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*Case No IV/M.604 -
ALBACOM*

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

Article 6(1)(a) INAPPLICABILITY
Date: 15/09/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.09.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No IV/M.604 - ALBACOM
Your notification of 11 August 1995 pursuant to Article 4 of Council
Regulation No. 4064/89**

1. This operation concerns the creation of a company which will combine the telecommunications activities of British Telecommunications plc (BT) and Banca Nazionale del Lavoro SpA (BNL) in Italy. The new company - to be called ALBACOM SpA - will initially offer business communication services based on the two companies' existing networks and will expand their activities to offer other types of telecommunications services as the Italian market is liberalized.
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 certain assets of BNL. The operation does not fall within the scope of application of Council Regulation 4064/89.

I. THE PARTIES

3. BT's principal activity is the supply of telecommunications services and equipment. Its main services are local and long-distance telephone calls in the UK, the provision of telephone exchange lines to homes and businesses, international telephone calls made from and to the UK and the supply of telecommunications equipment for customers' premises. BT and MCI Communications Corporation (MCI) are partners in the "Concert"

joint venture, for the provision of advanced business telecom services to multinational companies⁽¹⁾.

4. BNL is one of Italy's largest banks with a total turnover of about 2,5 billion Ecu. BNL's subsidiary - Multiservizi - has an exclusive private (X25, 100 nodes) telecommunications network. Multiservizi also operates BNL's primary data network. Multiservizi's telecommunications activities are offered to third parties as well as BNL. The Italian Treasury holds a stake of about 73% in BNL.

II. THE OPERATION

5. The operation is the creation of ALBACOM as a new business telecommunications operator in Italy. BNL will contribute Multiservizi and the other telecommunications activities in which BNL is engaged. BT will contribute the activities of BT Italy relating to its network business within Italy but not its international correspondent business. ALBACOM will immediately acquire the BT Italy GNS and the Multiservizi TDM networks. The Multiservizi X25 network will be leased initially to ALBACOM, in order to comply with [...] ⁽²⁾, and it is planned that that network will be automatically transferred to ALBACOM after five years. In any event, Multiservizi will not be able to sell capacity on the network.

III. CONTROL

6. The parties' shareholdings in ALBACOM will be split 50.5% BT and 49.5% BNL. At board level, BT is expected to have four members to BNL's three. Therefore at both shareholder and board level, BT will have an inbuilt majority of issues where no minority right provisions apply.
7. BNL retains certain joint rights, some of which are on a permanent basis (or until BNL's shareholding falls below 25%) and others of which are only applicable to the first three years (the Development Phase) of ALBACOM's operations. The permanent rights include the following:
 - approval of triennial reviews to the Business Plan;
 - approval of annual updates to the initial Business Plan and Business Plan where these entail funding above the thresholds in the Initial Business Plan;
 - changes to the power or authority of the Chief Executive Officer (CEO);
 - shareholder related contracts;
 - [...] ⁽²⁾;
 - changes in the scope of the company and the Articles of Association;
 - [...] ⁽²⁾.

⁽¹⁾ Case No. IV/M.353 - British Telecom / MCI, of 13 September 1993 and Case No. IV/34.857 BT-MCI, of 27 July 1994.

⁽²⁾ Deleted; business secret.

