EN

Case No IV/M.425 - BS / BT

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(a) INAPPLICABILITY
Date: 28.03.1994

Also available in the CELEX database
Document No 394M0425

Office for Official Publications of the European Communities
L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28 March 1994

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

Registered with advice of delivery

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.425 - BS/BT
Notification of 25.02.1994 pursuant to Article 4 of Council Regulation No 4064/89

1 The above mentioned operation concerns an agreement between Banco Santander (BS) and British Telecommunications (BT) to form a company to offer managed data network services (MDNS) in Spain.

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2 After examination of the notification, the Commission has concluded that the notified operation involves the acquisition of sole control by BT of a new joint venture company which incorporates MegaRed, a wholly owned Banco Santander subsidiary. The operation does not fall within the scope of application of Council Regulation 4064/89.

I THE PARTIES

3 BS is a leading company in the Spanish banking and financial services sector and has developed a private domestic network to support its financial services business. This network is operated through its subsidiary MegaRed S.A (MegaRed).

4 BT's principal activity is the supply of telecommunications and equipment principally in the United Kingdom. Its services in the UK market include the provision of managed network services to its corporate customers.

II THE OPERATION

5 The operation consists of the purchase by BT of a 50% interest in MegaRed which will be renamed BT Telecomunicaciones SA (BTSA). BS will transfer the existing assets (ie the network) of MegaRed into BTSA. BTSA will be the only vehicle by which the shareholders (BS and BT) will market, sell and service domestic and international managed network services (MNS) to customers in Spain. BTSA will use an upgraded version of MegaRed's existing network to provide domestic MDNS services in Spain. BTSA's network will be connected to both BT's and other international networks. BTSA will also offer a limited range of BT products for those customers who wish to source all their telecoms needs from a single supplier.

6 The operation will be achieved through a complex set of agreements. The main agreement is the joint venture agreement between BS and BT which sets out the formation, capitalisation, funding operation and management of BTSA; the manner in which BS and BT act as shareholders; and the framework for the supporting agreements. There are six supporting agreements: the supply agreement which commits BS to source all its current MNS requirements from BTSA for a period of at least 6 years; the marketing agreement which commits BT to appoint BTSA as its marketing representative for its international MNS operations in Spain; the distribution agreement which appoints BTSA as a distributor for a limited set of BT's telecommunications products; the support agreement which provides for BTSA to act as a maintenance, technical support and customer service contractor for BT's MNS customers in Spain; and a transport agreement which facilitates the interconnection between the BT international network and the BTSA network.

7 The joint venture agreement sets out the rights and obligations of both parties within BTSA. The principal rights and obligations are:

BS and BT each have 50% of the share capital of BTSA, but voting rights are split [ ][1] in BT's favour except for certain areas covered by consent rights which require both shareholders agreement;

(1) Business secret.

BS and BT will each have three directors on the board but the BT appointed chairman will have a casting vote except for certain key strategic issues for the first three years of the operation of the agreement where special protections for BS apply.

The General Manager (GM) and Deputy General Manager (DGM) will be responsible for the day to day management of BTSA. The GM will be initially appointed by both BS and BT and after that by the board by simple majority (including the BT casting vote if required). The DGM will be appointed by the board on BS's proposal.

8 The consent rights contained in Clause 20 of the joint venture agreement provide that the consent of both shareholders is required to take decisions on the following aspects of BTSA's business:

changes in scope (ie exploiting new markets other than MNS);
mergers, acquisitions and asset sales;
charges over assets (ie using assets as security for loans);
admission of new shareholders;
guarantees;
changes in dividend policy;
delegated authority of the GM;
increases in the Funding and Development commitments; and
shareholder related contracts.

9 These consent rights will remain in force until the joint venture agreement is dissolved or the shareholding of either BS or BT falls below 20%.

10 At board level, the BS special protections set out in Clause 18 of the joint venture agreement cover areas where the Chairman (appointed by BT) will not be able to exercise the casting vote provided for in the joint venture agreement. These areas are:

human resource policies;
organisational structure;
compulsory redundancies;
distribution and agency agreements;
changes in network investments;
major customer bids or advertising campaigns; and
substantial domestic tariff restructuring.

These special protections only operate for the first three years of the joint venture agreement.

11 After three years has elapsed, BS has an annual right for six successive years to require BT to purchase its shareholding in BTSA (the Put Option). The amount which BT would be obliged to pay is set out in a [ ][(1)] formula [ ][(1)].

