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A Competitive Assessment of Concentrations in the Mobile Telecommunications Sector under the EC Merger Regulation*

1. Introduction

The availability of large amounts of investment capital and the business strategies of mobile operators[1] aiming at enlarging their European footprint have resulted in the recent years in a number of concentrations involving companies active in the mobile telecommunications sector in the European Union (*EU*). Examples include mergers between mobile operators within one and the same Member State, the acquisition of a mobile operator active in one Member State by a fixed operator having various subsidiary mobile operators in several other Member States or the acquisition of a mobile operator active in one Member State by an investment fund active globally.

This paper identifies markets in the mobile telecommunications sector that may be considered as relevant and identifies potential competition concerns that may arise in case of such concentrations under the EC merger control rules. In its analysis, it builds on the decisional practice of the European Commission (*the Commission*) under the EC Merger Regulation.[2]

2. Relevant markets

Because of the specificities of the mobile telecommunications value chain, concentrations in the sector usually concern several relevant product and geographic markets within the meaning of Section 6, parts I and II of the Form CO,[3] i.e. the scope within which the market power of the new entity resulting from the concentration must be assessed.[4] These markets may be both horizontally and/or vertically affected within the meaning of Section 6, part III of the Form CO,[5] depending on the activities of the parties to the concentration.

At the retail level of the mobile telecommunications value chain, the relevant market is likely to be defined as "the market for the provision of mobile telecommunications services to end-consumers" (the *retail mobile telecommunications market*). There may or may not be a separate "retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers". At the wholesale level, relevant markets are likely to include at least "the market for access and call origination on public mobile telephone networks" (the *wholesale mobile access and call origination market*), "the market for voice call termination on individual mobile networks" (the *wholesale mobile call termination market*) and "the market for international roaming on public mobile networks" (the *wholesale international roaming market*).

Depending on the particular features of a concentration in the mobile telecommunications sector, other markets may equally be relevant or affected. However, based on their importance in the sector, this paper will focus on market definition and competitive assessment exclusively in relation to the markets mentioned above.

2.1. The retail mobile telecommunications market

Consumers purchase a bundle of services from a mobile operator, which usually includes access (the possibility to receive calls), national, international and roaming call and SMS. At the retail level, mobile operators compete with each other with these bundles and it is either not possible or not practicable to purchase individual elements of the bundle separately from different mobile operators. Therefore, the relevant retail market includes the whole bundle of retail mobile telecommunications services.

2.1.1. Further segmentation by type of customer

It may be possible to define narrower markets according to the type of customer, i.e. whether mobile telecommunications services are provided to business/corporate customers or to private/residential customers. It may indeed be argued that the mobile telecommunications needs of a company are different from the needs of a private individual, especially in terms of roaming services. Furthermore, from the supply-side, if there are mobile operators whose customers are mainly private individuals, they may find it difficult to exercise a competitive constraint on mobile operators focusing on business customers.

On the other hand, it may be an important sign of the existence of a single market if

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mobile operators themselves do not make a clear distinction in their offers between corporate and private customers. Furthermore, the absence of barriers restricting the switching of corporate customers to residential customer tariffs also points into the direction of a single uniform market. This may, for example, be evidenced by a large number of corporate customers being actually on private customer tariffs.
In its merger decisions, the Commission has so far either defined a single market without further segmentation by type of customer[6] or it has left the exact market definition open because the competitive assessment would have remained unchanged whatever the exact market definition.[7]

2.1.2. Further segmentation by type of payment

It may also be possible to define narrower markets according to the type of payment, i.e. whether mobile telecommunications services are provided on a post-paid or a pre-paid basis. The general characteristics of a post-paid offer (e.g. lower per minute rates, attractive bundle with mobile handset offered, no roaming restrictions) may make it so fundamentally different from the customers' perspective that they would not be willing to take on a pre-paid offer in case of a small but non significant increase in the price of the post-paid service.
On the other hand, there may be clear arguments in favor of no distinction as a result of strong supply-side substitutability: it may be relatively easy for a mobile operator only offering post-paid services to introduce prepaid tariffs and vice versa.
The Commission has not yet defined separate retail mobile telecommunications markets according to the type of payment in its merger control practice.

2.1.3. Further segmentation by type of network technology

Finally, it must be examined whether the retail mobile telecommunications market may be segmented according to the network technology used, that is second generation (GSM 900 or DC1800) or third generation (UMTS) standard.
One of the arguments in favor of not segmenting the market according to technologies is that the majority of mobile telecommunications services, such as voice telephony and small-bandwidth data service (e.g. short message services, multimedia messaging services, basic Internet access) are being offered using both technologies.[8] This argument is further strengthened if these services continue to make up the most important part of mobile telecommunications services offered to the end customer and if third generation mobile operators provide these services for the same price as second generation mobile operators.
Although other services that require faster transmission speed and larger bandwidth (such as video telephony, mobile TV, mobile broadband Internet and other multimedia services) can only be offered on third generation networks, these are only likely to constitute a distinct relevant market if they can be purchased separately from other services and do not form a part of a bundle of second and third generation services.
In its merger decisions, the Commission has so far either defined a single market without further segmentation by type of technology used[9] or it has left the exact market definition open because the competitive assessment would have remained unchanged whatever the exact market definition.[10]

2.1.4. Geographic scope of the market

The geographic scope of the retail mobile telecommunications market is likely to be defined as national. This is because retail mobile telecommunications services are provided by mobile operators holding a license that is limited to the territory of a given country and each country has its own licensing and frequency allocation regime. National markets were defined in the Commission's relevant decisions under the EC Merger Regulation.[11]