8. For the first three years only, BNL enjoys rights also in the following areas:
- appointment and dismissal of the CEO;
 - [...] ⁽³⁾;
 - [...] ⁽³⁾;
 - [...] ⁽³⁾.
9. The areas in which a simple majority is sufficient include the approval of the budget and long-term strategic decisions within ALBACOM's original scope.
10. A Put Option exists for BNL [...] ⁽³⁾.
11. On a permanent basis, a Call Option gives BT the right to acquire BNL's shareholding [...] ⁽³⁾.
12. An Initial Business Plan has been agreed between BT and BNL. This Business Plan covers the first ten years of operation of ALBACOM. The Business Plan is updated annually (with the joint rights listed above) and is subject to a triennial review which is proposed [...] ⁽³⁾ to the shareholders meeting where BNL [...] ⁽³⁾.
13. In the Commission Notice on the notion of a concentration, the relative importance of veto rights is assessed in section 2.2. In general, the principal rights which a minority shareholder should hold in order to be able to exercise a decisive influence are the appointment of the management and the determination of the budget (see paragraph 25). Next in order of importance is the rights over the business plan (paragraph 26). In the ALBACOM shareholder's agreement, the appointment of the Chief Executive Officer is subject to joint decision making during the first three years and is by simple majority thereafter. For the approval of the budget, a simple majority is sufficient as BNL has no joint rights at any stage. By contrast, BNL retains joint rights for both the triennial review of the Business Plan and for the annual updates where these involve major funding increases.
14. On the basis of the above information, it could be argued that for the time of the Development Phase (3 years), BNL has joint rights in relation to the Business Plan and to the appointment/dismissal of the CEO and will therefore exercise joint control over ALBACOM. After the completion of the Development Phase, BNL's veto rights will be limited to the updates and reviews of the Business Plan except of minor funding increases where BT has a Call Option (see para. 15). Thus, BT will subsequently not only control the budget and long-term strategic decisions of the JV, but also the appointment and dismissal of the CEO, i.e. the management of ALBACOM.
15. In the light of the BS/BT case ⁽⁴⁾, the fact that after three years BT will have the decisive influence over budget, management and long term strategic decisions in the context of a ten years business plan means that the operation should be assessed as sole control by BT. In BS/BT, both BT and Banco Santander were deemed to have joint control during the first three years of the operation of the joint venture. Due to a significant change in

⁽³⁾ Deleted; business secret.

⁽⁴⁾ Case No. IV/M.425 - BS/BT of 28.03.1994.

the consent rights of the parties and a special Put Option of BS, BT was deemed to exercise a decisive influence over the JV after three years.

16. In the present case, BNL will retain joint rights after three years as to the updates of the Business Plan including major funding increases. It is true that a veto right over the business plan may be sufficient to confer joint control even in the absence of any other veto right as it is stated in paragraph 26 of the Commission Notice on the notion of a concentration. However, the Business Plan of ALBACOM is in particularly close relation with the budget of the joint venture. According to section 1.11 of the Business Plan, the annual budget will be established on a monthly basis, allowing for variance analysis and updates on actual figures to be submitted to the Board on a monthly basis. Through the continuous control over the budget, BT will thus have a considerable influence on the regular updates of the Business Plan itself.
17. In addition, BNL will from year 4 onwards lose the right to veto changes to the [...]⁽⁵⁾. A part of the Business Plan which is of importance for the activities of ALBACOM will thus be solely controlled by BT after completion of the Development Phase.
18. Finally and as opposed to the BS/BT case, the options, which are granted to the parent companies under the Shareholders Agreement, are not appropriate to give decisive influence in one way or the other. The BNL Put Option [...]⁽⁵⁾ which can only be exercised in narrowly defined circumstances. Consequently, the Put Option cannot act as any sort of deterrent to BT to act in a way that takes account of BNL's views more than if it did not exist. This is equally true for the BT Call Option which can only be exercised [...]⁽⁵⁾.
19. It would appear, therefore, that on the basis of the traditional determinants of control, BNL may have joint control for the first three years. It will however no longer have control from year 4 onwards since it has no longer decisive influence on the appointment of the management and the budget, which are (according to the Commission Notice on the notion of a concentration) the most important veto rights. As in the BS/BT case, the business plan covers a ten year period and, according to the financial projections of the parties, [...]⁽⁵⁾. Given the long term nature of this investment in the telecoms sector in Italy, the three year period is insufficient to bring about a lasting change with regard to the participation of BNL (see also paragraph 38 of the Commission Notice on the notion of a concentration). BT will therefore have sole control over ALBACOM. Consequently, the operation is the acquisition of control by BT of a new joint venture company which incorporates certain assets of BNL. Therefore, for the purposes of calculating turnover, Article 5(2) is applicable.

IV. ABSENCE OF COMMUNITY DIMENSION

20. BT and the parts of BNL which are the subject of the transaction have a combined worldwide turnover of more than 5000 million ECU as BT alone had a worldwide turnover of 17,905 million Ecu in the financial year 1994/95. BT has a Community wide turnover of over 250 million ECU. The assets of BNL acquired by BT are about 20 million Ecu and do thus not have the Community wide turnover required by Article 1

⁽⁵⁾ Deleted; business secret.

(2) b of Council Regulation 4064/89. Therefore, the operation does not have a Community dimension.

V. CONCLUSION

21. 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,