

*Case No IV/M.975 -  
ALBACOM / BT / ENI /  
MEDIASET*

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION

Date: 13/11/1997

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.11.1997

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No IV\M.975 - Albacom/BT/ENI**

Notification of 16-09-1997 pursuant to Article 4 of Council Regulation No 4064/89 - Notification declared incomplete on 6.10.1997 - Notification complete on 10.10.1997

1. On 16.09.1997 the companies British Telecom plc ("BT"), Ente Nazionale Idrocarburi S.p.A. ("ENI") and Albacom S.p.A. ("Albacom") notified their intention to change the current structure of control of Albacom by the acquisition by ENI of 35% of its capital.
2. On 6.10.1997 the Commission informed the parties to this operation that, according to its investigation, with this operation Mediaset S.p.A. ("Mediaset") acquired joint control in Albacom and that, therefore, the obligation contained in Article 4.2 of Council Regulation No 4064/89 was not fulfilled. The Commission granted to Mediaset a delay within which to join the notification and provide all the relevant information, in order to render the notification complete. Mediaset joined the

notification and provided the relevant information on 10.10.1997. The notification therefore became effective on 13.10.1997.

## **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 is also active internationally, notably in Europe through Concert and other joint ventures.  
BT's Italian telecommunications business was transferred into Albacom on its formation in 1995.
4. ENI is the ultimate holding company of a group of companies involved in the oil and natural gas industries and chemicals. The activities of the group range from petrochemical and engineering to service industries. The ENI group is organised according to the following sectors: Research and Production of Hydrocarbons, Supply, Transport and Distribution of Natural Gas, Refinement and Distribution of Oil-derived products, Petrochemical Activities, Engineering and Services, telecommunications).
5. Mediaset is a company whose principal activity is television broadcasting in Italy.
6. Albacom is an existing joint venture established in 1995 by BT and the Italian bank Banca Nazionale del Lavoro, and later joined by Mediaset S.p.A. Its principal activity is the supply of voice and data telecommunications and value added products and services to business customers in Italy. It is in the company's intentions to expand its product portfolio and customer base in the future upon liberalisation of the Italian telecommunications market..

## **II THE OPERATION**

7. Albacom is an existing company. Albacom was set up in August 1995 by BT and the Italian bank Banca Nazionale del Lavoro to combine their telecommunication activities in Italy. At that stage, Albacom was owned 50.5% by BT and 49.5% by BNL. In a 6.1.a) decision of 15 September 1995 (IV/M.604) the Commission found that Albacom, solely controlled by BT, was not an operation of Community dimension. In May 1996, Mediaset S.p.A. joined Albacom with a 30% participation. At the same time, BT and Banca Nazionale del Lavoro created a new intermediate holding company, Albacom Holdings, owned 50.5% by BT and 49.5% by Banca Nazionale del Lavoro. Albacom Holdings acquired both BT's and Banca Nazionale del Lavoro's existing equity stakes in Albacom. Albacom Holdings held the remaining 70% stake in Albacom. The acquisition by Mediaset of 30% equity stake in Albacom was not at the time considered to be an acquisition of control.
8. The notified transaction consists of:

- (a) the acquisition by ENI of a 35% equity stake in Albacom through a share increase for a consideration of 173 billion lire (ECU 88 million);
- (b) the granting by SNAM S.p.A. (“SNAM”) (wholly owned subsidiary of ENI, which is a major European supplier and distributor of natural gas) to Albacom of the right, on a [.....]<sup>1</sup> exclusive basis, ([.....]<sup>1</sup>) to use its fibre infrastructure (“SNAM Fibre Agreement”); and
- (c) the acquisition by Albacom of the entire issued share capital of Nuova Società di Telecomunicazioni S.p.A. (“NST”, which is a wholly owned subsidiary of SNAM). Prior to this acquisition, the assets, liabilities and personnel of SNAM which relate to the provision of telecommunication services (therefore excluding the cables) will be transferred to NST.

9. Therefore, the participations in Albacom will be the following:

Albacom Holdings 45.5%  
 Mediaset 19.5%  
 ENI 35%

### **III THE CONCENTRATION**

Joint control: .

- 10. The parties have originally submitted that Albacom is going to be jointly controlled by BT (through Albacom Holdings, with 23% of the capital) and by ENI (with 35% of the capital).
- 11. The Commission considers that Albacom is going to be controlled by BT (which has sole control over Albacom Holdings, as indicated in Case IV/M.604, Albacom, Commission decision of 15 September 1995), ENI and Mediaset jointly.
- 12. The Board of Directors of Albacom will be responsible for its overall direction and management. The Board will consist of 5 directors designated by Albacom Holdings, 2 directors designated by Mediaset and 4 directors designated by ENI.

