COOPERATION AGREEMENTS (MOBILE PHONES); T-MOBILE / MM02

Subject: Cooperation agreements

Industry: Telecommunication, mobile phones

Parties: T-Mobile Deutschland GmbH
Viag Interkom GmbH, a wholly-owned subsidiary of MM02 plc (formerly known as BT Cellnet)

Source: Commission Statement IP/02/1277, dated 10 September 2002

(Note. This is an unusual application of the rules on competition to cooperation agreements and the first time the rules have been applied to network sharing agreements. Traditionally, the Commission tends to favour cooperation agreements; but the possible complexities of the present case may make it harder than usual to determine the exact boundaries between genuine technical improvements and underlying restrictions of competition. Third party views are awaited.)

Following careful examination, the Commission has reached the preliminary conclusion, still subject to third-party comment; that it can take a favourable view regarding two sets of agreements to share infrastructure networks for the third generation (3G) of mobile phones. The agreements were filed for approval under the competition rules by mobile network operators T-Mobile and MMO2 and concern the networks that they are building in Germany and in the United Kingdom. The Commission's analysis of the two deals is that the significant cost savings anticipated from the sharing of network elements should lead to quicker 3G network roll-out and services competition, which will benefit consumers, without leading to undue restraints on network competition. Other benefits include greater network coverage and a more limited environmental impact.

Commenting on the case, Competition Commissioner Mario Monti said: "The examination of the network sharing agreements between T-Mobile and MM02, the only two so far to have been filed for regulatory clearance, have led the Commission to believe that, provided that the appropriate safeguards are in place, such co-operation deals can bring benefits for the consumer in terms of a faster introduction of new services, more competition and a lesser impact to the environment. However my definitive view remains subject to comments by third parties. At any rate the Commission will remain vigilant to protect competition in mobile phone markets."

The third generation of mobile communications (3G) will combine wireless mobile technology with high data transmission capacities. 3G systems promise access to Internet services specifically tailored to meet the needs of people on the move, via multimedia applications using image, video, sound as well as voice. Nearly all European Union Member States have awarded 3G licences for mobile

services and networks, most of which through auctions which involved very huge fees for the successful bidders.

The sharing of 3G network elements should result in significant cost savings for the operators and lead to quicker 3G roll-out, greater network coverage and offset some of the potential environmental problems caused by the necessary infrastructure for 3G. Network sharing arrangements are under preparation in a number of EU countries and the Commission has spoken out in favour of such arrangements provided that there remains sufficient competition in the market to ensure that consumers have their fair share of benefits. In this context, Commissioner Mario Monti, responsible for EU competition policy, has instructed his services to deal with the notified cases on a priority basis, and following the period for third party comment a final position can be expected rapidly.

In February 2002, mobile operator T-Mobile Deutschland GmbH and Viag Interkom GmbH, a wholly-owned subsidiary of MM02 Plc (formerly known as BT Cellnet), notified an agreement concerning infrastructure sharing and national roaming for the third generation of GSM (Global System for Mobile communications) phones in Germany and the UK. The applicants sought either a negative clearance under Article 81(1) of the EC Treaty or an exemption from the cartel prohibition under Article 81(3).

This is the first time that the Commission has had to scrutinise 3G network-sharing agreements in the framework of the EU competition rules and the focus of the analysis was on the effects which network sharing could have on the balance between network and services competition. In the agreements concerning both Germany and the UK, T-Mobile and MMO2 have agreed to share sites and provide one another with national roaming facilities. The agreements also provide for the sharing of the radio access network (RAN) but the Commission has reserved its position on this aspect until the operators decide whether or not to proceed with this closer co-operation. The agreements do not relate to 3G downstream services which will be provided to consumers, with respect to which the parties remain entirely independent of each other.

Following a first analysis of the notified agreements the Commission takes the preliminary view based on the criteria provided by Article 81 of the Treaty that they would be eligible for a negative clearance and/or an exemption. The Commission takes this view because it appears that any restrictions of infrastructure competition involved are compensated both by faster network roll-out leading to increased services competition and by other benefits such as the limitation of the environmental impact, as less infrastructure will need to be deployed. Both agreements are not exclusive and generally allow third party site sharing and national roaming subject to limited exceptions. In addition safeguards are in place to limit the exchange of sensitive information between the parties.

