Recent developments in telecoms mergers
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1. Introduction

A wave of consolidation in the telecommunications sector has been underway in Europe for several years. These mergers have been subject to review at national level\(^1\) or by the European Commission. The Commission has reviewed a spate of telecoms transactions since 2012, including mergers between operators active in Austria, Belgium, Germany, Denmark, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom\(^2\).

The telecoms mergers wave has involved a variety of types of mergers, involving different factual circumstances and therefore raising different substantive issues, and leading to outcomes reflective of those differences. We could classify the mergers reviewed by the Commission in a number of ways.

A first classification can be made between in-country and cross-border consolidation. The telecommunications markets in the EEA have consistently been defined as national in scope\(^3\). Under that criterion, we can note that most of the recent telecommunications mergers have consisted of in-country consolidation, that is, the merger of activities of telecom operators active in the same country. To date there have been very few cross-border mergers involving the combining of operations in different national markets\(^4\). Gaining scale at EU level does not appear to matter much to telecoms operators in Europe (or their investors), who seem to pursue mainly M&A transactions aimed at achieving scale in one or more Member States.

A second classification can be made on the basis of the activities of the telecoms operators involved:

- **Mobile-only mergers**. These mergers combine telecoms operators exclusively or predominately active in the mobile sector. Therefore, they give rise to a horizontal overlap between the activities of the merging parties, the combination of which is the main rationale of the deal.
- **Fixed-mobile/convergent mergers**. These mergers usually combine telecoms operators with different business focuses, mainly a fixed network operator and a mobile network operator. The rationale behind these mergers is the complementarity of the merging parties’ assets. However, depending on the specifics of the case, these mergers


\(^{3}\) Elements considered by the Commission to define the geographic scope of the telecommunications markets as national are the fact that the telecommunications infrastructures of the EU Member States are independent from each other, that mobile telecommunications services are subject to a national regulatory regime, including spectrum allocation, and that prices are set on a national basis.

\(^{4}\) For example, case M.6948 Telenor/Global/Germanos.
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may also give rise to certain horizontal overlaps concerning the merging parties’ fixed or mobile telecom activities.\(^5\)

The merger wave has seen both mobile-only and convergent mergers. The purpose of this merger brief is to discuss the more recent mergers assessed by the Commission and to take stock of the lessons learned by the Commission’s experience of dealing with mobile-only mergers and convergent mergers.

2. Recent developments in mobile-only mergers

The first part of the wave of mobile-only mergers, leading to the reduction of competing mobile network operators (MNOs), was assessed by the Commission between 2012 and early 2014 (Austria, Ireland and Germany). The Commission’s findings with respect to those mergers were presented in the first issue of the Competition merger brief. Several lessons were drawn from these cases. Most importantly, the Commission repeatedly found that in mobile telecoms markets, which are typically national and oligopolistic, the reduction of the important competitive pressure previously exerted by the merging parties on each other, as well as the reduction of competitive pressure on the remaining competitors in the market, may be brought about by the proposed merger, raised serious competition concerns.

This article focuses on mobile-only mergers notified in the last two years, that is, the mergers in Denmark, Italy and the United Kingdom, and discusses: (i) the framework for assessing the effects of these transactions; (ii) the evidence used for that assessment; and (iii) remedies submitted by the notifying parties in each of those cases. All involved an in-depth analysis in phase II.

- **Denmark**: The transaction related to the proposed creation of a joint venture combining the Danish operations of TeliaSonera and Telenor. The parties failed to offer a remedy which would have solved the serious competition problems identified by the Commission and eventually abandoned the transaction on 11 September 2015.\(^6\)

- **United Kingdom**: The case related to a proposed acquisition of Telefonica’s British subsidiary, operating under the brand O2, by the market challenger Hutchison. Hutchison failed to offer suitable remedies fully eliminating the serious competition problems identified and the transaction was eventually prohibited by the Commission on 11 May 2016.\(^7\) Hutchison appealed the Commission’s decision and the court case is pending.\(^8\)

- **Italy**: The case related to the proposed creation of a joint venture combining the Italian operations of Vimpelcom and the market challenger Hutchison. The transaction was cleared by the Commission on 1 September 2016, subject to remedies consisting of a fix-it-first divestment including all assets needed to create a new fourth MNO in Italy.\(^9\)

A. Framework of assessment

All recent mobile-only mergers were 4-to-3 mergers between MNOs in the same country.

