

***Case No COMP/M.5607 -
AVAYA/ NORTEL
ENTERPRISE
SOLUTIONS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 18/11/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.11.2009
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5607 – AVAYA/ NORTEL Enterprise Solutions
Notification of 13 October 2009 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 13 October 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which Avaya Inc. ("Avaya", United States), jointly-controlled by TPG Partners V, L.P. and Silver Lake Partners III, L.P. ("TPG" and "SLP", both United States) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over certain assets and subsidiaries associated with the Enterprise Solutions business ("Nortel ES") of Nortel Network Corporation ("Nortel", Canada) by way of a purchase of assets and shares.

I. THE PARTIES

2. **Avaya**, headquartered in Delaware, is active in unified communications worldwide. Avaya provides communication systems, applications and services for enterprises, including large corporations, small businesses, government agencies and other organizations, operating in a broad range of industries around the world.
3. **Nortel ES** is the enterprise solutions business of Nortel, a Canadian company providing enterprise communications products and services to telecommunications carriers and

¹ OJ L 24, 29.1.2004, p. 1.

businesses of all sizes globally across a variety of industries ranging from small businesses to multi-national corporations, as well as government entities.

II. THE OPERATION

4. The operation takes place as a result of the creditor protection proceedings initiated by Nortel in Canada, the US, the UK and France. Substantially all the assets and liabilities of Nortel ES, including the Nortel subsidiaries NGS and DiamondWare, were subject to a bidding process, in which Avaya was declared the successful bidder on 14 September 2009. Avaya would therefore acquire sole control of Nortel ES.
5. Thus, the transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate worldwide turnover for 2008 of more than EUR 5 000 million² (Avaya: [...], Nortel: 1 759 million). Each of them has a Community-wide turnover for 2008 in excess of EUR 250 million (Avaya: [...], Nortel: [...]), without achieving more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
7. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. MARKET DEFINITION

A. The Relevant Product Markets

Unified communications

8. The proposed transaction concerns the "unified communications" sector. Unified communications products and services are used by business customers of all sizes to improve workgroup and collaborative communications, and are designed to provide a simple and consistent user experience across all types of communications (telephone, fax, email, voicemail, voice and videoconference, instant messaging, etc.).
9. In the sector of unified communications, customers have a choice between "public" and "private" solutions. "Public" service providers deliver unified communications solutions from a centralised location or distributed sites utilising equipment that does not reside on the customer's premises. "Private" solutions include equipment, software and related services that are specifically tailored to a particular enterprise and are located on that enterprise's premises.
10. The notifying parties submit that their activities in the EEA overlap only with regard to "private solutions", and more precisely in (i) PBXs and (ii) contact centres.

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p.1).

11. Several respondents to the market investigation confirmed a growing trend toward a unified communication market, with customers increasingly purchasing global systems for unified communications instead of specific and separate communication products. However, the market investigation did not confirm the existence of an overall market for unified communications yet. On the contrary, it brought evidence of a narrower product market definition based on the type of communication solutions concerned, revealing limited demand-side substitutability.

PBXs

12. A PBX is a telephone exchange system, based on a combination of hardware and integrated software that serves a particular business or office, as opposed to one that a common carrier or telephone company operates for many businesses or for the general public. At their most basic, PBXs provide connections among the internal telephones of a private organization and connect them to the public switched telephone network ("PSTN").
13. In previous decisions³, the Commission left open the question of whether the market for PBXs should constitute a separate market or be part of a broader market for telecommunication equipment.
14. The parties argue that the market for PBX should not be further segmented, based on the technology (traditional PBXs as opposed to PBXs based on Internet Protocol – "IP PBXs") or the number of lines/PBX size. In particular, the parties submit that while each generation of PBXs presents some unique physical and performance characteristics, all are essentially substitutable, both functionally and economically.
15. With respect to the technology, the parties emphasize the importance of the current shifting of the industry away from traditional legacy telephony technology (known as time-division multiplexing, or "TDM") to IP-based systems. In particular, according to the parties, TDM PBXs have developed into new types of PBXs systems that use IP to carry calls and other communication functions, offering more advanced features and significant cost savings. As a result of the advantage offered by IP, the use of traditional TDM PBX has been decreasing and it is increasingly common for companies installing a brand new enterprise telephony system (so-called "Greenfield project") to implement an IP PBX system.
16. Some respondents to the market investigation indicated that mixing both environments is not always practically feasible, or at least not cost-effective, notably in the cases where the existing installed base has not been upgraded regularly. However, the majority of the respondent to the market investigation clearly revealed that TDM and IP-based PBXs can coexist within hybrid environment using gateways and could therefore possibly be part of a global PBX market. Adding IP functionalities to a TDM-PBX environment notably enables customers to migrate smoothly towards a mostly IP environment.
17. With respect to the number of lines, most vendors usually distinguish between systems designed for small and medium businesses and for larger businesses (a thousand lines is a

