EN

Case No COMP/M.5730 -
TELEFONICA/
HANSENET
TELEKOMMUNIKATION

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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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.5730 – TELEFONICA/ HANSENET Notification of 16/12/2009 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 16/12/2009 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("Merger Regulation") by which the undertaking Telefónica Deutschland GmbH (“Telefónica”, Germany) an indirectly wholly-owned subsidiary of Telefónica S.A. ("Telefónica Group", Spain), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Hansenet Telekommunikation GmbH (“Hansenet”, Germany), currently wholly owned by Telecom Italia Deutschland Holding GmbH, by way of purchase of shares.

I. THE PARTIES

2. Telefónica belongs to the Telefónica Group, which operates fixed and mobile telephony networks in Spain, the Czech Republic, Germany, the UK, Ireland and Slovakia as well as in a number of countries in Latin America.

3. Hansenet provides broadband internet access and various telecommunications services, including fixed and data connections in Germany.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004 p. 1.

II. THE OPERATION

4. On 3 December 2009 Telefónica entered into a Share Purchase Agreement with Telecom Italia Deutschland GmbH and Telecom Italia S.p.A. under which Telefónica will acquire 100% of the share capital of Hansenet for a total value of EUR […]. As a result of the proposed transaction, Hansenet will be solely controlled by Telefónica. The operation therefore constitutes a concentration within the meaning of Article 3(1) (b) of the Merger Regulation.

III. COMMUNITY DIMENSION

5. The transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The parties have a combined aggregate worldwide turnover in excess of EUR 5 000 million (Telefónica Group EUR 57 946 million; Hansenet EUR 1 189 million) and a Community-wide turnover in excess of EUR 250 million (Telefónica Group […]; Hansenet EUR […]). The parties do not achieve more than two thirds of their Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension pursuant to Article 1(2) of the Merger Regulation.

IV. THE RELEVANT MARKETS

4.1 Relevant product markets

Horizontal aspect

Markets related to internet access

6. The concentration gives rise to limited horizontal overlaps in the parties' activities in the following market segments:

   a) retail fixed broadband access to residential customers and small business customers;

   b) retail fixed broadband access to large business customers;

   c) retail dedicated connections and capacity (leased lines).

7. Internet access services consist of the provision of a telecommunications link enabling customers to access the internet. Internet access may be provided as dial-up ("narrowband") access, as higher bandwidth ("broadband") access via xDSL, a cable modem or mobile broadband technology, or in the form of dedicated access involving leased lines linking one point to the internet and guaranteeing higher levels of performance and security.

8. The Commission has earlier taken the view that narrowband and broadband internet access constitute two separate markets. The Commission's market investigation in a more recent case[2] has indicated that, as a result of the progressive migration of customers from narrowband to broadband, a separate assessment of broadband and narrowband internet access may no longer be

[2] See Commission decision of 29 June 2009 in Case COMP/M.5532 - *Carphone Warehouse / Tiscali UK*.

necessary, and ultimately left open the question whether broadband and narrowband still must be considered to constitute distinct markets. It has also left open the question whether the retail broadband market comprises mobile broadband access or whether, due to the premium pricing and reduced speed of mobile broadband access compared to fixed broadband access, mobile broadband access may be part of a separate market.[3]

9. Furthermore, the Commission has differentiated between, on the one hand, residential customers and business customers without significant needs in terms of speed and functionalities of the internet access (small or micro-business customers) and, on the other hand, business customers with significant needs[4] which require higher performance in terms of security, bandwidth and functionality.

10. On the basis of the segments where Telefònica and Hansenet are active, the notifying party provides data for residential customers and small business customers and for large businesses, which is in line with previous Commission decisions.[5]

11. As the transaction would not give rise to any competition concerns even under the narrowest possible definition, the exact definition of the relevant product market for retail broadband and/or narrowband internet access can be left open.

