strategic decisions in the new entity and decisions will be adopted by simple majority. As a consequence, France Télécom will have sole control over Amena after the completion of the operation.

5. According to the foregoing, the operation described above constitutes an acquisition of control in the meaning of Article 3(1)(b) of the Merger Regulation and therefore a concentration.

III. COMMUNITY DIMENSION

6. According to the figures of 2004, the undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million[3] (France Télécom: EUR 47,157 million and Amena: EUR […]). Each of them has a Community-wide turnover in excess of EUR 250 million (France Télécom: EUR […] and Amena EUR […]) 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. COMPETITIVE ASSESSMENT

7. The parties are active in the same economic sector of telecommunications services but their activities do not overlap in the countries where they operate.

8. The markets vertically affected by the transaction will be the following: the mobile and fixed call termination markets, the provision of international fixed telephony services and mobile retail telephony services (which include international calls), the wholesale access to international roaming, the provision of mobile retail telephony

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[2] Auna operadores de Telecomunicaciones is a Spanish group which provides mobile telecommunications services in Spain through its subsidiary Retevisión Móvil SA under the brand Amena, as well as cable services and fixed network and voice services through its subsidiary Auna Telecomunicaciones S.A.U.. Auna is controlled by Endesa, Unión Fenosa and Banco de Santander Central Hispano.

[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, p 25).

services (which include retail international roaming services) and with the possible pan-European market of advanced telephony services.

9. In case the geographical dimension of this possible pan-European market of advanced telephony services would be European-wide, there would be a limited horizontal overlap between the parties' activities.

Relevant product markets

<u>Mobile telephony services</u>

Wholesale level

<u>Call termination services</u>

10. The Recommendation on relevant markets distinguishes voice call termination on individual mobile networks as a separate market. According to previous Commission's decisions[4], one of the wholesale services that the operators provide to each other through interconnection agreements is call termination, which consists of the service offered by network operator B to operator A to terminate traffic originating on A`s network. Termination services thus allow users of different networks to communicate with each other. Call termination is a wholesale service that is resold or used as an input for the provision of downstream services. There cannot be a substitute for call termination on each individual mobile network since the operator can only reach the relevant end-customers by terminating the call on that specific network. Each mobile termination access network would constitute a relevant market and the network operator has by definition a 100% market share.

11. The geographic market for call termination in mobile networks is considered to be essentially national in scope because of regulatory barriers according to which authorisations to operate a network are only granted for territories which are not wider than national. Mobile networks normally provide national coverage and the scope of the wholesale offer is thus national.

<u>Access to international roaming</u>

12. International roaming services enable operators to offer to their customers the possibility to travel abroad and to still give and receive calls[5] with their cell phones. To this aim, operators engage in agreements that give them access and capacity in a country other than the one in which they operate.

13. In order to provide these international roaming services, operators of a given country have usually engaged in bilateral agreements with all operators of other countries.

14. The Commission recently found that, apparently due to the absence of efficient steering techniques, international roaming traffic has traditionally gone through any available operator's network in some Member States, however now operators can

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4 COMP/M.1493 - Telia/Telenor, COMP/M.2803 - Telia/Sonera, COMP/M.3806 - Telefónica/Cesky Telecom. See also Recommendation on relevant markets.

5 And also send and receive SMS and data.

increasingly choose the network on which their clients roam out of their home country. Therefore the Commission concluded on a preliminary basis that the provision of wholesale international roaming services in certain operator's networks constituted separate markets at least in the past[6]. The Commission has not taken any stance as concerns the present situation in those Member States and the question can also remain open for the present case given that the transaction will not impede effective competition.

15. In previous decisions the Commission has considered that these markets are national in scope[7] given that authorisations to provide mobile telephony services are only granted for national territories by national authorities and wholesale contracts can only be subscribed with companies that have an authorisation to operate in a given country.

Retail level

<u>Provision of mobile communication services</u>

16. At retail level the Commission has previously considered whether a distinction between business customers and private individuals or between pre-pay and post-pay customers should be made. The exact market definition was however left open.

17. Concerning the distinction among private individuals, small and medium businesses, and multinational corporations (MNCs), the investigation has shown that the needs of the three groups are different especially in terms of roaming services. Also, from a supply-side perspective, operators whose customers are mainly residential cannot easily be a credible actor with business customers, let alone with MNCs. However, the investigation also suggests that the frontier among the three groups of customers is rather blurred.

18. As regards retail services of international roaming, the Commission has generally considered that they are part of a package of mobile services. As a consequence, they should not be considered as a separate product market. Concerning their significance as part of a package of mobile services, it should be noted that, according to the investigation, the ability to provide them becomes an increasingly important factor of competition. This is true with respect to all types of customers, including residential ones.