³ See Commission decision of 11 May 2000 in Case COMP/M.1745 *EADS*, para 40, Commission decision of 1 December 2005 in Case COMP/M.3995 *Belgacom/Telindus*, para 19, and Commission decision of 19 September 2008 in Case COMP/M.5300 *Gores Group LLP/Siemens Enterprise Communications*.

threshold which is commonly referred to). However the market investigation was not conclusive on the issue. While the technology of the different size of PBXs is the same, according to some respondents this distinction reflects different functionalities: systems designed for small and medium businesses are usually less configurable and reliable, and benefit from lower integration with other communication applications. However, other respondents replied that there is hardly any distinction between the number of users of PBXs in terms of technology or functionality. Moreover, according to a large number of customers, it is possible to add functionalities (hardware and software components) to a small PBX in order to increase the number of its users.

Contact centres

18. Contact centres are centralised locations used for the purposes of receiving and transmitting large volumes of requests by telephone, email, live chat or other forms of communications. Their functionality are typically performed through software that, among other things, allow incoming calls to be routed to appropriate agents, contacts to be tracked and data to be gathered.
19. There are no Commission decisions analysing a possible market for contact centre solutions. Although the market was discussed in *Gores Group LLP/Siemens Enterprise Communications*⁴, the exact product market definition was ultimately left open.
20. According to the parties, given their functional and technical similarities with other enterprise communications application software, the market for contact centres should also be considered as part of a broader market for unified communication products.
21. However, most respondents to the investigation indicated that contact centres can be purchased separately from PBXs, and integrated with PBXs from other suppliers. Such integration is actually becoming easier with the rise of IP-based unified communication systems, which facilitates interoperability. In addition, a limited number of suppliers of contact centres do not supply PBXs. This suggests that PBXs and contact centres belong to two different relevant product markets.

Conclusion on the relevant product market

22. For the purpose of the assessment of the present transaction, the exact definition of the relevant product markets for the various unified communications applications, including PBXs and contact centres, can be left open, given that the proposed transaction does not raise any competition concerns under any alternative market definition.

⁴ *Gores Group LLP/Siemens Enterprise Communications*, para 30.

B. The Relevant Geographic Market

PBXs and contact centres

23. In the past⁵, the Commission has considered the market for PBXs as national in scope because distribution of the equipment was usually structured on a national basis and because the equipment had to receive national technical approval. With regard to contact centres, there are no Commission decisions analyzing the geographic scope of such markets.
24. The parties submit that in light of the latest development in the industry the relevant geographic markets for PBXs and contact centres should be considered at least EEA-wide and likely broader for the following reasons: (i) the convergence of the telecommunications industry and products toward the IP-based technology has led to an increasing globalisation of the markets; (ii) there are no legal or technical standards that limit imports; (iii) many customers source on an EEA-wide or broader basis.
25. Most respondents to the market investigation considered the markets for PBXs and contact centres to be worldwide in scope, on the ground that prices are in general homogeneous, suppliers can provide solutions at a global level and large customers often purchase solutions centrally for different sites on a worldwide level.
26. However, several respondents considered that these markets should merely be defined as EEA-wide, notably because telecommunication standards still differ between Europe and other regions.
27. For the purpose of the assessment of the present transaction, the Commission considers the geographic scope of the above markets to be at least EEA-wide, if not worldwide. However the exact definition of the relevant geographic market for PBXs and contact centres can be left open, given that the proposed transaction does not raise any competition concerns under any alternative geographic market definition.