12. Larger corporate customers may require dedicated access (leased lines)[6] because they need much higher performance levels in terms of security and bandwidth and functionality.

13. The notifying party submits that the product market definition for retail dedicated access (leased lines) is in line with the Commission Recommendation[7] of 2003.

14. On the basis that the transaction leads only to a minor horizontal overlap in this area, the analysis of the possible sub-segments of this activity is not pursued any further.

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3 See COMP/M.5532 – *Carphone Warehouse / Tiscali UK*, for the purpose of the present analysis, mobile broadband access is not included into the broadband internet market.

4 See Commission decision of 7 December 2006 in Case COMP/M.4442, – *Carphone Warehouse /AOL UK*, para. 22 et seq.

5 See Commission decision of 16 July 2003 in Case COMP 38.233 – *Wanadoo Interactive*; see Commission decision of 28 November 2006 in Case COMP/ M.4417 – *Telecom Italia / AOL German Access Business* (this decision concerns the acquisition of the AOL access business by Telecom Italia from AOL Germany); COMP/M.4442 – *Carphone Warehouse /AOL UK*.

6 See COMP/ M.4442, – *Carphone Warehouse /AOL UK; COMP/* M.5532 – *Carphone Warehouse / Tiscali UK.*

7 Commission Recommendation of 11 February 2003 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 communication networks and services (notified under document number C(2003)497).

Markets related to telephony

15. The concentration gives rise to limited horizontal overlaps in the parties' activities in the following markets:

    d) local/national and international fixed-line telephony services for residential and non-residential customers;

    e) mobile telecommunications services to end customers;

    f) wholesale domestic transit services in fixed networks.

16. In previous merger decisions, the Commission has referred to the Recommendation which defines the market as "*access to publicly available telephone services provided at a fixed location for residential and non-residential customers"* and considers a differentiation between residential and non-residential customers and between local/national and international calls.

17. In case *Carphone Warehouse/Tiscali*[8], the Commission's market investigation confirmed that the above distinction may not be relevant as providers generally are able to provide all types of calls. The investigation also indicated that managed VoIP services are generally considered substitutable with fixed-line telephony services.[9] The notifying party concurs with this assessment. In any event, given the parties' insignificant market position, a further segmentation of the market would not influence the assessment of the case.

18. In previous decisions the Commission did not further subdivide the market for the provision of mobile telecommunications services to end customers by type of customer (corporate or private, post-paid subscribers or pre-paid customers) or by type of network technology (2G/GSM or 3G/UMTS networks). The Commission consequently assessed the previous cases on the basis of a single market for the provision of mobile telecommunications services to end customers.[10]

19. As defined in the Explanatory Note to the Recommendation[11], transit services refer to the (long distance) conveyance of switched calls on the public telephone network provided at a fixed location. Transit services are required to complete a call. They may involve the transmission and/or switching or routing of calls between switches on a given network or on different networks.

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8 See M.5532 *Carphone Warehouse / Tiscali*, par. 37.

9 See M.5532, *Carphone Warehouse / Tiscali,* par. 38.

10 See Commission decision of 16 September 2003 in Case COMP/ M.3245 *Vodafone/Singlepoint*; Commission decision of 24 September 2004 in Case COMP/ M.3530 *TeliaSonera/Orange*; Commission decision of 26 April 2006 in Case COMP/ M.3916 *T-Mobile Austria / Tele.ring*; Commission decision of 7 November 2007 in Case COMP/ M. 4947 – *Vodafone/Tele2 Italy/ Tele2 Spain*.

11 Commission Staff Working Document – Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation, Second edition (the "Explanatory Note"), 2007, p. 26.

Vertical aspect

<u>Markets related to internet access</u>

20. The transaction entails vertical relationships between the following markets:

    a) wholesale broadband access and the markets for broadband internet retail access indicated above in Germany;

    b) wholesale call termination for dial-up internet access and retail dial-up (narrowband) internet access in Germany;

    c) wholesale leased lines and retail dedicated connections and capacity (leased lines) in Germany.