2.2. The retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers

Concentrations in the mobile telecommunications sector may concern a retail market that may be different from the market for the provision of mobile telecommunications services to end-consumers based on differences in the characteristics of the service, the customers and the geographic scope of the market. Therefore, there may be a separate market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers.
As opposed to mobile telecommunications services provided to end-consumers on a national basis, advanced seamless mobile telecommunications services allow international mobile customers (mainly multinational corporations) to roam from a country to another with no difference in the service and interoperability in particular for data transfer (such as short code dialling to access voicemail). It also enables customers to request, through a single point of contact, a single service covering several countries allowing them to rationalize more effectively their mobile phone expenses thanks to the combination of billing systems.
Due to the national scope of licensing and frequency allocation regimes, mobile operators need to team up in ad hoc or more permanent international alliances to respond to this demand or have subsidiaries in all countries the coverage of which is requested by the customer. However, it is far from obvious whether "patchwork services" (i.e. a group of services which are negotiated individually on a national level between an international mobile customer or its subsidiaries and the individual mobile operators in a given country) are adequate substitutes to a real international (e.g. pan-European) service offering a single point of contact, one bill for a large territory, standardized international roaming costs and the at least partially existing seamlessness.[12] The conclusion on the definition of the relevant market will depend on i) whether there is manifest demand for a real seamless service covering several countries, ii) whether mobile operators – through subsidiaries or alliances – are able to provide such seamless service, iii) whether the terms of the seamless service are negotiated at a national or cross-country level and iv) whether the contractual relationship for the provision of the seamless service is between the international customer and a single alliance or mobile operator or between the international customer and several mobile operators.
Should it found to exist, the geographic scope of a retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers would be as wide as the geographic scope of demand of international mobile customers,[13] but is likely to be at least European-wide.[14]

2.3. The wholesale mobile call termination market

The wholesale mobile call termination market consists of the service offered by mobile operator B to mobile operator A to terminate traffic originating on A's network. Call termination services therefore allow users of different networks to communicate with each other. Each operator has to buy call termination at wholesale level in order to be able to terminate calls on other networks.

It is a wholesale service that the different operators of telecommunications networks provide to each other through interconnection agreements. The wholesale market for call termination services on a public mobile telephone network is vertically linked to the retail mobile telecommunications market and to the retail markets for the provision of fixed telecommunications services: call termination is used as an input for the provision of downstream retail telecommunications services.
There can hardly be a substitute for call termination in each individual network since the operator can only reach the relevant end-customers by terminating the call on that specific network. Each individual mobile network is therefore likely to constitute a separate relevant wholesale mobile call termination market.
The wholesale mobile call termination market is likely to be considered as national in scope because of the aforementioned regulatory barriers according to which authorizations to operate a network are only granted for territories which are not wider than national. If the actual coverage of a mobile network is not yet national (e.g. in case of a new entrant in the course of constructing its network), the geographic scope of the wholesale offer is likely to be limited to the actual coverage of the mobile network.
These arguments were used to define operator-specific wholesale markets for mobile call termination services in various Commission decisions.[15]

2.4. The wholesale mobile access and call origination market

The wholesale mobile access and call origination market consists of access and call origination services that are essential to provide retail mobile telecommunications services to end-consumers. Access and call origination are typically supplied together by a mobile operator owning its own network (i.e. a mobile network operator, *MNO*) to mobile virtual network operators (*MVNOs*) and service providers who seek access to the network of one or more MNOs in order to provide retail mobile telecommunications services to their end-consumers. Although the distinction between MVNOs and service providers is not always clear cut, it is usually understood that service providers either distribute SIM cards on behalf of the relevant MNO or issue their own SIM cards and brand services under their own name, while MVNOs issue their own SIM cards and, in addition, own part of their network (e.g. switching or backbone) and therefore depend to a lesser extent on the network of the host operator. There may be countries where in the absence of MVNOs and service providers, MNOs do not provide access and call origination services at the wholesale level to independent third parties and all provision is captive, i.e. supplied internally to the MNO's own downstream operations.
The geographic scope of the wholesale mobile access and call origination market is likely to be national on the same grounds as the retail mobile telecommunications market: the geographic scope of the licences granted to MNOs is in principle limited to the territory of a given country.
The existence of this market was explicitly recognized in several Commission decisions.[16]

2.5. The wholesale international roaming market

Wholesale international roaming services enable mobile operators to offer to their customers the possibility to make and receive calls with their mobile phones while abroad. To this aim, mobile operators provide access and capacity to their network ("the visited network") to foreign mobile operators ("the home network"). The provision of wholesale international roaming to foreign mobile operators satisfies primarily the demand by foreign mobile operators whose main objective is to enable them to offer to their own customers a mobile telecommunications service which is not limited to the territory in which they have their own physical network. This demand derives from the demand of the customers of these foreign mobile operators to be able to use their mobile phones abroad. The wholesale international roaming market is vertically linked to the retail mobile telecommunications market: the former is used as an input for the latter.
The question whether the wholesale international roaming market comprises international roaming services provided by all mobile operators in a given country or – similarly to the wholesale mobile call termination market – network specific relevant markets should be defined will be answered taking into account a number of factors.
First, the existence of effective traffic direction mechanisms allowing the home mobile operator to direct a substantial part of its international roaming traffic onto a specific foreign network will point in the direction of a single market in which the foreign mobile operators compete for international roaming traffic. The ability of traffic direction may be enhanced by the capability of mobile operators to store and (over the air) amend preference lists on their customers' SIM card that results in the selection of the preferred mobile operator's network while roaming abroad. In the absence of effective traffic direction mechanisms international roaming is likely to take place on any of the available mobile networks in the country in which the end customer is located and each network is likely to constitute a separate relevant market.
Second, even if effective traffic direction mechanisms exist, it is important to see whether they are actually being used as an instrument to entice competition. For example, the fact that specific discounts are agreed upon only with selected "preferred" operators may indicate competition between mobile operators for international roaming services. This remains true even if home mobile operators enter into standard roaming agreements with all or almost all mobile operators in a given country. Having several roaming agreements in a single country does not necessarily indicate that the roaming services of mobile operators in that country are complementary, which could warrant a network-specific market definition, but that it may be a strategy allowing for multi-sourcing (especially if there is a failure or gap in the preferred mobile operator's network) and facilitating switching between different roaming partners.
The geographic scope of the wholesale international roaming market is likely to be national on the same grounds as the wholesale mobile access and call origination market and the retail mobile telecommunications market.
Based on the above, a single wholesale international roaming market was defined comprising all mobile operators providing international roaming services in a given country by the Commission in a number of recent merger decisions.[17]

3. Competitive assessment

Under Article 2(3) of the EC Merger Regulation a concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.
Based on the fact that international telecommunications establish a vertical link between mobile operators in different countries, there are various ways in which competition in the relevant markets set out above may be affected by a concentration. Both horizontal and vertical concentrations may produce co-

ordinated and non-coordinated effects on one or more markets. A selection of the possible anti-competitive effects of concentrations in the mobile telecommunications sector will be set out below per market.

