NOTICE PURSUANT TO ARTICLE 19(3) OF COUNCIL REGULATION No 17

Case COMP/C1/N.38.369 — Rahmenvertrag T-Mobile Deutschland/VIAG Interkom (Notification)

(2002/C 189/04)

(Text with EEA relevance)

1. INTRODUCTION

1. On 1 February 2002, T-Mobile Deutschland GmbH ('T-Mobile') and VIAG Interkom GmbH ('VIAG') notified to the Commission a framework agreement of 20 September 2001 concerning infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications ('3G') on the German market. In their notification T-Mobile and VIAG ('The parties') have requested either negative clearance under Article 81(1) or an exemption under Article 81(3) of the EC Treaty [1].

2. In February 2002 the Commission published a first notice summarising the notified agreement and inviting third party comments [2]. The Commission has now finished its examination of the notified agreement and has come to a preliminary position. The present notice is published pursuant to Article 19(3) of Regulation No 17/62 in order to enable third parties to provide their comments on the Commission's proposed approach. Third parties may submit their comments to the Commission within a deadline of one month from publication of this notice in the Official Journal.

2. THE PARTIES

3. T-Mobile is an operator of digital mobile telecommunications networks and services in Germany using the GSM family of standards. T-Mobile operates a GSM network and provides GSM services in Germany based on a GSM 900 licence, and was awarded a universal mobile telecommunications system (UMTS) licence in Germany in August 2000 [3]. It is wholly owned by T-Mobile International AG, which in turn is a wholly owned subsidiary of the incumbent fixed network operator Deutsche Telekom AG ('DTAG').

4. T-Mobile International AG owns interests in mobile telecommunications operators in the United Kingdom (One2One, T-Motion, Virgin Mobile), Austria (max.mobil.), the Czech Republic (Radiomobil) and the USA (VoiceStream). T-Mobile International AG also has subsidiaries active in the Netherlands (BEN, CMobil), Russia (MTS) and Poland (PTC). In the 2000 financial year, T-Mobile International AG had a worldwide turnover of EUR 6,5 billion and DTAG had a worldwide turnover of EUR 40,9 billion.

5. VIAG likewise operates digital mobile telecommunications networks and services in Germany, based on a GSM 1800 licence awarded in 1997, and was awarded a UMTS licence in August 2000. VIAG is a wholly owned subsidiary of mmO2 plc, formerly BT Cellnet limited, a company previously controlled by British Telecommunications plc. mmO2 operates, through its subsidiaries, networks in the UK (BT Cellnet and BT3G), Germany (VIAG), The Netherlands (Telfort), the Republic of Ireland (Digifone) and the Isle of Man (Manx Telecom). In 2000, the BT group of companies had a worldwide turnover of EUR 31 billion.

3. PRODUCTS/SERVICES

6. 3G services are mobile communications systems capable of supporting in particular innovative multimedia services, beyond the capability of second generation systems such as GSM, and capable of combining the use of terrestrial and satellite components [4]. These services are characterised by their (i) multimedia capabilities, full mobility and low mobility applications in different geographical environments beyond 2G capabilities; (ii) efficient access to Internet, Intranets and other Internet protocol-based services; (iii) high quality speech transmission commensurate with that of fixed networks; (iv) service portability across 3G environments; (v) operation in one seamless environment including full roaming with GSM as well as between the terrestrial and satellite components of UMTS networks. With this agreement the parties aim to enter the German national market or markets for 3G infrastructure and wholesale roaming services. Although the agreement promotes their individual entry into the market or markets for 3G retail services the agreement does not directly relate to retail markets.

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[1] The Commission has also received a related notification from BT Cellnet Limited (and BT 3G Limited) and One2One Personal Communications Limited dated 6 February 2002 relating to a 3G Network Deployment and 3G Bilateral Roaming Agreement for the UK. This agreement is being dealt with separately (Case COMP/N.38.370 — UK Agreement).

[2] OJ C 53, 28.2.2002, p. 18.