21. The market for wholesale broadband access corresponds to market n. 5 of the Recommendation[12].

22. As for dial-up internet access to end-users, an ISP requires an arrangement with an operator ensuring the termination of dial-up calls in the operator's network. The Commission has, in its Explanatory Note[13], described the relevant market for regulatory purposes as wholesale call termination for dial-up internet access.

23. As regards dedicated access and capacity (leased lines), the Commission has, for regulatory purposes, distinguished at the wholesale level between wholesale terminating segments (local tails) of leased lines and trunk segments of leased lines.[14] The Revised recommendation has defined only the market for "Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity".

24. Given the very limited impact that the transaction has on this market, for the purpose of this decision it is not necessary to conclude as to the distinction between terminating segments and trunk segments of the leased lines at wholesale level.

<u>Markets related to telephony</u>

    d) retail fixed telephony in Germany and wholesale call termination on the fixed networks of Telefónica in Spain and the Czech Republic;

    e) wholesale call termination on fixed lines in Germany and

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12 Revised Recommendation, p.5.

13 "Wholesale call termination as part of Internet service provision is different from call termination on fixed or mobile networks for the completion of calls between two end-users. In the case of call termination for Internet service provision, end-users have a contractual relationship (implicit or explicit) with an ISP but normally have no notion of the undertaking terminating dial-up calls. The ISP chooses the terminating operator (or operators) receiving the dial-in calls and may itself pay the terminating charge39. Since any terminating charge is incorporated into the overall amount that is charged by the ISP (and faced by the end-user), and end-users can switch between competing ISPs, ISPs have an incentive to minimise the termination charges that they pay." Explanatory Note, p. 36.

14 Explanatory Note, p. 38.

a. retail fixed telephony in Spain and the Czech Republic;

b. retail mobile telephony in Germany, Spain, Czech Republic, United Kingdom, Ireland and Slovakia

f) wholesale call termination on mobile networks in Germany, Spain, Czech Republic, United Kingdom, Ireland and Slovakia and retail fixed telephony in Germany;

g) wholesale call origination on Telefónica's German mobile network and retail mobile telephony in Germany.

25. As for the market e) and f) above, call termination consists of the service offered by a network operator to another operator to terminate traffic originating on another network. Termination services allow thus users of the different networks to communicate with each other. Each operator has to procure call termination at wholesale level in order to be able to terminate calls on other networks. Call termination is indispensable in order to complete a call to its recipient when the call originates from another network than that of the recipient.

26. Since there is no substitute for call termination on each operator's fixed or mobile network, the Commission has considered each operator's network as a separate product market. This applies to fixed and mobile networks in the same way.[15]

27. As for the market g) above, access and call origination services are required by mobile virtual network operators and mobile service providers in order to provide retail mobile telephony services. Network access and call origination are typically supplied together by a network operator and have therefore been considered in previous Commission decisions and in the Explanatory Note as part of the same market.[16]

4.2. Relevant geographic markets

28. All the markets indicated above have been defined as national in scope.

V. COMPETITIVE ASSESSMENT

5.1. Horizontal assessment

<u>*Markets related to internet access*</u>

29. Telefónica and Hansenet have overlapping activities in a number of markets.

a) retail fixed broadband access to residential customers and small business customers

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[15] See Commission decision of 10 January 2006 in Case COMP/ M.4035 – *Telefónica / O2,* par. 9 et seq.; COMP/ M.4947 – *Vodafone / Tele2 Italy / Tele2 Spain*, par. 13; Revised Recommendation, p. 24.

[16] COMP/ M.4947 - *Vodafone / Tele2 Italy / Tele2 Spain*, par. 13; Revised Recommendation, par. 15; Explanatory Note, p. 44.

30. The post-merger combined market share would be limited, namely [10-20]% (Hansenet [10-20]% and Telefónica [0-5]%) by revenues and [10-20]% (Hansenet [10-20]% and Telefónica [0-5]%) by subscribers, on the basis of 2008 data[17].