As a preliminary point, it is important to emphasize that in a sector otherwise generally characterized by falling prices, anti-competitive effects should be meant to include not only market outcomes resulting in increased prices but also a situation in which prices would fall (further) in the absence of anti-competitive effects.

3.1. The retail mobile telecommunications market

3.1.1. Potential anti-competitive effects resulting from horizontal concentrations

The most obvious competition concerns may result from a horizontal concentration between two mobile operators active on the retail mobile telecommunications market within the same Member State.[18] Such concentrations may significantly impede effective competition by 1) eliminating important competitive constraints on one or more mobile operators, which consequently would have increased market power (non-coordinated effects) or 2) by changing the nature of competition in such a way that mobile operators that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition (coordinated effects).[19]

3.1.1.1. Non-coordinated effects

One example of non-coordinated effects is when, as a result of a concentration between two mobile operators, a dominant position of a single mobile operator is created or strengthened. Non-coordinated effects may also arise when the concentration not only eliminates important competitive constraints between the merging mobile operators, but also reduces competitive pressure on the remaining mobile operators. The mobile telecommunications sector exhibits a number of features which may influence whether significant non-coordinated effects are likely to result from the concentration.

The combined market share of the merged mobile operator, the increase in the market share resulting from the concentration, the difference compared with the market share of the remaining competitors and the number of remaining operators will provide important information. The larger the combined market share of the merged mobile operator, the more likely it is to possess market power. The larger the addition of market share, the more likely it is that the concentration will lead to a significant increase in market power. The higher the market share of the remaining competitors and the more mobile operators are active on the market (either as MNOs or MVNOs[20]) the less likely it is that the merged mobile operator will possess market power.

Changes in the market shares of the individual mobile operators prior to the concentration may inform about the competitive role of each individual mobile operator prior to the concentration. For example, the fact that the target mobile operator is the only mobile operator that managed to increase its market share in the years prior to the concentration may be a strong indication that it had more influence on the competitive process than other mobile operators, even if a static look at its market share would suggest otherwise. This may be the case, for example, when an established mobile operator with stagnating market shares acquires a dynamically growing new entrant.[21]

Switching possibilities are crucial to shape the competitive process in the retail mobile telecommunications market. An effective number portability regulation (guaranteeing timely and cheap transfer of numbers from one mobile operator to another), contracts with no or limited (e.g. 6 months) minimum duration and the absence of locked SIM cards may all facilitate switching and thereby limit the possible anti-competitive effects of concentrations. In this context, a high annual churn rate (e.g. above 30%) is usually an indication of low switching costs. An analysis of past switching behaviour may also reveal whether one of the mobile operators that is party to the concentration could have inserted more substantial competitive constraints on one or more of the other mobile operators, as evidenced by the fact that a large proportion of consumers that switched away from the latter switched to the former.

It is less likely that a concentration between mobile operators will significantly impede effective competition when the structure of the offers of competing mobile operators is similar. This is because the merged mobile operator's incentive to raise prices is more likely to be constrained when its competitors offer close substitutes to the services offered by the merged mobile operator. For example, the acquisition of a mobile operator specializing in post-paid packages by a mobile operator offering mainly pre-paid packages will not "take out" the latter's direct competitor and therefore is less likely to lead to competition concerns, provided the target mobile operator did not previously exercise substantial competitive pressure on the remaining mobile operators (for example, because one or more of the remaining mobile operators was also specializing in post-paid packages and substitution analysis reveals that the latter's customers were mainly switching to the target mobile operator).

The existence of spare capacity[22] in the networks of competitors of the merged mobile operator is likely to indicate that there may be incentives for these competitors to attract new customers by offering lower prices in order to use up significant spare capacity. However, this incentive is likely to be smaller or possibly even non-existent in case of mobile operators with a large customer base. This is because attracting new customers through an aggressive pricing policy will reduce or possibly eliminate the profitability of the existing customer base, unless the mobile operator can discriminate among its customers. Therefore, spare capacity of smaller operators, including new entrants, is usually more relevant. In this latter context, the obligation in mobile licences of new entrants to reach a specific network coverage within a specific timeframe could be an indication of spare capacity becoming available in the future.

3.1.1.2. Coordinated effects

Horizontal concentrations in the retail mobile telecommunications market may also lead to a weakening of the competitive process as a result of coordinated effects. This may be the case if the market structure is such that mobile operators would consider it possible, economically rational, and hence preferable, to adopt on a sustainable basis a course of action on the market aimed at selling at increased prices.[23] This is only possible if mobile operators can establish an element of their business behaviour on which a common understanding could be reached ("a focal point"), if any deviation from the common course of action can be detected by the other mobile operators and if the other mobile operators can retaliate in the case of such deviation in a way that would make the deviation unprofitable (for example, by engaging in a price war with the deviating mobile operator).

A particular feature of the retail mobile telecommunications market that may lead to coordinated effects may be a high market concentration resulting from a limited number of mobile licences, as this may lead to mobile operators realizing the possibility and preference of coordinating their business behaviour. On the other hand, the preference by a few MNOs to coordinate their business behaviour may be limited by the presence of MVNOs preferring to compete instead of coordinating, or even the presence of a sole MVNO capable of acting as a fringe competitor disrupting any coordinated equilibrium.

Mobile operators are only likely to prefer coordinating their behaviour if there is no spare capacity in the network of one or more of them. This is because a mobile operator with spare capacity will unlikely have the incentive to coordinate its behaviour with the rest of the operators instead of exploiting its spare capacity by attracting new customers (unless, as stated above, it would risk significantly cannibalising its own customer base). The incentive to coordinate will also be lower in a dynamically growing retail mobile telecommunications market, where capturing a larger part of the new demand can yield substantial benefits.

The focal point of coordination in the retail mobile telecommunications market may in theory be the price charged by mobile operators to retail customers. However, this "price" is unlikely to present the characteristics of transparency – which would be necessary to reach common understanding on the terms of coordination – if mobile operators use several different pricing tariffs varying on the basis of a great variety of elements[24] or apply secret discounts to a large group of customers (such as businesses). In fact, it is usually more difficult to coordinate when products are heterogeneous and when demand and supply conditions are continuously changing. The high level of technological change in retail mobile telecommunications markets also usually increases market uncertainty and creates stronger incentives to compete than to coordinate.