[3] In August 2000, the German Government awarded six 3G licences following a frequency auction procedure worth EUR 50,8 billion. The companies awarded the licences were T-Mobil, Vodafone-Mannesmann, E-Plus, Viag Interkom Group, Group 3G and Mobilcom multimedia.

[4] 'The introduction of third generation mobile communications in the European Union: state of play and the way forward' (COM(2001) 141 final of 20 March 2001).

7. The products/services that are directly concerned by this notification are (a) access to and use of 3G infrastructure, and (b) wholesale access to 3G national roaming. Actual or potential competitors in these markets are the other four licensees for 3G networks and services in Germany, and potential competitors may be third parties reselling access to and wholesale roaming services on the network of these other operators or on the parties' networks. As 3G networks and services have not yet been rolled out no conclusive estimate of market shares or assessment of the substitutability between 2G and 3G services can at present be provided.

4. LEGAL AND FACTUAL BACKGROUND

4.1. The development of third generation mobile communications in the EU

8. So far digital mobile communications networks and services in the EU have been based on the GSM family of standards. European telecommunication companies are at present developing and preparing the roll-out of mobile communication networks and services using the third generation ('3G') of the GSM family of standards ([5]). 3G will combine wireless mobile technology with high data transmission capacities and facilitate consumer access to Internet services through their mobile handsets. Its development in the EU is based on a common technological platform — universal mobile telecommunications system ('UMTS'), on the harmonisation of the radio spectrum and on the definition of a harmonised regulatory environment.

9. To meet these harmonisation objectives, the European Parliament and the Council have in 1997 adopted a directive on a common framework for general authorisations and individual licences in the field of telecommunications services ([6]). This was followed at the end of 1998 by a decision on the coordinated introduction of a third-generation mobile and wireless communication system (UMTS) in the Community ([7])). It required Member States to enable the introduction of UMTS services on their territory by 1 January 2002 and emphasised the role of technical bodies such as the European Conference of Postal and Telecommunications Administrations ('CEPT') and Europe Telecommunications Standard Institute ('ETSI') in harmonising frequency use and promoting a common and open standard for the provision of compatible UMTS services throughout Europe.

10. Finally, in March 2001 the Commission published a Communication setting out the state of play and the way forward for the introduction of third generation mobile communications in the EU ([8])). This Communication takes note of the combination of the difficult financial situation of telecommunications operators throughout the EU and of the high infrastructure investment costs involved that lead operators to engage in infrastructure sharing arrangements. It concludes that economically beneficial sharing of network infrastructure should in principle be encouraged, provided the competition rules and other relevant Community law are respected ([9]). In its recent follow up communication ([10]), the Commission emphasised that it would continue to work with national administrations towards establishing a best practice approach for network sharing.

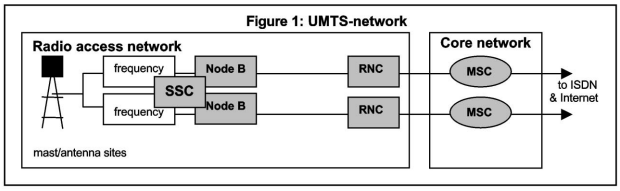
4.2. Network sharing

11. The basic distinction that is relevant in the context of the parties' network sharing agreement is that between the Radio Access Network ('RAN') and the core or backbone network.

12. RAN: this includes mast/antenna sites, site support cabinets ('SSC') and power supply, as well as antennas, combiners and transmission links, Nodes B, i.e. the base stations that receive and send data across frequencies and control a particular network cell, and the radio network controllers ('RNCs') that each control a number of such Nodes B and that are linked to the core network.

13. Core network: this is the intelligent part of the network that consists of mobile switching centres ('MSCs'), various support nodes, services platforms, client home location registers and operation and maintenance centres. It is linked to the fixed ISDN (integrated services digital network) and Internet networks.