The first business plan of Albacom will remain in force for the first financial year and it has been agreed upon by all the parties.

Clause 19.6 of the Joint Venture Agreement provides that the Board will discuss the proposal of the following business plans and annual budgets at least 70 days before the end of each financial year. The proposals will be adopted if at least 10 members of the Board will approve them.

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<sup>1</sup> Deleted as business secret

The clause (19.7) further provides that, in case such a consensus is not reached, a new meeting of the Board will have to be envisaged in order to allow consultations between the members of the Board and check whether a consensus between 10 members can be reached on the modifications to the Business Plan and Annual Budget. These modifications will have to be prepared in liaison with the members of the Board who had in the first meeting voted against the approval of the 2 documents. At least 45 days before the end of the financial year, a new meeting of the Board will take place, where the Business Plan and the Annual Budget so modified will be approved with the consensus by 10 members of the Board. If such consensus is not reached, the Board will meet again 20 days before the end of the financial year in order to find an agreement between at least 10 members of the Board. If the consensus by 10 members is not reached, a last meeting will take place at the latest 10 days before the end of the financial year where a consensus by 9 members of the board will be sufficient to adopt the new Business Plan and Annual Budget (19.8).

On the basis of the above, the Commission concludes that Albacom will be jointly controlled by BT, ENI and Mediaset . Indeed, in providing a specific procedure for reaching a consensus where the parties cannot initially agree, these rules may be intended to increase the opportunity to reach a consensus and thus reducing the possibility that a final deadlock situation may arise.

The fact that Mediaset will not, at the end of the conciliation procedure, be able to prevent the adoption of the Business Plan or Annual Budget and that, therefore, reconciliation is not possible despite the best efforts of all parent companies, does not necessarily mean that there is no joint control (cf. Notice on the notion of a concentration, OJ C385 of 31 December 1994, p. 5 -paragraph 37-). This is in particular the case where each company, with the present operation, provides a contribution to a joint venture which could be vital for its operation -paragraph 34-. In the present case, the purpose of the operation is that Albacom becomes a full public telecommunication operator in Italy, and to this purpose the experience of BT as a telecommunication operator, the role of ENI as a provider of the network and that of Mediaset as a telecommunications provider (all its telecommunications business is transferred to Albacom: voice and data transmission infrastructure and existing contracts for the provision of telecommunications services and infrastructure to external companies as well as to other companies of the Fininvest Group) are all vital for maintaining the expected profile of Albacom. In these circumstances, the parent companies of Albacom are only able to operate the joint venture with each other's agreement on the most important strategic decisions.

13. Autonomous entity: Albacom will have all financial resources, staff and assets in order to operate a business activity in this sector on a lasting basis. Albacom had already been considered as an autonomous entity by the Italian Authority in a decision of 4 October 1995. At the time, BT and BNL had transferred all their telecommunication business into Albacom. Mediaset joined in 1996. With this operation, Albacom will get ENI's telecommunication business as well, consisting of transmission facilities, voice and data transmission network, the microwave telecommunication network and 280 employees.

Absence of coordination:

14. As indicated above, with the liberalisation process in Italy Albacom is supposed to become a full public telecommunications operator in this country. Its activity is

currently focusing on business voice and data transmission. In particular, Albacom is currently focusing on the already liberalised data and corporate voice sectors, while broadening its target market to include a larger proportion of small and medium enterprises.

