

***Case No COMP/M.4947 -
VODAFONE / TELE2
ITALY / TELE2 SPAIN***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 27/11/2007

***In electronic form on the EUR-Lex website under document
number 32007M4947***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.XI.2007

SG-Greffe(2007) D/ 207195

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.4947 – Vodafone / Tele2 Italy / Tele2 Spain
Notification of 19/10/2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 19/10/2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Vodafone Group Plc ("Vodafone", United Kingdom) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertakings Tele2 Italia Spa ("Tele2 Italia", Italy) and Tele2 Telecommunications Services SLU ("Tele2 Spain", Spain) by way of purchase of shares.
2. After examining the notification, the Commission found that the notified transaction fell within the scope of the Merger Regulation and that it did not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES

3. Vodafone is the holding of a group of companies involved in the operation of mobile telecommunications networks and the provision of the related services in several EU Member States, among which Italy and Spain².

¹ OJ L 24, 29.1.2004 p. 1.

4. Tele2 Italy³ and Tele2 Spain⁴ are alternative providers of fixed line telephony services and internet connection services including broadband services.

II. THE OPERATION AND THE CONCENTRATION

5. Vodafone is acquiring sole control, through its subsidiaries Vodafone Omnitel N.V. and Vodafone Holdings Europe S.L., of, respectively, Tele2 Italia and Tele 2 Spain. Vodafone has publicly announced on 6/10/2007 that it had entered into two agreements with Tele2 Europe S.A., a subsidiary of Tele2 AB of Sweden. The two transactions are unitary in nature within the meaning of Article 3 of the Merger Regulation⁵: they are simultaneous, they take place between the same companies and they are legally conditional upon each other. As a result of the operation Vodafone will acquire control over both Tele2 Italia and Tele2 Spain. The operation therefore constitutes a single concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. In 2006, the combined aggregate worldwide turnover of all the undertakings concerned exceeded EUR 5 000 million⁶. The aggregate Community-wide turnover of each party exceeds EUR 250 million⁷. Vodafone does not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The proposed concentration therefore has a Community dimension.

IV. COMPETITIVE ASSESSMENT

1. Relevant markets

1.1 Relevant product market

7. Both parties are providers of telecommunications services in two countries, i.e. Spain and Italy, and in most of the markets for telecommunication services their activities overlap only to a very limited extent. The parties propose to define the relevant product markets in line with previous Commission decisions and along the Commission's Recommendation of 11 February 2003 on Relevant Product and Service Markets (the "Recommendation")⁸. The revised Recommendation has been

² In Italy, Vodafone is mainly active as a provider of mobile communications services, with around 26 million customers and a market share estimated as 32.6%. In Spain, Vodafone is the second largest mobile operator with approximately 15 million customers.

³ It has around 2.6 million customers as of 30 June 2007, thereof 400 000 are broadband customers.

⁴ It has 550 000 customers as of 30 June 2007, thereof approximately 240 000 are broadband customers.

⁵ See Recital n. 20 of Merger Regulation and paras 38 et seqq of the Commission Consolidated Jurisdictional Notice.

⁶ Vodafone: EUR 46 040 million; Tele2: EUR 796 million.

⁷ Vodafone: EUR 37 898 million; Tele2: EUR 796 million.

⁸ Commission's Recommendation of 11 February 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive

approved by the Commission on 13/11/2007. Nevertheless, for purposes of the definition of the product markets for the current case it can be referred to the previous Recommendation and the Commission decisional practice in merger cases based on that. Substantial changes following from the revision of the Recommendation will be discussed below as regards to the wholesale market for the wholesale access and call origination from a mobile network (market n. 15).