V. COMPETITIVE ASSESSMENT

28. On an overall market for unified communications, the proposed transaction will not lead to any affected markets on a worldwide or EEA basis. However, should the market be segmented according to the products concerned, the horizontal overlaps between the parties' activities will lead to affected markets in relation to (i) PBXs and (ii) contact centres.
29. It should be noted that the respondents to the market investigation did not express any significant objections against the proposed transaction. None of the customers and the distributors expressed any competition concerns; on the contrary, some respondents indicated that they see this transaction as a positive event in a market characterized by rapid innovation and a rapidly changing competitive landscape. A few competitors expressed concerns which were mainly related to the high market shares of the combined

⁵ See Commission decision of 11 May 2000 in Case COMP/M.1745 *EADS*, para 40; Commission decision of 1 December 2005 in Case COMP/M.3995 *Belgacom/Telindus*, para 19; and Commission decision of 19 September 2008 in Case COMP/M.5300 *Gores Group LLC/Siemens Enterprise Communications*, para 11.

entity⁶: for the reasons explained in the following paragraphs, the high market shares do not really represent the actual market power of the parties.

Market shares

30. According to the information submitted by the parties, the combined market share of Avaya and Nortel ES for PBXs would be approximately [10-20]% (Avaya: [10-20]%; Nortel ES: [5-10]%) in the EEA and approximately [20-30]% worldwide (Avaya: [10-20]%; Nortel ES: [10-20]%)⁷. Should the market be further delineated according to the technology (TDM as opposed to IP systems) or the size (number of lines), the parties' 2008 combined market share would be at most [20-30]% in the EEA and [30-40]% worldwide⁸.
31. As regards contact centres, the parties' combined market share would be approximately [30-40]% in the EEA (Avaya: [20-30]%; Nortel ES: [10-20]%) and approximately [50-60]% worldwide (Avaya: [30-40]%; Nortel ES: [10-20]%). These market shares have not evolved significantly over the previous years⁹.
32. On the relevance of the parties' market shares, it is important to note that both PBXs and contact centres are bidding markets involving few installations. As previously indicated by the Commission¹⁰, this implies that a high combined market share of the parties does not necessarily give indication of the market power that the merged entity will obtain post-merger.
33. Moreover, it should be noted that the parties currently make most of their sales (for PBXs: Avaya approximately [...]%, Nortel ES approximately [...]%; for contact centres: Avaya and Nortel ES approximately [...]%) to existing customers for upgrades/updates. Thus, the above market shares tend to over-estimate the actual market presence of the parties.

⁶ It should be noted that one of these replies was submitted extremely late in the procedure and expressed concerns that in any event do not appear to be merger-specific.

⁷ The market shares data in this decision are based on shipments.

⁸ In particular, considering a delineation by system types, the parties' combined market share would be less than [0-5]% for TDM and approximately [10-20]% for IP in the EEA and approximately [10-20]% for TDM and [20-30]% for IP worldwide. When considering a market definition based on customer size, the parties' combined market share would be approximately [10-20]% (1-499 lines), [20-30]% (500-999 lines) and [20-30]% (1000+lines) in the EEA and approximately [10-20]% (1-499 lines), [30-40]% (500-999 lines) and [30-40]% (1000+lines) worldwide.

⁹ At the worldwide level, Avaya's markets share was [30-40]% in 2006, [30-40]% in 2007 and [30-40]% in 2008 (respectively [20-30]%, [20-30]% and [20-30]% at the EEA level) while Nortel's market share was [10-20]% both in 2006 and 2007 then marginally declined to [10-20]% in 2008 (respectively [10-20]%, [10-20]% and [10-20]% at the EEA level).

¹⁰ See Commission decision of 13 December 2000 in Case COMP/M.1940 *Framatome / Siemens / Cogem / JV*, Commission decision of 20 July 2005 in Case COMP/M3653 *Siemens / Va Tech* and Commission decision of 10 July 2003 in Case COMP/M.3148 *Siemens / Alstom Gas and Steam Turbines*.

