KEY POINTS FOR MOBILE MERGER ASSESSMENTS IN THE 5G ERA

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Introduction

The scarcity of spectrum and the high fixed costs of rolling out a mobile network mean that the number of mobile network operators (MNOs) generally ranges between three and five in most European countries.

Given such a propensity towards oligopolistic market structures, regulators in Europe have sought to promote competition and innovation in mobile markets through the allocation of spectrum to new entrants via spectrum auctions. This practice was evident in the 3G auctions of the early 2000s and more recently with some auctions for 5G spectrum, for example in Sweden, Germany and Portugal. Indeed, 15 EU countries so far (plus the UK) have completed the allocation of 5G spectrum, with auctions either underway or scheduled for completion in 2021 in 5 others.

The development towards higher-speed and denser mobile networks has coincided with a consolidation of the mobile markets. After the auctions for 4G spectrum, we have seen mobile mergers in Europe where a 4th and/or 5th operator has been involved. This has left 15 mobile markets in Europe with three mobile network operators. Since 2006 there have been ten in-country mobile mergers in Europe that were reviewed by DG Competition, with eight approved with remedies, one merger blocked and one where the parties withdrew from the merger.

T-Mobile/tele.ring (2006)	5 to 4 in Austria	Phase II, cleared with remedies
T-Mobile/Orange NL (2007)	4 to 3 in the Netherlands	Phase I, cleared unconditionally
T-Mobile/Orange UK (2010)	5 to 4 in the UK	Phase I, cleared with remedies
H3G Austria/Orange AT(2012)	4 to 3 in Austria	Phase II, cleared with remedies
H3G/Telefónica IE (2014)	4 to 3 in Ireland	Phase II, cleared with remedies
Telefonica DE/E-Plus (2014)	4 to 3 in Germany	Phase II, cleared with remedies
Telia/Telenor DK (2015)	4 to 3 in Denmark	Parties withdrew

H3G/Telefónica UK (2016)	4 to 3 in the UK	Blocked
H3G Italia/Wind (2016)	4 to 3 in Italy	Phase II, cleared with new entrant
T-Mobile/Tele2 NL (2018)	4 to 3 in the Netherlands	Phase II, cleared with no remedies

Academics, competition watchdogs and regulators alike have sought to understand whether this recent (and possibly ongoing) mobile consolidation has contributed to better outcomes for consumers.[1] Further to economic research, the trade-off between the loss of competition and the benefits from a greater ability to invest and innovate have been debated concretely in the context of merger reviews by national competition authorities and the European Commission.

Against this backdrop, how likely will mobile mergers be in Europe post 5G auctions, and what is the key economic evidence that should be evaluated in assessing mobile mergers in the 5G era?

Should we expect more mobile mergers in Europe in the 5G era?

There are several reasons why we should expect more mobile mergers in Europe. While most countries have three operators, there are still 10 countries with at least four operators, including some big markets. In half of those, the last entrants are yet to achieve a scale comparable with the other competitors. Rolling out 5G networks and taking full advantage of 5G's potential for innovation will require significant investments in the coming years[2].

Some MNOs may be inclined to pursue acquisitions to benefit from scale and/or to gain ground in adjacent markets, such as a fixed broadband connection or premium content. Indeed, there is a recent trend in telecoms towards mergers and acquisitions that pool complementary assets to increase the appeal to consumers. These mergers are generally seen as pro-competitive because they lack any horizontal effects between competitors – though vertical theories of harm have been conceived and tested. For example, content with distribution networks, like the AT&T/Time Warner merger[3], fixed and mobile infrastructures, like Vodafone/Liberty in the Netherlands[4], Germany and Central Europe[5], as well as the recently approved Telefonica UK/ Virgin Media merger in the UK[6].

There are also good reasons why European MNOs may be cautious about pursuing further mergers and acquisitions. First, four-to-three mergers are unlikely to be cleared without significant scrutiny and possible remedies imposed by the current European Commission and that may suppress the appetite to engage in risky merger approvals.