8. The notifying party submitted that the reportable markets are:
 - a) the retail market for fixed broadband internet access in Italy,
 - b) the retail market for fixed broadband internet access in Spain
 - c) the retail market for telephony services at a fixed location in Italy
 - d) the retail market for telephony services at a fixed location in Spain
9. Potential vertical relationships between the parties have been identified regarding the markets for
 - e) wholesale call termination upon Tele2's fixed network, respectively, in Italy and Spain and
 - f) wholesale call termination upon Vodafone's mobile network in Italy and, respectively, in Spain
 - g) retail mobile telephony market, respectively, in Italy and Spain
10. A further market has to be considered in the framework of the analysis of the submissions received by five market players:
 - h) the wholesale market for access and call origination on public mobile telephone networks in Italy

Retail market for fixed broadband internet access

11. The definition of markets a) and b) is in line with the Commission decisional practice⁹ in as much as it entails a distinction between dial-up and broadband internet access, whereas it does not consider as relevant the distinction between residential and business customers.

Retail market for telephony services at a fixed location

12. For markets c) and d) the parties propose a definition in line with the Recommendation. The Recommendation further considers possible sub-divisions of the market in narrower segments (business and residential, national and international

2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic and network services, OJ L 114, 8.5.2003, p. 45. However, it is worth to note that the Recommendation is without prejudice to the markets that may be defined in specific cases under competition law (recital 18 Recommendation).

⁹ See Case COMP/M.3914 – Tele2/Versatel.

calls, etc.). However, for the purpose of the assessment of the concentration it is not necessary to further delineate the retail market for fixed telephony as, in any event, the competitive assessment would not change.

Wholesale call termination upon a fixed or mobile network

13. Market e) corresponds to market n. 9 of the Recommendation. Market f) corresponds to market n.16 of the Recommendation. As established in previous Commission decisions¹⁰, there is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended addressee only through the operator of the network to which the addressee is connected "as a guest". Each individual network therefore constitutes a separate market for termination. This applies both to fixed networks and to mobile networks. The Recommendation and the Commission's decision practice, accordingly, regard call termination in each different (fixed and mobile) network as constituting a separate market.

Retail mobile telephony market

14. As for market g), in previous decisions, the Commission did not further subdivide the retail market for the provision of mobile telecommunications services, e.g. according to business and residential customer or pre-pay and post-pay customers or according to the network used, i.e. between 2G (GSM) and 3G (UMTS) networks. For the purpose of those cases, the Commission's assessment was based on a single market for the provision of mobile telecommunications services on the retail level¹¹.

Wholesale market for access and call origination on public mobile telephone networks

15. This market corresponds to market n. 15 of the Recommendation. Access and call origination are key elements required to provide retail mobile telephony services. Network access and call origination are typically supplied together by a Mobile Network Operator (MNO), hence both services can be considered as part of the same market¹². MNOs own their mobile networks and constitute the supply side, whereas Mobile Virtual Network Operators (MVNOs) and Service Providers who seek access to one or more of the MNO networks in order to provide their retail services constitute the demand side of this market.

B. Relevant geographic market

16. In line with previous Commission decisions, it is considered that the geographic scope of all the markets above is national.

¹⁰ COMP/M.1493 – Telia/Telenor, COMP/M.2803 – Telia/Sonera and COMP/M.3806 – Telefónica/Cesky Telecom.

¹¹ Case COMP/M.3245 – Vodafone/Singlepoint; Case COMP/M.3530 – TeliaSonera/Orange; Case COMP/M.3916 – T-Mobile Austria / Tele.ring.

¹² See Explanatory Memorandum to Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications 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 communication networks and services, O.J. L 114 of 8 May 2003, p.45.