15. All the parent companies of Albacom either withdraw or continue their withdrawal from the Italian telecommunications market. The permanent withdrawal of the parties from this market is also assured by the non-compete provisions in the Joint Venture Agreement (clause 12.1). The parties agree not to compete in Italy with Albacom's business for so long as they retain a participation interest of 1% or more in Albacom. However, the parents will retain the possibility to operate in the specific following areas (which are not part of the core business of Albacom): systems integration; international telecommunications outsourcing business; multimedia and internet provision; air to ground/satellite communications for flight; international calling card services and international direct dialling provided on a correspondent basis; planning, development, ownership and operation of Concert's global network platform
16. Systems integration consists of the ability to integrate components such as software applications, hardware, telecommunications into a single solution for a specific customer. These services are not part of the core business of Albacom. This is therefore a very specific activity which has no significant interaction with Albacom's activity (see for the same conclusion Case No. IV/M.570 - TBT/BT/Tele Danmark/Telenor of 24 April 1995).
17. Air to ground and air to satellite communications for flights these activities are very specialist, niche activities which are outside the scope of action of Albacom (see for the same conclusion Case No. IV/M.570 - TBT/BT/Tele Danmark/Telenor of 24 April 1995).
18. Multimedia and Internet provision these activities are outside Albacom's core business. ENI's activities in this field are being transferred to Albacom. Mediaset's business in Italy concerns television broadcasting. Mediaset also provides maintenance services to the Italian pay-tv operator Telepiù. These activities are not multimedia activities. Mediaset does not provide any Internet service. BT does not provide any multimedia or Internet service in Italy. A risk of coordination is therefore excluded, as there are not at least two parents operating in this sector
19. Concert services: these activities concern the establishment and operation of a global network for the provision of international value-added services. In order to offer Concert international value-added and enhanced services over the Concert platform, Concert needs to roll-out its network world-wide, including Italy. Albacom distributes Concert services in Italy. BT is the only parent involved in this operation. Any coordination is therefore excluded, since the only relevant coordination is that produced between the parents as a result of the present operation.
20. International telecommunications outsourcing network business for business customers: it concerns the provision of telecommunication network services management to a customer in two or more countries. International outsourcing relieves corporations of the complexity of managing their own international telecommunication services. The exclusion of this activity from the non-compete clause allows BT to continue servicing its current customers, as well as to compete for

outsourcing deals which Albacom on its own would not be able to win. Also in this field the present operation will not lead to a risk of coordination between the parents.

21. International Card Services and international direct dialling of the parents, only BT is active in these services. Therefore no risk of coordination arises.
22. On the basis of the above it can be concluded that there is no risk of coordination of the competitive behaviour of the notifying parties as a result of this operation.

#### **IV COMMUNITY DIMENSION**

23. The combined world-wide turnovers of all the undertakings concerned exceeds 5.000 million ECU (BT: 18,352 million; ENI: 29,445 million; Albacom: 41 million; Mediaset: 1.631 million). The Community-wide turnover of at least two of the undertakings concerned is more than 250 million ECU (BT: 18,066 million; ENI: 23,068 million). Each of the undertakings concerned does not achieve more than two thirds of their turnover in one and the same Member State. Therefore, the operation has a Community dimension.

#### **V COMPATIBILITY WITH THE COMMON MARKET**

##### **A. Relevant product markets**

24. It is the Commission's established practice to consider the relevant product markets as domestic and international voice and data telecommunications 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 addition, as Albacom will have the availability of a telecommunications network, the further market of resale of transmission capacity has to be considered as relevant. As in past decisions, however, the precise product market delimitation in this case can be left open since even on the narrowest possible definition the proposed concentration does not create or strengthen a dominant position. (see cases IV/M.570 - TBT/BT/Tele Danmark/Telenor of 24 April 1995 and IV/M.900 - BT/Tele DK/SBB/Migros/UBS of 16 April 1997).

##### **B. Relevant geographic market**

25. The scope of the geographical market in telecommunications is determined:
  - (a) by the extent and coverage of the network and the customers that can economically be reached and whose demands may be met; and
  - (b) the legal and regulatory system and the right to provide a service.

Having regard to the licensing and regulatory framework for the provision of domestic and international basic voice and data services in Italy, the geographic market for these services (i.e. domestic services on the one hand and international services on the other) must be regarded as national. For the same reasons, the same conclusion stands

for the market of resale of transmission capacity. For enhanced international services provided via global networks as Concert, the related geographic market is world-wide.

## VI ASSESSMENT

26. With this operation Albacom will have the use of SNAM's telecommunications infrastructure. This infrastructure is given in use to Albacom as it was not possible for the parties to operate a pure sale. Indeed, SNAM has secured certain important easement rights (concerning the gas pipelines) through its ownership which would not be transferable if the fibre optic network were to be owned separately by a third party. These easements ("servitù") allow the laying of the fibres only insofar these are ancillary ("accessorie") to the pipelines. This prevents the ownership of the fibres from being separated from the ownership of the pipelines since, if the fibres were disposed of as a separate entity, thereby losing their ancillary relationship to the pipeline, then they would no longer fall within the scope of the existing easements with the consequence that their ownership could be claimed by landowners according to the Italian law principle of accession ("accessione"). In order to overcome this, SNAM would have to negotiate new easements contracts (relating to the fibre cables) which would amount to one hundred thousand. This would be so expensive and time consuming to render the deal unfeasible.
27. On the other hand, the right of use granted to Albacom will not preclude third parties from laying down their own telecommunications cables in the area eased to the pipeline, if such third parties wished to do so. According to information provided by the parties, it would be easier for a third party to obtain permits for construction of telecommunications cables than for a gas operator: all environmental permits would not be, for example, required. In addition, it appears easier to obtain a voluntary cable easement on land already burdened by a heavier gas pipeline easement. In any event, SNAM has made clear to the Commission that the intent of the agreement is to give Albacom the use of its telecommunications infrastructure and that it will not in any way prevent third parties who wished to lay telecommunications cables in the easement area. In these circumstances it is therefore clear that the "rights of way" of third parties are not in any event affected by the present operation.
28. In addition, it is important to stress that in this case the fibre which is given in use to Albacom is currently unlit. This means that the cable network is not available as such for use. It will be up to Albacom to make substantial investments (of approximately [...] <sup>1</sup> over a three year period) in order to be able to use the fibre for telecommunications purposes. Once the fibre will be lighted up, it is Albacom's intention, as indicated in its business plan submitted to the Commission, to enter into agreements with third party entrants in order to allow them access to and use of the network.
29. The operation has to be assessed in the context of liberalisation of the Italian telecommunications sector. Italy is for the moment behind the EU liberalisation timetable and is now starting to implement the relevant directives and, as required by Community law, it has fixed, in Article 2(3) of the Presidential Decree of 19 September 1997, n. 318, the date of 1st January 1998 to liberalise the provision of voice telephony services. Albacom appears to be a new entrant on this sector, having the profile of a future full public telecommunication operator. In this