19. In any case, it is not necessary to further delineate the market in the present case given that the transaction will not lead to competition concerns.

20. Taking into account the existing regulatory barriers, the product market concerned is national in scope.

<u>Pan-European mobile telecommunication services</u>

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6 See IP/05/161 "Commission challenges international roaming rates for mobile phones in Germany" and IP/04/994 "Commission challenges UK international roaming rates".

7 See for example Case COMP M. 2726 KPN/E-PLUS, COMP M 2469 Vodafone/Airtel, COMP M. 1863 Vodafone/BT/Airtel, COMP M 2803 Telia/Sonera and COMP/M.3806 - Telefónica/Cesky Telecom.

21. In previous decisions the Commission has discussed the existence of a possible market for pan-European mobile telecommunication services to international mobile customers, in particular multi-national corporations (MNCs)[8]. This market would essentially enable multinational companies to strike better price deals through European-wide requests of proposals, and to rationalize more effectively their mobile phone expenses thanks to the combination of billing systems. It would also possibly include advanced services such as messaging services and content/data services and the possibility for roaming customers to move from a country to another with no difference in the service[9].

22. In order to satisfy this demand three main groups have emerged: Vodafone and its partners and two strategic alliances: the FreeMove alliance and the Starmap alliance. Orange participates in the FreeMove alliance with T-Mobile, Telecom Italia Mobile and Telefónica S.A. and other operators. The FreeMove alliance operates in the following countries: Germany, Italy, United Kingdom, France, Spain, the Netherlands, Austria, Slovakia, Luxemburg, the Czech Republic, Hungary, Belgium and Denmark. Amena participates in the Starmap alliance. The other members of StarMap are Eurotel[10] (Czech Republic), mmO2 (Germany, United Kingdom and Ireland), One (Austria), Pannon GSM (Hungary), Sunrise (Switzerland), Telenor Mobil (Norway), Wind (Italy) and Sonofon (Denmark)

23. In the present case the market investigation has shown there cannot be drawn any definite conclusion whether the separate market for provision of pan European mobile telecommunication services exists or not. In particular, the investigation has shown that the market would in practice boil down to the access of better prices and billing services for MNCs and medium businesses that are large enough to qualify for these benefits and organise international bids on the basis of centralized request for proposals.

24. The parties submitted, and it was confirmed by the investigation, that only a small share of MNCs issue centralized request for proposals. The other MNCs let their affiliates negotiate at a national level their mobile telecommunication contracts with operators. In this case, retail roaming services are just part of a package of services. This suggests that the market, if it exists, would in all likelihood be constrained by the provision of retail international roaming services as part of any mobile phone subscription.

25. In any case, this market would still be at an emerging stage and would be based on multi-national partnership arrangements among operators, except, to a large extent, for Vodafone[11]. The territories covered by these multinational services vary according to the specific contracts subscribed by businesses and depend on their specific needs

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8 see for example COMP/M.3806 - Telefónica/Cesky Telecom

9 Such as short code dialling to access voicemail. See also COMP/M.1795 Vodafone Airtouch / Mannesmann

10 According to the information supplied by Telefónica in case COMP M. 3806 Telefónica/Cesky Telecom, Eurotel will join the FreeMove alliance.

11 Vodafone most often does not need to team up with another operator as it has the necessary European-wide footprint to offer the discussed services.

but for most of the multinational customers located in Europe, the overwhelming majority of roaming activity is within Europe.

26. As regards the geographical scope of this market, the parties submit that it is at least pan-European in scope for three reasons: (i) from the supply-side, Freemove provides its international services through a single point of contact in Europe; (ii) from the demand-side, while most of advanced services provided to MNCs are currently negotiated individually on a national level, there is a growing demand from MNCs to agree certain contractual terms for pan-European services centrally and (iii) an increasing number of customers request mobile services that are worldwide in scope.

27. According to the investigation carried out by the Commission, the dimension of this emerging market would still be national in scope because, even if the territories covered by the services are wider than national, the material provisions of the contracts for MNCs are currently negotiated individually on a national level and not on a multi-national level. Relations between MNCs and mobile operators are thus based on bilateral contracts subscribed between each subsidiary of the MNC based in a given country and each national operator based in the same country. MNCs exercise considerable buyer power through their scale and scope and are therefore able to 'cherry-pick' the most attractive deals available in each national market. As a result, even if a MNC issues a cross-country request for bids, it rarely purchases mobile services from the same provider or alliance in all of the countries in which a given operator or a given alliance is present. Finally, pricing of the services to the MNC customers usually reflect national market conditions.

