The shifting sands of EU merger control - un, deux, trois, piano!

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There’s a popular children’s game where one player (the Curator) stands with her or his back to the other players, who stand several metres behind. The Curator then turns around quickly with the goal of seeing the others move towards her or him (or a wall depending on the game’s variation), thereby excluding them from the game. However, frequently, each time she or he looks around, the others have taken a step forward towards their goal without being detected; and so it is with the Commission’s approach to merger control in the mobile telecoms sector. Each time the telecoms executives turn around, the European Commission has taken yet another step forward and they do not see the Commission moving. Despite the risks of the European Commission showing the red stop light (the Swedish variation), which effectively occurred in the UK and Denmark recently, the game is still being played. This article tracks the European Commission’s steps forward over the past decade and tries to catch the Commission moving.

The background to this trend is that, as the profits of mobile network operators across the EU come under attack, in part due to the EU’s policies to create a single EU market for telecommunication services, and in part due to the growth in OTT services, the industry is subject to pressure to consolidate. Though a few larger operators are present in several EU Member States, the markets are still divided along national lines, typically with 3-4 network operators active in each Member State. The European mobile industry is also still relatively fragmented, with the four biggest operators serving around 60% of EU subscribers.

By comparison, the four largest operators in the US jointly control approximately 98% of the market, and China only has three operators.

In the last ten years, a number of EU countries have seen transactions bringing the number of mobile network operators down from four to three. The European Commission (“Commission”) has reviewed seven such transactions in the last ten years. European operators have long argued that consolidation is necessary to justify the heavy investments required for the development and upkeep of mobile networks. They reason that increased investments will not only increase the quality of service, but will also drive prices down. Despite the fact that the parties have been submitting increasingly extensive evidence to back up their efficiency claims, the Commission has continued to systematically dismiss them, raising the standard of proof placed on the parties in each case it has reviewed. Commissioner Vestager herself stressed that, in her view, competition (rather than market consolidation) drives the investment and there are no guarantees that...

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* Here, the authors are showing their Belgian bias. French readers will be horrified, as there, the game is known as “un, deux, trois, soleil”; in Spanish, perhaps more relevant for these purposes, it is “un, dos, tres, toca la pared”; in Italian, 1-2-3 stars; in Algeria, 1-2-3 statues, which is something they have in common with the British, and, somewhat bizarrely, in Portugal, 1-2-3 little Chinese monkeys. In German, it is known as “Och am Berg” and for the Swedes, it is “1-2-3 –rött lijt” (red light).


2 See, e.g., Supersonic, European telecoms mergers will boost capex, driving prices lower and speeds higher, available at: https://www.orange.com/fr/content/download/33263/1086075/version/2/file/Supersonic+13.04.15.pdf.
allowing consolidation will result in a higher level of investments. \(^3\) While the Commission has been more open to so-called convergent, fixed-to-mobile mergers, \(^4\) it has become increasingly sceptical of in-country consolidation of mobile operators and taken several strides forward.

It seems like ancient history now, but it was only a decade ago that the first four-to-three mobile merger, an acquisition of Orange by T-Mobile in the Netherlands in 2007, was unconditionally approved by the Commission. The Commission decision in that case is 18 pages long and focuses on the impact of the transaction on the mobile retail market.

Under Commissioner Almunia, the Commission approved three four-to-three telecommunications deals in Austria, Ireland and Germany. Each of the three transactions had been very closely scrutinized. In each case, the review process involved a detailed and lengthy “Phase II” investigation, during which the Commission amassed extensive evidence to help it assess the impact of the transaction on the market. In each case, the parties offered to divest assets and services that would allow a mobile virtual network operator (MVNO), i.e., a company operating on the retail market that does not have its own mobile network, to enter the market. But the remedy packages submitted in the Irish and German cases went further than the remedies submitted in the Austrian case. In the Irish and the German cases, the Commission cleared the transactions only after the parties committed to offering up to 30% of their network capacity to MVNOs on preferential terms approved by the Commission. In both cases, the Commission insisted that the merging parties find an “upfront buyer” for the remedy, i.e. sign an agreement with a new MVNO entrant prior to closing the deal. The German decision and its implementation is currently the subject of five different challenges before the General Court, a development that is likely of relevance to the intensity of the Commission’s scrutiny in the more recent mobile mergers.

Under Commissioner Vestager, four-to-three mobile mergers have faced even greater regulatory hurdles. So far the Commission has only approved one four-to-three mobile merger, a joint venture between two Italian operators, but subject to the commitment to divest assets (spectrum and network assets) so as to allow the entry of a new MNO. In other words, this is really a four-to-four merger. Prior to the adoption of the Italian decision, the Commission refused to clear two four-to-three mobile mergers in Denmark and the UK, even though the parties offered remedies going beyond those offered in the cases cleared under Commissioner Almunia. In yet another case involving a merger of a Belgian fixed operator with significant mobile operations (MVNO) with an MNO, the Commission required significant remedies to address the concerns created by the proposed transaction in the mobile markets. Thus, under Commissioner Vestager, mobile mergers have been scrutinized even more closely than under Commissioner Almunia. The UK decision is 685 pages long; the Italian decision is 428 pages long. Both decisions include dozens of pages analyzing the parties’ internal documents and several annexes that contain the Commission’s econometric analysis of the merger’s impact on the market.