Before taking a final decision, the Commission has published a summary of the agreements in the Official Journal of the European Communities, pursuant to

Article 19(3) of Regulation 17/62, inviting interested parties to comment within one month from publication. The first summary was published in OJ C189, of August 9, and the Commission has already received several submissions. The second summary, on the UK market, can be found in OJ C 214, of September 10. The OJ can be consulted on the following website

http://europa.eu.int/comm/competition/antitrust/oj/

Network sharing can involve varying degrees of co-operation and the degree of independence retained by the operators depends on the network elements that are shared. Ranked by the increasing degree to which the network is shared it is possible to distinguish between shared use of:
sites, which ranges from sharing individual mast sites up to grid sharing (requiring a uniform layout of networks), and may include site support infrastructure, such as site support cabinets (SSC);
base stations (Nodes B), antennas and radio network controllers (RNCs), also known as radio access network (RAN) sharing, i.e. the initial transmission equipment;
core networks, including mobile switching centres (MSCs) and various databases, i.e. the intelligent part of the network;
the radio frequencies.

Finally, national roaming concerns a situation where the operators involved do not share any network elements as such but simply use each other's network to provide services to their own customers. See, generally, The Introduction of Third Generation Mobile Communication in the European Union: State of Play and the Way Forward, COM (2001) 141 of 20 March 2001; and Towards the Full Roll-Out of Third Generation Mobile Communications (2002) 301 0f 11 June 2002. ■

ACQUISITIONS (SHIPPING): THE P&O STENA CASE

Subject: Acquisitions

Industry: Shipping

Parties: P&O (UK)
P&O Stena Line
Stena Line UK Ltd

Source: Commission Statement IP/02/1203, dated 8 August 2002

(Note. Readers may well be confused by the seemingly endless permutations in the control over cross-Channel ferry services. The latest development adds in one sense to the confusion by being described in the Commission's Statement as a "de-merger". It is questionable whether this is a correct description of an operation resulting in the acquisition of a joint venture, previously authorized

under Article 81. However that may be, P&O now has sole control over what had been a joint venture with Stena Line; and the Commission considers that, in the light of external competitive factors, such as Eurotunnel, no competition problem arises. It will nevertheless continue to monitor the position.)

The Commission has approved a transaction by which P&O (UK) will acquire full control of P&O Stena Line, the cross-Channel ferry operator which is at present a joint venture between P&O and Stena Line UK Ltd. The analysis carried out by the Commission indicated that the change to sole control, which constitutes a concentration within the meaning of the Merger Regulation, does not raise any competition concerns. The Commission however remains fully committed to following closely cross-Channel market developments in contact with consumer organisations and national authorities.

The Peninsular and Oriental Steam Navigation Co (P&O) is a UK listed company involved, *inter alia*, in maritime shipping and port activities world-wide. In Europe, P&O, apart from its involvement in the P&O Stena Line joint venture, operates passenger and ferry services on the North Sea and the Western Channel. The P&O Stena Line joint venture is the leading ferry operator on the Dover-Calais route, formed in 1998 through a combination of P&O's and the Stena Line UK Ltd's interests on the Short Sea Route. That term describes the routes across the English Channel (between Dover, Folkestone, Ramsgate Newhaven and Calais, Dieppe, Boulogne and Dunkirk) and between Ramsgate and Ostend. P&O will acquire all the remaining shares in P&O Stena Line. The proposed concentration would therefore in effect be a de-merger of P&O's and Stena's interests in this area.

The Commission initially granted the creation of the P&O SL joint venture a three-year exemption under Article 81(3) EC which was renewed in 2001 for a further six year period. In last year's investigation the Commission already stated clearly that it would continue to follow developments in cross-Channel transport services.

In the present case, the Commission concluded that the change in control of P&O Stena Line would not lead to the creation of a dominant position for the provision of freight and passenger services between the Continent and the United Kingdom, regardless of how the market was defined. The Commission also examined whether the possibility of sole control over P&O Stena Line would give P&O additional advantages, enabling it to force competitors out of the market and thereafter raise prices. However, the investigation showed that such a scenario was not likely considering the amount of actual or potential competition on the market and the low barriers to entry. Lastly, the Commission concluded that the market did not show the characteristics which would enable the operators (both the ferry operators and Eurotunnel) to act in parallel to raise prices rather than compete. The fact that P&O would now be able to control P&O Stena Line alone would not change that structure.

The conclusion reached by the Commission in this specific transaction does however not affect its commitment to monitor market evolution in order to

ensure that prices and trade conditions are in accordance with the European Community's rules on competition.

