Mobile telecommunications mergers in the EU – Remedies revisited

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I. Introduction

1. In a much-noticed recent decision the EU Commission, for the first time in eleven years, cleared unconditionally a four-to-three merger between two mobile operators when it authorised the acquisition of Tele2 by T-Mobile in the Netherlands. This is in contrast to a number of previous decisions where mobile mergers were either prohibited or only cleared with various, sometimes far-reaching remedies.

2. The present article looks at key recent decisions on mobile mergers and examines the development of the Commission’s assessment of the respective remedies offered to overcome the competitive harm identified during the investigation. It describes the marked shift in the approach to remedies which occurred since 2015 and analyses the considerations put forward by the Commission in the assessment of remedies for mobile mergers. The article sets out the circumstances in which access remedies can be successful and draws a comparison to ex-ante telecom regulation. The article concludes with an outlook for future Commission decisions on mobile mergers and highlights obstacles which the parties must consider when planning a mobile merger in Europe.

II. The European mobile industry

3. Mobile communications are becoming increasingly important in Europe. With total revenues of €143 billion in 2017, mobile technologies and services represented an important economic weight in the European economy; in 2017, the European mobile industry generated 2.5 million jobs, it represented 3.3% of European GDP, and had an economic value of €550 billion.2

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1 Interestingly, the previous unconditional clearance of a four-to-three merger in telecommunications also concerned the Dutch market, see European Commission, dec. Art. 6(1) R. 139/2004 of 20.8.2007, T-Mobile/Orange NL, case COMP/M.4748.

4. By the end of 2017, 8.5% of the European population (that is, 465 million people) had subscribed to mobile services, the highest regional rate of unique subscriber penetration just above North America. This higher penetration rate is in part due to the EU regulators’ decision to impose the GSM standard, which allowed a rapid spread of the industry throughout the continent in a very short period of time, as opposed to US regulators, who left it to the market to determine the prevailing standard.8

5. At the EU level, fixed voice telephony is declining both in terms of volume and revenues, and is increasingly being replaced by voice over broadband services as well as by mobile telephony. In 2018, in Europe there were 238 million fixed-telephone subscriptions (the number has been decreasing since 2009) as opposed to 815 million mobile-telephone subscriptions (the number has been increasing since 2005). Furthermore, in 2018, there were 212 million fixed broadband subscriptions in Europe as opposed to 636 million active mobile-broadband subscriptions (with both numbers also increasing over the past ten years).6

6. The mobile sector is a high-investment industry: it is estimated that between 2010 and 2017, more than €193 billion was spent on capital expenditure. Most of these projects were related to 4G upgrades to deliver faster connections, as well as to network densification. However, the focus will increasingly shift towards the investment in fibre networks that will serve as the backhaul element of future 5G architectures.7 As regards 5G roll-out, it is clear that it will require far more spending than previous mobile technologies, and the European Commission has estimated that the cost will amount to €500 billion if its 2025 connectivity targets are to be met.8

7. The EU telecommunications market counts around 40 mobile network operators (MNOs), and although the biggest players are present in various countries, most of them only operate in one or two countries. In the US, on the other hand, there are only four nationwide mobile operators (AT&T, Verizon, Sprint and T-Mobile).9

8. Over the last ten years, the European mobile sector has gone through a consolidation process whereby around 20 mobile operators have either closed down or merged with a rival. This process seems to be slowing down—whereas in previous years mobile mergers were cleared with a variety of remedies, certain proposed mergers could not take place due to a lack of the necessary regulatory approvals (see the mergers in the UK and in Denmark, described below).

9. Although deployment of own networks still is an important competitive advantage in the market, operators might seek to combine with rivals to expand their individual footprint, increase their subscriber base and/or spectrum holdings, or achieve synergies. Furthermore, there have been combinations of fixed and mobile operators in Spain (Orange/Jazztel),10 the UK (BT/EE),11 and Germany (Vodafone/Liberty Global)12. Such fixed-mobile convergence (triple play or quadraple play) can improve the revenue mix and reduce customer churn. Spain is a good example of this trend, with almost 12 million fixed-mobile bundle subscriptions by the end of 2017 according to the Spanish national regulatory authority (NRA).13 Belgium and France have seen similar developments.

10. The next step for converged players is to move into content, and in particular adding pay TV to their bundles has the potential of becoming another source of growth for operators. In addition, telecom operators may move towards integrating horizontally into content production.

11. While the Commission as the EU’s competition authority takes a benign approach towards cross-border mergers, MNOs in Europe appear more interested in achieving within-country consolidation, as they see more scope for synergies and cost savings.15 However, competition authorities seem to have paid more attention to the potential effects of mergers on prices than to efficiencies and investments. Indeed, operators need continued investment in their networks in order to meet ever more ambitious customer demand. This will increase with the arrival of 5G technology while their revenues are declining due to price regulation and to increasing competition from online players (so-called OTTs) offering similar services. Hence, synergies gained from mergers could be viewed as a way for MNOs to continue with the necessary investments while maintaining profitability.16
III. The regulatory situation in EU mobile markets

12. EU markets for mobile telephony were traditionally not subject to access regulation or price controls. Unlike in fixed telephony there was no legacy infrastructure for mobile communications, which tended to preserve former monopoly positions. Following the revision of the EU telecommunications regulatory regime in 2002, the Commission recommended the market for access and call origination on public mobile telephone networks as a possible candidate for ex ante regulation under the 2003 Recommendation on Relevant Markets (Market 1). This market was subsequently removed from the recommendation in 2007, as the national wholesale and retail markets were generally regarded as competitive and not a priori susceptible to regulatory measures.

13. There have only been rare examples of ex ante access regulation imposed by NRAs at the national level. For instance, in 2006, Spain introduced regulatory wholesale access obligations towards mobile virtual network operators (MVNOs) on Telefónica, Vodafone and Amena (now Orange) based on a finding of joint dominance. The Commission endorsed the Spanish approach in this case, but called on the Spanish NRA to “closely monitor the effects of a possible entry of the fourth network operator.” Similarly, the Slovenian NRA regulated the wholesale access and call origination market, due to the fact that the largest mobile operator, MobilTel, was the only MNO capable of providing nationwide access. Despite these measures occurring after the revision of the regulatory framework in 2007, the Commission encouraged the Slovenian approach while recommending a review of the regulatory measures once other MNOs rolled out nationwide networks. The Spanish regulatory measures were ultimately withdrawn in 2017, as the Spanish NRA concluded that ex ante access regulation had facilitated entry of MVNOs which exercised competitive pressure at the retail level and had been able to extract favourable access terms, so that in future competition law would be sufficient to address any potential concerns. Similarly, the Slovenian measures have been withdrawn in the meantime.

14. When mobile networks were first rolled out, regulators often imposed roaming obligations as part of the assignment of radio frequencies. Still today, conditions accompanying the assignment of spectrum are one of the primary means of regulation in mobile markets. A notable example of such soft regulation in the context of 5G deployment was seen recently in Germany in the June 2019 spectrum auction. The acquirers of spectrum in Germany are subject to geographical coverage and investment obligations. In addition, spectrum holders should enter into negotiations with new access seekers with a view to providing them with national roaming.

15. The EU telecommunications regulatory framework rests on principles which are derived from EU competition law, and the two regimes are meant to complement each other. Unsurprisingly then, in the absence of ex ante regulatory measures, competition law has played an ever more important role in safeguarding competitive outcomes in European mobile markets. Following the original run of a multitude of operators around the year 2000 for radio spectrum in which the new, data-capable 3G mobile technology could be deployed, there was a wave of consolidation in national mobile markets. Competition authorities in Europe, and most notably the Commission, closely followed this development and took competition law measures in mobile markets.
when necessary. This occurred both in antitrust, with the recent statement of objections against a network sharing agreement in the Czech Republic being a notable example, as well as in merger cases. This article focuses on how markets were kept competitive through remedies in EU Commission decisions on mobile mergers. It outlines the development of regulatory measures, usually access and/or divestment remedies, and draws conclusions for future mergers between mobile operators.