While each case is assessed on its own merits, taking into account the specific circumstances such as the specificities of each national market, the legal and analytical framework underlying the Commission’s assessment is the same for all cases. This framework of assessment is found in the Commission’s Guidelines.\(^10\)

Against this background, the following lessons can be drawn from the most recent mobile merger cases assessed by the Commission.

**Horizontal unilateral effects**: All recent mergers did not lead to the creation or strengthening of dominance, but rather involved the elimination of the important competitive constraint that the merging parties previously exerted upon each other, together with a reduction of competitive pressure on the remaining competitors, within the meaning of paragraph 25 of the Horizontal Merger Guidelines. In reaching its conclusions, the Commission took a holistic approach to all the relevant

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5. Mobile only and fixed-mobile convergent type of mergers are not the only type of mergers that telecom operators engage in – several transactions involving telecom operator entailed the acquisition of audio-visual content (vertical integration) by telecom players (such as the cases M.7194 Liberty Global/Corelio/De Vijver Media and M.7282 Liberty Global/Discovery/All3Media).

6. Simon Vande Walle and Julia Wambac, No magic number to dial - The Competition merger brief 6. Several lessons were drawn from these cases. Most importantly, the Commission repeatedly found that in mobile telecoms markets, which are typically national and oligopolistic, the reduction of the important competitive pressure previously exerted by the merging parties on each other, as well as the reduction of competitive pressure on the remaining competitors in the market, may be brought about by the proposed merger, raised serious competition concerns.

information and evidence gathered during its in-depth investigation.

Paragraphs 27 – 38 of the Horizontal Merger Guidelines further list a series of factors, which, to the extent they are present, may influence whether significant horizontal unilateral effects are likely to result from a merger. However, not all these factors need to be present to make significant non-coordinated effects likely, and the list is not exhaustive.

In all recent cases, the transaction would have created a (non-dominant) market leader, although while in the United Kingdom the merged entity would have been the clear market leader in retail mobile services, in Italy the transaction would have led to a symmetric market structure, and in Denmark the merged entity would have been closely followed by a similar size player.

One factor mentioned by the Horizontal Merger Guidelines (paragraphs 28-30) is closeness of competition between the merging parties, which captures the degree of substitutability between their products. Closeness is an element of the Commission’s assessment that makes the finding of a significant impediment to effective competition more likely: the degree of likelihood is a function of the degree of substitutability between the merging parties and it is not influenced by the degree of substitutability of non-merging firms’ products. However, it is not necessary to establish that the merging firms are each other’s closest competitor to find concerns. In the recent mobile-only cases, the Commission found that the merging parties were closely competing against each other and against the few other MNOs in the market, and that rivalry between the parties had been an important source of competition on the market, which the merger would have removed.

Another factor is whether the transaction would eliminate an important competitive force, as defined in paragraph 37 of the Horizontal Merger Guidelines. Even a relatively small firm may be an important competitive force when it has more of an influence on the competitive process than its market shares or similar indicators might suggest. In order to make such a finding, the Commission looks at a series of qualitative and quantitative elements, which, whether in isolation or taken together, may indicate that a firm is able to exert a constraint on the competitive process that is greater than would appear at first sight on the basis of its market share. These elements may include the capacity to innovate in the market and to steer market trends (United Kingdom); the fact of engaging in price wars and/or exerting a significant price constraint (United Kingdom and Italy); and subscriber growth and gains in market shares (United Kingdom and Italy).

Horizontal coordinated effects: In past cases (Austria, Ireland and Germany) the Commission either did not find sufficient evidence to find coordinated effects or left open the question as to whether concerns of a coordinated nature could be established, because the remedy offered by the parties would also resolve any possible issue of coordination. In two of the most recent mobile mergers, however, due to the specific circumstances of the cases, the Commission identified concerns on the basis of coordinated effects at the retail level. In Denmark, the Commission identified a risk that the merger could strengthen the mobile operators’ ability and incentives to coordinate their behaviour, at least with respect to certain retail customers, by creating a duopolistic market structure where the merged entity and the former national monopolist, TDC, would together have had around 80% of the market, followed by the small player Hi3G. Likewise, in the recent Italian case, the Commission found that the transaction would have created a very symmetric market structure where the merged entity, Vodafone and TIM could have used market shares as a ‘focal point’ to slow down promotional efforts to win back lost customers, increase prices for new customers, reduce dealers’ commissions for new customers, etc. In both cases, coordination would have been possible in particular because of the existence of sufficient transparency in the market and the presence of credible deterrent mechanisms (such as the threat of price wars like past ones among Italian MNOs). This shows that, depending on the characteristics and features of the market and players, mobile telecom markets, at least at the retail level, may be prone to coordination.