This note traces the changes in the Commission’s approach to four-to-three mobile mergers and analyzes how the evidence gathered using these new investigative tools appears to have swayed the outcomes of the analyzed cases.

1. The changing anatomy of the EU merger investigation

The Commission has traditionally relied on the notifying parties to gather the information it needs to assess transactions under the merger control rules. Notifying parties fill in a lengthy form setting out the considerations that are relevant to the assessment of the case, including details on the transaction, their views on the relevant product and geographic market definitions and the competitively significant links between them. They submit it first as a draft and then respond to

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3 See Commissioner Vestager, Competition in telecom markets, 42nd Annual Conference on International Antitrust Law and Policy Fordham University, 2 October 2015.

4 Convergent mergers bring together a mobile player with a fixed network operator. The rationale behind these mergers is the complementarity of the merging parties’ assets. The Commission has cleared a number of convergent mergers in recent years, including Orange’s acquisition of Jazztel in Spain in 2015, Telenet’s acquisition of BÉASE in Belgium in 2016, and the creation of a joint venture between Vodafone and Ziggo in the Netherlands in 2016. However, some of these cases were cleared subject to divestments, which the Commission required in order to address the horizontal overlaps between the parties.
various questions the Commission may have in the pre-notification consultations. In more complex cases, this questioning often lasts several months, and at the end of this process the parties submit a filing form that may be several hundred pages long and, as we have seen recently, face significant penalties if there is the slightest omission or inaccuracy. The questioning continues after the official filing and notifying parties are often forced to gather a significant amount of additional information and comment on complex matters within very tight deadlines, which acts as a boost to the Brussels take-away food market. Needless to say, this creates a significant burden for the merging parties, who need to dedicate significant manpower to collect, identify, review and submit correct information. That burden has arguably increased in recent years.

At the same time, it appears that the Commission relies less on the Parties’ submissions in the assessment of mergers (other than to hunt for inaccuracies). In the last few years, two investigative tools began to feature more prominently in the Commission’s toolbox: the review of internal documents and econometric modelling. The Commission’s decisions on four-to-three mergers of mobile network operators (MNOs) reflect this general trend.

As a result of changes to the Implementing Regulation in 2013, notifying parties are bound to submit a large number of internal documents together with the filing. In addition, it is increasingly common for the Commission to issue, following the official submission of the filing, broader requests for internal documents, including email correspondence relating to topics pertinent to the assessment of the case. To add to the burden, the economists from the Chief Economists’ Team, with an insatiable appetite for data, play a prominent role in the assessment of complex mergers. But how much analysis is possible depends on the availability of data. The availability of switching data in mobile markets has allowed the Commission to embark on a frolic of econometric predictions of expected price levels post-merger, which are then used, in addition to the qualitative arguments gathered by the Commission, to challenge mobile mergers. The data-rich environment of the telecoms industry is one of its worst enemies.

Below, we analyze how the use of these new investigative tools appears to have swayed the outcomes of the Commission’s investigations into four-to-three mobile mergers reviewed by the Commission in the last ten years.

2. EU case law on mobile mergers

2.1 The Dutch case: Orange and T-Mobile (cleared unconditionally on 20 August 2007)

As noted above, this case is now ancient history, but it is still interesting as a background. The acquisition of Orange’s mobile telephony business by T-Mobile in the Netherlands was notified to the Commission on 13 July 2007 and cleared unconditionally in phase I.

As a result of the transaction, T-Mobile became the second largest operator in terms of subscribers with approx. 27% share. KPN remained the market leader with approx. 40%; Vodafone became the number three player behind the new entity.

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There were also plenty of MVNOs active in the market, which as the Commission noted exerted “significant competitive pressure on the MNOs.” Based on the analysis of Orange's pricing behaviour, the development of its market shares and revenues, and the switching data, the Commission concluded that Orange was not a “maverick” and that it had not been “the closest substitute” to T-Mobile. Unlike the other MNOs, which were stronger in the postpaid segment, Orange focused on pre-paid customers. The Commission further found that Orange was not particularly successful in attracting customers in the pre-paid segment and, moreover, its offering was at less competitive tariffs than those of the MVNOs active on the Dutch market. The Commission's analysis was based on the submissions of the parties and a limited market investigation.

The Commission also investigated the possible coordinated effects (or the possibility that the transaction would result in the creation of a collective dominant position). It found, however, that the market was not characterized by transparency and the presence and the development of fringe competitors made coordination in the retail market unlikely.

As to the effects of the transaction on the market for wholesale access and call origination on public mobile telephone networks (“wholesale market”), the Commission concluded that the parties' share was relatively small and, moreover, the wholesale market was dominated by KPN, the MNO with the largest amount of spectrum and a share of the wholesale market in excess of 50%. The Commission also found that all MNOs had an incentive to use their own unutilised spectrum capacity to host the MVNOs to improve their network utilisation. The Commission decision does not mention any review of internal documents. Neither did it mention any econometric modelling. The Commission reached these conclusions based on “traditional” investigative tools: the review of the parties' submissions and responses from third parties gathered in the course of its market investigation, in addition to rather simple analysis of the switching data.