5.2 Assessment

5.2.1 Italy

a) Retail market for fixed broadband internet access in Italy

17. In Italy, only Tele2 is active as a provider of broadband internet access with a 4.2% market share based on customers and 2% based on value¹³. Vodafone only provides mobile internet access via 3G handsets and HSDPA cards.
18. It can be concluded that the concentration does not raise any competition concern in relation to the retail market for fixed broadband internet access in Italy.

b) Retail market for telephony services at a fixed location in Italy

19. In Italy, Tele2 offers telephone services at fixed location, holding a 7.8%¹⁴ market share in 2006 by value. Vodafone offers fixed telephony services to its corporate customers, holding a market share of [0-5]%¹⁵ by value in 2006. The combined post merger market share would be, therefore, [5-10]%.
20. It can be concluded that the concentration does not raise any competition concern in relation to the retail market for telephony services at a fixed location in Italy.

c) Wholesale fixed and mobile call termination markets in Italy

21. The Recommendation and several other Commission decisions establish that each individual network, fixed and mobile, constitutes a separate call termination market, in which each operator holds a 100% market share. However, call termination markets are upstream to the retail provision of fixed and mobile telephony. In this respect, anti competitive discriminatory effects after the merger are unlikely. This is due to the fact that, first, the proposed concentration only brings together one mobile and one fixed networks. The rates for termination on fixed and mobile networks are very different and the proposed transaction does not increase the number of subscribers on either the fixed or the mobile network to the effect that network effects on each of the mobile and the fixed network can therefore be excluded.
22. Furthermore, both Vodafone's and Tele2's respective mobile and fixed call termination rates are subject to regulatory obligations in Italy which will be set out in more detail below.

¹³ Source: AGCOM Annual Report 2007.

¹⁴ Source: AGCOM Annual Report 2007

¹⁵ Source: parties' estimates.

Fixed call termination (market n. 9)

23. On January 2006, the markets for call termination over each operator's fixed network have been regulated by the Italian Regulator ("AGCOM") under the current Regulatory Framework¹⁶. AGCOM adopted the final measure on call termination on individual public telephone networks provided at a fixed location on August 2006¹⁷.
24. AGCOM defined separate market for each network operator providing call termination services over its fix network and designated Telecom Italia and 11 alternative network operators as having significant market power in the market for call termination on its own network. AGCOM imposed obligations under the Access Directive¹⁸. In particular AGCOM imposed a price control obligation through the imposition of a maximum fixed termination rate.

Mobile termination (market 16)

25. On 11 February 2006, AGCOM has adopted a measure concerning the market for voice call termination on individual mobile networks in Italy¹⁹, which followed the provisional measure adopted on July 2005²⁰.
26. AGCOM identified the four mobile operators TIM, Vodafone, WIND and H3G as having individually significant market power on each mobile network.

¹⁶ The new regulatory framework for electronic communications networks and services, covering all forms of fixed and wireless telecoms, data transmission and broadcasting adopted in 2002 by the European Union set out common rules for National Regulatory Authority with the aim of developing a better-functioning internal market for telecommunications networks and services. See EC website http://ec.europa.eu/information_society/policy/ecomm/current/index_en.htm.

¹⁷ Delibera n. 417/06/CONS " Mercati della raccolta, terminazione e transito delle chiamate nella rete telefonica pubblica fissa, valutazione di sussistenza del significativo potere di mercato per le imprese ivi operanti e obblighi regolamentari cui vanno soggette le imprese che dispongono di un tale potere (mercati n. 8, 9 e 10 fra quelli identificati dalla raccomandazione sui mercati rilevanti dei prodotti e dei servizi della commissione europea)" published on AGCOM website http://www.agcom.it/provv/d_417_06_CONS/d_417_06_CONS.htm on 4 August 2006 and on Gazzetta Ufficiale della Repubblica italiana n.208 of 7 September 2006.

¹⁸ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Access Directive"), O J L 108, 2442002 p.13.

¹⁹ *Delibera n. 3/06/CONS* "Mercato della terminazione di chiamate vocali su singole reti mobili (mercato n.16 fra quelli identificati dalla raccomandazione della Commissione europea n. 2003/311/CE): Identificazione ed analisi del mercato, valutazione di sussistenza di imprese con significativo potere di mercato ed individuazione degli obblighi regolamentari" published on AGCOM website http://www.agcom.it/provv/d_03_06_CONS/d_03_06_CONS.htm on 30 January 2006 and on Gazzetta Ufficiale della Repubblica italiana n. 32 of '8 February 2006, supplemento ordinario n. 35.