Efficiencies: In recent years incumbent telecoms operators have pleaded for more lenient application of EU merger rules to in-country consolidation, arguing that this is a necessary condition to enable more investment in telecoms infrastructure in the EU. However, when assessing efficiency claims in merger investigation, the Commission has so far never found that consolidation would significantly spur investment. Competition and customer demand appear to be the key drivers of investment, not necessarily consolidation. So relaxing competition rules may not guarantee that more investment will happen. Hence, there appears to be no evidence that consumers would benefit from more network investments, but there is a risk that they would be faced with less competition and higher prices. Indeed, the parties to the mobile mergers which the Commission has recently reviewed have continued to claim that mobile consolidation brings efficiencies. The parties’ claims include arguments that the merger would enhance the mobile network’s performance through better coverage and speed (e.g. by allowing faster and greater rollout of new technology such as 4G). Other efficiency claims derive from avoiding duplication of network and non-network fixed costs. The Commission carefully evaluates

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these claims, including those concerning more medium- to long-term “dynamic” and non-price efficiency gains, in the context of its assessment of efficiencies under the analytical framework of the Horizontal Merger Guidelines. To be taken into account, efficiencies must be (i) verifiable; (ii) passed on to consumers; and (iii) merger-specific; that is, there is no less restrictive alternative to the merger to achieve them.

The bulk of the efficiencies claimed by merging parties in mobile mergers analysed in 2012-2014 have not met this test, as they did not fulfil one or more of the Horizontal Merger Guidelines’ criteria. Even if the claims passed the test, they were insufficient to counteract the anti-competitive effects of the merger.\(^\text{14}\)

By the same token, in the most recent mobile mergers analysed by the Commission, the claimed efficiencies were either rejected or accepted, but where accepted it was only to a very limited extent, which was insufficient to counterbalance the competitive harm identified by the Commission in those cases. In Denmark, the parties’ efficiency claims related to cost-savings and network investments. These claims were not substantiated to the requisite legal standard. In the UK, Hutchison among others argued that the merger would bring network efficiencies (in the form of better capacity, quality and speed, at lower investment costs) and scale efficiencies. However, the Commission found that the network efficiencies did not meet the requirements of verifiability (in particular, as there was great uncertainty as regards the extent modalities and timing of network integration) and merger specificity (as less restrictive alternatives were possible). The Commission moreover found that, in any event, the network cost savings that could be expected to be relevant for pricing decisions would be too small to offset the expected price increases resulting from the loss of competition between the merging parties. Therefore, the Commission rejected the parties’ network efficiency claims.

In Italy, the parties argued that the creation of the JV would have on the one hand enabled the creation of a high-quality mobile network to the benefit of consumers and, on the other hand, led to fixed and variable cost savings, which would have resulted in lower prices for consumers. The Commission rejected the parties’ network efficiencies as failing to be merger-specific, as a network sharing agreement appeared to be a realistic and attainable less restrictive alternative. Additionally, the Commission found that the network efficiencies were also likely not to be fully verifiable. With respect to the cost savings claimed by the parties, the Commission found that the fixed cost savings did not satisfy the three-pronged test, and only accepted part of the claimed variable cost savings. However, these efficiencies were too small to counter the anti-competitive effect of the merger.

B. Evidence

The Commission’s findings rely on all of the qualitative and quantitative evidence on file. The results of the market investigation (including the assessment of internal documents from the merging parties and to a more limited extent from third parties) were confirmed by economic evidence (depending on the theory of harm, the complexity of the case and the phase of the review process\(^\text{15}\)) and the results of ad hoc customer surveys.

Internal documents: In all recent mobile mergers, the Commission carried out extensive reviews of the merging parties’ internal documents during its phase II investigations. These internal documents play an important part in the Commission’s competitive assessment, for both unilateral and coordinated effects. Internal documents can shed light on the rationale of a deal, the state of the market, its competitive dynamics, the behaviour of the market players, their positioning, and metrics used to benchmark such positioning. They can give also useful insights for the use of the economic evidence, by, for example, illustrating what type of costs firms actually consider in their pricing decisions. For instance, in the Italian mobile merger, the parties’ internal documents included evidence regarding “market repair” – a term indicating the lessening of competition and the increase of prices.

