

***Case No IV/M.900 - BT /
TELE DK / SBB /
MIGROS / UBS***

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

Article 6(1)(b) NON-OPPOSITION
Date: 16/04/1997

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.04.1997

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE (6)1(b)

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.900 - BT/TELE DK/SBB/MIGROS/UBS

Notification of 10.03.1997 pursuant to Article 4 of Council Regulation N° 4064/89

1. On 10 March 1997 British Telecommunications plc, (United Kingdom) (BT), Tele Danmark A/S (Denmark) (Tele-DK), Schweizerische Bundesbahnen (Switzerland) (SBB), Migros-Genossenschafts-Bund (Switzerland) (Migros) and Schweizerische Bankgesellschaft (Switzerland) (UBS) notified to the Commission an intended operation whereby they acquire joint control within the meaning of article 3(1)(b) of Council Regulation 4064/89 of Newtelco AG (Switzerland).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application 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.

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 telecommunication services to multinational companies¹.

¹ Decisions IV/M.353 - British Telecom / MCI, (13 September 1993) and IV/34.857 BT-MCI, (27 July 1994). The Commission is currently examining a merger between BT and MCI (IV/M.856 - British Telecom/MCI).

4. Tele-DK, controlled by the Danish state, is the principal provider of telephone services in Denmark. Other activities include the supply of telecommunications equipment, telephone directories and cable television. Tele Danmark operates under a concession granting to it the right to provide in Denmark, amongst other services, public voice, leased lines and NMT mobile telephone services and to install and operate the Danish public telecommunications network infrastructure. Tele Danmark also operates one of the two Danish GSM mobile telephone services.
5. SBB is the national railway company of Switzerland, organised as a department of state. It owns a backbone telecommunications system, Difonet, connecting the main cities of Switzerland and used to provide data services (DataRail) and voice communication services (ISDN-SBB) in connection with its operations. Together with UBS it holds a licence for WANDA, an ATM-based network confined to [...] customers. SBB also has an indirect non-controlling interest in Hermes Europe Railtel BV (Hermes), which provides carrier's carrier services for international traffic originating and terminating in Switzerland and for international transit traffic passing through Switzerland. ²
6. Migros, organised as a Genossenschafts-Bund (a form of cooperative) under Swiss law and owned by 12 regional Genossenschaften, is a leading Swiss supermarket retailer. It has its own data network (M-Net), with *de minimis* sales to third parties, businesses in Switzerland.
7. UBS is a leading Swiss bank. It operates UBINET, a worldwide data network with a [...] third party business based on lines leased from the Swiss PTT. It operates WANDA with SBB. It has an indirect minority shareholding but no active participation in Aare Tessin AG (Atel), a Swiss electricity utility which together with five other utilities has created DIAX, a joint venture offering national and international telecommunications services in Switzerland.

II THE OPERATION

a) Introduction

8. Newtelco was established in 1996. Its present shareholders are SBB (40 per cent), Migros (30 per cent) and UBS (30 per cent). It has never been active. The purpose of the present operation is, by the introduction of BT and Tele-DK as strategic partners into the joint venture, to create the second national telecommunications operator in Switzerland - a development made possible from 1 January 1998 by the Swiss Telecommunications Act. Newtelco will provide wireline and mobile communications (voice, data, multimedia and VANS) in Switzerland; will offer BT services (including Concert) in Switzerland; will operate a domestic network delivering transborder and domestic managed network services interconnected with the global network platform of Concert; will operate the third-party business of UBINET and the WANDA network of SBB and UBS; and will use the telecommunications infrastructure provided by SBB.
9. It is also likely to apply for a mobile communications licence in Switzerland when applications are invited later in 1997 or in 1998. However, neither the decision to apply for the licence nor the result of any application is sufficiently certain for the Commission to take either event into account for the purposes of assessing the concentration.

b) Joint control

² Decision IV/M.683 - GTS Hermes Inc/HIT Rail BV (3 March 1996)