²⁰ AGCOM adopted a provisional measure pursuant to Article 7(6) of the Framework Directive on the basis of which as from 1st September 2005 AGCOM applied a reduction of Tim, Vodafone and Wind mobile termination rate (MTR) o July 2005. The final measure " Misure urgenti in materia di fissazione dei prezzi massimi di terminazione delle chiamate vocali su singole reti mobili", n. 286/05/CONS was published on AGCOM website http://www.agcom.it/provv/d_286_05_CONS.htm on 19/07/05 and on Gazzetta Ufficiale della Repubblica italiana n. 171 of 25 July 2005.

27. In its decision on AGCOM's notified draft measure²¹, the Commission noted that AGCOM proposed to introduce an annual reduction of mobile termination rates (MTRs) for the year 2006 to 2008 on TIM, Vodafone and Wind based on a price cap mechanism. It also imposed a cost accounting obligation which would allow the Authority to verify the consistency of the imposed annual reduction of MTRs with the costs and a non discrimination obligation.²²

Third party submissions

28. Third parties complaints submitted in the course of the investigation claimed that, after the merger, Vodafone would have the ability to foreclose and discriminate fixed network operators in the upstream market for wholesale mobile termination services and in the fixed-to-mobile market.
29. In the complainants' view, Vodafone would be able to discriminate off-net calls originated in competing fixed telephony operators' networks in favour of on-net calls originated in the fixed network of its divisions (namely, the fixed clients in particular Tele2²³). It would be able to lower tariffs charged to Tele2 subscribers for calls to Vodafone mobile subscribers below the generally charged termination fees by subsidizing this market with excessive profits gained in the wholesale mobile termination market. By these means it would leverage its dominance on wholesale mobile termination on the fixed to mobile market.
30. It has to be noted that there is no Commission precedent in the definition of a separate market for fixed to mobile termination.
31. Furthermore, even considering that Vodafone would have the incentive and ability to unfairly charge higher termination prices to competing fixed line operators than to its internal divisions, such practice would have a minimal impact on the fixed line telephony market. As indicated above, the parties' combined market share in the latter market would be below 10%, even when considering the sub-segment of fixed to mobile calls²⁴. It is rather unlikely that, with such a low market share in the fixed telephony market and absence of significant market power in the retail mobile telephony market, Vodafone's current practice of applying lower on-net termination

²¹ See Commission decision on case IT/ 2005/0316 (SG-Greffe (2005) D/207789).

²² AGCOM proposed not to impose a price control obligation on H3G as it considered such an obligation would too burdensome for H3G and might prevent H3G from recovering its investments. However, it was foreseen to evaluate the imposition of a price control obligation the following year. On 2 July 2007 the Commission received a notification registered with case n. IT/2007/0659 by AGCOM concerning the imposition of a price control obligation on H3G Italy in the market for voice call termination on individual mobile networks. The notification followed the public consultation n. 712/06/CONS "Consultazione pubblica sulla valutazione ai sensi dell'art. 15, comma 4, della delibera n. 3/06/CONS, circa l'applicazione all'operatore H3g degli obblighi di cui all'art. 50 del codice delle comunicazioni elettroniche" which was published on AGCOM website http://www.agcom.it/provv/d_712_06_CONS/d_712_06_CONS.htm on 21/12/2006

²³ The argument was also made for MVNOs having bought capacity on Vodafone's network as British Telecom.

²⁴ Source: AGCOM Annual Report 2007 and parties' estimates.

fees would constitute a significant impediment to effective competition in the market for wholesale mobile termination services²⁵.