On 26 January 1999, the Commission approved the creation of the P&O Stena Line joint venture under Article 81(3) EC. Due to uncertainties as to the future developments in the market, the approval was however limited to three years. In December 2000, the parties applied for a renewal of the exemption until 2020. The application was made under Regulation 4056/86, under which the Commission has 90 days from publication of a summary of the application in the Official Journal of the European Communities to raise serious doubts if there is a need to continue the investigation. If no serious doubts are raised, the agreement is automatically exempted for six years from the date of such publication. The Commission concluded under that investigation that there had been no material changes in the market that would justify denying a further clearance and did not raise serious doubts, with the effect that the P&O Stena Line joint venture was deemed exempted until 7 March 2007. ■

The Continental Tyre Case

(Note. A State aid scheme, which appeared to "entice" an industry from one Member State to another, is shown to be justified under the current rules.)

The Commission has informed the Swedish and Portuguese governments that its investigation into State aid to Mabor-Continental, the Portuguese subsidiary of tyre manufacturer Continental, has provided no indication of a violation of the rules on competition. The closure of Continental's tyre factory in Gislaved in southern Sweden expected this summer and the resulting loss of jobs had raised concern in Sweden as to whether Community rules on state aid had been properly observed, and in particular whether Continental was not relocating production to Portugal, stimulated by the benefits promised by the Portuguese government.

The Commission requested full information from the Portuguese authorities to examine the compatibility of these measures with the state aid provisions of the Treaty: it wanted to verify whether the aid measures awarded to the company were covered by broader state aid schemes already approved by the Commission in the past. No prior notification of individual aid measures is necessary if a Government provides financing under a framework scheme already approved by the Commission. Furthermore, the Commission verified that aid to Mabor-Continental was not required to notify under the provisions of the Multisectoral Framework scheme on regional aid for large investment projects.

In the meantime the Portuguese government has provided the necessary information, which has been examined in-depth. According to the information obtained, the company is to receive a subsidy of around €10 million as well as tax reductions of nearly the same amount. On this basis the Commission concluded that the aid measures were in compliance with aid schemes it had previously authorised and remained well below the allowed regional aid ceiling. Moreover, the aid measures also remained well below the thresholds requiring notofication under the Multisectoral Framework scheme.

Source: Commission Statement IP/02/1210, dated 9 August 2002

The Morgan Stanley / Olivetti - Telecom Italia Case

(Note. The interest of this case lies in the unusual combination of an American investment bank and an Italian telecommunications group for the purpose of exploiting real estate in Milan and Rome. The combination does not appear to create any competition problems.)

The Commission has cleared two joint ventures in the field of sale and lease of real property for commercial use to be set up by US investment bank Morgan Stanley Dean Witter & Co. and Italian information technologies and telecommunications group Olivetti/Telecom Italia. The Commission has concluded that the transaction will not raise competition concerns in the municipalities of Milan and Rome, the only two geographic areas affected by the transaction, given the presence in these areas of other strong and qualified competitors.

Both Morgan Stanley and Olivetti/Telecom Italia have activities, through controlled companies, in the sale and lease of real property for commercial use in Italy, in particular in the sale and lease of offices.

Pursuant to the transaction, two private equity funds controlled by Morgan Stanley and other companies belonging to the Olivetti/Telecom Italia group will set up two joint ventures, called Tiglio I and Tiglio II. The parties will confer on the joint ventures certain activities in the field of sale and lease of immovable property for commercial use so far exclusively controlled by the Olivetti/Telecom Italia group or by the Pirelli Group.

The activities of Morgan Stanley and Olivetti/Telecom Italia in the field of sale and lease of real property for commercial use overlap to some significant extent only in the municipalities of Milan and Rome. However, given the presence of qualified and strong nation-wide competitors such as Beni Stabili, Aedes Immobiliare, Bonaparte, IPI and Withehall, and of a large number of local competitors in the municipalities of Milan and Rome, the joint ventures will not raise serious competition concerns in any of the affected areas.

Morgan Stanley Dean Witter & Co is a US investment banking firm active in global financial services, in particular securities, investment management and credit services. Olivetti/Telecom Italia is an Italian group of companies, controlled by the Italian groups Pirelli and Edizione Holding, active in information technology and telecommunication services.

Source: Commission Statement IP/02/1253, dated 30 August 2002