It can also be expected that mobile network operators will continue to pursue scale and network efficiencies, primarily through network sharing, which in most cases faces a lower competition clearance hurdle. Horizontal mergers between competitors may therefore be exceptional.

Expect some mobile mergers in the 5G era – and a debate about efficiencies

While mobile mergers will not possibly be as numerous in the 5G era in Europe as during the 4G

[1] [https://www.ofcom.org.uk/__data/assets/pdf_file/0019/74107/research_document.pdf]

[2] A recent report by ETNO puts the investment still required in Europe for 5G at around 150 Bn (https://etno.eu/news/all-news/704-etno-bcg.html). A recent report by the EIB and the EC adds that further investments to the tune of 4 to 6.6 Bn Euros per year are required to develop the 5G innovation ecosystem (https://www.eib.org/en/press/all/2021-065-new-eib-report-boosting-investments-in-european-digital-ventures-to-unleash-the-full-potential-of-5g#).

[3] https://www.theguardian.com/media/2019/feb/26/att-time-warner-deal-justice-department-loses-appeal-against-merger

[4] https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2711

[5] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4349

[6] https://www.gov.uk/cma-cases/liberty-global-plc-telefonica-s-a-merger-inquiry#history

era, there are reasons to expect some mobile mergers in the coming years. Competition authorities will review the mechanisms through which competition could be impaired alongside efficiency gains in the case of any future mergers involving MNOs, and recent cases provide some guidance on the economic arguments that may become important for merger clearances under the right circumstances.

First, some mergers involving smaller MNOs may be considered to have very limited or no adverse effect on competition. A good example is the merger of T-Mobile/Tele 2 NL in the Netherlands. The Commission, after an in-depth investigation, considered that the merger between the smallest MNOs "*would raise no competition concerns*" [7]. Further, the EU General Court's decision annulling the EC's decision to block the merger between Telefonica UK and H3G UK in 2016[8] (which the Commission has appealed and is pending further judgement[9]) has been considered to raise the bar for blocking a merger based on a finding that a smaller operator exerts an "important competitive force[10]".

Second, recent cases suggest that **the effects of mergers on the ability of MNOs to invest and innovate will play a role in any upcoming reviews of mobile mergers**. A widely cited example of the acceptance of an "*efficiency defence*" in a recent mobile merger comes from the US, with the FCC's[11] and the Department of Justice's[12] approvals of the T-Mobile/Sprint (2019) merger. Underscoring the importance of the expected gains in rolling out a nationwide 5G network much faster, the Department of Justice considered the merger to "*facilitate the expeditious deployment of multiple high-quality 5G networks for the benefit of American consumers and entrepreneurs.*[13]"

Citing academic evidence[14] in the aforementioned Telefonica UK/H3G ruling by the EUGC, the Court acknowledged that more concentration may positively correlate with more investments [15].

In the past, there has been an emphasis on assessing the overall effects on consumers primarily on the basis on how mobile mergers affect prices in the short-term ('static' effects). Efficiency gains (in the form of innovation and greater quality of service, so-called 'dynamic' effects) have been historically often underplayed or dismissed by European authorities on the basis of concerns as to whether they are likely to materialise in time, be passed on to consumers, or even be specific to the merger[16]. However, avoiding a more substantive

[7] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6588

[8] https://curia.europa.eu/juris/document/document.jsf?docid=226867&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=6742462

[9] https://www.reuters.com/article/uk-telefonica-m-a-ckh-holdings-eu-idUKKCN24U2GT

[10] More specifically, the Court found that "*the Commission erred in considering that an 'important competitive force' need not necessarily stand out from its competitors in terms of its impact on competition. If that were the case, that position would allow it to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure.*"

[11] https://docs.fcc.gov/public/attachments/DOC-360637A1.pdf

[12] https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package

[13] https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package

[14] Genakos, Valletti, Verboven, "Evaluating market consolidation in mobile communications", January 2018, Economic Policy 33(93):45-100

[15] "The EUGC notes that "*it is apparent from the evidence submitted during the administrative procedure that, while a positive correlation may be established between concentrations which reduce the number of operators in the mobile telecommunications sector from four to three and result in price increases, a correlation may also be established between those concentrations and an increase in network investments by mobile network operators*", Paragraph 281 of the Court decision.