12 Both BS and BT have agreed an initial amount of money which will be invested in BTSA over the first 5 years of its operation (the Funding Commitment). A proportion of the Funding Commitment (the Development Commitment) is designated for the funds required during the first 3 years of the operation of BTSA.

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(2) Business secret.

(3) Business secret.

13 During the first 3 years, funding will be by way of equity contributions only and any increase in the Development Commitment (or any modification to the business plan which would lead to an increase in the Development Commitment) would require the agreement of *both* shareholders.

14 In Years 4 & 5 increases in the Funding Commitment would be able to be approved by simple majority of the shareholders but should BS be outvoted, they would not be obliged to participate in any such additional capital injection. If BS chose not to participate, then its shareholding would be diluted. However, any change in the funding mix (eg through debt capital or operational leasing) would require the consent of *both* shareholders. From Year 6 onwards, the Funding Commitment will cease to exist. Increases in equity participation would continue to be decided by simple majority and decisions on changes to the funding mix would continue to require consensus.

15 An initial business plan will be agreed between the two shareholders. The business plan will be for ten years and will be updated annually (jointly in the first three years if this requires an increase in the Development Commitment and solely by BT otherwise). For the first three years, the approval of BS is required where changes to the business plan impinge on areas which fall under the consent rights or the special protections.

III SOLE CONTROL

16 For the first three years of the joint venture agreement, the special protections will cover a wide range of management issues and, combined with the shareholder consent rights, will provide veto rights to BS in the running of BTSA. In addition, the Development Commitment and the requirement for the agreement of both shareholders to any change in the amount of equity participation will preclude either shareholder from increasing its shareholding at the expense of the other.

17 From Year 4 onwards, however, the balance of the joint venture agreement changes as the special protections no longer apply and the Development Commitment will be exhausted. The opportunity for BS to influence the conduct of BTSA is contained in the consent rights and the possibility of BS exercising the Put Option.

18 The consent rights, set out in paragraph 8, cover a range of major issues on which the approval of both shareholders is required. Protections for such major issues are necessary to protect minority rights but are not sufficient in themselves to provide the possibility of exercising a decisive influence on BTSA. In particular, according to clause 13.3(b) of the joint venture agreement, after the first three years of the operation of the agreement:

" ..any business case or update to the business plan may be approved by a simple majority of Shareholders but should it require funding in excess of the Funding Commitment the Shareholders shall be free to decide whether or nor to participate in the provision of the additional funding...".

The effect of this clause is to give BT the possibility of increasing its equity participation in BTSA without the agreement of BS and, should BS decide not to increase its equity stake then its shareholding would be diluted and BT would have a permanent majority at shareholder level. Should BS's shareholding fall below 45% then they would lose one of their nominees on the BTSA board.

19 The other major protection for BS within the joint venture agreement is the opportunity of exercising its Put Option between Year 4 and Year 10. The Put Option could be seen to provide a financial disincentive to BT to seek to control BTSA without reference to BS by requiring BT to purchase the whole of BS's stake at a price based on [a formula][(1)]. The minimum value for the stake in Year 4 is [ ][(1)]. This [ ][(1)] value does not represent a large amount for BT whose worldwide turnover in 1993 was approximately 18 billion ECU. If the value is higher, then the prospects for BTSA are better which BT, as a major telecommunications operator, would be well placed to exploit. The Put Option does not, therefore, provide a sufficient incentive for BT to allow BS to exercise a decisive influence over BTSA.

20 In the light of the above, it does not appear that BS will have the opportunity to exercise a decisive influence over BTSA after three years of the joint venture agreement.

21 At most BS will be able to exercise a decisive influence over BTSA for only the first three years of the joint venture agreement. The business plan covers a ten year period and [ ][(1)]. Given the long term nature of the investment, the three year period is insufficient to bring about a lasting change in the structure of the undertakings concerned. BT will therefore have sole control over BTSA. Consequently, the operation is the acquisition of control by BT of a new joint venture company which incorporates MegaRed. Therefore, for the purposes of calculating turnover, Article 5(2) is applicable.

IV ABSENCE OF COMMUNITY DIMENSION

22 BT and MegaRed have a combined worldwide turnover of over 5000 million ECU. BT has a Community wide turnover of over 250 million ECU. MegaRed does not have a Community wide turnover of over 250 million ECU. Therefore, the operation does not have a Community dimension.

(4) Business secret.

(5) Business secret.

(6) Business secret.

(7) Business secret.

V CONCLUSION

Based on the above, the Commission has concluded that the notified operation does not have a Community dimension within the meaning of Article 1 of the Merger Regulation and therefore does not fall within the scope of the Merger Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No 4064/89.

For the Commission,