28. However, for the purpose of the present case it is not necessary to take a position on the product and geographical market definition as regards pan-European mobile telecommunication services given that the transaction would not significantly impede competition in the common market or in a substantial part of it.

Fixed line telephony services

Wholesale level

Call termination services

29. The definition provided in paragraph 10 for fixed networks can be applied *mutatis mutandi* for fixed networks. Accordingly, there cannot be a substitute for call termination on each individual fixed network since the operator can only reach the relevant end-customers by terminating the call on that specific network. Each fixed termination access network would constitute a relevant market and the network operator has by definition a 100% market share.

30. The market for terminating access services in fixed networks may be concluded to be national (i.e. the relevant fixed telephony network) in scope as fixed networks normally provide national coverage and the scope of the wholesale offer is thus national. This conclusion can also be applied in the present case given that authorisations to operate a network are granted by national authorities for national (or regional) territories.

Retail level

International call services from a fixed network

31. Fixed line telephony retail services comprise the provision of connection services or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving calls and related services. The Recommendation on relevant markets[12] distinguishes for fixed call services the following markets (i) local/national and (ii) international services. Each of them can be further divided into services to (a) residential and (b) business customers. Only international services will be affected by the transaction in view of their vertical integration with call termination services in the countries to which the international calls are directed.

32. Due to the existing regulatory barriers the Commission has always considered that the geographic market for retail services in a fixed network is national in scope[13].

Assessment

Call termination services in mobile and fixed networks in connection with fixed and mobile retail telephony services

33. As indicated in the Telia/Sonera decision[14] and in numerous decisions, according to Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, termination in fixed and mobile networks can be used upstream in one country to distort competition downstream in the other country.

34. In Spain, Amena holds a 100% market share in the provision of termination services on its mobile network. This market is vertically linked to the different national retail markets for international call services from a fixed network (Belgium, France and Poland[15]) and/or mobile networks (Belgium, The Netherlands, France, Poland, Slovakia and the UK[16]) where France Télécom is active.

35. However, the proposed transaction cannot lead to any competitive foreclosure effects on any of these markets. First, even if Amena engaged in a policy of discrimination against France Télécom's competitors, this could not influence significantly the cost structure of France Télécom's competitors (since termination calls on Amena's network represents a very small share of this cost structure). Furthermore, in principle, discrimination by Amena against France Télécom's competitors outside Spain would

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12 Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services; OJ 8.5.2003, p.45

13 See for example the decision taken recently for case COMP/M. 3806– Telefónica/Cesky Telecom.

14 COMP/M.2803 – Telia/Sonera

15 In Belgium France Télécom market share is less than [0-10]%, in France [55-65]% for residential customers and [50-60]% for business customers and in Poland [70-80]% for residential customers and [55-65]% for business customers).

16 The market shares in terms of value in the retail market for mobile services of the companies belonging to the France Télécom group are the following: Belgium [25-35]%, France [35-45]%, Netherlands [5-15]%, UK [15-25]%, Poland [25-35]% and Slovak Republic [55-65]%.

be technically impossible since Amena receives their traffic from international carriers that act as intermediates between the foreign telecommunications operators and Amena which cannot identify the exact origin of the traffic terminated on its network when it comes via these international carriers (it is only possible to identify the exact origin of the international traffic terminated on a network where there is a direct interconnection with the foreign telecommunications operators).

36. As regards the countries where France Télécom is active as a fixed and/or mobile network operator (see paragraph 34) and holds a 100% market share in the markets for call termination services, France Télécom would not be in a position to have a discrimination policy against Amena's competitors for the same technical reasons described in paragraph 35 and, even if this discrimination were to take place, given that Amena's market share in the provision of mobile communication services is only [15-25]% in terms of value and [10-20]% in terms of volume. A limited increase of these market shares resulting from possible discrimination would not significantly impede competition in Spain.

Wholesale access to international roaming

37. Operators are now increasingly able to steer their traffic on the network of the desired operator, in particular if this operator is a member of the same alliance. For example, Orange estimates that it is able to steer […]% of its customer's traffic on the networks of the operators of the Freemove alliance […]. As a result, it appears that alliances play now a significant role in the roaming markets.

38. Through its subsidiary Orange, France Télécom is active and holds a market share […] as a wholesaler of international roaming services in Belgium ([30-40]%), France ([20-30]%), The Netherlands ([20-30]%), Poland ([20-30]%) and Slovakia ([35-45]%).