32. In addition, in its investigation of 2005²⁶, the AGCM inquired whether TIM, Vodafone and Wind were abusing individually their dominant positions on their respective market for termination. In particular AGCM considered whether TIM, Vodafone and Wind allegedly charged favourable economic and technical conditions to their own commercial divisions for terminating the calls with the purpose to exclude their competitors from the market for integrated fix-mobile service for business clients. Having Vodafone submitted commitments, the proceeding against it was subsequently closed in May 2007²⁷ (see below paragraph 47). On August 2007, AGCM adopted a decision only with regard to TIM and Wind concerning an abuse of a position of single dominance on the integrated market for fixed to mobile services. In its final decision AGCM fined the two operators and ordered to stop charging their rivals higher termination rates²⁸.

Conclusion

33. It can be concluded that the concentration does not raise any competition concern in relation to the wholesale fixed and mobile call termination markets in Italy.

d) Retail mobile telephony market in Italy

34. The operation does not directly affect this market as Tele2 is not active as a MNO or as an MVNO in Italy. Consequently, there is no horizontal overlap between the merging parties. This market is taken into account by the notifying party with respect to its vertical relationship with the wholesale market for call termination on fixed and mobile networks in Italy. Given that Tele2's market share in the market for fixed telephony is below 10% (as mentioned above) and that its termination fees are subject to regulation, no competitive concerns arise from this vertical relation for the retail mobile telephony market in Italy.
35. This market is also in a vertical relationship with the access and call origination on public mobile telephone networks in Italy. Third parties have submitted that the proposed transaction could raise competition concerns in the wholesale access market and that these competition concerns could have an effect on the retail market for mobile services.
36. As will be analyzed below, the Commission has found no elements on the basis of which it could be concluded that a significant impediment to effective competition

²⁵ See also the Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework of May 2006 http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf.

²⁶ See below, footnote 33.

²⁷ Provvedimento n. 16871 of 24/05/2007 "Chiusura parziale istruttoria (impegni) in case A357 – Tele2/TIM – Vodafone – Wind.

²⁸ Case A357 - TELE2/TIM-VODAFONE-WIND *Provvedimento n. 17131*, Bollettino Settimanale Anno XVII - n. 29, published on AGCM website www.agcm.it on 6 August 2007.

could be found at the wholesale level and, as a consequence, the same conclusion can be reached for the retail market.

e) Wholesale market for access and call origination on public mobile telephone networks in Italy

37. The notifying party does not consider the market for wholesale access and call origination on public mobile telephone networks to be a technically affected market, as Tele2 is not active as an MNO and does not own a public mobile telephone network in Italy.
38. The Commission has received comments from some market players, which submitted their concerns in respect of alleged anti-competitive effects of the merger when considering in combination the current situation of the market for mobile access and origination and the market for call termination on fixed and mobile networks in Italy. It is claimed that the Italian market for wholesale access and call origination on public mobile telephone networks is not competitive, rather that it is characterized by a collective dominant position of all MNOs.
39. In the third parties' view, after the merger Vodafone would be able to initiate foreclosing and discriminating practices against fixed network operators in the upstream market for wholesale access and call origination on public mobile telephone networks and that this would have an anti-competitive effect also in the market for retail mobile services.
40. It has firstly to be noted that, as the merger does not affect this market. There are no elements on the basis of which it can be concluded that, after the acquisition of Tele2, Vodafone will have the incentive and ability to reduce the capacity to be provided to prospective MVNOs or ESPs.
41. Nevertheless, the Commission has analyzed the arguments brought forward by the complainants. It found no elements on the basis of which the operation could raise competition concerns for this market under the Merger Regulation.
42. There are no indications of the presence of a single or collective dominant position of MNOs in this market in Italy according to previous decisions by the Italian Authorities or the Commission.
43. AGCOM's 2005 analysis of the market for access and call origination on public mobile telephone networks²⁹ showed that, notwithstanding the fact that – at that time - no transactions existed on the wholesale market for mobile access and call origination since all supply was provided internally by vertically integrated MNOs, none of the mobile operators held a position of individual or collective dominance on the Italian market for access and call origination on public mobile telephone network. This