Figure 1: UMTS-network



([5]) The first generation was GSM 900, the second generation DCS 1800 (now referred to as GSM 1800); GPRS is often regarded as an intermediate step (or '2.5 G') between 2G and 3G.

([6]) Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 (OJ L 117, 1997, p. 15). This Directive sets out the procedures associated with the granting of authorisations for the purpose of providing telecommunications services and the conditions attached to such authorisations.

([7]) Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 (OJ L 17, 1998, p. 1).

([8]) 'The introduction of third generation mobile communications in the European Union: state of play and the way forward' (COM(2001) 141 final of 20 March 2001).

([9]) Ibidem, paragraph 4.3.

([10]) Towards the full roll-out of third generation mobile communications' (COM(2002) 301 final of 11 June 2002).

14. 3G network sharing can take place at a number of different levels and involve varying degrees of cooperation. The degree of independence retained by an operator depends on which network elements are being shared and their remaining ability to install separate elements (planning freedom). 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) and antennas,

— radio network controllers ('RNCs'),

— core networks, including mobile switching centres ('MSCs') and various databases,

— frequencies.

Finally, national roaming concerns a situation where the operators concerned do not share any network elements as such but simply use each other's network to provide services to their own customers.

15. In their notification the parties use the term 'extended site sharing' for shared use of infrastructure up to the level of, but not including, Nodes B and RNCs (i.e. the first bullet point above). They reserve the term 'RAN sharing' for common use of the entire radio access network, up to and including Nodes B and RNCs (i.e. the first, second and third bullet points above). The parties do not envisage sharing their core networks, but their agreement does cover national roaming outside the areas where they engage in extended site sharing, respectively in RAN sharing.

4.3. **The national regulatory framework**

16. In addition to Community law, the applicable national licensing and regulatory requirements must be taken into account in the context of network infrastructure sharing ([11]). Both the general national regulatory framework in Germany and the terms of the parties' 3G licences set out parameters for network sharing. These include:

— network roll-out requirements in terms of effective coverage related to a specific timetable, notably a requirement to cover 25 % of the population by the end of 2003 and 50 % of the population by the end of 2005 that cannot be met by means of national roaming but can be met by shared infrastructure,

— general obligations as regard e.g. site and antenna sharing relating to planning restrictions and environmental concerns,

— limitations as regards the extent of network sharing allowed related to e.g. sharing network intelligence and sensitive customer data.

17. For the notified agreement the responsible national telecommunications regulatory authority ('NRA') is the German Regulatory Authority for Post and Telecommunications (Regulierungsbehörde für Telekommunikation und Post — 'RegTP'). RegTP published general guidance in June 2001 in which it took a favourable view of infrastructure sharing provided certain conditions were met ([11]).

18. In particular RegTP excluded sharing of the core network and the pooling of spectrum, but allowed sharing of sites, masts, antennas, cables and combiners as well as shared used of site support cabinets, and the shared use of logically distinct Node Bs as well as RNCs ([12]), provided that:

— each licence holder has independent control of their own logical Node B, respectively RNC,

— there is no exchange of data (such as customer data) beyond that required for technical operations,

— separation of operation and maintenance centres,

— additional own Nodes B respectively additional own RNCs can be operated to guarantee planning independence and the operator's own Nodes B operated solely by himself are connected to own logical RNCs,

— there is no regional division of coverage areas that rules out overlapping network and coverage areas; i.e. parties may not agree to each cover only a distinct and different geographical area and rely on roaming on each other's network in those areas where their own network does not have coverage.

([11]) A number of other national regulatory authorities (NRAs) in the EU issued guidance on the conditions on which infrastructure sharing would be consistent with the national licensing and regulatory requirements. In Germany, RegTP published its Interpretation of the UMTS award conditions in light of more recent technological advance, RegTP (6 June 2001), available at www.regtp.de. In May 2001, Oftel, the UK NRA, published a note for information on '3G mobile infrastructure sharing in the UK', available at http://www.oftel.gov.uk/publications/mobile/infrashare0501.htm. The Dutch and French NRAs have published similar guidance documents, which are available on their websites at http://www.opta.nl/download/concept_notitie_nma_vw_opta_umts_netwerken_190701.pdf and at http://www.art-telecom.fr/dossiers/umts/partage-infras.htm.