Retaliation may be easier in the mobile telecommunications sector as compared to some other sectors of the economy. This is because 1) retaliatory mechanisms can be put in place relatively easily (e.g. lowering prices for certain services with immediate effect) and 2) mobile operators have commercial contacts with each other in various separate markets[25], which increases the number of areas where retaliation can theoretically take place.

3.1.2. Potential anti-competitive effects resulting from vertical concentrations

Cross-border consolidation in the mobile telecommunications sector leads to vertical concentrations resulting from the interlinkages between markets in different Member States. When a mobile operator active in Member State A acquires or mergers with a mobile operator in Member State B, competition in the retail mobile telecommunications market in Member State B may be affected through the vertical links with the wholesale mobile call termination market and the wholesale international roaming market in Member State A. Furthermore, the same concentration may affect competition in the retail mobile telecommunications market in Member State A through the vertical links with the wholesale mobile call termination market and the wholesale international roaming market in Member State B.[26]

3.1.2.1. Potential anti-competitive effects resulting from the vertical links between the retail mobile telecommunications market in Member State A and the wholesale mobile call termination market[27] in Member State B[28]

Following a cross-border concentration between a mobile operator in Member State A and a mobile operator in Member State B, the merged entity may have the incentive to raise the price of termination of calls in Member State B originating from the competitors of the mobile operator in Member State A. Such a strategy of "raising rivals' cost" could in theory affect competition on the retail mobile telecommunications market in Member State A. However, for such concentration to have significant anti-competitive effects, a number of conditions must be fulfilled.

First, the merged entity must be able to discriminate[29] on the wholesale mobile call termination market in Member State B against its competitors on the retail mobile telecommunications market in Member State A. Discrimination will not be possible if 1) sector-specific regulation prohibits discrimination in Member State B[30] and 2) the merged entity cannot identify the exact origin of the calls terminated on its network in Member State B.[31]

Second, even if such discrimination was legally and technically possible, it would have to influence significantly the cost structure of the merged entity's competitors in Member State A. This will depend on the value of call termination on the merged entity's network in Member State B compared to the overall value of terminating calls made by the customers of the competitors of the merged entity in Member State A[32]. A significant influence is unlikely, unless 1) there are extraordinarily close links between two Member States (resulting in a very large number of calls originated in Member State A being terminated in Member State B, compared to the number of calls terminated in other networks in Member State A or in Member States other than B) and/or 2) the merged entity being active in a very large number of Member States (resulting in a large number of calls originated in Member State A being terminated in various Member States where the merged entity is active in the wholesale mobile call termination market). Even if one or both of these conditions is met, a very large number of calls would have to be terminated in the network of the merged entity (and not in one of its competitors' network) in Member State B – or in the Member States it is active in – for the concentration to produce significant anti-competitive effects. This is only likely if the merged entity has a very large market share on the retail mobile telecommunications market in these Member States.[33]

3.1.2.2. Potential anti-competitive effects resulting from the vertical links between the retail mobile telecommunications market in Member State A and the wholesale international roaming market in Member State B[34]

Following a cross-border concentration between a mobile operator in Member State A and a mobile operator in Member State B, the merged entity may have the incentive to raise the price of wholesale international roaming in Member State B for competitors of the mobile operator in Member State A. As in the case of wholesale mobile call termination, such a strategy of "raising rivals' cost" could in theory affect competition on the retail mobile telecommunications market in Member State A. Again, for such strategy to have significant anti-competitive effects, a number of conditions must be fulfilled.

First, the merged entity must be able to discriminate against its competitors in Member State A. Contrary to wholesale mobile call termination, the exact origin of the roaming traffic can normally be identified in case of wholesale international roaming and therefore there are unlikely to be technical obstacles to discrimination. Furthermore, although wholesale international roaming services are subject to price regulation[35], this regulation – in itself[36] – does not prohibit price discrimination in favour of the merged entity's own downstream mobile operator.

Second, even if technically and legally possible, foreclosure through the wholesale international roaming market may only be successful if the switching possibilities of the competitors of the merged entity are limited. In this context, it should be pointed out that unlike in the wholesale mobile call termination market – where the merged entity has a monopoly for terminating calls to its own network – the merged entity is likely to compete with other mobile operators in the wholesale international roaming market. A decisive factor will therefore be the ability of buyers of wholesale international roaming services (in our example, the competitors of the merged entity in Member State A) to steer their roaming traffic between networks (in our example, between networks in Member State B)[37]. In this context, the level of coverage in terms of extension and quality of the competing networks in the wholesale international roaming market will be relevant.[38] Similarly, the absence of exclusive international roaming agreements and spare capacity in the networks of the merged entity's competitors in the wholesale international market make a successful foreclosure strategy less likely.

Third, even if the switching possibilities were limited, raising rivals' costs could only have a significant impact on competition in the downstream retail mobile telecommunications market if it could influence significantly the cost structure of the merged entity's competitors in that market. Similarly to the situation for wholesale mobile call termination, this will depend on the value of wholesale international roaming on the merged entity's network in Member State B compared to the overall value of international roaming services purchased by the merged entity's competitors in Member State B and other Member States[39]. A significant impact on competition in the retail mobile telecommunications market is unlikely, unless 1) there are extraordinarily close links between two Member States (resulting in a very large amount of roaming traffic being originated by customers of mobile operators in Member State A in the networks of mobile operators in Member State B)[40] and/or 2) the merged entity is active in a very large number of Member States (resulting in a large amount of roaming traffic being originated by customers of mobile operators in Member State A in the networks of the merged entity in various Member States).

3.2. The retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers

3.2.1. Potential anti-competitive effects resulting from horizontal concentrations

Provided that such a market is defined as a relevant market, there may be two different kinds of horizontal concentrations between mobile operators in such a market. In the first case, the concentration expands the geographic scope in which the merged entity will be able to provide advanced seamless mobile telecommunications services to international mobile customers on its own, i.e. without having to enter into bilateral or multilateral agreements with other mobile operators. An example for such a concentration is when a mobile operator active in Member States A, B and C acquires a mobile operator in Member State D, and thereby the new entity will be capable of offering such services covering Member States A, B, C and D on its own. In the second case, the concentration does not change the geographic area in which the merged entity can provide services. Examples for such a concentration are when the above mentioned mobile operator acquires another mobile operator in Member State A, B or C, or when two mobile operators merge within the same Member State.