Economic evidence: Similarly to the previous telecoms merger cases (Austria, Ireland and Germany), in the most recent cases the Commission performed a calibrated merger simulation to analyse within a coherent economic framework the horizontal unilateral effects arising from the loss of competition between the merging parties. This technique analyses the interplay of the degree of substitutability between the products and of margins (both key measures affecting pricing incentives before and after the transaction) and approximates the incentives for the merged entity and its competitors to increase prices post-transaction due to the loss of competition between the merging parties.

The key inputs measuring the degree of substitutability between different products for such analysis are diversion ratios, which provide a measure of the extent to which sales lost by one of the merging parties are taken up by the other party or the remaining market participants. Diversion ratios have been calculated on the basis of mobile number portability (MNP) data (data on customers switching provider while keeping their phone number). While such data on historic switching may be reasonable as a first approximation, it is not necessarily based on price changes and does not directly measure customers’ first and second choices. Therefore, it does not necessarily correctly reflect consumers’ reactions to post-merger price changes.

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\(^{14}\) This was the case also for the types of efficiencies raised in the Austrian, Irish and German mobile mergers. Only in Ireland, the Commission accepted certain of the parties’ efficiency claims, which were insufficient to counteract the anti-competitive effects of the merger. See Simon Vande Walle and Julia Wambach, No magic number to dial – The Commission’s review of mobile telecoms mergers, Competition Merger Brief 1/2014 – Article 3, cited.

\(^{15}\) Some tools, such as econometric analysis and customer surveys, are more pertinent to phase II analysis, given the legal standard of a phase I assessment and the time required to perform such assessments.
To account for this possible shortcoming, in all recent mobile mergers the Commission performed a customer survey, designed to measure customers’ first and second choices of mobile operators at the time of their last purchase, and to capture the preferences of the marginal customers (those who are most likely to switch operator following a price increase). In the Danish case, the survey was conducted in cooperation with the Danish competition authority, while in the other cases most of the processes necessary for the survey were managed in-house. The customer survey has proved to be a helpful tool to improve the reliability and robustness of the Commission’s economic analysis. Therefore, while in the Danish case price effects of the merger were quantified by means of a merger simulation based on demand estimation, this type of simulation was not carried out in the United Kingdom and Italian cases.

C. Remedies

There is no blueprint remedy that fits all mobile cases. However, the more structural and future-proof the remedy, the better. In particular, structural remedies involving the divestiture of a standalone business have the potential fully to resolve competition concerns once and for all and are by nature unlikely to raise implementation issues.\(^\text{16}\)

Some of the MVNO remedies\(^\text{17}\) accepted in previous cases have raised issues in the implementation phase. A lot of ink has been spilled from several quarters on the effectiveness of the remedies in the Austrian case. Most recently, the Austrian Competition Authority and the Austrian telecommunications regulator published studies on the effect on mobile prices in Austria following the Hutchison 3G Austria/Orange Austria merger and found significant price increases\(^\text{18}\). The appeals that are currently pending in relation to the German case also focus on the issue of effectiveness and proper implementation of the remedies in that case. Moreover, when accepting these MVNO remedies the Commission has always aimed for the development of one of the remedy takers into a full MNO, namely by including in the commitments the option for the remedy takers to acquire mobile spectrum at a later stage. However, this has proved difficult and to date such options have not been exercised.

In the Italian case it was possible to find an effective structural solution. The merging parties in that case offered the divestment of sufficient assets (spectrum and sites) to allow the creation of a new fourth MNO, which the Commission considered sufficient to allay the identified competition concerns and therefore to clear the transaction. Moreover, the merging parties submitted this remedy as a “fix-it-first” solution. This means that the merging parties had already entered into a binding long form agreement with a purchaser during the merger review process, and presented that buyer to the Commission for its approval during that process. In the clearance decision the Commission assessed the suitability of the buyer and approved it. The buyer selected by the parties and approved by the Commission is Iliad, an operator who successfully entered the French mobile market as a fourth mobile network operator four years ago, and has established itself as an important driver of competition there.

In the Danish and British cases, a similar outcome was not possible as the parties failed to offer a remedy which the Commission considered sufficient to solve its concerns entirely.