IV. Remedies in key EU Commission merger decisions

16. The Commission has reviewed seven four-to-three mergers of MNOs since 2012, and all of them were subject to an in-depth review in Phase II. It can be observed that the Commission’s approach changed gradually over the years. During the mandate of Commissioner Joaquín Almunia, the Commission conditionally approved all three four-to-three mergers subject to broadly similar remedy packages. His successor, Commissioner Margrethe Vestager, took a tougher stance in the following three cases, openly expressing her insistence on structural remedies which would ensure the entry of a fourth MNO. The first two cases under Vestager’s review, concluded with a Phase II withdrawal and a prohibition, whereas the third case was cleared subject to an extensive divestment package in the form of a fix-it-first solution. The latter three cases might have suggested that the Commission was concerned about maintaining the “magic number” of four MNOs, but in 2018 a four-to-three merger in the Netherlands was cleared unconditionally following an in-depth review. The following section outlines the evolution of the Commission’s remedies policy in the most important recent mobile mergers.

1. Conditional clearances with access remedies

1.1 Hutchinson 3G Austria/Orange Austria

17. On December 12, 2012, the Commission conditionally approved the merger between the third and fourth largest MNOs in Austria.33

18. The investigation focused on the retail mobile telecommunications market. The Commission found that the wholesale market for access and call origination on public networks in Austria was not likely to be affected by the transaction since neither H3G nor Orange provided access to independent MVNOs pre-merger.32

19. Based on the parties’ estimated market shares, the Commission found a concentrated market structure in the retail market with Telekom Austria holding [40–50%]33 and T-Mobile holding [30–40%] and the transaction giving the merging parties a total market share of approximately [20–30%] by revenue.34 The parties would, however, have a higher combined market share of [40–50%] in the data segment, which was considered an important indicator of future market developments.35 On this basis the Commission examined possible unilateral effects in the retail market and, notably, conducted an upward pricing pressure (UPP) analysis, for the first time in a Phase II merger review, to assess the impact of the planned concentration on retail mobile prices.36 The UPP analysis resulted in a predicted average price increase of [10–20%] within the overall relevant market without any demonstration of efficiencies.37

20. During the market investigation, the Commission examined in particular diversion ratios, as well as internal documents, and found H3G and Orange to be particularly close competitors. The majority of respondents to the market investigation also considered Orange to be H3G’s closest competitor in terms of low prices and flexible tariffs. The Commission thus considered H3G to be an important competitive force driving competition on the Austrian mobile telephony market,38 and concluded that post-merger H3G would most likely compete less aggressively.

21. To address the Commission’s concerns in the retail market, the parties offered: (i) a set of divestiture commitments seeking to ensure the entry of a new MNO; and (ii) a wholesale access commitment to MVNOs.

22. As far as structural measures are concerned, H3G offered 2 x 10 MHz of spectrum in the 2,600 MHz frequency band to a prospective new MNO entrant on the Austrian market. That spectrum was to be complemented by further spectrum in the 800 MHz frequency band, earmarked by the Austrian telecoms regulator for their upcoming 2013 auction. The divestment spectrum and


31 European Commission, dec. 8(2) R: 139/2004 of 12.12.2012, Hutchison 3G Austria/Orange Austria, case COMP/6497. Six years before that, the Commission conditionally cleared a four-to-four merger between the Austrian number two (T-Mobile) and the number five (tele.ring) MNOs. In response to the Commission’s concerns, the parties offered a remedy aimed at strengthening H3G, which was the smallest MNO at that time, and Orange (number three at that time). The Commission cleared the deal subject to a structural remedy package which consisted of the transfer of parts of tele.ring’s spectrum and mobile telecommunication sites to H3G and Orange.

32 Only Orange provided access to its network to Etyx, which was a small MVNO jointly controlled by Orange.

33 Where exact figures are confidential the approximate ranges are put in square brackets throughout this article as they appear in the respective Commission decisions.

34 Hutchison 3G Austria/Orange Austria, M. 6497, supra note, 31, para. 135.

35 Ibid., para. 192.


37 Supra, para. 314.

38 Ibid., para. 265.
the auction spectrum would only be sold to the same new MNO entrant by giving any auction acquirer the option also to purchase the divestment spectrum.39

23. The divestment remedy imposed certain additional obligations on H3G for a period of up to six years, including national roaming access to the H3G network at specified terms in order to ensure the viability of a new MNO entrant. However, if the new MNO requested more than 30% capacity of the H3G network, H3G would have the right to terminate the agreement.40

24. The MVNO remedy served as a proxy for the divestment and auction remedy by ensuring that absent MNO entry, H3G would be sufficiently constrained by MVNO competition. In the final commitment, H3G agreed to make wholesale access available to 30% of its network for up to 16 MVNOs over the course of ten years on a pay-as-you-go basis, unless the MNO remedy for divestment occurred at an earlier date. (In which case, H3G would only remain committed to their pre-existing MVNO agreements.) The MVNO access remedy included one upfront agreement, with prior terms approved by the Commission.41

25. The Austrian Competition Authority and the Federal Cartel Prosecutor expressed concerns that market entry by a new MNO was rather unlikely. Nevertheless, the Commission, with the support of the Austrian NRAs, accepted the final commitments.42 In particular, the Austrian NRAs considered that even in the absence of the new MNO entry, the MVNO commitment alone should in principle eliminate competition concerns post-transaction.

26. The commitments were eventually implemented, albeit with a significant delay, as UPC, the MVNO which signed the upfront agreement, did not enter the market until two years after the merger.43 The MNO entry remedy has not been taken up until this day for lack of interest. Nevertheless, the Austrian mobile market still has one of the lowest price levels in the EU.44 Even though the entry of several MVNOs (UPC and Hofer Telekom) as a result of the remedy occurred late, their impact on the competitive process and on prices seems to have been significant.45

1.2 Hutchison 3G UK/Telefónica Ireland

27. On May 28, 2014, the Commission conditionally approved the merger between Hutchison 3G UK, the Irish number four, and Telefónica Ireland, the second largest MNO, selling its services under the brand name O2.46 Hutchison is active in Ireland through its subsidiary Three, who at the time was the most recent entrant and fastest growing MNO in the Irish market.

28. The Commission’s investigation focused on the market for retail mobile telecommunications services and the wholesale market for access and call origination on public mobile networks. The Commission’s two main concerns in the retail mobile telecommunications services market were that the concentration would remove Three as an important competitive force and that it would reduce Eircom’s ability to compete due to termination or frustration of the network sharing agreement with O2 which was in place at the time.47 As regards the wholesale market for call origination and network access, the Commission found indications of potential anti-competitive effects since the merger would reduce the number of network hosts for MVNOs in Ireland, bringing with it the risk of less attractive access terms.

