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# Telecoms Mergers – Mixed Signals from the Commission?

by **Marco Hickey**

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## Mobile telecoms companies, like broadband operators and other network businesses across Europe, are investing in modernising their networks.

Given the scale of investment required, some operators are merging their operations in order to fund network improvements.  The European Commission's view has been that network investment and competition must go hand in hand and a series of such mergers in the mobile phone sector were approved subject to commitments to ensure that, after the merger, consumers would continue to benefit from the attractive prices and services.

However, some decisions since Margrethe Vestager became the EU Commissioner in charge of competition policy appear to indicate that such commitments may no longer be sufficient.  From that perspective, this article reviews a 2014 decision in relation to the Irish market and then compares it to two 2016 merger investigations, relating to Italy and the United Kingdom.

## Ireland:  02 and Three

In May 2014, the Commission approved the proposed acquisition of Telefónica Ireland's mobile telecommunications business (O2 Ireland) by Hutchison 3G (Three).  The approval came during the term in office of Joaquín Almunia as the Commissioner in charge of competition policy.  The Commission had indicated concerns that the merger, as initially notified, would have removed an important competitive force from the Irish mobile telecommunications market to the detriment of consumers.  To address these concerns, Three submitted a comprehensive set of commitments based around ensuring that new competitors would enter the market as mobile virtual network operators (MVNOs).  MVNOs offer mobile telecoms services to final consumers through access to the physical network of mobile network operators (MNOs).

After the merger, Three would only face competition from Vodafone and Eircom as MNOs.  The Commission's main concern was that since Three was the smallest player among the four MNOs, with clear incentives to grow its subscriber base by offering attractive prices, the merger would remove an important competitive force.  However, in approving the merger, the Commission accepted Three's commitment to sell up to 30% of the merged company's network capacity to two MVNOs.  Importantly, these arrangements used fixed payment structures rather than variable rates, meaning the new MVNOs would have the same incentives as Three had to fill their capacity by offering attractive prices and innovative services.

In relation to the wholesale market, Three and O2 competed as network hosts for MVNOs that wished to offer their services to end consumers.  The merged company would only face competition from Vodafone since the fourth MNO, Eircom, was dependent on a network sharing agreement with O2.  However, the package proposed by Three included a commitment to divest blocks of spectrum to allow one of the new MVNOs to become a full MNO.  That new MNO would, in turn, become a credible network host for MVNOs, which was sufficient to resolve the Commission's concerns.

## United Kingdom:  O2 and Three

In May 2016, the Commission blocked a parallel but separate deal which would have combined Telefónica UK's "O2" and Hutchison 3G UK's "Three", creating a new market leader in the UK mobile market. As in Ireland, the Commission's in-depth investigation gave rise to concerns since the takeover would have removed an important competitor, leaving only two MNOs, namely Vodafone and BT's Everything Everywhere (EE), to challenge the merged entity. According to the Commission, the significantly reduced competition in the market would likely have resulted in higher prices for mobile services in the UK and less choice for consumers than without the deal. The takeover would also likely have had a negative impact on quality of service for UK consumers by hampering the development of mobile network infrastructure in the UK. Finally, the takeover would have reduced the number of mobile network operators willing to host other mobile operators on their networks.

Although the full written decision has yet to be published, it appears that -- in contrast to the situation in Ireland in 2014 -- the remedies proposed by Hutchison UK failed to adequately address the Commission's concerns in relation to the takeover. In particular, the proposed remedies did not resolve the structural problems created by the disruption to the network sharing agreements in the UK. They were also not capable of replacing the weakened competition in the retail and wholesale mobile telecoms markets as a result of the takeover. Furthermore, the largely behavioural measures raised significant uncertainty as regards their effective implementation and monitoring, also because they were difficult to define precisely and some depended on the agreement of others.

## Italy: Wind and Hutchinson

In March 2016, the European Commission opened an in-depth investigation to assess a proposed joint venture in Italy between Hutchison and VimpelCom. On 8 June 2016, the Commission, with the agreement of the parties, extended its deadline to make a decision on the proposed merger to 8 September 2016.

The transaction would combine VimpelCom's "Wind" subsidiary with Hutchison's "H3G" subsidiary, respectively the third and fourth largest operators in the Italian retail mobile telecommunications market. It would therefore reduce the number of MNOs in Italy from four to three and would create the largest player in terms of the number of subscribers, ahead of two similar-sized MNOs, TIM and Vodafone. As in the UK and Ireland, the Commission is concerned that the transaction could lead to higher prices, less choice and reduced innovation for mobile customers in Italy. The transaction will reduce the number of MNOs that host MVNOs, meaning prospective and existing MVNOs will have less choice of host networks and a potentially weaker negotiating power to obtain favourable wholesale access terms. Finally, the Commission has also highlighted that the reduction in the number of competitors also risks increasing the likelihood that MNOs would coordinate their competitive behaviour and raise prices on the retail and wholesale markets. Given the similarities between this transaction and the reviews conducted in the Irish and Italian markets, it will be interesting to see what approach the Commission takes in its final decision.

## Comment

Commissioner Vestager has consistently stated that such mergers are examined on a case by case basis. However, given the importance of achieving scale and size required to undertake significant technological investments in mobile phone and other network sectors, businesses such as telecommunications and broadband network operators should pay very close attention to the more recent Commission decisions and not assume that the type of quasi-structural commitments accepted in Three-O2 (Ireland) will be sufficient going forward.

**For more information, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets team at mhickey@lkshields.ie. Marco is the author of Merger Control in Ireland published by Thomson Reuters.**

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