In particular, in the Danish case, the first remedy offered was comparable in concept to the core element of the remedies accepted in the Irish and the German mobile mergers in 2014. However, it was inferior in several respects and notably in terms of the amount of capacity divested. In addition, the remedy package, taken as a whole, was not adequate to address all of the competition concerns identified. The second remedy proposal in that case was a step in the right direction toward a structural solution, aimed at creating a fourth MNO, but, as formulated, it was still insufficient in scope and scale effectively to remedy the identified harm and lacked crucial precision on fundamental aspects. These shortcomings were likely to affect the viability, competitiveness and incentives of the new entrant.

In the United Kingdom, the Commission did not consider the remedy proposals sufficient. While featuring certain structural elements (concerning, for example, the divestiture of O2’s stake in the MVNO Tesco Mobile, on which there were however a number of uncertainties), the proposed commitments ultimately consisted of a series of behavioural remedies, complex and highly uncertain in their implementation. Moreover, the behavioural remedies offered would not have addressed the Commission’s


\(^\text{17}\) MVNO stands for mobile virtual network operator, that is to say an operator that offers mobile telecommunications services without having ownership of a network, but on the basis of access to a host MNO’s network through a wholesale access agreement. MVNO remedies are behavioural remedies which provide the takers with access to the merged entity’s network to provide their services.

\(^\text{18}\) On 14 March 2016, the Austrian Competition Authority (BWB) published a report that assesses the effect on mobile prices in Austria following the Hutchison 3G Austria/Orange Austria merger and the related transaction by which Orange’s second brand Yesss! was sold to the incumbent operator Telecom Austria. BWB found significant price increases in the range 14–20% in the period 2013–2014, with pre-paid tariffs suffering the highest price increases (20–30%). In particular, the price increases materialized in December 2013 and lasted at least one year. The report is available here: http://www.bwb.gv.at/Documents/BWB2016-re-Ex-post%20evaluation%20of%20the%20mobile%20telecommunications%20market.pdf.

On the same day, the Austrian telecommunications regulator (RTR) also published a study on the effect on mobile prices in Austria following the Hutchison 3G Austria/Orange Austria merger and found significant price increases for smartphone users and traditional mobile phone users. The study is available here: https://www.rtr.at/en/en/inf/Analysis_merger_H3G_Orange/Ex_post_analysis_s_merger_H3G_Orange_RTR.pdf.

These studies show that prices in Austria started to decline in 2015, with the entry of UPC in December 2014, in line with the remedies, and with entry by several other MVNOs. However there is no evidence (yet) to show that price competition has been restored to pre-merger level.
concerns stemming from the fact that post-transaction the merged entity would have had network sharing agreements in place with both remaining MNOs, and thus the transaction would have had an impact on the entire mobile network infrastructure of the United Kingdom.

All in all, the outcome of the Italian case shows that in-country consolidation is possible, if the merging parties are willing to offer an effective solution to the competition concerns and engage with the Commission to this end very early on in the process. That said, there is no remedy that fits all cases. This goes back to an individual assessment of each case. Any effective and viable remedy must take into account all the specificities and must fully address the competition concerns of a given case.

3. The other trend in telecoms mergers: convergent mergers

In addition to mobile-only mergers, in recent years there have been several cases concerning fixed-mobile integration of telecoms operators, leading to “convergence”. Convergence mainly refers to the combination of one or more fixed telecoms services (fixed voice, fixed broadband internet, TV) with mobile services (voice or voice + data) offered in a package or bundle to consumers. Such bundles are often referred to as ‘multiple play’ and depending on the number of services combined, can be dual play, triple play or quadruple play bundles (quadruple play being by default a convergent bundle).

Convergence is a developing phenomenon in the telecoms sector. However, the pace of convergence varies greatly from country to country (some markets are further ahead in purchasing telecoms services jointly) and on the basis of the combination of services offered.

In recent years, the Commission has dealt with a series of “convergent” mergers, the most recent being the acquisition of mobile operator BASE by the cable operator Telenet in Belgium and the creation of a joint venture between Vodafone and Ziggo in the Netherlands.

To some extent the acquisition of Jazztel by Orange in Spain in 2015 could be considered relevant in the context of convergence, mainly because of the relatively advanced take-up of fixed-mobile bundles in the country and the fact that both Orange and Jazztel were active in the provision of such fixed-mobile bundles in a highly convergent market environment. However, the Orange/Jazztel transaction can be qualified as rather horizontal in nature, as it combined two already integrated fixed-mobile players19.