2.2 The Austrian case: Hutchison 3G Austria/ Orange Austria (cleared on 12 December 2012, subject to conditions)

Five years after the Commission’s decision in the Dutch case, on 7 May 2012, the acquisition of Orange's mobile telephony business in Austria by H3G was notified to the Commission. The deal was subject to a markedly higher level of scrutiny. The Commission opened a Phase II investigation and adopted a Statement of Objections on 20 September 2012. The transaction was eventually cleared, subject to commitments, on 12 December 2012.

Like the Dutch case, the transaction resulted in the combination of the second and fourth largest MNOs in Austria. The merged entity had a market share of approximately 24%, behind Telekom Austria (46%) and T-Mobile (30%). However, unlike in the Netherlands, at the time the Commission reviewed the proposed merger, there were virtually no MVNOs present in Austria.

On the retail market, the Commission’s assessment focused on non-coordinated effects. The Commission concluded that the parties had a high combined market share and were close competitors in data segments, which it considered to be the most important and growing market segments. It took the position that H3G and Orange's market power was greater than their market share showed in light of the switching data. Finally, it concluded that there were no countervailing factors to the parties' market power, such as buyer power or substantiated efficiency claims.

Although the Commission found that some characteristics of the Austrian mobile telecommunications market might be conducive to coordination and some past parallel behaviour of the Austrian MNOs could point to co-ordination, it concluded that there was not sufficient evidence to establish a significant impediment to effective competition leading to coordinated effects.
As for the wholesale market, at the time of the decision only Vectone Mobile qualified as an independent MVNO on the Austrian market. The Austrian wholesale market, therefore, exhibited a significant lack of activity compared to the markets in other Member States. That said, the Commission found during the market investigation some indications that the merger might “possibly affect” access opportunities for MVNOs. The Commission however concluded that there was no need to come to a final decision in that respect, as the commitments proposed by the parties were aimed at facilitating market entry. The Commission therefore brushed off concerns on the wholesale market without characterising the potential negative impact on competition.

The Commission decision was 121 pages long and included detailed analysis of the parties’ internal documents (the decision indicates that the parties received a request for internal documents shortly before the end of Phase I). Based on the analysis of the parties’ internal documents, the Commission concluded that, contrary to the notifying party’s submissions, Hi3G considered Orange a close competitor, and that they were also perceived by customers as such. According to the Commission, the analysis of the switching data confirmed that conclusion. The Commission also relied on internal documents as evidence that Hi3G was a “maverick” driving competition in the Austrian market. The Commission also identified internal documents, which it used to support its view that the merged entity would have reduced incentives to compete aggressively post-transaction. Finally, the Commission also relied on Orange’s internal documents to dismiss Hi3G’s arguments that Orange was financially constrained, would not be in a position to invest in spectrum, and its network and its position were going to deteriorate significantly in the near to medium term. Hi3G challenged the Commission’s reliance on the internal documents, submitting that the Commission was selective in the choice of internal documents and quoted them in a misrepresentative manner, but to no avail.

Another interesting feature of the Austrian case is the Commission’s reliance on econometric analysis. The decision includes a chapter and an accompanying annex that set out the Commission’s quantitative analysis of the anticipated effects of the proposed transaction. To this end, the Commission used the upward pricing pressure (“UPP”) and indicative price rise (“IPR”) analyses to estimate the incentive of the parties to raise prices post-merger. The UPP is calculated based on prices, margins and diversion ratios between the merging firms (it does not take into account the rivals’ reactions). Unlike in many other markets, in mobile telephone markets the data on diversion ratios is readily available. Fed into an econometric model, the Commission economists came up with an estimate of how much the parties would raise prices post-transaction based on that data. The IPR analysis in the Austrian case yielded predicted price increases of 10 to 20% in the post-paid private segment. Hi3G challenged the Commission’s methods as an inadequate tool to predict pricing outcomes in complex telecommunications markets, but their arguments were dismissed.

The Austrian case was ground-breaking, as it was the first four-to-three mobile merger in which the Commission heavily relied on both the review of the parties’ internal documents and on the econometric analysis to assess the impact of the transaction on the market. These investigative tools have become mainstays of the Commission’s analysis of mobile mergers. Eventually, to obtain clearance, Hi3G offered to sign the agreement with one of the MVNOs prior to closing the transaction.

16 Ibid, at paragraphs 451-456.
17 Ibid, at paragraph 236.
18 Ibid, at paragraph 237.
19 Ibid, at paragraphs 184-189.
21 Ibid, at paragraphs 278 and 284.
22 Ibid, at paragraphs 392-394.
23 Ibid, at paragraph 362.
and to give access to up to 30% of the joint network capacity to 16 MVNOs. Hi3G also agreed to offer spectrum and additional rights to a new MNO entrant in the event that a new company bought spectrum in the spectrum auction planned for 2013.\(^\text{24}\)

### 2.3 The Irish case: Hutchison 3G UK/Telefónica Ireland\(^\text{25}\) (cleared on 28 May 2014, subject to conditions)

The acquisition of Telefónica Ireland’s mobile telephony business (“O2 Ireland”) by Hutchison 3G (“H3G”) was notified to the Commission by H3G on 6 November 2013; the SO was issued on 30 January 2014; the case was cleared, subject to commitments, on 28 May 2014.