([12]) 'Logically distinct' means that a single physical network element, due to its programming, can perform logically distinct operations for the two networks, as if two separate Nodes B or RCS were involved.

19. On 7 December 2001 the RegTP found the parties' framework agreement to be in line with these regulatory constraints, provided that the parties respected the requirements of logically independent control of Nodes B and RNCs. RegTP's approval was further subject to reporting obligations concerning the geographical distribution of shared infrastructure, and the meeting of their respective 50 % of population coverage obligations.

20. Subject to the principle of the primacy of Community law, the national regulatory framework and the EU competition rules are of parallel and cumulative application. National rules may neither conflict with the EU competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the EU competition rules. Hence a full assessment of the notified Agreement under the EU competition rules is required.

5. THE AGREEMENT

21. On 20 September 2001, the parties entered into a framework agreement setting out the principal terms for their cooperation on 3G infrastructure. The objectives of the agreement are to achieve capital expenditure efficiencies and operating expenditure savings; to expand geographical coverage while limiting the environmental impact, and to achieve early deployment of 3G network infrastructure. Under the terms of the framework agreement, the parties will cooperate on the basis of:

(i) extended site sharing: mutual sharing of elements of the site infrastructure such as mast sites, site support cabinets ('SSC') and power supply, as well as possibly antennas, combiners and transmission links, within a geographical area sufficient to enable the parties to each attain its 50 % population coverage obligation;

(ii) radio access network ('RAN') sharing: mutual sharing of Nodes B (i.e. the base stations that receive and send data across frequencies and control a particular network cell) and the radio network controllers ('RNCs'), that each control a number of such Nodes B and that are linked to the core network;

(iii) national roaming: for the remaining part of the population (i.e. over and above each party's respective 50 % coverage obligations) mutual national roaming on the proprietary network infrastructure of the other party that is not subject to site sharing or RAN sharing is envisaged.

The parties will maintain separate core networks and service provision, and will not share their frequencies. The agreement is not exclusive, to the extent that both parties can agree on extended site-sharing, RAN sharing and national roaming with third parties (clause 1.3). The key provisions of the agreement are set out in more detail below.

5.1. Extended site sharing

22. The parties will each construct their own proprietary network infrastructure but will cooperate on the basis of 'extended site sharing' within an area which corresponds to their licence obligations for a population coverage of 50 % by the end of 2005. Under the agreement, 'extended site sharing' involves sharing Common Site Support Cabinets ('SSC') and power supply and possibly antennas, combiners and transmission links.

23. The agreement specifies rules for the determination of sites that may become the subject of sharing arrangements. Clause 2.1 states that, first, each party will draw up its own roll-out plans independently; next, the plans are divided into planning periods of 18 months showing the respective areas which T-Mobile and VIAG plan to develop. The geographical areas that the parties consider relevant for their individual network roll-out, will be compared periodically and where overlap exists may be identified as infrastructure sharing areas. The parties' respective local branches at technical level will determine which sites should be subject to extended site sharing based on maximising cost saving.

24. Clause 3.2 specifically provides that the parties cannot jointly own or control the extended site sharing elements. However, the party that owns or controls the particular site-sharing elements must allow their use by the other party. According to clause 3.3 a bilateral site framework agreement that remains to be concluded will set out the position on common and beneficial use as well as cost regulation for shared sites.

25. The agreement also contains safeguards in relation to the exchange of confidential information. Clause 2.6 provides that only information necessary for the technical realisation of extended site sharing can be exchanged. Under the agreement, other information, in particular commercially sensitive customer information, cannot be exchanged.