29. As regards the network structure, the four existing MNOs in Ireland were part of two network sharing agreements: the Mosaic agreement between O2 and Eircom and the Netshare agreement between Three and Vodafone.48 The Commission found that after the merger, O2 would have incentives to terminate the Mosaic agreement because: (i) the combination with Three’s mobile network meant that O2 had less to gain from sharing than pre-merger; (ii) the parties to the merger would likely focus more on integrating their networks rather than investing in network sharing with other MNOs; and (iii) the merged entity would have an incentive to terminate the agreement in order to weaken Eircom, resulting in less competition.49 The Commission concluded that the merged entity would have the ability and incentive to terminate the network sharing agreement in place with Eircom, with important repercussions for the latter’s network costs and coverage, and hence for Eircom’s ability to compete.50 Furthermore, the termination of the network sharing agreement with Eircom would weaken its position as a network host for MVNOs.51

30. In order to overcome these concerns, the parties submitted commitments that were analysed and market tested by the Commission but found to be insufficient to remove the competitive concerns. The improved final commitments comprised three elements: (1) an MVNO

39 Ibid., para. 526–531.
40 Ibid., para. 529.
41 Ibid., para. 495.
42 Ibid., para. 551–552.

47 Ibid., para. 667 and 698.
48 Ibid., para. 112.
49 Ibid., para. 678–683.
50 Ibid., para. 683.
51 Ibid., para. 709.
entry commitment; (2) an MNO commitment; and (3) a commitment addressing Eircom’s situation.52

31. The MVNO entry commitment enabled the entry of two MVNOs operating under a capacity model by which they would purchase a significant minimum capacity from Three.53 The capacity available for the MVNOs was calculated as a proportion of the merged entity’s total network capacity, taking as a reference the merged entity’s expected network capacity in 2018, i.e., some four years ahead.54 The Commission was satisfied with the substitution of the initial pay-as-you-go model by a capacity model, where the entrant would pay a fixed fee to access a certain capacity, instead of paying fees per subscriber or per minute. This was considered to create greater incentives for the MVNO to aggressively acquire customers in order to fill the network capacity it had purchased.55 As a result, the incentives of the two MVNO entrants would be comparable to those of traditional MNOs. Furthermore, a capacity model enabled MVNOs to flexibly design their retail offers to subscribers, using their bandwidth to offer packages of whatever combination of services was more profitable.56

32. In addition, the capacity made available under the entry commitment would be enough to replicate Three’s offers and in any case, if the entrants required additional capacity, there was a possibility to increase the initial allocation up to a maximum cap of 15% of the merged entity’s network capacity, each subject to payment of a proportionately increased fixed annual fee.57 Furthermore, the upfront MVNO had the option to acquire the customer base of one of the parties’ brands, which could enable it to enhance visibility of its operations and achieve scale more quickly.58 The capacity offer to an MVNO was designed as an upfront remedy which guaranteed that Three would have enough incentive to agree to network sharing on conditions and prices that were acceptable to the upfront MVNO.59 It also guaranteed that the parties would have incentives to ensure the MVNO had access to all additional services and technical assistance it may need.60 Hence, the Commission considered that the final MVNO entry commitment was adequate to replace the competitive constraint exerted by Three in the Irish retail market.61

33. The MNO commitment allowed either of the two MVNOs to purchase spectrum and become a fourth MNO in Ireland. The Commission considered that such a remedy would, on the one hand, lower the barriers to entry of a fourth MNO, since lack of spectrum was one of the main obstacles, and on the other hand, boost the effectiveness of the final MVNO entry commitment providing the MVNOs with an alternative if they wished to upgrade their capacity agreements.62 Nevertheless, even after exercising the spectrum option and becoming an MNO, the operator could remain under the capacity agreement with Three for a transitional period in order to facilitate entry.63

34. As regards the concerns on Eircom’s (third largest operator in Ireland) reduced ability to compete because of the termination of the network sharing agreement, the final commitments included an offer by the parties to conclude a strengthened network sharing agreement with Eircom.64 The Commission was satisfied that post-merger, Eircom would continue to have the same options to network sharing as it did pre-merger.65 Pre-merger, it could share with one of the two operators with national coverage, either Vodafone or O2. Post-merger, Eircom would continue to have two options, between Vodafone and the merged entity. Since Vodafone had expressed an interest in entering into a network sharing agreement with another MNO in Ireland, the final commitment ensured that Eircom would continue to have a choice as to its preferred sharing partner.66 The revised network sharing agreement with Three allowed Eircom to preserve and potentially increase its strength in the retail telecommunications services market.67 Thus, the Commission concluded that the final Eircom commitment was suitable to eliminate its concerns on the potential weakening of Eircom as an effective competitor on the retail market.68

35. Finally, as regards the wholesale market for call origination and network access, the Commission found that the final commitments addressed both the reduction in the number of hosts for MVNOs and any potential weakening of Eircom as a consequence of the merger.69 On the one hand, the final commitments enabled the entry of two new MVNOs in Ireland under attractive wholesale access terms.70 On the other hand, the final commitments ensured that Eircom had the possibility of becoming a third MVNO host, as it addressed the lack of nationwide network coverage that was previously impeding the provision by Eircom of MVNO hosting services.71

52 Ibid., para. 975.
53 Ibid., para. 982.
54 Ibid., para. 976.
55 Ibid., para. 983.
56 Ibid., para. 984.
57 Ibid., para. 985.
58 Ibid., para. 989.
59 Ibid., para. 992.
60 Ibid., para. 995.
61 Ibid., para. 998.
62 Ibid., para. 1000.
63 Ibid., para. 1004.
64 Ibid., para. 1008.
65 Ibid., para. 1009.
66 Ibid., paras. 1007 and 1008.
67 Ibid., para. 1004.
68 Ibid., para. 1000.
69 Ibid., para. 1011.
70 Ibid., para. 1012.
71 Ibid., para. 1024.
1.3 Telefónica Deutschland/E-Plus

36. On July 2, 2014, the Commission approved the merger between Telefónica Deutschland (operating under the brand O2) and E-Plus, subject to a number of conditions.72 This was a four-to-three merger which resulted in three MNOs of roughly equal size in the German mobile telecommunications market, the other two being Deutsche Telekom and Vodafone, who were previously the two market leaders. The merged entity would be the third largest operator in terms of overall retail revenues in Germany.

37. The Commission again identified concerns in the retail market for mobile telecommunications and the wholesale market for access and call origination and international roaming. Based on the analysis of diversion ratios, data from the market investigation and the parties’ internal documents, the Commission found E-Plus and Telefónica to be particularly close competitors.73 Indeed, the Commission considered that the competitive strength of the parties was greater than suggested by their market share and in particular E-Plus was a pioneer in the granting of wholesale access to 4G services, hence an important competitive force despite its small market share.74

38. The Commission found that the merged entity would have a reduced incentive to compete thus removing two important competitive forces from the market.75 It based this finding partially on its own decisional practice, in particular T-Mobiletelecing and Hutchison 3G Austrial Orange Austria, where it had considered that providers with a large customer base have less incentive to attract new customers by offering lower prices.76 Furthermore, the Commission conducted a UPP analysis and demand estimation-based simulations, according to which the merger would intensify the parties’ incentives to raise prices and induce competitors to also increase their retail prices.77

39. The competitive assessment showed that MVNOs would have been unable to compete effectively, as they largely depend on the MNOs’ wholesale access conditions.78 They were more prepared to exit the market and had less incentive to compete aggressively, as they did not need to recoup fixed costs.79 In addition, the pay-as-you-go model diminished their incentives to engage in aggressive retail competition.80 Hence, the Commission found that any remedy which did not result in the entry of a fourth MNO would at least need to strengthen the ability and incentives of non-MNOs to compete.81

40. In order to overcome the Commission’s concerns, the parties offered a package of commitments consisting of three components: (1) an MNO remedy; (2) a mobile bitstream access (MBA) remedy; and (3) a non-MNO remedy.82 The MNO remedy sought to create a fourth competing MNO, the MBA MVNO remedy sought to generate competition that would offset the loss of competition resulting from the elimination of E-Plus, and the non-MNO remedy sought to make the wholesale market more competitive.

41. Under the MNO remedy the parties offered to conclude an agreement with a newly entering MNO,83 which included the following elements: lease of parts of their spectrum; provision of national roaming services to the new entrant until it had rolled out its own network; sites for the placement of antennas; sharing of passive network infrastructure; and retail outlets in urban areas including sales staff. If no potential entrant appeared, the parties would offer the same agreement to the MVNOs that had entered into wholesale agreements with Telefónica under the second limb of the remedy package.84

42. The MBA remedy consisted of an upfront commitment to conclude at least one and up to three wholesale agreements with MBA MVNOs before closing the merger. As in the Irish case,85 they would offer a capacity based wholesale model (i.e., offering a certain percentage of the network capacity) and allow access to all services and technologies, including 4G access, new network technologies and download speeds in the future.86 The minimum contract duration was five years.