The transaction involved the combination of the second and fourth largest MNOs in Ireland, giving H3G a market share of approximately 37% percent, just behind Vodafone’s 39% percent and well ahead of the smallest market player, Eircom, with approx. 20%. H3G, the smallest MNO, held a share of less than 10% in the overall mobile retail market. Unlike in Austria, there were several MVNOs active in the Irish market with a total market share of approximately 8%. The strongest MVNO, Tesco Mobile, was, however, a 50/50 joint venture between Tesco Ireland and O2. The Commission again requested that the parties produce internal correspondence and reports and analyses of the proposed transaction and of the competition on the Irish market.

The Commission relied heavily on the internal documents as evidence that H3G was a “maverick” and its impact on the market went “beyond what its market share indicate[d].”\(^\text{26}\) It also referred to internal documents on “market repair” as evidence that both the parties to the transaction and their rivals would increase prices post-transaction.\(^\text{27}\)

The Commission also used these documents in support of its claim that post-transaction Vodafone would refrain from competing aggressively and would also increase its prices.\(^\text{28}\) This conclusion was supported, in the Commission’s view, by the fact that the transaction would create a new entity similar in size to the largest market player. The Commission acknowledged that Eircom, the smallest competitor, would have an incentive to compete strongly with the merged entity and Vodafone. It asserted, however, that the merged entity would not have an incentive to continue the network sharing agreement with Eircom, which would make Eircom a less effective competitor.

The Commission also identified concerns on the wholesale market. According to the Commission, both parties were important providers of wholesale access to MVNOs and their combined share in that market was in the range of 80-90%.\(^\text{29}\) According to the Commission, the proposed transaction would effectively reduce the number of MNOs willing to host MVNOs from three to two (Eircom was not active in the wholesale market) and increase the possibility that MNOs would coordinate their behaviour and increase prices, to the detriment of both MVNOs and consumers. The Commission, however, stopped short of developing a full-fledged theory of harm based on coordinated effects, concluding that there were “elements” that suggested the merger would “make coordination more likely and sustainable”, but noting that there were also “indications” that coordination would be “difficult to sustain.”\(^\text{30}\)

Interestingly, if one only looks at the market structure and the parties’ market shares, one could say that the Commission allowed the creation of a de facto monopoly on the wholesale market. It would appear that at this stage of the evolution of the Commission’s assessment of mobile mergers, the wholesale market did not play an important role in the assessment of the case.

The trend of relying on econometric analyses also featured prominently in the Irish case. In addition to conducting the relatively simple UPP/ IPR analysis, the Commission also conducted a calibrated merger simulation analysis, accounting also for rivals’ reactions to the parties’ price increases. The Commission also attempted to use an alternative model based on an econometric estimation of demand, but that analysis did not yield plausible results and was eventually dropped. According to the Commission’s calculations, H3G was predicted to increase prices in the post-paid

\(^{24}\) If there was no buyer for the spectrum, there would be no further obligation for H3G to divest and the licence would remain with H3G.

\(^{25}\) Case COMP/M.6992 of 28 May 2014 – Hutchison 3G / Telefónica Ireland.

\(^{26}\) Ibid, at paragraph 450.

\(^{27}\) Ibid, at paragraphs 315-320 and ff.

\(^{28}\) Ibid, at paragraph 582.

\(^{29}\) Ibid, at paragraph 700.

\(^{30}\) Ibid, at paragraph 740.
segment by 14% and O2 by 9% (larger increases were expected in the pre-paid segment). The calibrated merger simulation indicated an average price increase of 11% in the post-paid segment. The Decision is accompanied by a 30-page annex setting out the details of the analyses conducted by the Commission and a separate annex of a similar size rebutting the econometric analyses submitted by the parties.

There were also several strong MVNOs present in the German market with an aggregate share of 10-20%. The case was notified on 31 October 2013; the Statement of Objections (“SO”) was published on 26 February 2014. The Commission cleared the case, subject to conditions, on 2 July 2014.

Again, the Parties were requested to produce their internal documents. The Commission notes that it relied on “internal documents that were either approved by or submitted to each of the Parties’ decision making bodies prior to the adoption of strategic decisions” and therefore considered them “to reflect the Parties’ strategy and views”. The decision (which is over 300 pages long) includes long passages poring over the statements made in various presentations, reports and email correspondence submitted to the Commission. The Commission relied on the Parties’ internal documents as evidence that (1) the parties were close competitors (in addition to the switching data and the analysis of the parties’ tariffs); (2) E-Plus (but also Telefónica) were important competitors, exerting more of an influence on the competitive process than their market share would suggest; (3) the incentive of the merged entity to compete would diminish due to its larger customer base; and (4) that non-MNOs are dependent on wholesale conditions granted by MNOs and would lack the ability to compete aggressively and thereby counter possible price increases effectuated by the MNOs.

Econometric analyses also played an important role in the assessment of the case. As in the Irish case, there were long passages over the econometric analyses submitted to the Commission.

The remedies offered by H3G to obtain clearance in the Irish case went further than the remedies offered in Austria. H3G committed to sign the agreement with one of the MVNOs prior to closing (“Upfront MVNO”) and to sell 30% of the joint network capacity to two MVNO operators at “fixed payments”. H3G also offered to divest five blocks of spectrum (2x25 MHz) to allow one of the remedy takers to become an MNO. H3G also offered to amend and strengthen Eircom’s existing network sharing agreement with O2 to ensure that Eircom would remain an effective competitor on the Irish market.