[16] For an overview of past mergers decisions in Europe, you can look at: https://www.competitioneconomics.org/dyn/files/basic_items/566-file/Motta-Mobile%20mergers%20What%20have%20we%20learned%20[Compatibility%20Mode].pdf

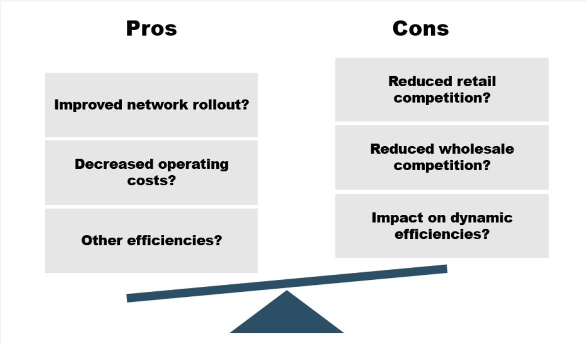
discussion on the benefits, as well as the costs, of a proposed mobile merger might become more difficult following the General Court's judgement, even though the European Commission has appealed it and judgement is pending.

Key issues to assess in mobile mergers in the 5G era

Each merger is unique and must be assessed on its own merits. In the 5G era, competition authorities will continue to assess whether a merger is likely to harm or benefit consumers. On the one hand, concentration can harm consumers due to reduced competition (which can lead to higher prices and/or a lower quality of service), while on the other hand, it can benefit consumers via efficiencies (which can lead to lower prices and/or improved network quality) – see the figure.

A balancing act

Evaluating the potential impact on consumers



Source: Copenhagen Economics conceptual illustration

However, although the framework remains unchanged, we have yet to see how recent developments might tip the scale in the 5G era. For example:

- Will the high costs associated with 5G rollout provide an additional argument in favour of consolidation?
- What practical impact will the ECJ judgment have for the burdens of proof and the requirements for quantification of competitive harm and dynamic efficiencies?

Mergers that are not *prima facie* expected to reduce competition are likely to be cleared, e.g. if conditions are similar to those in the T-Mobile NL/Tele 2 NL merger.

However, things become more complicated when the question becomes one concerning the extent to which potential efficiencies can offset a reduction in competition. Operators may, for instance, have to demonstrate how the merger (and the merger alone) can bring about network rollout that otherwise would not be possible.

This may have worked well in the US for the T-Mobile/Sprint merger, but given the inherent uncertainty of predicting the evolution and take-up of 5G, MNOs should not underestimate the evidential requirements needed for a successful efficiency defence.

Specifically, operators considering a merger (or opposing a merger) need to prepare the following evidence:

- Assess and quantify the impact of concentration on competition, at the wholesale and retail level, to account for whether any of the parties play a special role (e.g. as a 'maverick'). Impacts can include both unilateral and coordinated effects.
- Assess and quantify the impact on efficiencies in the network and elsewhere in the business. This could also include broader efficiencies, such as sustainability benefits in the future. It may also be important to demonstrate how the same (e.g. 5G) network rollout could not be achieved with a less extensive collaboration such as network sharing (that would preserve retail competition).

- Potentially consider remedies: for instance, could an MVNO access remedy address concerns about retail competition? What about divestment of spectrum?

By deploying the right economic tools and preparing supporting evidence on these key points, MNOs contemplating a merger can reach better decisions on whether to pursue a transaction or not. Where they do, having considered these factors early on will facilitate the review process.

Feedback welcome

The views expressed reflect our own opinion on the significance of this topic for the telecoms sector and for regulatory economics practice. We welcome questions, comments, and the opportunity to hear and discuss other points of view.

At CE, we advise European telecom operators on a broad range of economic issues, including on the potential effects of mergers, and issues related to concentration in the telecoms sector, including competition safeguards at spectrum auctions and the impact of network sharing agreements. If you would like to discuss the issues in the above article, please do not hesitate to get in touch with the authors.

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