It will be important to examine whether the parties to the concentration have been active on this market prior to the concentration. Unless all parties have been active, the concentration is unlikely to influence competition. This may be the case with mobile operators who – prior to the concentration – have specialised more on residential customers and small businesses and have not entered the retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers.

In any event, concentrations between mobile operators (whether across Member States or within the same Member State) may only risk significantly impeding effective competition in the retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers if 1) mobile operators other than the parties to the concentration are prevented from entering into bilateral and/or multilateral agreements to submit joint bids for such services covering the same countries and 2) bilateral and/or multilateral agreements (including alliances) restrict the parties to the concentration from entering into similar agreements with other mobile operators for the purposes of submitting bids for such services covering the same countries.

It follows that anti-competitive effects are only likely if a narrow market is defined (consisting of the provision of advanced seamless mobile telecommunications services to international mobile customers covering a particular set of countries – such as Member States A, B and C –, being a separate market from the same services covering even a slightly different set of countries – such as Member States A, B and D) and if alternative service offerings within this narrowly defined market are substantially restricted (for example, because all mobile operators in at least one of the Member States A, B and C are subsidiaries of one and the same company[41], because all mobile operators in at least one of the Member States A, B and C belong to the same mobile alliance[42] and alliance members are prohibited from competing against each other or because all mobile operators in at least one of the Member States A, B and C enter into mutually exclusive agreements to submit joint bids for advanced seamless mobile telecommunications services provided to international mobile customers covering Member States A, B and C.[43]

3.2.2. Potential anti-competitive effects resulting from vertical concentrations

The vertical links between the retail market for advanced seamless mobile telecommunications services covering several countries provided to international mobile customers and the wholesale mobile call termination and wholesale international roaming markets are the same as those between the retail mobile telecommunications market and these wholesale markets. Therefore, the same analysis applies to potential anti-competitive effects as set out above in point III.1.2.

3.3. The wholesale mobile call termination market

3.3.1. Potential anti-competitive effects resulting from horizontal concentrations

As each individual mobile network is likely to constitute a separate relevant wholesale mobile call termination market, each mobile operator will have a monopoly over wholesale mobile call termination services offered on its network. It follows that a horizontal concentration between mobile operators is not possible on this market and that a horizontal concentration between mobile operators on the vertically linked retail mobile telecommunications market will have no competitive impact on the wholesale mobile call termination market (it cannot result in market share addition or any increase in market power in an already monopolised market).

3.3.2. Potential anti-competitive effects resulting from vertical concentrations

Cross-border mergers between mobile operators will equally not have any competitive impact on the wholesale mobile call termination market. This is because, the vertical integration between the wholesale mobile call termination activities of a mobile operator in Member State A and the retail mobile telecommunications activities of a mobile operator in Member State B will not influence (non existent) competition on the wholesale mobile call termination market in Member State A.[44]

3.4. The wholesale mobile access and call origination market

3.4.1. Potential anti-competitive effects resulting from horizontal concentrations

As a result of the vertical links between the retail mobile telecommunications market and the wholesale mobile access and call origination market within the same Member State, a concentration in the latter will always constitute a concentration in the former.[45] It also follows, that the competition issues in case of horizontal concentrations will be similar for both markets. However, the wholesale mobile access and call origination market also has some particular features as set out in the following.

First, barriers to entry are higher than in the retail mobile telecommunications market, as there is no upstream market where regulatory obligations could facilitate downstream market entry. The maximum number of frequencies will act as absolute regulatory barriers to entry and even mobile operators with licences are likely to face high barriers to entry resulting from the substantial costs that constructing a mobile network entails. It follows that the wholesale mobile access and call origination market is likely to be more concentrated than the retail mobile telecommunications market.[46]

Second, the presence or absence of customers in this market may inform about the level of competition both prior to and following the concentration. For example, the mere fact that there are MVNOs and/or service providers with whom the MNOs have voluntarily signed access agreements could be an indication that no MNO (individually or jointly) has significant market power in this market. Information on spare capacity will also be useful to judge whether MNOs are likely to (continue to) have the incentive to grant access to MVNOs and service providers. Importantly, switching costs for customers of wholesale mobile access and call origination may be higher than for customers of retail mobile telecommunications services, as an MVNO or a service provider may need to reconfigure part of its network or services if it changes wholesale provider.

Third, coordinated effects are more likely to appear in this market than in the retail mobile telecommunications market. This is because there is a potential focal point of coordination that is relatively easy to identify and to monitor deviation from: not granting access to the network of MNOs to MVNOs and service providers. Horizontal concentrations in the wholesale mobile access and call origination market in Member States where no MVNOs and service providers are active prior to the concentration may make mobile operators realise that it is possible and preferable to keep it like this and hence further strengthen a potentially existing joint dominant position.

Fourth, regulatory obligations may play a greater role in shaping the competitive process than in the retail mobile telecommunications market. In fact, the wholesale mobile access and call origination market was listed as one of the markets susceptible to ex ante regulation in the First Recommendation on relevant markets in the electronic communications sector.[47] Therefore, potential anti-competitive effects of a horizontal concentration in this market may be neutralized by ex ante regulation in place, rendering an otherwise anti-competitive concentration compatible with the common market.

3.4.2. Potential anti-competitive effects resulting from vertical concentrations

Cross-border concentrations are unlikely to affect the wholesale mobile access and call origination market, as cross-border vertical links are established between the retail mobile telecommunications market in one Member State and wholesale mobile call termination and wholesale international roaming markets in another Member State. Vertical concentrations within one and the same Member State (e.g. a MNO buying a MVNO or service provider) may be considered as horizontal concentrations in the retail mobile telecommunications market, due to the vertically integrated nature of MNOs. Therefore, the analyses above apply to these situations, respectively.

3.5. The wholesale international roaming market

3.5.1. Potential anti-competitive effects resulting from horizontal concentrations

As MNOs tend to be vertically integrated, a horizontal concentration on the retail mobile telecommunications market will also usually entail a concentration on the upstream wholesale international roaming market within the same Member State and vice versa. Although a horizontal concentration will lead to an increase in market shares, the importance of increased market shares will be lower than in the retail mobile telecommunications market.