2.4 The German case: Telefónica Deutschland/E-Plus (cleared on 2 July 2014, subject to conditions)

The German case, reviewed by the Commission in parallel to the Irish case, involved the acquisition of E-Plus, the Dutch telecom operator KPN’s German business, by Telefónica Deutschland, respectively, the third and fourth largest MNOs in Germany.

The transaction resulted in a market structure with three MNOs of a similar size (a reduction from four), with the merged entity being the largest MNO with a market share of approximately 31%

“The Commission acknowledged that a UPP analysis would always predict some price increase.”

31 Ibid, at paragraph 593.
32 Case COMP/M.7018 of 2 July 2014 – Telefónica Deutschland/ E-Plus.
and Austrian cases, the Commission conducted a UPP analysis and a merger simulation. In the German case, it also conducted a merger simulation based on a complex demand-estimation model. The Decision includes a lengthy chapter with estimates of the predicted price increases and a 70-page annex setting out the details of the Commission's analyses.

To allay these concerns and have the transaction cleared, similarly to the Irish case, Telefonica offered to sell, prior to completion, up to 30% of the merged company’s network capacity to up to three MVNOs at “fixed payments”. Prior to the clearance, Telefonica agreed to sell 20% of the combined network capacity via Bitstream Access to Drillisch and granted Drillisch the right to buy up to 10% more capacity. The Commission approved this arrangement prior to granting clearance. Telefonica further offered to ease an MNO entry into the German market by giving an interested party the ability to acquire a package of 2x20 MHz spectrum, mobile sites, national roaming and passive site sharing. Telefonica also offered a so-called “wholesale remedy”, according to which Telefonica committed to extend existing wholesale agreements with Telefónica’s and E-Plus’ partners, to offer wholesale 4G services in the future, and to improve its customers’ ability to switch from one MNO host to another.

The Commission’s approval of Telefónica’s acquisition of E-plus has been challenged by the parties’ competitors: 1&1 Telecom, a German MVNO, and Airdata filed applications for annulment before the General Court in 2015. In addition, three German MVNOs challenged the implementation of the remedy package. The number of challenges that the German decision faces is quite unprecedented. Many view this as one of the factors that led the Commission to tighten its review of mobile mergers under Commissioner Vestager.

2.5 The Danish case: TeliaSonera/Telenor/JV (abandoned on 11 September 2015)

This case was notified on 27 February 2015 and withdrawn on 11 September 2015. The transaction would have created a joint venture between Telenor and TeliaSonera, respectively the number two and number three MNOs in Denmark.

No decision was published in this case, but in various statements Commissioner Vestager and other officials indicated that the Commission was concerned that the joint venture would have a high market share on the mobile retail market, hold the majority of the spectrum, and that the very strong competition between the Parties would be lost, resulting in price increases for both private and business customers. With respect to the wholesale market, the Commission was concerned that wholesale access price and contractual terms would worsen post-transaction, since there would be fewer MNO hosts offering wholesale access.

The Commission observed that one of the additional issues identified in the Danish case (and unlike in Austria, Ireland and Germany) was the coordinated effects. In Denmark, the Commission identified a risk that the merger could strengthen the mobile operators’ ability and incentives to coordinate their behaviour, at least in the retail market. This was partly due to the fact that the merger would lead to the creation of “a duopolistic market structure where the merged entity and the former national monopolist, TDC, would together have had around 80% of the market, followed by the small player Hi3G.”

To address the Commission’s concerns, the parties offered two remedy packages, the second of which included an offer to sell to a new entrant an ownership stake in the parties’ shared mobile

40 Case T-43/16 1&1 Telecom v Commission; Case T-885/16 Mass Response Service v Commission and Case T-884/16 Multiconect v Commission. Mass Response Service and Multiconect are challenging correspondence with the Commission in which the latter expressed the view that the non-MNO remedy is limited to pure service providers, excluding MVNOs, which prevented them from benefiting from the remedies. 1&1 Telecom is challenging how Telefónica has implemented the wholesale commitment to extend wholesale agreements that Telefónica and E-Plus had with existing wholesale customers. Telefónica is understood to have sent letters to extend such agreements, but to have added certain caveats. 1&1 Telecom is bringing an action against the Commission on the basis of a letter it received in which the Commission latter appears to have backed Telefónica’s approach.

41 Case COMP/M.7419 (abandoned) – TeliaSonera/Telenor/JV.
42 See e.g., Competition Merger Brief 3/2016 (Special Edition Telecoms), Commission press release of 8 April 2015, IP/15/4749, Mergers: Commission opens in-depth investigation into the proposed merger of Tijlisona and Telenor’s Danish telecommunications activities and Statement by Commissioner Vestager of 11 September 2015 on announcement by Telenor and TeliaSonera to withdraw from proposed merger.
43 Competition Merger Brief 3/2016 (Special Edition Telecoms), at p. 3.
network with a right to use a corresponding share of the network capacity. This was complemented by the divestment of one of the companies’ secondary brands and additional options, such as the take-over of some shops. The Commission did not consider these remedies sufficient and the parties abandoned the transaction. In a speech, Commissioner Vestager commented that “an effective remedy in the Danish case would have been the creation of a fourth mobile network operator (MNO). This would have replaced the competitive pressure eliminated by the merger.”