5.2. RAN sharing

26. Section 4 of the agreement deals with cooperation in the form of RAN sharing. Under the agreement, RAN sharing can include additional sharing of Common Physical Nodes B and Common Physical Radio Network Controllers ('RNC') — (to remain within the framework set by RegTP, Nodes B and RNCs would have to be logically separate). Clause 4.1 provides that the parties must carry out a feasibility study into RAN sharing before 30 June 2002. Clause 4.2 states that if RAN sharing is feasible, the parties will enter into an agreement regulating its implementation as soon as possible. However, since the feasibility of RAN sharing has not yet been determined, the Commission reserves its position on this issue.

5.3. **National roaming**

27. Outside the area required to obtain 50 % population coverage, no extended site sharing and/or RAN sharing is proposed. Instead the parties will build their own respective 3G infrastructure and any cooperation will be limited to bulk purchasing of both circuit switched and package switched national roaming. VIAG but not T-Mobile commits to purchasing a minimum volume of such roaming services from T-Mobile. T-Mobile obtains a right to purchase roaming services from VIAG under the same conditions, but it is not under an obligation to do so.

28. Section 5 sets out the key principles on national roaming. Clause 5.3 provides that the parties agree not to discriminate against other national or international roaming partners. In addition, neither of the parties will treat the other party's customers less favourably than their own customers. Clause 5.6 states that the parties undertake to ensure that the cooperation on roaming will not restrain service competition between the parties.

29. Section 6 deals with national roaming by VIAG customers on T-Mobil's 3G network. Clause 6.1 provides that T-Mobile will provide VIAG with bulk purchasing of national roaming for the duration of the agreement. As part of the agreement, VIAG has agreed to purchase a minimum quantity of roaming services from T-Mobile within three years from the date of launch of the 3G roaming services (Clause 6.5). parties claim that the experience with VIAG roaming on T-Mobile's GSM network shows that this is likely to represent a very small proportion of VIAG's requirements. Conversely, section 7 deals with national roaming by T-Mobil's customers on VIAG's 3G network. Clause 7.1 states that T-Mobile has the option but not an obligation to purchase 3G roaming services from VIAG. However, if T-mobile undertakes to purchase national roaming services from VIAG, it is subject to the same minimum purchase requirement as VIAG (clause 7.4).

30. Section 8 sets out specific rules on barring customer use. Clause 8.3 states that the party providing national roaming has the right to bar subscribers of the other party from its network. Also, the party using national roaming can bar its own customers from using the other party's service. This applies in cases where there are overlapping areas. The agreement also provides information about the location areas for barring and circumstances when the parties will dispense with barring.

31. Section 10 sets out a two tier system of pricing for 3G roaming. It provides that prices for circuit-switched 3G roaming (destined for voice telephony services) are based on their respective interconnection termination prices ([13]). Wholesale prices for packet-switched 3G roaming are based on a retail minus pricing model taking into account possible future developments of packet-switched roaming prices and demand. In addition, the agreement also provides, as a general principle, that each party has to ensure that the subscribers of the other party roaming on its network are treated no less favourably than its own subscribers (clause 5.3).

32. Section 11 sets out specific rules on the resale of national roaming capacities to third parties. Clause 11.1.a sets out the general rule that each party has the right to resell the roaming capacity of the other party to resellers and service providers. However, the resale of circuit-switched (voice) capacity to MVNOs is subject to the approval of the other party. Clause 11.1.b provides that parties have the right to make national roaming capacities of the respective other party available to Mobile Virtual Network Operators ('MVNO') for data traffic ('data MVNO') ([14]), provided that these MVNOs do not use this capacity for the provision of services to end customers that are essentially identical to an end-to-end mobile voice service from a customer's viewpoint ('voice MVNO'). This aims to stop 'voice MVNOs' from providing voice over Internet Protocol based on roaming access charged at data rates, and thereby undercutting the parties in retail markets. The parties are able to provide roaming capacity for voice traffic to 'data MVNOs' acting as resellers, but this is likely to be charged at a different (higher) rate. Clause 11.1.b is subject to review at the end of 2003.