43. In the non-MNO remedy, the parties committed to offer the extension of all existing 2G and 3G wholesale contracts between MVNOs/service providers and Telefónica or E-Plus, and to offer 4G access to these operators before a certain date.87 4G access was to be offered at the best prices that were offered to other MVNOs/service providers. The parties also offered to remove contractual restraints from the agreements with Telefónica or E-Plus wholesale partners that could prevent the MVNOs and service providers from switching their customers from one MNO to another, as well as any obstacles that prevented MVNOs from switching their business models.88
2. Prohibitions—or the need to replace a lost competitor

44. Whereas the cases referred to above were all decided during the tenure of Commissioner Almunia, the following decisions were taken under the auspices of Commissioner Vestager, who commenced her first term in November 2014.

2.1 TeliaSonera/Telenor JV (DK)

45. On September 11, 2015, the Swedish and Norwegian telecom incumbents TeliaSonera and Telenor withdrew in Phase II the notification of a 50/50 joint venture that would have brought together their respective mobile telecommunications business units in Denmark.99 Prior to the transaction, TeliaSonera and Telenor had already cooperated in Denmark under a network sharing agreement.

46. The four-to-three transaction would have combined the number two and number three players in Denmark, creating the largest MNO in Denmark in terms of both revenues and subscribers. The Commission identified unilateral concerns in both retail and wholesale markets and also closely investigated the risk of spillover into markets in Sweden and Norway from the combination of the parties’ pan-Nordic mobile telecommunications offers for businesses.90 Additionally, the Commission was concerned that the transaction would have created a highly concentrated market structure with two large and symmetric operators (TDC and Telia/Telenor) at the retail and wholesale level, leading to possible coordinated effects.91 H3G was also present at the time, albeit as a smaller operator.

47. The parties initially sought to address the Commission’s concerns by offering to sell two blocks of their 2,100 MHz spectrum and to make available up to 15% of the joint venture’s network capacity to a new entrant. After the Commission found that this proposal fell far short of alleviating the concerns it had identified, the parties submitted a revised proposal. To facilitate the entry of a fourth MNO, they offered to sell up to 40% of the JV’s network capacity to a new player. However, the Commission also rejected this proposal as insufficient, reportedly finding that even the modified remedies would not enable the emergence of a new mobile network operator. It is likely that since TeliaSonera and Telenor already shared a network, they had fewer options to divest parts of the network to a new player to win over regulators.92 In view of the Commission’s continued objections, the parties eventually abandoned the transaction in September 2015.93

2.2 Hutchison 3G UK/Telefónica UK

48. Shortly after the abandoned TeliaSonera/Telenor merger described above, the Commission, on May 11, 2016, blocked the proposed acquisition of Telefónica UK by H3G UK. When the parties notified the transaction to the Commission in September 2015, the UK retail mobile telecommunications market was highly competitive, with prices among the lowest in the EU and 4G technology roll-out more advanced than in most other Member States.94 At the time, Telefónica UK (operating under the brand O2) was the second largest UK MNO, whilst H3G (operating under the brand Three) was number four, the other two mobile operators being BT/EE and Vodafone.

49. Prior to the present decision, the CMA had unconditionally cleared the fixed/mobile merger of BT and EE in January 2016.95 The CMA had considered that EE was a minor player, and that due to vibrant competition in the UK mobile market, the BT/EE combination was unlikely to impact negatively competitive conditions. In Hutchison 3G UK/Telefónica UK, the Commission took due account of the CMA’s assessment and treated BT/EE as a single entity.96

50. The Commission noted that the transaction would have created a new market leader in the UK retail mobile telecommunications market, with a combined market share exceeding 40% when measured both by subscribers and by revenues. Moreover, the Commission was concerned that the transaction would remove Three as an important competitive force, which—despite being the smallest—was regarded as the most aggressive and innovative MNO exercising a significant competitive constraint on the market.97 Due to Three’s high network quality, excellent levels of customer service and strong brand image, the Commission took the view that Three’s position in the market was more significant than its

90 European Commission press release, Commission opens in-depth investigation into the proposed merger of Hutchison 3G UK and Telefónica UK, case COMP/M.7612, supra note 89.
91 Ibid.
93 Hutchison 3G UK/Telefónica UK, M.7419, supra note 89.
96 Where there are two mergers in the same market(s) subject to the Commission’s control under the merger regulation, the Commission normally applies the “priority principle,” under which it will assess each transaction in light of the competitive situation that prevailed at the time of notification. See European Commission, dec. Art. 8(2) R. 139/2004 of 23.11.2011, Western Digital Ireland/Viviti Technologies, case COMP/M.6503, para. 31-44, where the Commission gave priority to Scopio/Scopix, notified one day before Western Digital/ Viviti, unconditionally approving the former and approving with commitments the latter. The priority rule was also applied in European Commission, dec. Art. 8(2) R. 139/2004 of 27.3.2017, BSN/DuPont, case COMP/M.9392, with respect to other agronomic mergers such as European Commission, dec. Art. 8(2) R. 139/2004 of 3.4.2017, ChemChina/ Syngenta, case COMP/M.7962, and European Commission, dec. Art. 8(2) R. 139/2004 of 21.3.2018, Bayer/Monsanto, case COMP/M.8084.
market shares would suggest. Again, the concept of an important competitive force played a crucial role in the Commission’s assessment.

51. The Commission also raised concerns at the wholesale level, where O2 was at the time the largest supplier of wholesale access to MVNOs, and H3G was considered an important competitive force, even though they did not provide any meaningful wholesale access pre-merger.98 Given the reduction of the number of host MNOs, the Commission was concerned that post-merger the position of non-MNOs would be worsened, and that the merged entity would have lower incentives to offer attractive wholesale terms.

52. Importantly for this decision, and as a distinguishing factor to other cases, the Commission raised particular concerns with respect to network sharing. The four UK MNOs shared two mobile networks in the UK by means of network sharing agreements: the CTIL/Beacon agreement between Vodafone and O2 and the Mobile Broadband Network Limited (MBNL) agreement between Three and BT/EE. The Commission was concerned that through the presence of the merged entity on both networks, the competitive dynamic which existed prior to the transaction would be lost. In particular, the Commission considered that Vodafone and/or BT/EE positions in the network sharing agreements would have been negatively affected. The Commission took the view that the combined entity’s presence on both MBNL and Beacon would likely cause a misalignment of interests and grant it a possibility to employ “a unique threat towards its network sharing partners.”99 As a result, the merger was expected to harm consumers by decreasing “industry-wide investments [in] network infrastructure.”100

53. To alleviate these concerns the parties proposed remedies which consisted of five principal components: (1) the Tesco Mobile commitment; (2) the new entrant operator (NEO) commitment; (3) the Virgin Media commitment; (4) the wholesale market commitment; and (5) the network sharing commitment.

54. The Tesco Mobile commitment consisted of divesting O2’s stake in Tesco mobile so as to give that MVNO full independence. Following the divestment, the parties committed to offer a capacity-based MVNO access agreement for up to [5–10%] capacity of the combined networks of Three and O2. The commitment was not upfront, regarding neither the divestment nor the capacity-based wholesale agreement. The Commission was concerned about not having the possibility to review the implementation of the Tesco Mobile commitment at a later stage and that there was “no legally binding obligation to actually enter into a final signed agreement.”101 As regards Tesco’s ability to compete post-merger, the Commission concluded that the constrained capacity share left Tesco Mobile with limited potential to grow its customer base.