2.6 The UK case: Hutchison 3G/Telefónica UK (blocked on 11 May 2016)

The proposed transaction involved the acquisition of Telefónica UK’s “O2” by Hutchison 3G UK’s “Three”, combining the respectively second and fourth largest operators. The merger would have reduced the number of competitors on the market from four to three and the merged entity would have become the new market leader with a share of more than 40%. There were several strong MVNOs present on the UK market.

The scope of the Commission’s investigation into the effects of the UK merger dwarfed the inquiries into previous four-to-three mobile mergers. During the investigation the Commission sent over 500 requests for information (“RFIs”) to the Parties, third party MNOs, non-MNOs and customers. In response to the Commission’s requests, the Parties and third parties submitted extensive information on (i) their tariff sales and tariff characteristics; (ii) their revenue, cost and usage figures per segment (e.g. prepaid private); (iii) their estimates of the incremental costs; and (iv) their mobile number portability data. The Commission had already started reviewing internal documents from the parties in the pre-notification stage. In addition, in response to the requests for internal documents issued by the Commission in the course of the Phase I investigation, the parties submitted over 300,000 internal documents to the Commission.

Again, internal documents were central to the theories of harm developed by the Commission.

They were used in support of the argument that the merging parties were close competitors and that Three was a maverick in the UK market. The Commission also relied on the parties’ internal documents in support of its argument that non-MNOs were not an important competitive force on the UK market. Finally, it claimed that Three’s internal documents supported “the likelihood of the Parties’ decreased incentive to compete aggressively, and related price effects, following the Transaction and the reduction of the number of MNOs from four to three.”

In that regard, the Commission referred to the statements of Three’s CEO made four years before Three’s bid for O2, in which he stated roughly that in Hi3G’s experience four-player markets tend to be more competitive than three-player markets.

Internal documents were also key evidence used by the Commission to assess the overlap between the parties in the wholesale market. Three was present in the wholesale market, but had a very small share (less than 5%) and, according to the submissions of the notifying party, hosted only some minor wholesale customers and struggled to attract serious interest from existing large and new ambitious wholesale customers. The Commission relied on Three’s internal documents as evidence that Three actively bid for wholesale contracts, that it had a strategic interest in hosting non-MNOs, and that its importance as a competitor in the wholesale market was increasing. On this basis, the Commission concluded that the competitive conditions on the wholesale market would “materially deteriorate” post-transaction.
As in the other cases, the Commission extensively relied on the econometric analyses. The Chief Economist’s Team ran the same types of analyses as in the German case (from the simpler UPP analyses to the calibrated merger simulation) and on that basis concluded that the transaction would result in significant price effects. The Commission’s first model (based on diversion ratios at the network level) predicted price increases for Three and O2 of respectively 15.4% and 10.7% in the overall private segment. The resulting segment-wide predicted price effects were 14.9% in the pre-paid segment, 5.7% in the post-paid private segment and 7.3% in the overall private segment. The Commission’s second model (based on diversion ratios at the provider level) resulted in slightly lower price effects.

In line with common criticism, the parties argued that the UPP would predict price increases in every horizontal merger and were inappropriate to estimate price effects of the proposed merger, arguing that such tests could only be used as a first screen to identify cases that require closer investigation, rather than a self-standing theory of harm. The Parties further contrasted the Commission’s approach with the approach of the U.S. agencies, which place less evidentiary weight on such analyses. The Parties further submitted that the use of such analyses effectively reverses the burden of proof to the merging parties and leads to arbitrary discrimination against mergers in markets where UPP data is available. The Commission rejected these arguments, stating that its econometric analyses were a “rigorous and standard economic framework” and were not used in isolation from other qualitative evidence. The Commission acknowledged that a UPP analysis would always predict some price increase, but took the view that the magnitude of the price increases could be used as one of the relevant elements for the Commission’s overall assessment of the case.

An additional issue in the UK case, which did not exist in other cases, was the fact that the merged entity would be part of both existing network sharing arrangements in the UK. According to the Commission, that situation would hamper the future development of mobile infrastructure in the UK.

To alleviate the Commission’s concerns, Hutchison proposed to divest O2’s stake in the Tesco Mobile joint venture, to offer a wholesale agreement for a share of its network capacity to Tesco Mobile, and give access to a share of the merged entity’s network capacity to one or two mobile virtual operators. It also offered behavioural commitments to remedy the Commission’s concerns relating to the network sharing agreements between the UK MNOs. The Commission did not consider the remedies to be sufficient to alleviate its concern and prohibited the merger.

Hutchison has challenged the Commission prohibition decision before the General Court. In its application, Hutchison is challenging (i) the broad interpretation of what makes an operator an “important competitive force”; (ii) the economic assessment, in particular the predicted price effects; (iii) the conclusions with regard to the wholesale market and (iv) the rejection of the proposed remedies. Notably, Hutchison’s appeal gives the General Court an opportunity to weigh in on how the Commission uses its economic tools.