34. Finally, the market investigation unanimously confirmed that post-merger the combined entity will continue to face several effective competitors for both PBXs and contact centres.
35. As regards the market for PBXs, strong players are active at both the EEA level and worldwide level: the respondents mentioned major global companies such as Alcatel-Lucent/Genesys (approximately [10-20]% in the EEA and [5-10]% worldwide), Siemens Enterprise Communications ("SEC") (approximately [10-20]% in the EEA and [5-10]% worldwide), and Cisco¹¹ (approximately [10-20]% in the EEA and [10-20]% worldwide), as well as competitors such as Aastra (approximately [10-20]% in the EEA and [5-10]% worldwide). Moreover the market investigation confirmed the presence of recent entrants from neighbouring market such as Microsoft¹².
36. Similarly, the market investigation confirmed that effective competitors are also present in the market for contact centres including Genesys/Alcatel-Lucent (approximately [20-30]% in the EEA and [10-20]% worldwide), Cisco¹³ (approximately [10-20]% in the EEA and [10-20]% worldwide), Aspect (approximately [0-5]% in the EEA and worldwide) and SEC (approximately [0-5]% in the EEA and [0-5] worldwide).
37. According to the information submitted by the parties and provided by the analyst reports, many other smaller companies are also active both in PBXs and contact centres, such as: (i) for PBXs, Mitel (PBX - approximately [0-5]% in the EEA and [0-5]% worldwide), NEC (PBX - approximately [0-5]% in the EEA and [5-10]% worldwide), and Samsung (PBX - approximately [0-5]% in the EEA and [0-5]% worldwide); and (ii) for contact centres, Mitel (approximately [5-10]% in the EEA and [0-5]% worldwide), Altitude (approximately [0-5]% in the EEA and [0-5]% worldwide).

Market dynamics

38. As mentioned above, the market investigation revealed that in the last decade the communications industry has undergone a major shift from traditional TDM PBXs toward IP-based technologies and software-based solutions. These products were first developed in the 90s and entered into the market at the end of the 90s-beginning of 2000. The shift towards IP-based solutions made the trend towards unified communications easier, which in turn facilitated the entries of companies active on neighbouring markets. Due to the same technological evolution, this statement equally applies to contact centres. Examples of recent new entrants include Microsoft in the market for PBXs and Cisco in the market

¹¹ Cisco entered the enterprise telephony business in the late 1990s but become a significant player only recently. Its market shares on the EEA market for PBXs rose from [5-10]% in 2006 to [5-10]% in 2007 and [10-20]% in 2008 (respectively [5-10]%, [5-10]% and [10-20]% at the worldwide level). This increase in market shares seems to have been made mostly to the detriment of SEC (from [10-20]% to [10-20]% at the EEA level), Nortel (from [5-10]% to [5-10]% at the EEA level) and a number of other smaller players.

¹² Microsoft market shares are still limited due to the fact that they are a recent entrant. However, the majority of the respondents to the market investigation considered Microsoft as an effective competitor.

¹³ Cisco's market shares on the EEA market for contact centre solutions rose from [5-10]% in 2006 to [10-20]% in 2007 and [10-20]% in 2008 (respectively [5-10]%, [5-10]% and [10-20]% at the worldwide level). This increase in market share seems to have been made mostly to the detriment of Genesys/Alcatel-Lucent (from [20-30]% to [20-30]% at the EEA level), Aspect (from [5-10]% to [0-5]% at the EEA level), SEC (from [0-5]% to [0-5]% at the EEA level) and a number of other smaller players.

for contact centres. The market investigation also revealed that these entries were in general successful, with in particular Cisco having rapidly become a major competitor to the parties.

39. The parties submit that the vast majority of all new telephony systems purchased by EEA customers have IP telephony capability and the vast majority of new enterprise lines are IP-based lines. According to analysts¹⁴ almost all lines shipped will be IP lines. Thus, according to the parties, TDM PBX and contact centres will likely disappear at the end of their life cycle (3-5 years and not more than 8-10 years) and be replaced by IP-based solutions. Both Avaya and Nortel have also developed IP-based solutions.
40. Respondents to the market investigation generally confirmed such a trend: the vast majority of the respondents has confirmed the ability of the users to add IP functionalities to TDM PBXs and contact centres in order to implement the switching towards IP-based solutions. A small number of respondents to the market investigations indicated that the possibility to add IP functionalities to TDM solutions may be limited, mainly for cost opportunity reasons, as well as, in some occasions, for interoperability and proprietary issues. According to these respondents, when customers decide to add upgrades or updates, they tend to source from their initial suppliers.
41. On the other hand, the market investigation revealed that communications solutions are generally purchased through multi-year contracts of generally 3-5 years and not more than 8-10 years after which customers have the choice to entirely replace their existing communications systems with brand new projects, with no limitations as to the choice of the communications systems and thus supplier. In addition, the majority of the respondents have confirmed that subject to limitations due to internal and external infrastructures, most of the new projects concern IP solutions.
42. This indicates that even in the event of attributing to the parties the ability to leverage their large installed basis, which is mainly TDM-based, in order to increase the prices of their updates/upgrades, this ability would be limited to the length of the contract after which they will be facing their competitors on equal grounds in a bidding procedure for mostly IP solutions. As mentioned, their market strength – linked to their TDM installed basis – will play no role in a bidding procedure where customers are not bound to previous suppliers.