10. The control of Newtelco will be determined by four principal agreements - a framework agreement between all the parties a five-party shareholder agreement between all the parties, a two-party shareholder agreement between BT and Tele-DK and a three-party shareholder agreement between SBB, Migros and UBS. BT will hold [...] per cent of the shares in Newtelco and Tele-DK [...] per cent - in total 49.24 per cent; together they will appoint four directors. SBB ([...] per cent), Migros ([...] per cent) and UBS ([...] per cent) will hold the remaining shares (total 50.76 per cent); together they also will appoint four directors.
11. The two-party agreement requires that BT and Tele-DK will reach a common position on issues to be decided by the board of directors or by the shareholders meeting of Newtelco and to vote together on those issues; the three-party shareholder agreement imposes a similar requirement on SBB, Migros and UBS. For certain issues the board of directors can act only by a majority of two thirds; these issues include:
 - commitments involving assets above ECU [...] million,
 - contracts involving expenditure above ECU [...] million,
 - amendments to the 10-year rolling business plan which change the funding requirements in excess of + [...] per cent or - [...] per cent from the previous business plan or in excess of + [...] per cent or - [...] per cent in aggregate from the initial business plan,
 - transactions outside the scope of Newtelco, and
 - decisions relating to the participation of Newtelco in a mobile operator's licence.
12. The effect of these provisions is that the board cannot act on certain critical issues except with the consent of all the parties. Newtelco will accordingly be subject to joint control by the two voting blocks BT/Tele-DK and SBB/Migros/UBS.

c) Autonomous long-lasting economic entity

13. The parties will contribute to Newtelco all their telecommunications activities in Switzerland with the exceptions discussed below. These activities are those of BT Switzerland (including the exclusive sub-distribution of Concert services); the right to lay cables along the tracks of SBB; the WANDA business of SBB and UBS; and the [...third party business of the...] UBINET network of UBS. TD is not at present active in Switzerland but will contribute to the capital of Newtelco.
14. As a result of these contributions and other cash subscriptions by the parties the initial share capital of Newtelco will be ECU [...] million; it will be increased to ECU [...] million by further contributions by the parties (principally Tele-DK) when Newtelco receives a licence to operate a fixed telecommunications network.
15. The revenue which Newtelco will derive from its sub-distributorship of Concert services is estimated by the parties to be [...less than 10%...] per cent of its total revenues. The sub-distributorship will accordingly not make Newtelco dependent upon its parents for more than an insignificant part of its business.
16. After the initial build-up phase (during which BT and Tele-DK will temporarily second about [...] staff to Newtelco) Newtelco will have its own organisation and will engage sufficient staff to be able to perform all its functions independently. Each of the parties is prohibited from transferring its shares in Newtelco (except intra-group or to strategic associates approved by the other parties) for five years. Newtelco will accordingly perform on a lasting basis all the functions of an autonomous economic entity.

d) Absence of coordination

17. The parties will withdraw from the Swiss telecommunications market. Their withdrawal is confirmed by provisions in the five-party shareholder agreement whereby each of the parties is prevented, while it is a shareholder and for one year after, from competing in Switzerland with Newtelco and from engaging in activities harmful to its business. However, a party can after three years compete with Newtelco provided that the competing business falls outside the last approved business plan of Newtelco and that Newtelco does not itself decide to include the competing business in its business plan
18. These restrictions are also subject to exceptions for particular activities: The majority of these exceptions are naturally confined to Switzerland and accordingly do not give rise to the possibility of coordination between the parties in the European Union.
19. SBB retains its indirect non-controlling interest in Hermes (a wholesale activity - in contrast to the retail activities of Newtelco - in which no other party engages). UBINET has limited third-party supply outside Switzerland; this will migrate to Newtelco [...]. UBS retains the right to supply banking and financial services to any telecommunications company (but not without the consent of Newtelco to engage in its management except for “workout” for bad loans or credits) and to control small companies supplying telecommunications outside Switzerland. Otherwise SBB, Migros and UBS will retain no activities outside Switzerland. Accordingly the exceptions are principally for the benefit of BT and Tele-DK. The exceptions relevant to the EU are:
 - systems integration (creating integrated data processing systems and services and telecommunications systems and services solutions): This activity involves the provision of computer software and is thus not connected with the activities of Newtelco. BT, the only party which engages in it, has an insignificant market share.
 - existing and new correspondent relationships and substituting services: These bilateral relationships and services are the basis for international telecommunications under the ITU. Co-ordination of these activities will not increase as a result of the operation.
 - outsourcing services for multinational business customers with headquarters outside Switzerland and facilities management services for multinational business customers: Only BT engages in these activities. TD, the only other party capable of doing so, has no such plans.
 - Concert: Tele-DK distributes the Concert joint venture services in Denmark, but its turnover from this activity is [...] and it is not otherwise engaged in this activity. There is accordingly no appreciable risk of cooperation arising from the joint venture.
 - telecommunications equipment and related software: BT supplies these products in the United Kingdom and elsewhere in Europe, but not in Denmark; Tele-DK supplies them only in Denmark.
 - air-to-ground and ground-to-air communications on flights and satellite-to-air and air-to-satellite communications on flights: Only BT is active in these markets, which are wholly unconnected with the activities of Newtelco.
 - international calling card services operated from outside Switzerland: BT and Tele-DK provide these services, but they are wholly unconnected with the activities of Newtelco.