- **Belgium:** The case related to the proposed acquisition by the Belgian subsidiary of Liberty Global, cable operator and MVNO, Telenet, of the mobile-only operator BASE. The Commission approved the acquisition on 4 February 2016, subject to a fix-it-first MVNO remedy involving the divestment/transfer of a stake in an existing MVNO and of a customer base.

- **Netherlands:** The case related to the proposed creation of a joint venture combining the Dutch telecommunication business of Liberty Global (cable operator and MVNO) and Vodafone (MNO and recent entrant in fixed services). The transaction was cleared subject to a structural remedy consisting of the divestment of Vodafone’s fixed consumer business, including customer base.

A. Framework of assessment

Unlike the mobile-only mergers, the main rationale for these recent “convergent” transactions in Belgium and the Netherlands has been the creation of a new fully integrated player (usually next to the historic incumbent) operating proprietary mobile and fixed infrastructures by combining largely complementary assets/businesses.

Hence these cases might in principle be considered, at first sight, as less problematic in terms of horizontal overlap between the parties’ activities compared to mobile-only mergers. As set out in paragraphs 92 and 93 of the Non-horizontal Merger Guidelines, conglomerate mergers in the majority of circumstances will not lead to any competition problems. The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.

Nevertheless, the horizontal aspects of the transaction – not only in relation to each of the fixed and mobile markets but also in relation to potential fixed-mobile markets (depending of course on the level of advancement of convergent bundles in the given market) – were also carefully scrutinized by the Commission. As set out in more detail above, in the recent cases, horizontal overlaps were identified that gave rise to competition concerns. The horizontal assessment was carried out alongside a careful assessment of the potential conglomerate effects of these transactions (such as the potential leveraging of a market position in fixed to a fixed-mobile market).

It is worth mentioning the evolution in the Commission’s approach to assessing convergent mergers. Besides assessing

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potential impact on separate fixed (that is, potential separate markets for each of telephony, TV and broadband services) and separate mobile markets in their own right, the Commission has also been increasingly assessing the possible impact of transactions on possible (fixed and/or fixed-mobile) multiple play markets, taking due account of the specificities of each national market. For instance, in the Netherlands, the possible markets for fixed bundles and for fixed-mobile bundles were scrutinised. In Belgium, while the Commission considered that it was ultimately unclear whether a separate market for fixed-mobile multiple play services could be defined, it nevertheless noted the growing trend in Belgium towards fixed-mobile bundles and carried out its competitive assessment with respect to the potential impact of the transaction on fixed-mobile multiple play services, as part of its assessment of conglomerate effects (which in that case focused specifically on cross-selling of fixed and mobile services).

As for mobile-only mergers, due consideration is given to the specificities of each market. Given that convergence penetration differs from country to country and may consist of various combinations of services, the conglomerate issues raised by each case may vary, and some cases may be more problematic than others. Moreover, if convergence is indeed advanced, it might be more pertinent to consider horizontal effects on convergent markets rather than conglomerate effects involving the leverage of market power from one component market to another.

Conglomerate mergers are rather complex in terms of competitive assessment, and may imply a number of efficiencies. For example, consumers may be offered a better or cheaper convergent product from an integrated player. However, conglomerate mergers can also entail anti-competitive effects. In the two most recent convergent mergers in Belgium and the Netherlands, the Commission assessed various conglomerate issues related to bundling of fixed and mobile services.

First, the Commission analysed the possibility that non-integrated rivals (MVNOs with a fixed network or mobile-only operators) may be harmed by the ability of the newly integrated player to leverage market power by cross-selling mobile services to existing fixed customers or fixed services to mobile customers (Liberty Global/BASE Belgium, Liberty Global/Vodafone/Dutch JV). These concerns were dispelled, as they amounted to an ‘efficiency offense’ which would likely benefit consumers without leading to the exclusion of non-integrated rivals.

Second, the Commission also analysed price discrimination incentives that would lead the merged entity to offer its services together at a cheaper price than the sum of the single services pre-merger, while also possibly charging a higher price for its fixed services on a standalone basis. A central concern consisted of the exclusion of mobile-only rivals as a result of the changed ability and incentive of the newly created integrated player to price its converged and standalone products (Liberty Global/Vodafone/Dutch JV).

The Commission assessed the ability and incentives of the merged entity to increase the price of its standalone fixed products, to the detriment of mobile-only players.

