

EN

***Case No IV/M.855 -
BT / NS - TELFORT***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 20/12/1996

*Also available in the CELEX database
Document No 396M0855*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.12.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.855 - BT/NS/Telfort
Notification of **21.11.1996** pursuant to Article 4 of Council Regulation No 4064/89

1. On 21 November 1996, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which the undertakings British Telecommunications plc ("BT") and NS Groep N.V. ("NSG") a wholly owned subsidiary of N.V. Nederlandse Spoorwegen ("NS"), acquire within the meaning of Article 3 (1) (b) of the Council Regulation joint control of a newly created company constituting a joint venture named Telfort ("the JV").
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

THE PARTIES

3. BT's principal activity is the supply of telecommunications services and equipment. Its main services are the supply of local and long-distance telephony in the UK, the provision of telephone exchange lines to private and business customers, the provision of international telecommunications services from and to the UK, and the supply of telecommunications equipment for customers' premises. Together with MCI Communications Corporation BT has established the "Concert" joint venture for the provision of advanced business telecom services to multinational companies. BT has currently only limited activities in the Netherlands, mainly comprising of the supply of "Concert" services. BT's present turnover in the Netherlands amounts to about NLG []¹ million.

¹ Deleted business secrets.

4. NSG is mainly active in the field of passenger and freight transport within the Netherlands. NSG has the disposal of a voice and data network which was set up for internal telecom purposes but has been attributed to a separate entity (NS Telecom B.V.) to pursue the telecom ambitions of NS. Recently, NS Telecom has started to provide telecom services to third parties on an experimental basis.

THE OPERATION

5. The parties have the intention to create a major alternative telecom operator in the Netherlands. The objects of the JV are (inter alia):
 - to install, maintain and operate a fixed telecommunications infrastructure in the Netherlands,
 - to provide in the broadest sense domestic and transborder telecom services to customers in the Netherlands, including voice telephony, data transmission, the provision of leased lines and the provision of other services, such as voice messaging, calling cards and fax services.
6. BT and NS will contribute, with minor exceptions, all their assets and current activities in the field of telecommunications in the Netherlands to the JV. The JV will build its infrastructure based on the existing core transport network of NS, which at the moment exists of links along rail tracks throughout the Netherlands. []² Furthermore, the JV will become the exclusive distributor of Concert's value added and enhanced international services within the Netherlands.

COMMUNITY DIMENSION

7. The operation has a community dimension. The joint worldwide turnover of BT and NS in their respective last financial year amounts to more than 5000 million ECU and the Community wide turnover of both BT and NS exceeds 250 million ECU. BT and NS do not achieve more than two-thirds of their aggregate Community wide turnover within one and the same Member State. The operation does not constitute a cooperation case under the EEA Agreement, pursuant to Article 57 of that agreement.

CONCENTRATION

Joint Control

8. The joint venture agreement between the parties provides for the establishment of a Holding Company in which BT and NSG will each hold 50% of the shares. The parties will have equal voting rights and no casting vote.
9. Half of the members of the Management Board and of the Committee of Directors of the Holding Company will be nominated by BT while the other half will be nominated by NSG. They will be appointed by the general meeting of shareholders, which also has to approve the update or amendment of the business plan.

² Deleted business secrets.

10. The joint venture agreement also provides for the establishment of an Operating Company which will become a full subsidiary of the Holding Company. The Holding Company shall be the sole managing director of the Operating Company.
11. From the moment that this will be required by law, there will be a supervisory board. The Parties shall each appoint half of the initial members of this board.
12. It follows from the above that the JV will be jointly controlled by BT and NSG.

Full Function

13. The JV will be established for an indefinite period. Furthermore, the business plan and the fact that the JV will receive substantial assets staff and funding from the parent companies, including a telecom network, show the intention of the parties to establish a joint venture that will operate on a long-lasting basis.
14. The JV will operate at arm's length from its parent companies and will thus operate in an autonomous manner. The JV will operate its own infrastructure and will provide a broad range of telecom services. It can be considered as an entity which performs all the functions that are normally carried out by other undertakings in the same market.
15. In the first years, NSG will be a major customer of the JV. This does however not preclude the full-function character of it as the proportion of the sales to NSG in the total sales will decline rapidly during the first years of its existence.
16. It can therefore be concluded that the JV will perform on a lasting basis all the functions of an autonomous economic entity.