²⁹ *Delibera n. 306/05/CONS* "Consultazione pubblica sull'identificazione ed analisi del mercato, valutazione di sussistenza di imprese con significativo potere di mercato ed individuazione degli obblighi regolamentari cui vanno soggette le imprese che dispongono di un tale potere (mercato n. 15 fra quelli identificati dalla raccomandazione sui mercati rilevanti della Commissione Europea)" published on AGCOM's website on 04/08/05 http://www.agcom.it/provv/c_p_306_05_CONS/d_306_05_CONS.htm on Gazzetta Ufficiale della Repubblica italiana n. 184 of 09/08/2005.

conclusion was supported by looking at the retail mobile market structure³⁰. Since none of the MNOs was found to possess either individually or jointly with others a dominant position, AGCOM did not propose to impose regulatory remedy. The draft measure was then notified to the Commission in accordance to Article 7 (3) of the Framework Directive³¹.

44. On 9 November 2005 the Commission issued a comment letter on AGCOM's notified draft measure. The Commission noted in its decision positive signals of increasing competition in the market. However, although it acknowledged that existing MNOs started negotiating access to their mobile network, they had not concluded – at that time - any agreement with Mobile Virtual Network Operators (MVNOs) or other service providers. Therefore, the Commission invited the Authority to "*closely monitor the market so as to identify whether these are irreversible trends towards a competitive market structure in which any tacitly co-ordinated outcome is unlikely to happen*"³².
45. As recommended by the Commission, once AGCOM adopted its final measure on February 2006³³, it started to monitor negotiations between MNOs and undertakings without spectrum assignment.
46. The Italian Autorità per la Concorrenza ed il Mercato ("AGCM") investigated (Case A357) into the Italian mobile telecoms market against Telecom Italia Mobile Spa (Tim), Vodafone Omnitel N.V. (Vodafone) e Wind Telecomunicazioni Spa (Wind)³⁴. In particular, AGCM investigated whether the three mobile GSM network operators - TIM, Vodafone and Wind - were abusing their collective dominant position by refusing to negotiate access to their mobile network with MVNOs with the purpose to prevent alternative providers to enter the retail mobile market. The investigation revealed that no collective dominant position could be identified in this market. AGCM also investigated whether TIM, Vodafone and Wind were abusing individually their dominant positions on their respective market for termination.

³⁰ Given that none of the existing MNOs had a wholesale offer for access and call origination services to Mobile Virtual Network Operators (MVNOs) or to service providers, AGCOM looked at retail market shares of all the MNOs as a proxy for market shares of the corresponding wholesale market and the other indicators of dominance.

³¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), OJ L 108, 2442002, p.33.

³² See Commission decision on case IT/ 2005/0259 (SG-Greffe (2005) D/206078).

³³ *Delibera n. 46/06/CONS* "Mercato dell'accesso e della raccolta delle chiamate nelle reti telefoniche pubbliche mobili (mercato n. 15 della raccomandazione della Commissione europea n. 2003/311/CE): identificazione ed analisi del mercato, valutazione di sussistenza di imprese con significativo potere di mercato ed individuazione degli obblighi regolamentari", published on AGCOM's website on 16/02/06 http://www.agcom.it/provv/d_46_06_CONS/d_46_06_CONS.htm and on 24/02/06 on Gazzetta Ufficiale della Repubblica italiana n. 46 of 24/02/2006.

³⁴ Case A357 - TELE2/TIM-VODAFONE-WIND *Provvedimento n.14045*, Bollettino Settimanale Anno XV - n. 8, published on AGCM website www.agcm.it on 14 March 2005.