2.7 The Belgian case: Liberty Global/BASE Belgium (cleared on 4 February 2016, subject to conditions & obligations)

Unlike the other cases discussed in this note, Liberty Global/BASE did not involve a merger of two MNOs with their own the network infrastructure, but rather the acquisition of an MNO (BASE), the third-largest Belgian MNO by revenue and second-largest by number of subscribers, by Liberty Global, a provider of fixed telecommunications services. Liberty Global’s Belgian subsidiary Telenet offered services and was the largest MVNO operator on the market. This was the first case in which the Commission looked in-depth at a combination of an MNO with a virtual operator with no network assets.

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52 Ibid, at paragraph 1209.
53 Ibid, ANNEX A: THE COMMISSION’S QUANTITATIVE ANALYSIS, at paragraphs 242-244.
55 Case T-399/16 – CK Telecoms UK Investments v Commission.
56 Case COMP/M.7637 of 04 February 2016 – Liberty Global/BASE Belgium.
As in the other cases involving the combination of fixed and mobile operators, the Commission was concerned about the possibility of bundling the two offerings or the so-called “convergence” and the potential conglomerate effects. But it appears that the main concern (and indeed the remedies offered by the parties) addressed the overlap between the Parties in the mobile market. BASE, one of the three MNOs on the Belgian market, was, according to the Commission, the most aggressive operator, offering the lowest prices and the best “value for money”. Telenet, the target, was the largest independent MVNO on the Belgian market, with its own core infrastructure, but its customer base was almost exclusively in the footprint of its cable network (i.e., Belgium’s Flemish Region and Brussels). While in the other recent cases, there was an increasing trend for the Commission to dismiss the competitive constraint exercised by MVNOs, interestingly, in Liberty Global/BASE, the Commission found that Telenet significantly contributed to competition in the mobile market, in particular through the introduction of aggressive pricing plans. In addition, as an established cable operator, Telenet had access to a loyal customer base and distribution channels. As in the MNO merger cases discussed above, the Commission decided that Base and Telenet were close competitors, notably based on the parties’ internal documents and on the diversion ratios.

To obtain clearance, Liberty Global offered (i) to sell BASE’s share in Mobile Vikings, a mobile virtual network operator that uses BASE’s network, to Belgian broadcaster Medialaan; (ii) to transfer part of BASE’s customer base to Medialaan; and (iii) to give Medialaan access to BASE’s mobile network at conditions that would allow Medialaan to compete effectively as a full MVNO. Notably, in the remedies discussions, the Commission rejected the suggestion to make divestitures to two remedy takers, stressing that one stronger MVNO player would be better placed to discipline the other market players than smaller MVNOs.

2.8 The Italian case: Hutchison 3G Italy/Wind58 (cleared on 1 September 2016, subject to conditions)

The Italian case is so far the only four-to-three mobile merger cleared under Commissioner Vestager. The proposed joint venture combined VimpelCom’s subsidiary Wind and Hutchison’s subsidiary, H3G, which constitute respectively the third- and fourth-largest operators in the Italian telecommunications market. The merged entity would become the largest operator on the market. There were also several MVNOs present, with a total market share in the range of 5-10%.

As in the UK case, the Parties’ internal documents played a key role in the Commission’s analysis. The Commission asked the parties for internal documents for the past 4 years, possibly because the parties discussed the potential transaction for such a long period. The review of the decision suggests that the Commission identified in the course of this exercise numerous documents that were unhelpful for the parties. The Commission used the Parties’ internal documents (in addition to other third-party documentary sources) to argue that the driving rationale for the transaction was the achievement of “market repair” in the Italian mobile market, understood as a reduction in competition and an increase in mobile prices and profits for the operators. The decision includes dozens of pages discussing both internal and third-party documents suggesting that the transaction will result in “market repair”. The Commission argued that the Parties’ internal documents show that WIND and Hi3G not only quantified and accounted for “market repair” in their business plans/documents discussing transaction rationale, but also demanded a “contribution” from the other MNOs for the benefits they would derive from “market repair”. As in the other cases, the Commission also used the internal documents as evidence of the merging parties’ role on the market (the Commission argued that Hi3G was a “maverick”, forcing the other MNOs to lower prices – Hi3G sparked a price war in Italy – and to launch new products).

57 Similar concerns were raised in other cases, see e.g., Case M.7978, Vodafone/Ziggo, Case M.7421, Orange/Jazztel and Case M.6990, Vodafone/Kabel Deutschland.
58 Case COMP/M.7758 – Hutchison 3G Italy/Wind/JV.
59 Ibid, at paragraph 243.
The internal documents were also used to support the Commission’s theory on the coordinated effects that the proposed transaction would create in the market. The Commission found that the transaction created a very symmetric market structure where the merged entity, Vodafone and TIM, could use market shares as a “focal point” to slow down promotional efforts and increase prices. According to the Commission, the Parties’ internal documents indicated that there was already some cooperation between the Italian MNOs. The Commission also used the documents relating to the “market repair” as evidence that coordinated effects were likely to occur.

Hi3G (as well as Wind) complained that they would not be able to compete in the long term, but, again, based on the internal documents, the Commission dismissed these claims. The Commission also cited WIND’s investments in its network as another piece of evidence showing that WIND’s financial situation did not impair its ability to compete.

Internal documents were again important to the assessment of the overlap in the wholesale market. Hutchison was not present in the wholesale market. But, as in the UK case, the Commission relied, inter alia, on the Parties’ internal documents to argue that H3G had both the incentive and ability to offer wholesale access to its mobile network and that it participated in bids and negotiations for wholesale contracts.