- Internet, Intranet, multimedia, broadcasting and media services: These activities are unconnected with the activities of Newtelco. BT and Tele-DK supply these services in different member States.
20. In addition to these exceptions BT and Tele-DK retain other telecommunications activities:
- In Belgium BT through BT Worldwide Ltd supplies data and voice services to corporate users and closed user groups; the turnover of BT Worldwide is [...]. Tele-DK is a shareholder in Belgacom. The joint venture gives rise to no serious prospect of coordination in these activities.
 - BT and Tele-DK are separately parties to joint ventures in various member States. The only geographical overlap is in Germany, where VIAG-INTERKOM (in which BT participates) supplies liberalised telecommunications services (ie excluding until 1998 public voice telephony) and Tele-DK participates in Internetz, which resells telecommunications capacity in Hamburg and in Miniruf, which supplies paging services in major cities. In Sweden BT and Tele-DK both participate in Telenordia, which supplies voice and data telecommunications services in Sweden. None of these activities is related to the activities of Newtelco.
 - BT and Tele-DK supply mobile telecommunications services in various member States. These activities have no connection with those of Newtelco.
21. There is thus no possibility of coordination of the competitive conduct of the parties as a result of the operation.

e) Conclusion

22. The operation accordingly constitutes a concentration within the meaning of article 3(1)(b) of the Regulation.

III CONCENTRATION OF COMMUNITY DIMENSION

23. The aggregate worldwide turnover of BT is ECU 17,430 million, of Tele-DK is ECU 2,607 million, of SBB ECU 4,039 million, of Migros 10,893 million and of UBS 5,978 million. The parties therefore have a combined aggregate worldwide turnover in excess of 5000 million ECU. The aggregate Community-wide turnover of BT is ECU [...] million, of Tele-DK ECU [...] million and of Migros ECU [...] million.- each in excess of 250 million ECU. BT achieves more than two-thirds of its aggregate Community-wide turnover within the United Kingdom. Tele-DK achieves more than two-thirds of its aggregate Community-wide turnover within Denmark.
24. The operation therefore has a Community dimension within the meaning of article 1(1) of the Regulation.

IV COMPATIBILITY WITH THE COMMON MARKET

a) Relevant product markets

25. In IV/M.570 - TBT/BT/Tele Danmark/Telenor (24 April 1995) the Commission accepted for the purposes of the assessment the definition proposed by the parties of one of the relevant product markets as - domestic and international voice and data telecommunication

services, with a segmentation between the voice market (in which both private households and business participate) and the data market (primarily used by business), and further segmentation into domestic and international markets. In this respect it appeared that enhanced global network services (e.g. Concert) would be a separate product market.

26. As in TBT/BT/Tele Danmark/Telenor the precise relevant product market delimitation in the present case can be left open since even on the narrowest possible basis ie four separate relevant product markets, the proposed concentration does not give rise to the creation or strengthening of a dominant position.

b) Geographical reference markets

27. In TBT/BT/Tele Danmark/Telenor the Commission concluded that, having regard to the licensing, regulatory and supervisory framework, the current market participants and their market shares and the physical interconnection arrangements for telecommunications operators, the geographical reference market for domestic and international, voice and data telecommunication services could be considered to be at least national. By the corresponding analysis in the present case the geographical reference market can be considered to be at least Switzerland.

28. The geographical reference market for enhanced global telecommunications was considered in TBT/BT/Tele Danmark/Telenor to be worldwide.

c) Competitive assessment

29. The joint venture will primarily operate in Switzerland, which is outside the EEA. The domestic services provided by the joint venture in Switzerland will only have an impact on the national Swiss market. The operation also concerns enhanced global network services, where the markets are global. However, the formation of the joint venture and the consequent changes in the distribution arrangements for Concert services in Switzerland will neither create nor strengthen a dominant position for enhanced global network services at a worldwide level.

V ANCILLARY RESTRAINTS

30. The parties have requested that certain restrictions be considered as ancillary to the concentration.

31. All except one of these restrictions operate only in Switzerland and are therefore outside the competence of the Commission. Those restrictions are:

[... detailed description of the restrictions applicable in Switzerland...]

The Commission accordingly makes no further observation on these restrictions.

32. By the remaining restriction parties which contribute assets to Newtelco agree not for three years to solicit for employment or consultancy services any person transferred to Newtelco by the operation. This provision is necessary to the implementation of the concentration and can therefore be considered ancillary to it. The Commission's assessment of this restriction is confined to any effect which it might have within the European Union.

VI CONCLUSION

32. For the foregoing reasons, the proposed concentration does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

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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 No. 4064/89.

For the Commission,