The key factor of competition in the wholesale international roaming market in Member State A will be the possibility for customers of wholesale international roaming services (i.e. mobile operators in Member States B, C, D, etc) to switch between mobile operators in Member State A. Even a merged entity with relatively high market shares on the wholesale international roaming market in Member State A will not be able to exercise market power through refusing access to its network or raising prices[48] if mobile operators from Member States B, C, D, etc. can direct a significant part[49] of their traffic to a network of one of the merged entity's competitors in Member State A.[50]

The existence of alliances or close contractual relationships between mobile operators is unlikely to make the exercise of market power any easier. Even if the merged entity has sister companies or subsidiaries in other Member States or is part of a mobile alliance[51], it is unlikely to have the incentive not to provide (or raise the price of) wholesale international roaming services to competitors of its sister companies/subsidiaries/alliance partners, unless 1) the merged entity's competitors in the wholesale international roaming market are contractually restricted[52] or do not have sufficient spare capacity to provide wholesale international roaming services to the competitors of the merged entity's sister companies/subsidiaries/alliance partners or 2) the competitors of the merged entity's sister companies/subsidiaries/alliance partners are contractually or technically[53] restricted to purchase wholesale international roaming services from the merged entity's competitors in the wholesale international roaming market.

Even if the above conditions were fulfilled and the merged entity could raise the price of wholesale international roaming to certain mobile operators, it is questionable whether this could have a significant effect on competition downstream, i.e. on the retail mobile telecommunications market, due to the limited proportion of input costs this is likely to affect.[54]

3.5.2. Potential anti-competitive effects resulting from vertical concentrations

Cross-border concentrations between mobile operators may also affect competition on the wholesale international roaming market. In case of a concentration between a mobile operator in Member State A and a mobile operator in Member State B, each mobile operator party to the concentration is likely to have increased incentives to direct most or all of their international roaming traffic to the network of the other party when their retail customers roam in each others' network while abroad. This is likely to increase the market share of the parties

on their respective wholesale international roaming markets.[55]
However, this is unlikely to have a significant effect on competition unless the traffic directed into the network of the merged entity on the wholesale international roaming market is substantial. This will depend on the overall value of the international roaming traffic that the merged entity's downstream arm in Member State B (and C and D, etc, in case of a concentration involving mobile operators active in several Member States) can send into the network of the merged entity in Member State A. Therefore, a significant impact on competition in the wholesale international roaming market in Member State A is unlikely, unless 1) there are extraordinarily close links between two Member States (resulting in a very large proportion of international roaming traffic in Member State A being originated by customers of the merged entity in Member State B)[56] and/or 2) the merged entity is active in a very large number of Member States (resulting in a very large proportion of roaming traffic in Member State A being originated by customers of the merged entity in various Member States).[57]
Furthermore, even in the case of a substantial increase in market shares, switching possibilities discussed above will limit the risk of significant anti-competitive effects on the wholesale international roaming market.

4. Conclusion

Concentrations in sectors with several interlinked markets may give some extra work for competition authorities. A proper understanding of market functioning at various levels of the supply chain is required to be able to assess the effects of intra-Member State and inter-Member State concentrations in the mobile telecommunications sector. Cross-border vertical links, ex ante regulation, the bundled nature of retail services and the technical pre-conditions of switching are but a few market characteristics that must be taken into account when deciding on whether a concentration will impede effective competition in this sector, which is likely to experience further consolidation in the years to come.

Notes

* The views expressed by the author are purely personal and do not necessarily reflect the official position of the institution to which the author is affiliated.

1 For the purposes of this paper, the term "mobile operator" should include mobile network operators, mobile virtual network operators and mobile telephony service providers, unless explicitly stated otherwise. For a tentative definition of these, see part II.4. below.

2 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

3 Commission Regulation 802/2004 of 7 April 2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p. 1.

4 See Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

5 Affected markets consist of relevant product markets where, in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State:
(a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;
(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration. These are vertical relationships.

6 COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007, COMP/M.3916 – *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006.

7 COMP/M.3530 – *Teliasonera/Orange DK*, Commission decision of 24 September 2004, COMP/M.3920 – *France Télécom/Amena*, Commission decision of 24 October 2005, COMP/M.3245 – *Vodafone/Singlepoint*, Commission decision of 16 September 2003, COMP/M.4035 – *Telefónica/O2*, Commission decision of 10 January 2006, COMP/M.4034 – *Telenor/Vodafone Sverige*, Commission decision of 22 December 2005.

8 In fact, there is some experience that suggests that operators providing both second and third generation mobile telecommunications services cannot distinguish between second generation and third generation customers, as they both use the same SIM card. Furthermore, operators providing both second and third generation mobile telecommunications services can direct traffic between second and third generation networks according to availability, capacity and efficiency considerations. See the findings of the market investigation in COMP/M.3916 – *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006.

9 COMP/M.3776 – *Vodafone/Oskar Mobile*, Commission decision of 25 May 2005.

10 COMP/M.4034 – *Telenor/Vodafone Sverige*, Commission decision of 22 December 2005, COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007.

11 COMP/M.3776 – *Vodafone/Oskar Mobile*, Commission decision of 25 May 2005, COMP/M.3920 – *France Télécom/Amena*, Commission decision of 24 October 2005, COMP/M.3916 – *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006, COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007.

12 In COMP/M.4035 – *Telefónica/O2*, Commission decision of 10 January 2006, the Commission found that "patchwork services" are part of the same market as truly pan-European services at the current stage of this emerging market, but are expected to become distinct markets in the future.

13 For example, in COMP/M.4034 – *Telenor/Vodafone Sverige*, Commission decision of 22 December 2005, the market investigation found that there was a growing interest from large companies with operations in the Nordic countries for the procurement of mobile telecommunications services on a pan-Nordic basis, suggesting at least a pan-Nordic scope for the market.

14 Emerging demand for pan-European services was indicated in COMP/M.4035 – *Telefónica/O2*, Commission decision of 10 January 2006.

15 COMP/M.4034 – *Telenor/Vodafone Sverige*, Commission decision of 22 December 2005, COMP/M.4035 – *Telefónica/O2*, Commission decision of 10 January 2006, COMP/M.3916 – *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006, COMP/M.3806 – *Telefónica/Cesky Telecom*, Commission decision of 10 June 2005, COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007.