Absence of coordination of economic behaviour

17. NS will terminate its, at the moment still experimental, telecom services to third parties. It will contribute its fibre network to the JV and will only retain its copper wire connections which will be used for rail traffic management.
18. NS will retain some interests in markets which are related to that of the JV. Firstly, an interest in the internet provider World OnLine, which does not give NS control and consequently can not lead to a risk of coordination. Secondly, NS will maintain its indirect shareholding in Hermes Europe Railtel B.V. (Hermes). According to the decision of the Commission in Case No IV/M.683 - GTS-Hermes Inc/HIT Rail BV, Hermes is jointly controlled by inter alia ten European national railway undertakings including NS. In this decision it was also concluded that the market on which Hermes operates is the market for the provision of infrastructure services to telecom operators. This is a market at the upstream level from the activities of the JV. There is no special supply relationship between Hermes and the JV envisaged, nor is there reason to expect that Hermes will be an important supplier of infrastructure services to the JV.
19. BT will transfer the majority of its services for customers in the Netherlands to the JV, but will keep providing some international telecom services to these customers. It is however not necessary to take these activities into consideration. From the definitive withdrawal of NS from the markets on which the JV will operate it follows that the creation of the JV will not give rise to coordination of competitive behaviour between NS and BT.

Conclusion

20. On the basis of the above it can be concluded that the notified operation constitutes a concentration within the terms of Article 3 of the Merger Regulation.

COMPATIBILITY WITH THE COMMON MARKET AND THE EEA

Relevant product Markets

21. The parties have stated that voice telephony, data transmission and leased line services are segments of the telecommunications market. No position has been taken with respect to the other services which belong to the proposed field of activities of the JV.
22. It is however, for the assessment of the present operation, not necessary to define the relevant product markets since even the narrowest possible product market definition does not give rise to the creation or strengthening of a dominant position.

Relevant geographic market

23. The parties have stated that for the provision of basic voice and data services and leased lines in the Netherlands the geographic market must be regarded as national, while for the provision of enhanced international services provided via global networks, the relevant geographic market is world-wide.
24. As has also been decided by the Commission in earlier cases (IV/M.570 - TBT/BT/Tele Danmark/Telenor and IV/M.689 - ADSB/Belgacom) that the markets for domestic and international voice and data telecommunications services, leased lines and telex, can be considered national, having regard to the regulatory environment and the structure of the market, especially the market positions of the incumbent players in the respective territories.
25. On the other hand, the market for value added business telecom can be considered worldwide, as the activities themselves are by their nature international and offered on a world-wide scale (above mentioned decisions as well as IV/34.857 BT-MCI).
26. It is however not necessary to decide upon the scope of the geographical market because the present case does not give rise to competition problems however the market is defined.

Assessment

27. As was already shown, the activities of the parties in the field of telecommunication in the Netherlands are very limited. Especially the present activities of NS on the telecom market are practically non-existent. There is no overlap of the activities of the parties.
28. The JV will enter telecom markets in the Netherlands in which the Dutch PTT is dominant. Its initial position on these markets will be in the order of []³ market share. According to the parties the JV may reach, in a period of ten years, a market share of []³ on the markets for data transmission, voice telephony and leased lines and a share of []³ on certain markets for special services.

³ Deleted business.secrets.

29. On the market of advanced business telecom services on which BT's Concert format is operating, the competitive situation does not change as the distribution of these services is taken over by the JV from BT.
30. It follows from the above reasons that the concentration will not create or strengthen a dominant position in the EEA territory or a substantial part of it.

ANCILLARY RESTRAINTS

31. The joint venture agreement contains a non-competition clause which prevents NS and BT to compete directly or indirectly with the JV in the Netherlands. In particular, the JV will act as exclusive distributor of Concert services in the Netherlands, and BT itself will not distribute these services in this territory. These clauses reflect the permanent withdrawal of the parents from the markets to be served by the JV and can therefore be recognized as an integral part of the concentration.
32. The parent companies will provide the JV with know-how and expertise. Terms will be agreed on an arm's length basis. This provision ensures that the JV will have the necessary resources for carrying on business and can be considered as an integral part of the concentration.
33. The JV will obtain from BT the right to use certain of BT's trade marks on a non-exclusive basis. This is not to be considered a restriction of competition.
34. The parties have also entered into a 'framework network agreement' which provides for cooperation between the parties to ensure that interconnection of the two networks is achieved, in order to allow the JV to distribute Concert services in the Netherlands. As far as restricting competition, it can be regarded ancillary to the operation.
35. NSG agrees that it will continue to source its telecom requirements from the JV for a period of at maximum five years. Partly this agreement preserves the continuation of a previous intra-group supply-demand relationship within NS. For another part it includes telecommunications services now supplied by third parties. It can be considered ancillary for a period of 4 years, because the resulting revenues are necessary to the JV during this initial period.

CONCLUSION

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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,