55. The NEO commitment was intended to create a new player who was to be offered capacity-based wholesale access, the cost structure of which was similar to that of an MNO and, thereby, was expected to maximise the NEO’s incentives to compete by optimally utilising the available capacity. The NEO would receive a “perpetual fractional network interest” of up to [10–20%] capacity.102 The parties proposed this commitment to be upfront, i.e. to be fulfilled before the closing of the transaction. Following a specified period of time, the parties committed to offer an option for the NEO to acquire the assets of O2, or, alternatively, to discuss in good faith the acquisition of Three103. The Commission rejected the commitment, as it considered it insufficient to address its concerns at retail level. In the Commission’s view, the NEO would continue to be commercially and technically dependent on its host MNO with a cost structure that would not allow it to exercise a competitive constraint on other market participants, and it would also have very limited ability to differentiate its offerings, including in terms of quality. Further, the O2 divestments consisted of many optional elements, which the Commission considered to be excessively uncertain.

56. Following the Commission’s scepticism, the parties added the Virgin Media commitment to the final commitments, by which they undertook to offer Virgin Media a fixed capacity delivered on the O2 network, available to Virgin Media for a fixed term. If the NEO exercised the O2 Divestment Option, the parties would offer Virgin Media an equivalent agreement delivered on Three’s network. The Commission was not satisfied with this proposal, due to similar reasons that led to the rejection of the Tesco Mobile commitment, and due to the uncertainty as to whether Virgin Media would eventually sign up to the wholesale agreement.

57. The wholesale market commitment consisted of the proposed amendment to the existing wholesale access agreements with MVNOs to cover 4G and 5G at no extra cost, and offered wholesale access to other MVNOs with the same quality of service. However, the Commission considered that the suggested pricing of 4G and 5G services may be unattractive for MVNOs in the future given the increasing data consumption and declining costs per GB of MNOs for providing data services. As a result, the Commission was concerned that under the proposed access terms, the MVNOs were unlikely to be able to offer products that could compete with those of MNOs in both the short and long term.104 Additionally, the Commission was not satisfied with the proposed commitments, because of the uncertainty of the implementation plan.

98 Ibid., para. 2126.
99 Ibid., para. 1240.
100 Ibid., para. 1233.
101 Ibid., para. 2926.
102 Ibid., para. 2625.
103 Ibid., para. 2636.
104 Ibid., para. 3144–3148.
58. In order to address the Commission’s network sharing concerns, the parties also offered a set of behavioural commitments designed to strengthen Vodafone’s and EE’s positions under the network sharing agreements. This included, among others, an offer to EE of a number of amendments to the MBNL agreements, including a fast-track dispute resolution procedure aimed at facilitating unilateral network improvements, an agreement on a new business plan for MBNL, and the waiver of certain veto rights vis-à-vis EE. To strengthen Vodafone, the parties proposed to offer Vodafone the partitioning of the transmission of 4G traffic and the possibility to re-enter into the active sharing agreements, in case they were terminated by the parties post-merger. In addition, the parties proposed a network integration plan, according to which they were to remain committed to the Beacon grid and to use an agreed number of extra MBNL sites. The parties also proposed to erect firewalls in order to avoid information sharing between MBNL and Beacon.

59. The Commission considered the proposed package to raise significant uncertainties and to be difficult to monitor. It rejected the network sharing commitment, as in its view it did not materially improve the positions of either Vodafone or EE in the underlying agreements. In addition, there was uncertainty as to whether Vodafone and EE would accept the range of behavioural commitments offered by the parties. In a comparable situation in Hutchison 3G UK/Telefónica Ireland, interestingly the concerns were resolved since Vodafone in that case expressed an interest to enter into an agreement with Eircom, should Three’s proposal not be accepted by Eircom.

60. In order to overcome the hesitations of the Commission, the parties pointed to the fact that in the Irish and German cases described above, the Commission had approved a remedy package which was broadly similar to the one offered by the parties in the present case. Also, the results of the Commission’s UPP analysis indicated that the predicted overall price increases at the retail level (7.3%) were only marginally higher than in the Irish case (6.6%), and lower than in the German case (9.3%).

61. The Commission was unmoved by these arguments and noted simply that results of the quantitative analysis were only one of the elements at the basis of the Commission’s assessment. In addition, the Commission emphasised that the prior transactions were distinguishable, in particular as regards the concern that the merged entity would have network sharing agreements with both of the remaining MNOs (EE and Vodafone), which thus appears to be key to the prohibition decision. The Commission’s scepticism as to the workability of the behavioural solution to the network sharing concern was one of the main reasons for eventually prohibiting the transaction. Overall, the Commission concluded that the proposed commitments did not “fully and unambiguously resolve the competition concerns identified.”

62. The case is currently under appeal at the General Court. Two of the main arguments brought before the court question the Commission’s interpretation of the concept of “important competitive force.” The applicant considers that the Commission erred in the appreciation of the features both in the retail market and in the wholesale market, where in its view, the Commission should not have qualified Hutchison as an “important competitive force” given that they had a very small market share (less than 3%). The applicant, furthermore, finds fault with the fact that the Commission based its conclusions on the opinions of third parties instead of conducting its own analysis. The applicant also pleads that the Commission erred in relation to the necessity and extent of “alignment” between competitors in network sharing agreements; and by basing its conclusions on potential harm to competitors of the merged entity rather than to competition.

2.3 Hutchison 3G Italy/WindJV

63. On September 1, 2016, the Commission conditionally approved the joint venture between Hutchison’s subsidiary H3G and VimpelCom’s subsidiary Wind, which resulted in the creation of the largest retail mobile telecommunications operator in Italy. At the time of the transaction, there were four MNOs on the Italian telecommunications market (H3G Italy, Wind, Vodafone and TIM) together with a number of MVNOs. Wind and H3G were, respectively, the third and fourth largest mobile operators in the market. As in previous cases, the Commission raised concerns in the markets for the provision of retail mobile telecommunications services and wholesale services for access, and call origination on mobile networks.

64. As regards the first market, the Commission concluded that the transaction would significantly impede effective competition in the retail market for mobile telecommunications operators in Italy.

105 Ibid., para. 2793–2798 and 2832–2834.
106 Ibid., para. 2788 to 2792.
107 Ibid., para. 2645.
108 Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.
109 Ibid.
110 Telefónica Deutschland/E-Plus, M.7018, supra note 72
111 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97, para. 3058.
112 Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.
113 Telefónica Deutschland/E-Plus, M.7018, supra note 72.
115 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97, para. 3151.
116 GCEU, CK Telefónica UK Investments v Commission, case T-399/16, case pending.
117 For further details see summary published in OJ C 371, 10.10.2016, p. 10.
119 Ibid., para. 50 and 65.
mobile telecommunications services in Italy as a result of horizontal non-coordinated effects caused by the reduction of the number of MNOs from four to three in a highly concentrated market with high barriers to entry.\footnote{Ibid., para. 952 and 953.} The counterfactual analysis played an important role, as the Commission found that the merger would remove from the market H3G as an important competitive force.\footnote{Ibid., para. 436.} The Commission qualified H3G as such because its gross adds market share was higher than its nominal market share and because it behaved as an aggressive player on the Italian retail mobile market, fostering competition and constraining other MNOs.\footnote{Ibid., para. 535.}

65. In the Commission’s view, the parties closely competed on the market, and exerted a competitive constraint on each other and on the other MNOs.\footnote{Ibid., para. 813.} Post-merger, the JV would have a significant market share, and would not have the incentive to compete in the same way as the parties did before, separately.\footnote{Ibid., para. 821 and 822.} Other MNOs would not have the incentive to compete against the JV to counter the anti-competitive unilateral effects of the transaction.\footnote{Ibid., para 855.} MVNOs may have had the incentive to compete, but would lack the ability, and would thus be unable to replace the competitive constraint exerted by the parties.\footnote{Ibid., para 865–866 and 898.} According to the Commission, this would have resulted in significant price effects, which would not be offset by buyer power or market entry.\footnote{Ibid., para. 436.}