31. Given the very limited increment to the market share of Hansenet, the transaction is unlikely to have any anti-competitive effect on this market.

b) retail fixed broadband access to large business customers

32. The post-merger combined market share would be insignificant, namely […]% (Hansenet [0-5]% and Telefónica […]%) by revenues and […]% (Hansenet [0-5]% and Telefónica […]%) by subscribers, on the basis of 2008 data[18].

33. Given the very limited combined market share, the transaction is unlikely to have any anti-competitive effect on this market.

c) retail dedicated connections and capacity (leased lines)

34. The post-merger combined market share would be very limited, namely […]% (Hansenet [0-5]% and Telefónica […]%) by revenues on the basis of 2008 data[19].

35. Given the very limited combined market share, the transaction is unlikely to have any anti-competitive effect on this market.

Markets related to telephony

d) local/national and international fixed-line telephony services for residential and non-residential customers

36. The post-merger combined market share would be limited, namely [5-10] % (Hansenet [0-5]% and Telefónica [0-5]%) by revenues and [5-10]% (Hansenet [5-10]% and Telefònica [0-5]%) by minutes, on the basis of 2008 data[20].

37. Given the very limited combined market share, the transaction is unlikely to have any anti-competitive effect on this market.

e) mobile telecommunications services to end customers

38. The post-merger combined market share would be limited, with a minor increase, namely [10-20]% (Hansenet [0-5]% and Telefónica [10-20]%) by revenues and [10-20]% (Hansenet [0-5]% and Telefónica [10-20]%) by subscribers, on the basis of 2008 data.

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[17] The notifying party elaborated the market share data on the basis of the BNetzA, IDC, Merril Lynch and Deutsche Telecom AG publicly available data.

[18] Source: IDC European Telecom Services Database Q2/2009, internal data.

[19] Source: IDC; internal data.

[20] Source: DTAG 2007/2008, Telefònica internal estimates. The notifying party indicates that IDC statistic value the German fixed telephony market in 2008 as larger (EUR […]) than DTAG's estimates (EUR 8 billion). Considering the larger estimate of the market size, Hansenet's market share would be [0-5]%.

39. Given the very limited increment to the market share of Telefònica, the transaction is unlikely to have any anti-competitive effect on this market.

f) wholesale domestic transit services in fixed networks

40. Both parties provide wholesale transit services in their respective fixed networks. Transit services are offered by all fixed network operators in Germany to other operators with which they are interconnected. The notifying party submitted that, during the past years, viable competition between these operators has developed in the transit market in Germany. As a consequence, the German regulator has released the market from regulation.

41. The Commission has contacted the German regulator, the Bundesnetzagentur ("BNetzA") in order to obtain data regarding the volume of the overall German market for wholesale transit services. This data, which has to remain confidential in detail, confirms the parties' submissions. Firstly, following the Commission's Recommendation, the BNetzA has pointed out that due to a suffient level of competition, the market for transit services can be released from regulation. Secondly, the BNetzA regards wholesale transit services as part of larger markets, for example including network access or termination. Both the minutes sold by the parties for wholesale transit services as well as their revenues represent a small share of the overall market. Notably, the main market player Deutsche Telekom and various other competitors with market shares higher than the combined entities', ensure that competition on that market remains viable.

42. Therefore, the transaction is unlikely to have any anti-competitive effect on this market.

5.2 Vertical assessment

Markets related to internet access – a), b) and c) above

43. Telefónica and Hansenet do not have overlapping activities in the markets for wholesale internet access in Germany. Telefónica provides wholesale broadband access and wholesale call-termination for dial-up internet access at fixed locations in Germany, whereas Hansenet only provides wholesale products for dedicated access (leased lines).

a) Wholesale broadband access and the markets for broadband internet retail access

44. Telefónica acts as a backbone service provider to other Internet Service Providers (ISPs) and has interconnection agreements with Deutsche Telekom ("DT") to reach the final customers.