Sales patterns

43. Moreover, the market investigation showed that the great majority of customers of PBXs and contact centres generally have a policy of multi-sourcing in order to establish price and quality protection and to create a competitive environment. As a matter of fact, many respondents to the market investigation have declared that customers pursue a "best of breed" strategy, whereby they tend to select the best product from different suppliers. This strategy further limits the parties' ability to extract market power from their market shares, also considering that neither Avaya nor Nortel provide any "must have" products by reference to technology or know-how in the fields of PBXs and contact centres that cannot be provided by other suppliers.

¹⁴ Avaya analysis based on multiple industry reports.

44. According to the parties, providers of unified communications solutions sell through a mixture of direct sales and sales through channel partners.
45. As regards direct sales, the market investigation revealed that direct customers are typically sophisticated buyers that, as indicated above, make their purchases through competitive bidding processes, involving multiple vendors for few installations. Such purchasing patterns maintain pressure on all vendors to offer competitive and cost effective solutions.
46. The parties submitted an empirical analysis of bidding data showing that, in their view, Nortel ES was not a significant constraint on Avaya's pricing, while Nortel ES' pricing was constrained by a wide range of competitors including Avaya. Moreover, the study was claimed to show that Cisco appeared the primary competitive constraint in the industry. In the course of the investigation, the bidding data underlying the study was checked and found incomplete and most likely unrepresentative for all bids in which parties participated in the EEA. The parties explained that a complete data set with EEA bids did not exist. Therefore, the Commission considers the results of the study not reliable and does not see them as part of evidence.
47. As regards channel partners, the market investigation indicated that the majority of the sales of PBXs and contact centres are carried out through channel partners. As submitted by the parties, [...] of Nortel ES' sales and about [...] of Avaya's sales in the EEA are carried out through channel partners. In Nortel ES' case these include major telecommunications services providers such as British Telecom (which accounts for [...] of Nortel ES' EEA sales and provides PBXs under their own brand) and TeleDenmark.
48. According to the majority of the respondents to the market investigation, channel partners also tend to multi-source and offer products from more than one supplier. Channel partners multi-source in order to be able to select the supplier or the different suppliers that best meet the requirements of the end customers; as a matter of fact, only rarely do the end customers request a specific supplier. Moreover, channel partners provide the majority of the after sales maintenance services to end customers. It is therefore the channel partner that may benefit from a customer-loyalty relationship, which on the other hand leads to the absence of brand loyalty towards specific suppliers.
49. These dynamics, in particular the fact that direct customers are sophisticated buyers, that most of the sales are carried out through channel partners and that PBXs and contact centres are sold through bidding processes, clearly limit the ability of the combined entity as well as of the several remaining competitors to increase their prices.

Nortel ES' position

50. According to the parties, Nortel ES' competitive position has been severely weakened as a result of Nortel's financial difficulties and historic market share data overstates its current and future competitive position.
51. The market investigation generally confirmed Nortel ES' current financial difficulties. However, the majority of respondents indicated that Nortel ES remains an effective competitor in the unified communications, notably due to its large installed base of customers, technology platform and reputation. It appears indeed that Nortel ES' market shares have only declined marginally in 2008 compared to the previous years (e.g. in the EEA they went from [5-10]% in 2006 to [5-10]% in 2007 and [5-10]% in 2008 in the

market for PBXs, while they remained stable ([10-20]%) in the market for contact centres)¹⁵.

Conclusion

52. In light of the above considerations, the Commission concludes that the proposed concentration does not raise doubts as to its compatibility within the common market.

VI. CONCLUSION

53. 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)
Neelie KROES
Member of the Commission

¹⁵ At the worldwide level, Nortel's market shares marginally declined from [10-20]% in 2006 to [10-20]% in 2007 and [10-20]% in 2008 in the market for PBXs and from [10-20]% in 2006 and in 2007 to [10-20]% in 2008 in the market for contact centres.