66. In contrast to the other two cases mentioned above,\footnote{Ibid., para. 913.} the Commission found that the transaction would also significantly impede effective competition on the retail market as a result of horizontal coordinated effects. The loss of H3G would increase the symmetry in market shares of the remaining MNOs and enhance the alignment of incentives, as well as the ability to monitor, observe and punish deviation from coordination, allowing MNOs to coordinate and raise prices in a sustainable manner post-merger.\footnote{Ibid., para. 919, 950 and 1364.} In addition, there were indications from previous statements of market players that such coordination was considered to be beneficial.\footnote{Ibid., para. 813.} The Commission considered that the effects of coordination would materialise in addition to the non-coordinated effects arising from the transaction, leading to additional harm to consumers.\footnote{Ibid., para. 1211.}

67. For the remainder, the Commission examined horizontal non-coordinated effects in the wholesale market for access and call origination on mobile networks. These effects would materialise in the elimination of the competitive restraint exercised by the parties and would be particularly relevant for MVNOs who were not contractually bound to an MNO in the short term as well as for potential new entrants.\footnote{Ibid., para. 1773–1796.} The Commission, however, did not find any conclusive evidence of horizontal coordinated effects on the wholesale market.

68. It is worth noting that, in the context of the efficiencies analysis, the Commission looked at network sharing agreements even though there were none currently in place in Italy. It concluded that the parties had not proven that a network sharing agreement between Wind and H3G would not be a commercially viable alternative to the merger, nor that it would not yield similar efficiencies as the proposed JV.\footnote{Ibid., para. 1800–1804.}

69. In recognition of the stricter approach taken by the Commission in Hutchison 3G UK/Telefónica UK,\footnote{Ibid., para. 1615.} and although the transaction was notified before the UK prohibition decision was issued, the parties submitted a fix-it-first remedy designed to bring about the entry of a fourth MNO into the Italian market.\footnote{Ibid., para. 1348.}

70. The commitments included the divestment of substantial radio spectrum from different frequency bands, the option to acquire/co-locate on mobile base station sites, and the option of a radio access network (RAN) sharing agreement which ensured immediate coverage also of the least populated areas in a cost-effective manner.\footnote{Ibid., para. 1348.} In addition, the package included an agreement for roaming on the merged entities’ network to enable the purchaser to offer nationwide service during the construction of its own network.\footnote{Ibid., para. 1348.} Furthermore, the new MNO would be free to offer wholesale access to other MVNOs and was offered a pricing model that would ensure it was indeed able to offer such access competitively.\footnote{Ibid., para. 1733–1796.} This would also resolve the concerns on the wholesale access market.

71. The identification of a suitable buyer played a key role in the Commission’s conditional clearance. Iliad, an established MNO in the French market with a credible business plan and the intention of investing, agreed to purchase the divested assets and spectrum in Italy. It was independent from the parties, it had financial resources, and it raised no prima facie competition concerns (cf. the “standard purchaser requirements” set out in

\footnote{Ibid., para. 1384.}
the Remedies Notice.\textsuperscript{139} Given the clarity and certainty of the agreement as well as the quality of the buyer, the Commission approved Iliad as a suitable new MNO in the clearance decision.

3. An unconditional clearance—a surprise decision?

72. On November 27, 2018, following an in-depth review in Phase II, the Commission unconditionally cleared the merger between T-Mobile and Tele2, which combined the third and fourth largest MNOs in the Netherlands. Prior to the merger, the parties already cooperated through a network sharing agreement.\textsuperscript{140}

73. The Commission’s investigation largely focused on non-coordinated horizontal effects in the retail market. Post-transaction, the merged entity would have a share of [20–30\%] making it the third largest player in the Dutch retail mobile market after KPN and VodafoneZiggo in terms of revenues, but the second largest player by a small margin before VodafoneZiggo in terms of subscribers.\textsuperscript{141} The Commission qualified T-Mobile as an important competitor, who offered the highest network quality in the Netherlands. T-Mobile historically pursued an aggressive pricing policy and the Commission concluded that there was no reason to believe that its attitude would change post-merger.\textsuperscript{142}

74. In contrast to the previous mergers described above, the Commission concluded that Tele2 could not be considered an important competitive force, primarily due to its limited market share and network limitations.\textsuperscript{143} The Commission also considered that Tele2’s competitive impact on the retail market would gradually deteriorate. This was in particular as Tele2 was spectrum-constrained and it was set not to be allocated further spectrum in the 2019 auctions.\textsuperscript{144} Overall, the Commission concluded that the competitive importance of Tele2 would be reduced in the absence of the merger.

75. As in previous mobile mergers, the Commission conducted a UPP analysis and concluded that the merger was likely to lead to a [5–10\%] overall price increase in the retail market,\textsuperscript{145} which was the same range as the Commission had predicted in the previous three mergers in Ireland, Germany and the UK (see para. 60 above). However, in this case, the Commission considered price increases to be “moderate,”\textsuperscript{146} and that the UPP analysis did not take into account the gradual marginalisation of Tele2.

76. As the transaction did not produce anti-competitive effects, the Commission did not engage in an efficiency assessment. Likewise it did not assess potential anti-competitive effects at the wholesale level in any detail, since only T-Mobile was active on the market.\textsuperscript{147}

77. It is interesting to note in this context that previously, in 2007, the Commission had authorised unconditionally a four-to-three merger between T-Mobile and Orange in the Dutch mobile market.\textsuperscript{148} The decision was based on the finding that: (1) Orange had not been a major competitive constraint and was not considered to be a particularly close substitute to T-Mobile; and (2) a large number of MVNOs and service providers would remain on the market and would “exert significant competitive pressure” even though their combined market share was less than 5\%.\textsuperscript{149}

V. Synthesis

78. With one exception, all recent mobile mergers that reduced the number of players from four to three have met with competition concerns from the Commission.\textsuperscript{150} These concerns have focused on three issues in particular:

- Loss of an important competitive force (in view of the often concentrated market structure, any elimination of a competitor was viewed critically);
- Loss of competition between networks or deterioration of such networks that could carry the traffic of mobile operators; or
- Loss of the number of networks that would be able and willing to host an MVNO.

79. In all of these recent cases, remedy packages were offered by the merging parties which always contained structural as well as behavioural elements. The former generally consisted of a divestment of spectrum, often together with network capacity, and of making available sites for antennas and other passive infrastructure. The latter focused on suitable network access for new MVNOs and/or better access conditions for existing ones. The packages also sometimes included an offer of national roaming for possible new MNO entrants in order to achieve early coverage.

\textsuperscript{139} Ibid., para. 1800–1804.
\textsuperscript{141} Ibid., para. 372.
\textsuperscript{142} Ibid., para. 398.
\textsuperscript{143} Ibid., para. 443–455.
\textsuperscript{144} Ibid., para. 536.
\textsuperscript{145} Ibid., para. 815.
\textsuperscript{146} Ibid., para. 822.
\textsuperscript{147} Ibid., para. 751.
\textsuperscript{149} Ibid., para. 34.
\textsuperscript{150} There have been a number of smaller mobile mergers, which were either cross-border (European Commission, dec. Art. 6(1) R. 139/2004 of 3.7.2013, Tele2/Global/Germanas, case COMP/M.6948), or were characterised by a weak competitive relationship between the parties (European Commission, dec. Art. 6(1) R. 139/2004 of 8.10.2013, Tele2/Coo How Holding, case COMP/M.8642), and which were cleared unconditionally in Phase I.
80. These combined remedy packages were considered sufficient by the Commission in the above-mentioned Austrian, Irish and German merger cases.\(^{151}\) It is true, however, that the optional structural elements of the remedies were for the most part either not considered acceptable by the Commission,\(^{152}\) or not taken up by any new entrant.\(^{153}\) The mobile markets in Austria and Ireland were presumably too small and unattractive to possible investors. In addition, entry barriers in terms of spectrum or infrastructure were high, which could have also affected prospective entrants. Nevertheless, in Germany, 1&1 Drillisch (United Internet) initially preferred the improved MVNO access remedies, but in the meantime acquired 5G spectrum\(^{154}\) thus entering the path to becoming a fully-fledged MNO.\(^{155}\)

