# Europe: Mobile Mergers – Current Trends in Competition Regulation

The European mobile markets seem to be saturated. The EU-wide SIM card penetration rate stood at 127% in 2011, once more up from 123% in 2010. On the other hand, mobile broadband still benefits from booming smartphone sales. Subscriptions increased from 26.8% to 43.1% at EU level last year. There is certainly room for further growth, but here as well, margins are increasingly under pressure.

Market response is clearly a trend towards (further) consolidation:

- Already in 2007, France Télecom sold its Dutch mobile business (Orange) to competing mobile network operator (MNO) Deutsche Telekom, which reduced the number of market players in The Netherlands from four to three.

- France Télecom (Orange) and Deutsche Telekom merged their UK mobile operations in 2010, subject to EU conditions, which – post merger – left the UK market with four MNOs instead of five.

- Vodafone recently considered to combine its Greek business with Wind Hellas, which would have merger number two and number three in the market. However, the deal eventually failed because of general market uncertainties in Greece.

- KPN, in an attempt to fight a hostile take-over by Carlos Slim's América Movil group, publicly discussed a sale of its German mobile business (E-Plus) to Telefónica/O2. This deal, which for the moment is said to be off due to lack of financing, would have merged number four and number three MNOs in the German market.

- In Austria, Hutchinson3G's proposed acquisition of Orange is pending before the EU Commission, which would again reduce the number of MNOs from four to three.

- And finally, Orange intended to acquire one of its two competing MNOs in Switzerland (Sunrise), but the deal was blocked by the Swiss competition authority.

So from a regulatory perspective, what lessons can be learned as to how competition authorities address this deal activity?

First, there is no consistent EU-wide regulatory approach to mobile mergers. These deals often involve multinationals with large revenues, and many mobile mergers therefore fall under EU jurisdiction. At the same time, the affected markets are typically national in scope (end customer markets, but also wholesale termination, network access and roaming markets). In essence, it therefore remains an issue of regulating national markets, where the relevant conditions may differ from Member State to Member State.

Second, and despite the fact that different national markets are affected, what can be observed is that mobile mergers typically raise similar competition issues:

- **What is the relevant market?** The authorities have developed an established practice on market definitions in the mobile sector. In particular, they do not distinguish between voice communication and data services, i.e. there are no separate (end customer) markets for mobile telephony and mobile broadband, and there is also no separation by type of customer (business or residential, subscription or pre-paid) or type of network (2G, 3G). Nevertheless, the emergence of new products like quadruple play bundles, LTE-based services or hybrid fixed and mobile solutions may still provide arguments in favour of an even broader market definition.

- **What is the minimum number of market players to ensure effective competition and relevant consumer choice?** This very much depends on the specific market characteristics and the existing allocation of market shares. Recent cases suggest that the authorities are generally less concerned about 5-to-4 or even 4-to-3 mergers (like in the UK and Dutch examples), whereas 3-to-2 consolidations (like in Switzerland) are generally still viewed critically. Nevertheless, the latter have already been accepted at least in other communications markets, e.g. by the German Federal Cartel Office in 2011 when it approved Liberty Global's acquisition of Kabel BW, a merger that narrowed an oligopoly on the broadband cable market to a duopoly.

- **Does the merger take a particularly "active" player from the market?** This can typically be the case in mobile markets where, say, two new market entrants compete against two incumbents, and now the new entrants intend to merge. Under these circumstances, the (smaller) new entrants will often be the more innovative and dynamic competitors. A merger affecting an "active" player by these means may therefore have a greater anti-competitive effect than is expressed merely in terms of market share.

- What effect has the merger on the likelihood of new market entries (third parties entering the market by building their own networks)?
The effect on potential competition is a standard test in merger control cases. In mobile markets, where there is anyway a trend towards market consolidation and to decreasing numbers of market players, potential competition from new market entrants is hypothetical. It seems more likely that MNOs face increasing competition from non facilities-based service providers (MVNOs) or from fixed line operators trying to expand their business to mobile communications. Such competition – service providers versus network operators – may well be fostered through an MNO merger. A larger (dominant) MNO can more easily be forced through antitrust or sector-specific telecoms regulation to offer wholesale access to its network.

- Which undertakings could remedy any anti-competitive effects of a mobile merger?
"Classic" undertakings like divestitures of business parts will typically not be an option in mobile merger cases, because by definition, the underlying rationale for these mergers is to combine the two businesses as a whole. On the other hand, at least the EU Commission is rather flexible with "behavioral" undertakings, which recently could also be found with certain member state authorities (e.g., the German Federal Cartel Office in the Liberty/Kabel BW case). With regard to mobile, this could include network sharing, MVNO access or national roaming obligations, but also price caps or spectrum sales.

Third, and to conclude, the market development is not only about mobile mergers. There are also various kinds of joint ventures either between different mobile operators or among mobile operators and other industry players: for example, the German Federal Cartel Office already in 2007 allowed three of the four German MNOs to set up a joint venture to launch a nationwide DVB-H network for mobile television services (the project never materialized). Likewise, the Commission recently cleared a joint venture between Telefonica, Vodafone and Everything Everywhere (the combined T-Mobile/Orange operation) – i.e. of three of the four MNOs in the UK – to set up a mobile commerce platform. And even though it does not specifically concern mobile but fixed line broadband networks (xDSL, FTTx), competition authorities show some flexibility under applicable antitrust laws when it comes to network sharing in order to close certain "white spots" in remote areas which without the cooperation would not be served as well.

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