16 COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007, also referring to the Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic telecommunications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic telecommunication networks and services, OJ L 114 of 8 May 2003, p.45. (the *First Recommendation on relevant markets in the electronic telecommunications sector*)

17 COMP/M.4035 – *Telefónica/O2*, Commission decision of 10 January 2006, COMP/M.3916 – *T-Mobile Austria/Tele.ring*, Commission decision of 26 April 2006, COMP/M.4748 – *T-Mobile/Orange Netherlands*, Commission decision of 20 August 2007.

18 In fact, horizontal concentrations in markets upstream from the retail mobile telecommunications market in Member State A (such as the wholesale international roaming market in Member State B) may also have potential anti-competitive effects on the retail mobile telecommunications market in Member State A. However, these effects result from the vertical links between markets in the mobile telecommunications sector and therefore will be discussed under point III.1.2. (*Potential anti-competitive effects resulting from vertical concentrations)*

19 See also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5.

20 Whereas for new MNOs barriers to entry are absolute in the absence of new frequencies and in any event they are high as a result of high investment costs associated with establishing a network, a high number of MVNOs – either resulting from regulatory obligations in the wholesale market for access and call origination on public mobile telephone networks or from voluntary contractual relationships between MNOs and MVNOs - may indicate low barriers to entry on the retail mobile telecommunications market.

21 The conclusion may be the same if the acquired mobile operator was offering the best prices on the market, even if this did not result in a substantial or asym-

metric increase in its market share compared to its competitors. However, it is also relevant to establish (for example, from the internal plans of the acquired company) whether this mobile operator would have continued its aggressive pricing policy in the future in the absence of the merger.

22 For the purposes of this paper, capacity is meant to be the network capacity determined on the basis both of the frequency spectrum available and of the number of carriers within a cell that transmit the radio signal between the mobile equipment and the antenna.

23 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, point 39.

24 This does not exclude establishing a limited set of pricing points, such as, for example, SMS, thereby somewhat reducing the coordination problem.

25 Multi-market contacts can take place within the same Member State (e.g. the same mobile operators being active as MNOs on the wholesale mobile access and call origination market and as MVNOs, or downstream arms of MNOs on the retail mobile telecommunications market) or across Member States (e.g. the same mobile operators being active on the retail mobile telecommunications market in Member State A and on the wholesale international roaming market in Member State B).

26 A separate kind of vertical concentration that may affect competition in the retail mobile telecommunications market is when a MNO purchases a MVNO in the same Member State. However, as MNOs are usually vertically integrated (being active on both the wholesale mobile access and call origination market and the retail mobile telecommunications market in the same Member State), the competitive effects of such a concentration should be assessed primarily as if it was a horizontal concentration in the retail mobile telecommunications market between the downstream arm of the MNO and the MVNO.

27 The following analysis will also apply to situations where one (or both) of the parties to the concentration provide also fixed telecommunications services and therefore are active on the wholesale market for call termination on individual public telephone networks provided at a fixed location. See, for example, the concentration between France Télécom, operating a fixed network in France and – through its subsidiary Orange - mobile networks in several Member States and Amena, operating a mobile network in Spain (COMP/M.3920 – *France Télécom/Amena*, Commission decision of 24 October 2005)

28 Due to the interconnection of markets and the vertically integrated nature of mobile operators, a concentration between a mobile operator active in Member State A and a mobile operator active in Member State B could not only affect competition in the retail mobile telecommunications market in Member State A through vertical links with the wholesale mobile call termination market in Member State B, but at the same time the other way around: the retail mobile telecommunications market in Member State B may also be affected through vertical links with the wholesale mobile call termination market in Member State A.

29 For the purposes of this paper, discrimination should be understood as applying dissimilar conditions to similar transactions, including, for example, charging different prices to mobile operators for the same service or granting access to call termination services to some mobile operators while refusing access to others.

30 The wholesale mobile call termination market is one of the markets susceptible to ex ante regulation under the both the First and the Second Commission Recommendation on relevant markets in the electronic telecommunications sector (for the Second, See: Commission Recommendation of 13 November 2007 on relevant product and service markets within the electronic telecommunications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic telecommunication networks and services, not yet published in the OJ (the *Second Recommendation on relevant markets in the electronic telecommunications sector*). Obligations that national regulatory authorities may impose on undertakings with significant market power in this market include access and non-discrimination. It is important to note that price control – another one of the obligations that national regulatory authorities may impose on undertakings with significant market power in this market – does not in itself exclude the possibility to discriminate, for example by lowering the termination price for calls originated in the network of the merged entity in Member State A and keeping the price the same (albeit still at the level of or below the regulatory price cap) for calls originated in the network of its competitors.

31 It is only possible to identify the exact origin of a call in case of direct interconnection between mobile operators. A large proportion of international mobile calls may arrive through international carriers, in which case the terminating operator cannot identify the origin of the calls, unless it has a special contractual (or ownership) relationship with (the majority of) the international carrier(s). Furthermore, even if a large proportion of international mobile calls would arrive either through direct interconnection or “friendly” international carriers, there may be no obstacles impeding originating operators from switching to an(other) international carrier in case of discrimination.

32 One could argue that in order to properly assess the potential anti-competitive effects of raising rivals’ costs, the comparison should be made with the overall input costs of competitors in the retail mobile telecommunications market (including the costs of call origination, transit, international roaming, etc.), in which case the ratio of costs potentially affected through raising rivals’ mobile call termination costs will be even more limited. This is linked to the fact that in the retail mobile telecommunications market large bundles of services (comprising SMS, national calls, international calls, international roaming, data services, etc) compete against each other and therefore an increase in the price of an individual wholesale input – even if passed on in the form of a price increase at the retail level – will have a more limited impact on the overall price of the retail bundle.

33 Or provides termination services for a number that is for some reason extraordinarily popular for consumers in another Member State.

34 Due to the interconnection of markets and the vertically integrated nature of mobile operators, a concentration between a mobile operator active in Member State A and a mobile operator active in Member State B could not only affect competition in the retail mobile telecommunications market in Member State A through vertical links with the wholesale international roaming market in Member State B, but at the same time the other way around: the retail mobile telecommunications market in Member State B may also be affected through vertical links with the wholesale international roaming market in Member State A.