39. Following the transaction, it is to be expected that Amena, […], will send more traffic to the mobile telephony companies belonging to France Télécom and to the FreeMove alliance and these companies will send more traffic to Amena.

40. However, the total roaming-out sent by Amena in each country where the FreeMove alliance operates represents a negligible part of the total international roaming traffic in each of these countries. Therefore, the transaction will not significantly impede effective competition in the common market or in a substantial part of it, in particular, as a result of the creation or strengthening of a dominant position.

41. With respect to any attempt to foreclose Amena's competitors by France Télécom's subsidiaries or to increase their costs by means of the wholesale roaming services, it has to be borne in mind that, in all the countries where France Télécom's subsidiaries operate, all mobile operators have a similar national coverage in terms of extension and quality. These attempts would thus be vain as the combination of non-exclusive roaming agreements and the ability to direct traffic enables Spanish home network operators to switch among visiting networks in any given country.

42. It has been pointed out by third parties that, in case Amena joins the FreeMove alliance, parallel behaviour in relation to third parties of the FreeMove Spanish partners (Telefónica and Amena), might be expected to the detriment of independent companies of third countries that subscribe wholesale roaming agreements with them. In this respect, it has to be pointed out that the members of the FreeMove alliance

established in the same country remain free to negotiate roaming agreements and discount agreements with operators that are not part of FreeMove on a bilateral basis and independently from the alliance. Consequently, the fact of being members of the FreeMove alliance does not entail tacit collusion.

43. Having regard to the above, the concentration would not significantly impede effective competition in the markets for wholesale international roaming in particular as a result of the creation or strengthening of a dominant position.

The retail market for the provision of mobile communication services

44. In Spain, Amena provides roaming services at the wholesale level. Though Amena holds […] of the market ([10-20]% in value and [10-20]% in volume), this market is vertically integrated with a number of retail markets for mobile communications services where Orange holds more than 25% of the market share. These are the retail markets for mobile communication services in Belgium ([25-35]%), France ([35-45]%), Poland ([25-35]%) and Slovakia ([50-60]%).

45. Nevertheless, the operation would have no impact on the retail markets for mobile communication as the market position of Amena on the market for international roaming in Spain is weaker than those of Vodafone (>35%) and Telefónica (>40%), and, that, in any case, it is in the best interest of Amena to attract as much roaming traffic as possible from these countries. Moreover, due to the presence of these alternatives, France Télécom would not significantly benefit from refusing access to Amena's network for foreign roaming or discriminating Orange's competitors. Due to the existence of two alternative roaming networks in Spain, any attempt to foreclose Orange's competitors would thus be meaningless. Under these circumstances, the transaction will have a negligible impact (if any) in the above-mentioned retail mobile telephony markets and would not significantly impede competition, in particular as a result of the creation or strengthening of a dominant position.

Pan-European mobile telecommunication services

46. As already indicated, France Télécom is a member of the Freemove alliance, whereas Amena is currently a member of Starmap.

47. […].

48. At a national level, and […], the operation might reduce the number of options for MNCs from 3 to 2 in Spain: Vodafone and Freemove (with both Amena and Telefónica) would be the only actors able to provide advanced services to MNCs. At a Community-wide level, the operation would further strengthen the Freemove alliance, whereas the Starmap alliance might be significantly weakened by losing its gateway to a highly-populated Member State. Thus, the operation could sharpen a trend towards the emergence of two main actors on the provision of Pan-European services, Vodafone and FreeMove, at the expense of Starmap.

49. However, the proposed operation will have very limited impact on the possible emerging market of advanced pan-European services for several reasons.

50. First account should be taken of the fact that nothing prevents operators from entering into bilateral or/and multilateral agreements and submit joint bids without being members of an alliance.

51. Second, the internal rules of the Freemove alliance ensure that Telefónica and Amena would still be able to compete even if they are both members of the alliance (so-called "overlap rules"). MNCs will still have the choice among three different options on the Spanish market. The Commission has recently analysed these internal rules in case COMP M. 3806 Telefónica/Cesky Telecom and has arrived to the conclusion that FreeMove is an alliance without structural integration that allows competition among its members in all countries where the activities of its members overlap.

52. Third, […] and Amena's present activity is clearly more focused toward residential customers and small customers so that its acquisition by France Télécom would have a limited effect on this possible emerging market […].

53. Under these circumstances, it is highly unlikely that the transaction would significantly impede competition in particular as a result of the creation or strengthening of a dominant position.

CONCLUSION

54. 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 (EC) No 139/2004.

For the Commission
signed
László´KOVÁCS
Member of the Commission