context, the telecommunications network of which it will have the use will be essential in achieving and maintaining this profile.

30. The total Italian telecommunications market (excluding mobile) was worth about 20 billion ECU in 1996. The largest contributing sector are voice and data services. The fastest growing sector is value-added services.

The parties estimate that the key deregulated markets for alternative telecommunications carriers account for less than half of the total market. They include business telephony, calling cards, data transmission, value added and Internet services and customer premises equipment. Albacom's key target markets are business voice and data transmission.

The only competitor having more than 10% in the deregulated market is Telecom Italia. Telecom Italia has a monopoly over public voice telephony in Italy, which will come to an end on 1st January 1998. Competing voice services are currently allowed only within closer groups and over private corporate networks.

Besides Albacom, other players in the deregulated market include Infostrada (a joint venture between Olivetti and Bell Atlantic) which is currently focused on the value-added sector. Other players include AT&T Unisource, Global One, SITA, EDS, GEIS (having each a different specialisation).

In this context, the operation appears to be pro-competitive.

## **VII ANCILLARY RESTRAINTS**

31. Non-compete provisions: these provisions can be accepted since they allow the full value of the business transferred and express the definitive withdrawal of the parents from the market in which the joint venture operates.
32. Outsourcing Agreements: the parties have required the Commission to consider certain outsourcing agreements as an integral part of the operation of concentration.

In the alternative, should the Commission not consider these agreement as part of the concentration, the parties require the Commission to consider the agreements as ancillary restraints.

According to these agreements, the companies belonging to ENI will outsource their telecommunication requirements to NST. NST shall be appointed as exclusive for those services which are prevailingly telecommunications services in nature and non-exclusive supplier of those services which contain a telecommunication element. These agreements are concluded for a period of five years.

These agreements contain an exclusivity for five years on the companies belonging to ENI. As far as Albacom is concerned, it will be able to provide its telecommunication services freely on the market to any company requiring its services.

The parties indicate that this agreement is an essential part of the concentration as it guarantees Albacom an important source of revenue during the start-up period. It is

the Commission's view, however, that this agreement can be dissociated from the core of the operation which is that to allow Albacom to become a full operator on the Italian telecommunication market (i.a. by the right of use of SNAM's telecommunications infrastructure).

On the other hand, these agreements are necessary, in the context of the Italian telecommunications market, for Albacom to become a larger competitor on a market which is currently dominated by the monopolist Telecom Italia. In particular, with these agreements Albacom is granted an important source of revenue in the start-up phase. Moreover, the increased volume of traffic will afford Albacom increased economies of scale, which will, in turn, allow it to make greater investments in its network and services portfolio. These agreements are therefore considered as restrictions which are ancillary to this operation.

33. NST Equipment Housing Agreements in order to continue and develop its activities as a telecommunication service provider to ENI group, Albacom must have access to premises and facilities which belong to certain companies of this group to install certain telecommunications equipment.

These agreements reserve the right to install and maintain such equipment to Albacom on an exclusive basis for a period of nine years.

The agreements appear to be complementary to the outsourcing agreements and therefore necessary. Their duration should however be limited to the same number of years (five). For the remaining period the agreements will have to be assessed under Articles 85 and 86.

## **IX CONCLUSION**

34. It follows from the above that the proposed concentration will not create or strengthen a dominant position as a result of which competition will be significantly impeded in the common market or in a substantial part of it.
35. 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,