35 See Regulation 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community, OJ L 171, 29.06.2007, p. 32.

36 Although the wholesale international roaming market was one of the markets identified as susceptible to ex ante regulation under the First Recommendation on relevant markets in the electronic telecommunications sector, no national regulatory authority found significant market power and, hence, imposed any regulatory obligations in this market. The wholesale international roaming market is not listed under the Second Recommendation on relevant markets in the electronic telecommunications sector. Therefore, if a national regulatory authority would wish to impose regulatory obligations (e.g. non-discrimination) on mobile operators in this market, it would first have to prove that the three criteria set out in Point 2 of the Second Recommendation on relevant markets in the electronic telecommunications sector are met and, in addition, that the mobile operator(s) have significant market power in this market.

37 The market investigation in the COMP/M.4035 – *Telefónica/O2* case has shown that the percentage of traffic network operators can steer to a foreign network can arrive to 75%-80%.

38 The more networks there are with similar or superior coverage and quality than the merged entity, the less likely it is that the merged entity could pursue a foreclosure strategy without its downstream competitors switching to another mobile operator for wholesale international roaming services.

39 One could argue that in order to properly assess the potential anti-competitive effects of raising rivals’ costs, the comparison should be made with the overall input costs of competitors in the retail mobile telecommunications market (including the costs of call origination, transit, call termination, etc.), in which case the ratio of costs potentially affected through raising rivals’ wholesale international roaming costs will be even more limited.

40 This may be the situation in case of a particularly popular tourist destination for citizens of a given Member State.

41 A very unrealistic scenario, as this would require full concentration of mobile operators at national level.

42 An unrealistic scenario.

43 A possible, but rather unlikely scenario.

44 For the potential anti-competitive effects of such a concentration on the retail mobile telecommunications market, see point III.1.2.1.

45 It is, however, not necessarily so the other way around. Horizontal concentrations in the retail mobile telecommunications market involving MVNOs and service providers will not constitute a horizontal concentration in the wholesale mobile access and call origination market, where these market players are not active as suppliers, but only as buyers.

46 Unless there are no MVNOs and service providers in a given Member State, in which case the wholesale market will mirror the structure of the retail market.

47 The market does not figure in the Second Recommendation on relevant markets in the electronic telecommunications sector.

48 As discussed above, „raising prices“ should also mean not lowering prices for certain operators. This is particularly so in the wholesale international roaming market which is subject to a price cap regulation (see Regulation 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community, OJ L 171, 29.06.2007, p. 32.)

49 The remaining traffic, i.e. the smaller, undirected part of the roaming traffic, is of less relevance, as the network used for that traffic is normally selected at random depending on certain parameters, such as network coverage, network availability or the manual choice made by the customer.

50 Only networks with comparable coverage will be considered as alternatives as the purchasers of wholesale international roaming will want their retail customers to be able to use their mobile phones throughout the country in which they roam.

[51] Or the merged entity or one of the parties to the concentration changes from one alliance to another as a result of the concentration.
[52] For example, through exclusivity arrangements or non-compete clauses.
[53] For example, being unable to steer a significant part of their roaming traffic.
[54] See analysis in point III.1.2.2.
[55] For the potential anti-competitive effects of such a concentration on the retail mobile telecommunications market, see point III.1.2.2.
[56] This may be the situation in case of a particularly popular tourist destination for citizens of a given Member State.
[57] The existence of alliances may further increase the amount of traffic steered into the network of the merged entity. This will be the case if the merged entity will become member of an alliance (or change from one to another) and members of that alliance will have an incentive or contractual obligation to direct a significant part of their roaming traffic into the network of the merged entity when their customers roam in the Member State in which the merged entity is active in. However, the impact will be mitigated if the alliance already had a member mobile operator in that Member State, as in such case members of the same alliance will compete for the roaming traffic.

András Tóth

The Promotion and Protection of Investments in the European Competition Law and the Electronic Communication Regulation

1. Introduction

The issue of investment protection has got into the centre of scientific interest in the course of the review of the electronic communication regulatory framework in 2006. According to a study[1] prepared by the Commission 25% of the respondents believed that the regulation encouraged investments and 18% of them thought that the uncertainty in the regulation set back investments. These numbers show that the majority of the market players in practice do not recognize the actual relationship between regulation and incentives for investments, despite the fact that they often use the arguments related to this.

Protection of investments has become a hot issue in competition law with the *Microsoft* case[2] where the interest to keep up the development of a whole sector has come into conflict with the protection of individual innovations.

This article intends to give an overview of how electronic communication and competition laws handle the question of investments.

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2. Promotion and protection of investments in the European electronic communication regulation

One of the main principles of the European regulatory model for electronic communication besides technology neutrality, proportionality, and internal market is the promotion and the protection of investments.[3]

The European electronic communication regulation is based on the static efficiency "competition on networks" model meaning that it aims to achieve the competitive outputs by intra modal or access competition in short time. However, the long-term "aim of the new regulatory framework is ultimately to achieve a situation where there is full infrastructure competition (i.e. inter modal) between a number of different infrastructures. This can occur within or between platforms. Regulation mandating access to existing networks serves as a transitional measure to ensure services competition and consumer choice until such time as sufficient infrastructural competition exists."[4]

The long-term aim of the regulation could only be achieved by strong efforts to make investments. At the same time, short-term access competition may seem to undermine this aim since it creates the typical free riding problem and discourages newcomers to make investments into infrastructure.[5] This, therefore, requires a system within the regulatory framework that in parallel ensures promotion and protection of investments in infrastructure as well.

According to de Streel the three criteria test already contains an investment safeguard, namely the second criterion that relates to dynamic considerations.[6] However, such a safeguard may not be able to provide sufficient legal certainty for investors.

2.1. Investment protection within the regulatory framework

The requirement of the protection of investments arises from the regulation on undertakings with significant market power (SMP). In high-tech markets innovation may be twofold: on the one hand it promotes competition (i.e. the competition key drivers), on the other hand, it creates monopolistic position which might be a starting point for anti-competitive effects.[7] The reasons of this can be found in the specific features of the high-tech market such as the lock-in and network effects, the winner-takes-all strategy and the low marginal costs.

Investments can lead to both first-mover-advantages and the mere strengthening of monopolistic position. Protection shall be