33. In addition, clause 11.1.c provides that the resale of roaming capacity to other licensed network operators or to 'voice MVNOs' as defined in clause 11.1.b is subject to consent by the other party. However, pursuant to clause 11.2, the prior consent requirement of clause 11.1.c does not apply if the MVNOs are group companies, provided they respect the different pricing regimes for voice and data services. In addition, pursuant to clause 11.3, once a party itself offers roaming to a third party (not a group company) that is a 'voice MVNO' and offers services essentially identical to an end-to-end mobile voice service from a customer's viewpoint in the sense of clause 11.1.b, this party is obliged to allow the other party to provide their received national roaming capacities to such 'voice MVNOs' as well.

([13]) Circuit switching is a transmission technique that is based on a continuous stream of data over a permanent connection between the points of origination and destination for the duration of a call. Packet switching is a more efficient transmission technique based on the division of the information transmitted into packets that are sent separately, using the network only when there is data to be sent.

([14]) MVNOs are undertakings with an own mobile network code and an own range of mobile IMSI numbers or an equivalent for 3G, but that do not own a licence to operate wireless frequencies.

5.4. **Duration**

34. The agreement will continue in force until 31 December 2011, after which date it will be automatically renewed for a period of two years unless either party with two years prior notice terminates it.

6. ARGUMENTS OF THE PARTIES

35. The parties primarily explain the need for their agreement on 3G network sharing in financial terms. More specifically they claim that network sharing is necessary: (1) first, because 3G network infrastructure is more expensive than its predecessors, given the much higher antenna density required, namely twice as high as 2G GSM networks; (2) second, as since 3G licences were awarded the expectations of 3G services revenue have been revised downward; and (3) third, because due to the general downturn of the mobile telecommunications industry their cost of raising capital has increased. As a result of the agreement, the parties envisage a reduction of up to 30 % of their investments in network infrastructure with further savings on network operating costs.

36. Article 81(1): The parties argue the agreement does not have the object or effect of appreciably restricting competition within the common market contrary to Article 81(1) as their prospective site-sharing and possible RAN-sharing will not result in the sharing of core networks, and because the agreement requires the parties to maintain full competition at the service and retail level. In addition, network planning, design and operations will remain independent and any disclosure of technical information will be limited to the minimum necessary.

37. Article 81(3): The main potential restriction of competition concerns the limitations on resale of capacity to 'data MVNOs'. If the agreement is considered to restrict competition, the parties argue in the alternative, that it is exemptable under Article 81(3). In view of the large licence costs incurred followed by a significant decrease in the commercial value of 3G spectrum the parties argue that infrastructure sharing will enable them to reduce capital and operating expenditure by reducing their investments in network infrastructure and network operating costs. According to the parties, this is necessary as infrastructure sharing will help alleviate some of the burden of the simultaneous opening of 3G market access in the EU. Further, the parties argue that the approach adopted is in line with the policy adopted by RegTP, the German NRA, as well as by other NRAs such as Oftel in the UK. In addition, infrastructure sharing is required due to planning restrictions and to meet environmental concerns.

38. The parties argue that consumers will ultimately benefit through the delivery of faster, more innovative 3G services at lower prices. Finally they state that competition will not only be preserved but will be increased in the markets for 3G networks and services in Germany as the agreement will enable earlier and more complete network roll out, resulting in greater competition.

7. CONCLUSION

39. The Commission intends to take a favourable view in respect of the notified agreement. Before doing so, the Commission invites third parties to submit their comments within one month of the publication of this notice, to the address or fax number given below, quoting the reference Case COMP/N.38.369 — Rahmenvertrag T-Mobil Deutschland/VIAG Interkom (notification).

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40. If a party submitting comments considers that these contain business secrets, it must indicate the passages which, in its opinion, ought not to be disclosed on the grounds that they contain business secrets or other confidential material, and state the reasons. If the Commission does not receive a request with reasons, it will assume that the comments do not contain any confidential information.