81. As far as the MVNO remedies are concerned it has always been clear that they were only a second-best solution, but they allowed for the necessary restructuring without unacceptable consequences. Looking back, it can be argued that they have achieved generally satisfactory results in that, e.g., prices for mobile services in Austria are still among the lowest in the EU.\(^{156}\) The BEREC Report on the development of mobile prices post-merger criticised access remedies in abstract terms, but did not produce any conclusive evidence to the contrary and even referred to competitive pressure from MVNOs.\(^{157}\)

82. It is only in recent years that the Commission has become more demanding, now consistently requiring a new player to enter the market in order to replace any loss of competition. There was a marked shift in approach to mobile mergers with the arrival of the new Commission in November 2014. This tightening of control was already felt in the near-blocked four-to-three merger between Tele2 and Telenor in Denmark.\(^{158}\)

83. The two merger decisions which followed took an interesting turn: in the Italian Hutchison/Wind JY case,\(^{159}\) the parties were fortunate enough to find an extensive structural solution and with the entry of French operator Iliad (Free) into the Italian market, a new fourth MNO appeared. This was achieved by way of a fix-it-first remedy, so that questions of certainty of entry did not arise. Commissioner Vestager later underlined with regard to Hutchison 3G Italy/Wind JY that divestitures aimed at creating a new MNO are "the best answer to competition concerns."\(^{160}\) This type of solution will, however, not always be available since it supposes a sufficiently large and attractive target market as well as an eager challenger willing to enter another Member State. As mentioned above, the difficulties with finding a new MNO entrant were exemplified in Austria and Ireland, where to this day no new entrant has taken up the optional structural elements of the remedies proposed in Hutchison 3G Austria/Orange Austria and Hutchison 3G UK/Teléfonica Ireland.\(^{161}\)

84. And finally, in a surprise move, the four-to-three merger between T-Mobile and Tele2 in the Netherlands was cleared unconditionally by the Commission in Phase II. This decision is remarkable in that the predicted price increases were similar to those found in other problematic cases, and the combined market share of the parties was presumably higher than that of the merging parties in the Austrian case.\(^{162}\) In addition, the merging parties became the second largest operator in terms of subscribers, albeit by a small margin. Nevertheless, it seems that the Commission discovered—after even sending a statement of objections—elements that led it to conclude that Tele2 was not an important competitive force within the meaning of the Commission's Horizontal Merger Guidelines.\(^{163}\)

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151 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31; Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46; and Telefónica Deutschland/E-Plus, M.7018, supra note 72.

152 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97.

153 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31; and Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.


155 This development is similar to the so-called "ladder-of-investment" approach discussed in traditional telecoms regulation. See, e.g., M. Bourreau, P. Doğan and M. Manant (2010), A Critical Review of the "Ladder of Investment" Approach. Telecommunications Policy 34(11), pp. 663–696.

156 See, e.g., European Commission, Mobile Broadband Prices in Europe in 2018, March 21, 2019. See also European Commission, dec. Art. 6(1) R. 139/2004 of 9.7.2018, T-Mobile Austria/Telefónica, case COMP/M.8808, para. 17–41, where the Commission recognised fixed and mobile broadband to belong to the same product market in Austria.

157 BEREC, Report on Post-Merger Market Developments – Price Effects of Mobile Mergers in Austria, Ireland and Germany, Butt (18) 119, June 15, 2018, at pp 5–6. As with all evaluations of remedies the proof of causality is a major problem. In the Austrian case, for example, the relevant transactions also included the sale of Orange’s daughter “Hutch,” a low budget, mainly prepaid provider, to the market leader (Telekomm Austria).

158 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97.

159 In addition, in Commissioner Vestager’s speech following the withdrawal announcement, she cited research suggesting that reduction of the number of MNOS to three may lead to higher prices. Then, in her October 2015 speech at the 42nd Annual Conference on International Antitrust Law and Policy at Fordham University, Commissioner Vestager simply stated that in mobile mergers “the more structural the remedy, the better.”

160 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97.

161 Hutchison 3G Italy/Wind JY, M.7758, supra note 118.

162 M. Vestager, Competition and Investment in Telecoms, Speech delivered at the CERRE Dinner Debate, Brussels, November 20, 2016.

163 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31; and Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.

164 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31.
Merger Guidelines. Commissioner Vestager stressed on several occasions that this case is to be distinguished from others, and is to be read in “the specific circumstance of the merging parties, their qualities, their characteristics, their market size, their footprint and the specific market.”

85. Overall, the Commission’s hesitation to accept access remedies and to insist invariably on the presence of four mobile operators does not seem justified. The Dutch clearance decision described above may indicate a renewed Commission openness towards a consolidation between weaker players. It seems, however, that instead of relaxing its general rejection of access remedies, the Commission prefers to adopt a more generous approach regarding the competitive strengths of the merging parties. Whether this approach, which leads to unconditional clearances, will produce better results than the remedies offered in previous cases remains to be seen.

86. It is submitted that the negative attitude of the Commission vis-à-vis access/MVNO remedies is not warranted for the following reasons.

87. First, it has to be noted that granting access to key infrastructure is expressly foreseen as a remedy in the Commission’s 2008 Remedies Notice. Such access inevitably leads to equivalent effects as a divestiture remedy because it has to facilitate timely and likely market entry by competitors. Apart from the abovementioned cases access to a telecom network was accepted as a remedy, e.g., in Telia/Telenor where it served to reinforce a divestiture remedy. As is shown by the Commission’s own decisional practice, access remedies intended to trigger or reinforce MVNO entry are acceptable in principle, provided they are properly designed and certain to be taken up.

88. Second, access remedies are used in a regulatory context as a suitable instrument to safeguard competition in telecom markets. The imposition of access (and price) remedies is the key instrument for ensuring competitive markets under the EU telecoms regulatory framework. This system has produced solid results in keeping markets open and ensuring competitive prices at the wholesale and retail level. For instance, as noted above, the Spanish NRA after initially imposing access regulation in the national mobile market, lifted the regulation in 2017 after concluding that in view of MVNO entry the market tended towards effective competition. Access remedies have allowed competitors and new entrants to build market share and gradually roll out their own networks, the effect being that today only a handful of markets are characterised by a need for regulation. In its merger decisions the Commission itself often refers to existing access regulation which would prevent, e.g., foreclosure.

89. Third, the usual procedural concern that behavioural remedies need to be constantly monitored by competition authorities is irrelevant since NRAs for telecommunications can be charged with this task. They are particularly well placed in view of their long-standing experience with safeguarding the respect of regulatory access and price remedies. This is traditionally part of their core business, which consists inter alia of imposing (access) remedies on operators with significant market power (SMP) and ensuring their application in practice. The Commission itself has on several occasions relied on the work and contributions of NRAs. For example, in T-Mobile Austria/tele.ring, the Austrian NRA was entrusted with the role of arbiter in potential dispute settlement regarding implementation of the remedy. Also in the above-mentioned Telia/Telenor decision, the parties undertook to regularly report on the implementation of the commitments to Swedish and Norwegian NRAs. In addition, in concentrated and transparent mobile markets, remedy-takers can also engage in monitoring the access remedy themselves, by seeking relief before national courts or making a complaint to the Commission. This was exemplified in a recent statement of objections against Telefónica, where the Commission started an investigation against an alleged breach of commitments relating to the 2014 Telefónica-E-Plus decision. The Commission would therefore not normally have to engage in constant monitoring of access remedies.