45. As regards wholesale broadband access, Telefónica's market share at the wholesale level in 2008 was [5-10]% (including captive use), with as the incumbent competitor DT holding a [60-70]% market share, Arcor with [10-20]% and QSC with [0-5]%. When considering the market shares excluding captive use, Telefónica's position is [20-30]%, DT [60-70]%. Arcor [0-5]% and QSC [5-10]%.

46. The concentration will not lead to an increase of Telefónica's market share and no risk of foreclosure would arise given the limited market shares of the parties at

both upstream and downstream level (around [10-20]% combined market share, see paragraph 30 above). Given that at either level the concentration does not give rise to affected markets, it is unlikely that it would have any anti-competitive effects.

b) Wholesale call-termination for dial-up internet access at fixed locations and retail dial-up (narrowband) internet access

47. […]. Hansenet's market share at the downstream level is [10-20]% by subscribers (T-Online [30-40]%, Freenet [10-20]%, Arcor [10-20]%). In any case, given the steep decline of dial-up internet access connections observed by the BNetzA in the recent years[21], which shows a clear trend towards broadband connections, the vertical relationship between the parties with respect to these markets cannot give rise to any competition issues. Moreover, even if Telefónica had an interest to discriminate against Hansenet's competitors at the downstream level, such competitors could easily switch to other suppliers such as DT, Vodafone/Arcor or QSC with ample capacities.

c) Wholesale products for dedicated access (leased lines) and retail dedicated connections and capacity

48. Hansenet offers dedicated access as a wholesale product to carriers which resell or use the purchased capacity in order to offer dedicated access products to their own customers.

49. As Telefónica does not offer wholesale products for dedicated access, the concentration will not increase Hansenet's market share. For this reason and given the parties' small combined market share ([0-5]%) in the downstream retail market for dedicated access, the vertical relationship between that market and the wholesale market for dedicated access cannot influence the conditions for competition at either level or give rise to any foreclosure issues.

50. No estimate of the overall value of the German market for wholesale dedicated access is available to Hansenet. As Hansenet is only a minor player in this market, it does not have sufficient own market intelligence to provide a reliable estimate.

51. The Commission has contacted the BNetzA in order to obtain the data regarding the volume of the overall German market for wholesale dedicated access. The BNetzA provided access to its last estimations of the respective market for 2005 and the first half of 2006, which have to remain confidential. On the basis of this data, the Commission estimated that Hansenet's revenues for 2006, […], represent a negligible share of the overall market. Moreover, the presence of at least five strong competitors on the market, including the market leader Deutsche Telekom, as well as the limited combined market share reached by the parties at retail level ([0-5]%), indicate that the transaction is unlikely to have any anti-competitive effects

[21] 60 billion minutes in 2006 to 10 billion in 2008.

Markets related to fixed and mobile telephony - d), e) f) and g) above

d) Retail fixed telephony in Germany and wholesale call termination on the fixed networks of Telefònica in Spain and the Czech Republic

52. Telefónica is active in fixed retail telephony in Spain ([50-60]% market share by revenues in 2008) and in the Czech Republic ([50-60]% market share for residential and [40-50]% for non-residential in 2008). Given the small combined market share of Hansenet and Telefònica at retail level in Germany (around [5-10]%), the competitive conditions in the markets for call termination on the fixed networks of Telefónica in Spain and in the Czech Republic are unlikely to be significantly affected by the transaction.