47. Following the submission of commitments³⁵ by Vodafone, the AGCM – with a decision dated 24/05/2007 - closed the proceeding against the mobile operator which negotiated access to its mobile network with the fixed network operator British Telecom - Albacom³⁶. In addition, it has to be noted that Vodafone has recently entered also in ESP agreements with Carrefour³⁷, PosteMobile S.p.A. - a subsidiary of Poste Italiane - and CONAD. Also Telecom Italia has entered into ESP/MVNO agreements with COOP³⁸, the largest Italian retailer, and, according to its own press release, Tiscali³⁹.
48. It should also be noted that in the recently approved legislative proposal to reform the Regulatory Framework of 2002 the market for access and call origination on a mobile network has not been included in the markets to be analyzed by national regulatory authorities in accordance with Article 15(3) of Directive 2002/21/EC.⁴⁰
49. Given the above, the present transaction does not lead to any competition concerns in relation to the wholesale market for access and call origination on public mobile telephone networks in Italy.

f) Further concerns of third parties' complainants: creation of a collective dominant position of Vodafone and Telecom Italia in the provision of integrated and convergent fixed and mobile services

50. In the complainants' view, Vodafone will become, after the acquisition of Tele2, a fully integrated operator owning a fixed and a mobile network. It could have then the ability and the incentive to prevent access to its mobile network to potential competitors (fixed line operators) who could request access in order to enter the retail mobile market. Hence other potential operators would not be able to offer convergent services due to lack of access to the mobile network. This would determine the creation of a collective dominant position held by Vodafone and Telecom Italia on a submitted market of integrated and convergent fixed and mobile services.

³⁵ Vodafone presented the agreement concluded with the fixed line operator British Telecom/Albacom and the preliminary contracts with Carrefour and Poste Italiane, with which it grants access to its mobile network. In particular, the contract with BT allows the latter to propose fixed and mobile offers in competition with those offered by Vodafone. In the same contract, Vodafone undertakes to grant wholesale access to its mobile networks without restrictions.

³⁶ BT's mobile offer will be offered on the market as from 3/12/2007.

³⁷ Carrefour launched its mobile offer on 7/06/2007.

³⁸ COOP launched its mobile services on 4/06/2007.

³⁹ See Tiscali's press release of 27/07/2007.

⁴⁰ See the Commission recommendation on relevant product and service markets within the electronic communications 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 communications networks and services and the Explanatory note: Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications 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 communications networks and services that can be found on http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm.

51. First, in previous decisions, the Commission has not found that a market for convergent fixed and mobile services existed. Second, as it has been analyzed above, there are no elements on the basis of which it can be concluded that Vodafone would have, after the merger, no longer the incentive to grant access to its mobile network to fixed network operators. Third, there is, furthermore, no evidence that coordination in relation to an emerging market among Vodafone and Telecom Italia would become likely as a result of the merger.
52. Currently, Vodafone and Telecom Italia are offering similar but not identical products in the convergent segment, as acknowledged by the analysis of AGCOM concluded in August 2007⁴¹. Furthermore, AGCOM found that it is not possible to identify a separate market for convergent fixed and mobile services at this stage and that the issue of possible replicability of the offer by other competitors is connected to the analysis of the market for access to mobile network, where in Italy no operator has been notified. The AGCOM, in line with the opinion of the AGCM, found that it would not be justified nor proportional, in this new emerging market where no dominant position can be found, to impose access obligation on operators⁴².
53. Furthermore, in Italy, not only Vodafone and Telecom Italia will be able to provide a convergent offer. Also Wind owns both a mobile and a fixed network so that it would be able to make an offer combining fixed and mobile telephony. After having entered into an agreement with Vodafone, Albacom (British Telecom) is able to make such an offer. In the same way, also Tiscali announced in a press release that it would be able to make such a convergent offer.
54. Finally, in any case, Tele2's and Vodafone's combined market share in the retail fixed telephony market is below 10% and Vodafone's is not a dominant player in the retail mobile telephony market.