90. Fourth, and most importantly, there is no conclusive evidence that MVNO remedies have led to unacceptable results. Mobile prices in Europe are still lower than...
those in other parts of the world (USA, South Korea) and mobile prices in the countries where four-to-three mergers were cleared with access remedies are for the most part comparing favourably to price levels in other Member States. 178

91. It is true, however, that access remedies are only fully effective if the MVNO offers are actually taken up and market entry (or expansion) occurs within a relatively short time frame. The typical approach to avoiding such harmful delays is for the Commission to require fix-it-first or upfront solutions, i.e., the transaction can only close if and when it is sufficiently clear that the remedy will actually be taken up by an existing (smaller) competitor or new entrant. Furthermore, when selling network access to MVNOs, it is advisable to do this through a capacity model rather than a “pay-as-you-go” model. Capacity models are preferred by the Commission since they create stronger incentives for price competition by MVNO entrants who will strive to fill the purchased capacity thus making them comparable to the incentives of traditional MNOs who have to recoup the cost of infrastructure investments.

92. Even though access remedies could be used to address most competition concerns in mobile mergers, they would normally fall short of remedying network sharing problems, such as those identified by the Commission in Hutchison 3G UK/Telefónica UK. 179 If the merged entity is present on two different network sharing agreements, the Commission will be very sceptical to accept a behavioural solution and will look closely as to whether the merger could negatively affect the pre-merger network sharing agreements.

93. The parties should also consider that network sharing itself might raise competition concerns beyond the effects of the merger. This is in particular because of the commonality of costs between the parties sharing a network which—depending on the extent—may lead to an unhealthy competitive alignment. The Commission may thus insist on the parties leaving network sharing agreements intact post-merger (as it did in Hutchison 3G UK/Telefónica UK). 180

VI. Conclusions

94. The above analysis of the Commission’s decisional practice in mobile mergers during the last eight years shows that, in particular, concentrations between smaller operators will still be possible. But the Commission is likely to take a much tougher stance if the merger involves stronger market players. Should it raise concerns, the most recent of the precedents analysed above show two possible solutions for the merging parties: either proving the target is not an “important competitive force,” or if that is not possible, finding a new competitor that would enter the market to replace the target.

95. Proving that an operator constitutes (or not) an important competitive force could become a challenge for both the Commission and the parties. The concept played a key role in the conditional clearance of Hutchison 3G Austria/Orange Austria, where the Commission considered H3G to be an important competitive force 181 and in Hutchison 3G UK/Telefónica Ireland, where the Commission was concerned by the removal of Three as an important competitive force.182 The factors leading the Commission to conclude that a given operator is an important competitive force could involve, for example, a pioneer role in the granting of wholesale access to 4G services, 183 or high network quality, excellent customer service and strong brand image.184 This concept was also at the core of the recent unconditional clearance of the merger between T-Mobile and Tele2, where the Commission did not consider Tele2 to be an important competitive force due to its declining market share and network limitations.185 The appeal brought by CK Telecoms UK Investments against the Commission’s prohibition decision in Hutchison 3G UK/Telefónica UK will address this contentious notion. 186 It remains to be seen whether the Commission can show that it has a clear concept of what constitutes an important competitive force, or whether it may have perhaps applied this term somewhat arbitrarily in practice.

179 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97.
180 Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.
181 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97.
182 Network Sharing – Czech Republic, case AT/40305, case pending.
183 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31, para. 265.
184 Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46, para. 667 and 698.
185 Telefónica Deutschland/E-Plus, M.7018, supra note 72, para. 803.
186 Hutchison 3G UK/Telefónica UK, M.7612, supra note 97, para. 681.
187 T-Mobile NL/Tele2 NL, case COMP/M.3972, supra note 140, para. 443.
188 CK Telecoms UK Investments v Commission, case T-399/16, case pending.
96. As far as the second alternative is concerned, finding a new competitor to enter the market is not a simple task either. The situation in Hutchison 3G Italy/Wind/JV, where the French mobile provider Iliad was willing to penetrate the Italian market, will not always be replicable. Remedies may not be taken up by any new entrant if the market is not attractive for potential investors, due to its small size or high barriers to entry, as was the case in Austria and Ireland. In any event, the suitable candidate will most likely be an ambitious challenger from a neighbouring country.

97. A third possibility which merits renewed attention would be to offer convincing access remedies that would produce (or reinforce) strong and efficient MVNO competition. This would be a possibility only if those remedies were put in the form of a fix-it-first or upfront solution in order to quell any doubt about certainty of entry. The success of this strategy may not be guaranteed, but it is well worth trying in view of the uncertainty of the other two above solutions. As detailed in the preceding section, the effectiveness of competition through access remedies has repeatedly been recognised by the Commission itself as well as by other NRAs. In view of the evolving competitive environment and the challenges facing mobile operators in the EU today, there should be no reason why access remedies accompanied by the aforementioned appropriate safeguards should not be acceptable to the Commission.

98. An additional element that the merging parties should take into account is the network sharing agreements to which they have subscribed. It follows from the decision in Hutchison 3G UK/Telefónica UK that, if both parties are part of different network sharing agreements, the Commission might require them to leave one of them post-merger, to ensure there is enough independence between networks. This is particularly true if there are a limited number of networks in the country concerned (as was the case in the UK and Ireland with only two networks). The Commission’s approach in the aforementioned case seems to indicate scepticism towards accepting behavioural solutions to network sharing concerns, unless the Commission is confident that the behavioural remedies will actually be implemented.

99. The above debate is all the more relevant as telecom operators are facing financial burdens through the shift to 5G and fibre connections and might thus move towards more network sharing. Indeed, not only has the total market value of the EU telecommunications operators fallen from €234 billion in 2012 to €133 billion in 2018; but their revenues and profits have been dented by further regulation and increased internet competition, which leaves companies with fewer resources to invest in infrastructure. A future alternative could be the introduction of “neutral hosts” (third parties focused on owning and operating networks and shared licensed spectrum) which may solve competition problems but may not achieve the same level of efficiencies as a network sharing agreement. With that in mind, the Commission might consider network sharing solutions as possible counterfactuals to mergers. For example, in Hutchison 3G Italy/Wind/JV, the Commission’s efficiencies analysis concluded that the parties should have not ruled out the establishment of a network sharing agreement as a commercially viable alternative to the merger.

100. The need for increased investment in the 5G era will in all probability trigger further attempts at consolidation within the mobile sector. With the difficulties in most cases of achieving effective and smooth market entry, the time seems ripe to give access remedies another chance. As explained above, the Commission’s reluctance seems unjustified: there is no clear evidence that access remedies failed to address competition concerns. Telefónica Deutschland/E-Plus might on the contrary be seen as an indication of their success, since the remedy taker is now in the process of becoming a fully-fledged MNO. The recent sending of a statement of objections for non-respect of remedies in that case also illustrates that such access commitments could well be monitored. More generally, it seems that the Commission’s general reluctance to access remedies in telecoms might slowly come to an end, as shown recently in Vodafone/Certain Liberty Global Assets, where a cable access remedy was approved by the Commission. It remains to be seen, however, whether access remedies will actually become acceptable to the Commission again in the future, in light of the recent events in Germany and the Netherlands.

189 Hutchison 3G Italy/Wind/JV, M.7758, supra note 118.
190 Hutchison 3G Austria/Orange Austria, M. 6497, supra note 31; and - Hutchison 3G UK/Telefónica Ireland, M.6992, supra note 46.
191 Hutchison 3G UK/Telefónica UK, M. 7612, supra note 97.
193 European Parliament, 5G deployment: state of play in Europe, USA and Asia, In-Depth Analysis requested by the ITRE committee, April 2019.
194 Hutchison 3G Italy/Wind/JV, M.7758, supra note 118, para. 1615.
195 Telefónica Deutschland/E-Plus, M.7018, supra note 72.
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