As in the German and the UK case, the Chief Economists’ Team ran several econometric models to estimate the predicted price increases resulting from the transaction. As in the other cases, these models predicted sizeable price increases: 12.1-13.1% for H3G and 10-10.7% for Wind, and an average price increase of 6.1-7% in the private segment.

On the basis of this evidence, the Commission found that the joint venture would: (i) eliminate competition between the parties; (ii) reduce the number of MNOs willing to host MVNOs; (iii) increase the likelihood that MNOs would coordinate their competitive behaviour. To alleviate these concerns, H3G and Wind offered to introduce a fourth MNO on the Italian market. The French operator Iliad signed an agreement with H3G and Wind to acquire the remedy package. The package included: 2x35MHz of spectrum, several thousand macro sites and a national roaming agreement. Signing the agreement was a precondition for clearance by the Commission.

3. Conclusions

Despite the Commission’s pronouncements that there is “no magic number to dial”, it is very clear that the Commission is scrutinizing mobile mergers more closely, perhaps due to the availability of switching data, and is, accordingly, increasingly sceptical of market consolidation in the mobile telephony sector. Under Commissioner Vestager, the Commission has blocked two out of the three mobile mergers it has reviewed so far; the one case that was approved essentially involved the divestment of a large part of the acquired business. The policy change under Commissioner Vestager may have a chilling effect on operators contemplating mobile mergers, as the negative synergies of embarking on such a deal have clearly increased.

The increasing substantive and procedural hurdles that mobile players face to get their mergers over the finishing line may well be a combination of the changing political landscape, legal actions against previous Commission decisions, and the sharpening of the Commission’s investigative tools. The Commission decision in the German case is currently facing five separate challenges before the General Court, a development that must have led the Commission to be more cautious.

The Commission also boasts reaching “a high level of sophistication in the use of its investigative tools, including econometric analysis and internal document review” in mobile mergers, perhaps justifying its decision not to refer these cases to the national authorities. Indeed, in all recent mobile mergers, the Commission carried out extensive reviews of the merging parties’ internal documents and these internal documents played an important part in the Commission’s assessment of the transaction. Internal documents were used as evidence of the rationale for the deal, the competitive dynamics on the market, and the role of the merging parties in the market. In the Italian case, they were crucial.

60 Ibid, at paragraphs 999-1009.
61 Ibid, at paragraphs 937-938.
for the Commission’s theory of harm based on coordinated effects. The review of the recent cases further suggests that the Commission attaches higher evidentiary weight to the statements made in internal documents than to the parties’ submissions. Indeed, internal documents are often used to undermine the arguments made by the parties.

In all recent cases (including those assessed under Commissioner Almunia), the Chief Economists’ Team has been heavily involved in the assessment of the case, notably, since mobile mergers are among the so-called “gap cases”\(^6\) and therefore the Commission deploys alternative “filtering methods” rather than simply focusing on the market structure. In mobile mergers, the “filtering method” typically used by the Commission is the “upward pricing pressure” (“UPP”) test, which can only be used in industries where reliable switching data is available. In each case, the notifying parties and other market players were requested to produce a significant amount of economic data, based on which the Commission first calculated the UPP and then produced a calibrated merger simulation to estimate the predicted price increases. In addition, in all recent cases, customer surveys were produced to allow the Commission to conduct more sophisticated analyses. Despite criticism relating to the limitations of these econometric models, which focus the analysis on the short-term price effects, and their ability to predict real outcomes, it appears that the Commission’s econometric “toolbox” is here to stay.

The uncritical reliance by the Commission on such econometric analyses as evidence of anti-competitive effects is in stark contrast to the standard of proof required by the Commission to accept the efficiency claims submitted by the parties. Whereas theoretical models based on various assumptions are used as evidence of anti-competitive effects of the transaction, real evidence of efficiencies that would have positive effects on the market in the medium to long term has been dismissed by the Commission. Notably, some obvious efficiencies, like those relating to running one network (rather than two), were dismissed on the grounds that a less restrictive alternative\(^6\) (i.e., a network sharing agreement) was in theory available.\(^6\) In the UK case, where the parties already had a network sharing agreement and claimed efficiencies relating to the integration of the radio area network and a more efficient use of spectrum, the Commission dismissed the efficiency claims on the ground that the parties could have entered into a spectrum sharing agreement.\(^6\) That begs the question of whether the standard of proof placed on the parties is not disproportionately high, in particular in comparison to the burden of proof required to show the anticompetitive effects of the transaction.

The numerous challenges against the Commission’s clearance of Telefonica’s acquisition of E-plus, and Hutchison’s challenge of the Commission’s prohibition decision of its proposed acquisition of O2, offer the General Court an opportunity to review the Commission’s mobile merger playbook, particularly its use of econometric analyses and internal documents submitted by the parties in support of its theories of harm. The General Court has recently annulled two merger decisions, in one case, notably, due to the Commission’s handling of the econometric evidence.\(^6\) Perhaps the General Court will catch the Commission moving and, thereby, create a more level playing field as far as the merger control process is concerned.

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\(^6\) In other words, they typically do not lead to the creation of a dominant market player, but rather lead to the weakening of competition in an oligopolistic market.