As regards the ability to increase the price of standalone fixed products, the Commission looked, inter alia, at the proportion of customers of mobile-only rival operators that had a fixed services subscription with the merging parties.

As regards the incentives to increase the price of standalone fixed products, the Commission looked at the likely profit gains and losses from such a strategy. The possible gains derive from the fact that some rivals’ mobile customers already having a fixed subscription with the parties would change their mobile component and opt into a fixed-mobile bundle with the merging parties. The profit losses derive from the fact that some rivals’ mobile customers with a fixed subscription with the parties would prefer to switch to another fixed services provider.

The size of these gains and losses depends, inter alia, on:

- How margins in fixed compare to margins in mobile in absolute value (for instance are margins derived from fixed services higher than the margins in mobile); this element relates to the possible number of mobile customers who must be converted to the fixed-mobile bundle of the merged entity in order to offset the potential loss of fixed-only customers;
- Identifying the possible switching costs for customers and whether such potential switching costs differ in fixed and in mobile;
- The existence of alternative fixed offers in the market other than the merged entity. The relevant regulatory framework (e.g. whether there is regulated wholesale access to the network of one or more operators, which might enable other players to also offer additional services) also is an element that the Commission takes into account;
- The possibility by mobile-only rivals to adopt counterstrategies, such as lowering the price of mobile in order to counteract the increased price of fixed services by the merged entity;
- The stage of transition towards convergence in the market – a lower uptake of fixed-mobile bundles would suggest a significant share of the mobile customers would continue to source either only mobile services or in any event mobile and fixed services separately, thereby reducing the merged entity’s incentive to increase the price of fixed standalone products.

The Commission reached the conclusion that the newly created merged entity would unlikely have the ability and incentive to engage in a price discrimination strategy that would impair the competitive strength of rivals.
B. Remedies

Interestingly, to date, the Commission has identified horizontal concerns (including in relation to potential convergent fixed-mobile markets) in relation to convergent mergers rather than conglomerate effects. In light of the fact that the Commission’s assessment in the recent convergent cases ultimately showed that the respective transactions did not raise any competition concerns relating to conglomerate issues, the remedy packages accepted in each of these cases address solely the identified horizontal anti-competitive effects.

Given that each national market has its own regulatory specificities and the issues identified differ from case to case, the remedies accepted were inevitably tailored to addressing the particular concerns in each case.

The competition concerns raised by the Liberty/BASE transaction in Belgium were connected to the elimination of an MVNO player on the market for retail mobile telecommunication services. Thus, the commitments involved divestment/transfer of a customer base to enable the entry of a new MVNO operator. To ensure a suitable purchaser would be available, the remedy was modelled as a "fix-it-first" solution; that is, the remedy taker was found and a divestiture deal signed during the merger review process, thus allowing for a higher level of certainty about the availability of a suitable buyer.

To address the horizontal concerns in relation to the fixed and fixed-mobile bundles that the Liberty/Vodafone JV transaction raised in the Netherlands, the remedy package accepted was also structural, consisting of the divestment of Vodafone’s fixed consumer business along with the respective customer base.

Given that the two convergent mergers in Belgium and the Netherlands were cleared conditionally only very recently (both in 2016), it is premature to draw any conclusions on the effectiveness of the remedies in these two cases.

4. Conclusion

In recent years the Commission examined several mobile-only and convergent mergers. While each case has to be assessed on its own merits, the legal and analytical framework underlying the Commission’s assessment is the same for all cases in any industry, and is elaborated in the Commission’s Guidelines.

In the mobile-only cases competitive concerns stemmed largely from the horizontal overlap of the parties’ activities. The Commission has gained significant experience in analysing this type of issue and has reached a high level of sophistication in the use of its investigative tools, including econometric analysis and internal document review. The Commission has also found that, where mobile-only mergers resulted in in-country consolidation, this was unlikely to bring more investment to the benefit of consumers.

In convergent mergers, in addition to (often more limited) horizontal overlaps, the Commission also carefully analysed a variety of conglomerate issues. The Commission has thus far not found conglomerate concerns in relation to convergent mergers. However, the Commission has reached that conclusion only after careful scrutiny of the specific conglomerate issues raised by each case against the regulatory and other features of the national market involved.

With regard to remedies, there is no one solution that fits all cases, but remedies must fully address the competition concerns of a given case and be viable. To this effect, the Commission has a preference for structural solutions.