

*Case No IV/M.722 -
Teneo / Merrill Lynch /
Bankers Trust*

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 15/04/1996

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EUROPEAN COMMISSION

Brussels, 15.04.1996

PUBLIC VERSION

To the notifying parties:

Dear Sirs,

Subject: Case N° IV/M.722 - TENEO/MERRILL LYNCH/BANKERS TRUST

Notification of 12.3.1996 pursuant to Article 4 of Council Regulation No 4064/89

1. On 12.3.1996 the Commission received a notification of an operation whereby Téneo S.A., Merrill Lynch Europe PLC (MLE) and Bankers Trust Foreign Investment Corporation (BT) establish a joint venture, to be named Andes Holding B.V.(Andes), which will hold certain South American Airline interest formerly owned by Iberia Líneas Aéreas de España, S.A. (Iberia).
2. On 19.03.1996 the Commission granted the parties a derogation from the obligation to suspend the concentration, imposed by Article 7(1) of the Merger Regulation of Council Regulation No. 4064/89 (the Merger Regulation) pursuant to Article 7(4) of the said regulation.
3. After examination of the notification, the Commission has concluded that the notified operation does not fall within the scope of the Merger Regulation.

I. THE PARTIES AND THE OPERATION

4. MLE is a subsidiary of the American undertaking Merrill Lynch & Co., Inc., which provides investment, financing, insurance and related services on a global basis. BT is a subsidiary of Bankers Trust Company, one of the largest commercial banks in the United States.

5. Téneo is an autonomous holding company with interests in the energy, air transport, aerospace, engineering and construction, aluminium, cellulose and sea transport sectors with 100% of its share capital owned by the Kingdom of Spain. It is the Holding Company of Iberia.
6. AA is an airline principally (but not exclusively) operating to and from destinations in Argentina to various parts of the world. Through its subsidiary Austral, it also operates domestic flights within Argentina.
7. Andes is a joint venture that will be owned as to 42% by Téneo, 49% by MLE and 9% by BT. It will acquire from Iberia all the shares of the Argentinean holding company Interinvest S.A., which holds a majority of the shares of Aerolíneas Argentinas (AA) and its affiliated company Austral, one of Argentina's domestic airlines. Andes will acquire directly from Iberia additional interests in AA and Ladeco, which is a Chilean airline company . After completion of the transaction Andes will own 86.16% of AA, 89.99% of Austral and 13% of Ladeco.
8. The background to the above referred operation is fully explained in the Commission decision of 31 January 1996 under Article 93(2) EC Treaty. In that decision the Commission did not consider that the operation under consideration in this case was a State aid in the sense of Article 92 paragraph 1 of the EC Treaty. The proposal to establish the current joint venture was a key factor, subject to other conditions, in enabling the Commission to consider that the capital injection by Téneo was in accordance with the market investor principle and that the sale of the assets permitted a substantial reduction in the risks which had been borne until now by Iberia through its involvement in the South American airline companies. In this context, the joint venture has been created as an intermediate step to the disposal of a part of Iberia's Latin American assets. The parties expect the disposal to take place within a period of three years.
9. There is a Management Agreement signed between Iberia and AA which confers substantial powers to Iberia over AA. Under paragraph 14 of the Share Purchase Agreement between Andes and Iberia, Iberia will comply with its duties applying the diligence of a prudent businessman ("ordenado comerciante"). It will terminate its services if so instructed by Andes.
10. Andes will have eleven Directors. Téneo and MLE will be entitled to nominate five Directors each. BT is entitled to nominate one Director. Decisions will be adopted by simple majority. The Chairman will not have a casting vote.
11. According to the Shareholders Agreement, matters requiring unanimous consent of the shareholders are limited and veto rights are not different from those generally given to strong financial investors and other minority interests. According to these provisions Andes may, with the joint consent of MLE and BT, enter into any arrangement for any joint venture, acquire, sell or dispose of any assets, merge, issue debentures or loans, etc. This identifies MLE and BT as finance providers in order to secure the debt. In fact MLE and BT will begin to take steps to sell the assets of Andes shortly after it is incorporated, although Iberia has an option to repurchase the assets during a period of two years.

12. Although paragraph 11.2 of the Share Purchase Agreement between Andes and Iberia establish that Iberia will prepare a five year strategic business plan acceptable to Andes and the majority senior lenders (MLE and BT) in their sole discretion, neither further definition of the content nor binding effects of the business plan are disclosed in the agreement.

II. CONCENTRATION

13. Article 3 (2), second subparagraph, of Regulation No 4064/89 stipulates that a joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity.
14. Andes has a reduced amount of capital (10 million US Dollars) in proportion to its total financial needs and will finance its assets with debt from its shareholders. It will not have the staff or technical resources needed to undertake the operational management of the business of which, it will be temporary owner, for which reason such management will be undertaken by Iberia under a forty two month contract.
15. It is the intention of the parties, as described in the Commission Decision on State Aids to dispose of Andes assets to third parties within three years, repay its loans to its shareholders and distribute any surplus. On this basis only, and subject to other conditions, the Commission has allowed the capital increase of Iberia. Andes is, therefore, purely a vehicle for the temporary holding of the shares and once its objectives are achieved the Company will be dissolved. Thus, the existence of the vehicle transaction and the holding of the assets acquired will be limited in time and not long- lasting within the meaning of Article 3.2 of the Merger Regulation.
16. The creation of Andes by Téneo, MLE and BT is not a concentration within the meaning of Regulation 4064/89 as it will not be a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

III. CONCLUSION

For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

For the Commission,