53. In any case the notifying party submits that it would not be possible for Telefónica to discriminate against Hansenet's competitors whose subscribers also make calls to the fixed networks of Telefónica in Spain or in the Czech Republic, since Telefónica's termination fees are fixed by the Spanish regulator and there is thus no scope for Telefónica to discriminate against competitors. Furthermore, there are no obstacles which would prevent a foreign telecommunications provider to switch to an international carrier in order to acquire call termination in case of discrimination. In any event, Telefónica is prevented by regulation from raising prices to these operators.

e) wholesale call termination on fixed lines in Germany and

(a) retail fixed telephony in Spain and the Czech Republic;

(b) retail mobile telephony in Germany, Spain, Czech Republic, United Kingdom, Ireland and Slovakia

54. The number of calls terminated on a network is determined solely by the number of calls received by its subscribers. Therefore, the number of calls received by either Hansenet or Telefónica or their competitors and terminated in their respective networks will not change in any way as a result of the transaction.

55. The concentration will also not affect competitors of the parties with respect to calls made by their subscribers to Hansenet's and Telefónica's network. Although, according to the Commission's market definition, Hansenet and Telefónica have a monopoly in selling call termination to these operators, this position existed prior to the transaction, and is in no way strengthened by it.

56. Furthermore, given Hansenet's small share (approximately [0-5]%) and Telefónica's insignificant share ([0-5]%)[22] of the total German termination market, it is unlikely that any attempt to discriminate against competitors with respect to call termination rates would appreciably affect their cost structure. In any event, Telefónica is prevented by regulation from raising prices to these operators.

22 This market share is calculated as a proportion of the number of minutes terminated on the respective operator's network to the total termination market in Germany.

f) wholesale call termination on mobile networks in Germany, Spain, Czech Republic, United Kingdom, Ireland and Slovakia and retail fixed telephony in Germany;

57. Telefónica has mobile networks in Germany, Spain (retail market share by revenues in 2008 – [40-50]%), the Czech Republic (retail market share by revenues in 2008 – [40-50]%), the UK (retail market share by revenues in 2008 – [20-30]%), Ireland (retail market share by revenues in 2008 – [30-40]%), and Slovakia (retail market share by revenues in 2008 – [0-5]%).

58. For the same reasons as set out above with respect to call termination on fixed networks (see paragraph 54), the transaction will not affect significantly the number of calls received by either Telefónica or its competitors and terminated in their respective networks. Therefore, neither other mobile operators in Germany, Spain, the Czech Republic, the UK, Ireland or Slovakia nor Hansenet's competitors whose subscribers also make calls to the mobile networks of Telefónica in these countries will be affected by the transaction.

59. Any attempt by Telefónica to charge unfairly high call termination rates to competitors of the merged entity in Germany would not have an appreciable impact on competition as it would hardly affect their cost structure. This is due to the fact that the costs borne by German retail fixed telephony operators to provide termination only in Telefònica's mobile networks in the other countries constitutes a very limited percentage of their overall cost structure.

60. This is shown by the data regarding the total amount of traffic generated by Hansenet's fixed network in Germany in 2008 by minutes and costs and terminated in all mobile networks in Spain, the Czech Republic, the UK, Ireland and Slovakia respectively[23]. These data confirm that the percentage of calls originating from Hansenet and terminating on mobile networks in each respective country is very limited. A fortiori, the percentage of calls terminating only on Telefònica's networks is even smaller.

61. In any event, price regulation for mobile call termination would prevent Telefónica from charging unfairly high call termination fees to these operators.

g) wholesale call origination on Telefónica's German mobile network and retail mobile telephony in Germany.

62. Telefónica's market share at wholesale level in Germany is […]% by subscribers in 2008. Given the presence of the large competitors T-Mobile ([…]%) and Vodafone ([…]%) and of the third player E-plus ([…]%), and considering the low combined market share of the parties at retail level (around […]%) the transaction is unlikely to give rise to any foreclosure scenarios.

23 For example, the total amount of traffic (in minutes) generated by Hansenet's network and terminated in mobiles networks in Spain represents approximately [0-5]% of the total call termination in Spain; in the Czech Republic [0-5]%; in the UK [0-5] %, in Ireland [0-5]; in Slovakia [0-5] %.

VI. CONCLUSION

63. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the internal 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