⁴¹ "Se tuttavia le offerte dei due operatori sono analoghe dal punto di vista delle funzionalità offerte alla clientela, esse si differenziano, come meglio precisato nel seguito, nelle piattaforme e configurazioni di reti utilizzate per la realizzazione del servizio. Infatti in un caso (Vodafone) il servizio integrato viene svolto con l'utilizzo esclusivo della rete mobile, mentre nell'altro (Telecom Italia) attraverso un'integrazione tra la rete mobile e la rete fissa a larga banda, anche di operatori interconnessi, richiedendo altresì l'uso di connessioni *wireless* in tecnologia WiFi o DECT"
http://www.agcom.it/provv/d_415_07_CONS.htm

⁴² "Relativamente alla potenziale criticità inerente la replicabilità dell'offerta integrata di Vodafone, si evidenzia in primo luogo che la stessa AGCM riconosce che l'assenza di obblighi specifici sul tema costituisce un "fenomeno generalizzato e dovuto alla stessa definizione del mercato dell'accesso alle reti mobili, dove nessun operatore risulta notificato di significativo potere di mercato". D'altra parte, nello stesso parere l'AGCM condivide la posizione dell'Autorità di non individuare, almeno allo stato, uno specifico mercato per i servizi in questione, in virtù, tra l'altro, del loro carattere di assoluta novità e dell'impossibilità di stabilire a priori il grado di diffusione che i servizi stessi avranno presso i consumatori. Appare quindi sin d'ora che subordinare l'avvio dei servizi in questione all'imposizioni di specifici obblighi in tema di accesso alle reti mobili risulterebbe non giustificato, stante l'impossibilità di identificare posizioni di dominanza nei servizi in questione, oltre che non proporzionato, in quanto gli stessi servizi si trovano appena in fase emergente. Si condivide tuttavia l'esigenza di monitorare le dinamiche competitive e di verificare la necessità di individuare ed imporre nel prosieguo, ove del caso, specifiche misure. Ciò potrà essere, già a breve termine, effettuato nelle appropriate sedi della revisione del mercato dell'accesso da rete mobile, la cui procedura di analisi di mercato l'Autorità ha, come prima detto, riavviato.", *ibidem*.

55. It can be concluded that, even if a market for convergent fixed and mobile offerings should exist, the present transaction would not lead to competition concerns on such a market.

g) Conclusion

56. Given the above, the present concentration will not lead to a significant impediment of effective competition on any of the telecom markets concerned in Italy.

5.2.2 Spain

a) Retail market for fixed broadband internet access in Spain

57. Tele2's has approximately 3.3% market share based on number of lines for broadband access in Spain and more than 4% by value⁴³. Vodafone Spain offers fixed broadband services through a wholesale agreement with[...]⁴⁴ and mobile internet access via 3G handsets and HSDPA data cards. Its market shares when considering both the market for fixed broadband internet access and an overall market for both fixed and mobile broadband internet access is negligible.

b) Retail market for telephony services at a fixed location in Spain

58. In Spain, Tele2 offers telephone services at fixed location, holding a 3.4%⁴⁵ market share in 2006 by number of lines. Vodafone offers fixed telephony services to some of its mobile corporate customers. However, this represents a market share of [0-5]% by lines and [0-5]% by minutes⁴⁶ of the total fixed telephony market in 2006. The combined post merger market share would be, therefore, [0-5]% by lines.

e) Wholesale fixed and mobile call termination markets in Spain, retail fixed and mobile telephony in Spain

59. The Recommendation and several other Commission decisions establish that each individual network, fixed and mobile, constitutes a separate call termination market, in which each operator holds a 100% market share. However, call termination markets are upstream to the retail provision of fixed and mobile telephony. In this respect, anti competitive discriminatory effects after the merger are unlikely given that both Vodafone's and Tele2's respective mobile and fixed call termination rates are subject to regulatory obligations in Spain.

VI. CONCLUSION

⁴³ Source: CMT 2006 Annual Report and parties' estimates.

⁴⁴ [...]

⁴⁵ Source: CMT 2007 Annual Report

⁴⁶ Source: Vodafone's estimate.

60. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission