Regulating Mergers in the Communications Industry in the 21st Century

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The communications industry is part of the key infrastructure for the economy and policies to ensure a competitive, dynamic communications industry can significantly impact overall economic growth. In this article, the authors examine approaches taken by competition authorities in Europe and the United States in regulating mergers in the early years of the 21st century. The years following the end of the dotcom boom in 2000 have witnessed significant consolidation on both sides of the Atlantic. Much of this consolidation has occurred between geographically discrete networks thereby avoiding concerns about a loss in direct horizontal competition, although vertical foreclosure concerns have sometimes led to restrictions being imposed. Both European and US authorities have shown themselves ready to use merger regulation as a means to achieve more general policy objectives where there is little relationship between the conditions sought and any direct impact of the merger on market power. In some respects, the United States has applied more interventionist forms of regulation. Nonetheless, the legacy of national industries in Europe still leads to Europe having a more fragmented communications sector and the potential for further significant consolidation in the years ahead.

Introduction

For much of the 20th century, telecommunications services were provided by national monopolies in both the United States and in many parts of Europe.[1] TV services were separately provided by terrestrial broadcasters and, in some countries, cable operators. Operators thus faced little competition either from operators using the same technology or using different technology platforms. Towards the end of the 20th century, a number of changes set the scene for a dramatic increase in competition: licensing restrictions were reduced or removed entirely, mobile technology was deployed by multiple mobile operators and technological developments were put in train that led to fixed and cable operators increasingly being able to offer voice, video and broadband services in competition with each other.

The market liberalisation and technological change led to a wave of large mergers in the communications sector in the late 1990s. This merger wave and indeed some of the merging companies disappeared with the ending of the dotcom boom in 2000. In the years following the end of the boom, merger activity in the communications sector has gradually increased again. Fixed operators constrained from mergers in their core markets have sought to gain scale by expanding into other geographic areas and into related services. Regional cable operators have merged increasingly into national and international operators. Mobile operators have also sought greater scale through mergers of operators in discrete geographic areas. In addition, mobile markets have also experienced mergers between significant direct competitors, creating perhaps the greatest challenge for competition authorities.

Faced with the industry's drive to consolidate, competition authorities have needed to strike a balance between allowing firms to achieve efficiencies through greater scale and scope in an industry that is inherently concentrated at the network level while ensuring sufficient competitive pressure remains to protect consumer outcomes. The aim of this article is to assess how well competition authorities on each side of the Atlantic have approached this task.

In the article, the authors first provide an overview of the development of the industry in Europe and the United States. Much of the earlier history of the industry continues to shape the nature of competition to date. Secondly, the article outlines the nature of the consolidation that has taken place in the early years of the 21st century. It identifies the main types of mergers and their key drivers. It then briefly compares the institutional and legal frameworks for assessing mergers in Europe and the United States before turning to survey the specific approaches taken to the assessment of mergers and agreements between operators. The authors consider mergers in fixed, pay-TV and mobile markets as well as mergers between operators using different technological platforms. The article assesses the approaches taken from a consumer welfare perspective. Finally, it brings the earlier analysis together with a number of overall conclusions.

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1 In some parts of Europe, telecommunication services were provided by discrete regional monopolies.

Consolidation in the communications industry

This section reviews the development of the telecommunications industry in Europe and the United States to provide an understanding of current market structures and the process of consolidation up to 2000.

Initial consolidation and then liberalisation

The early history of telecommunications in the United States and parts of Europe was characterised by the entry of a number of generally city-based companies providing telephone services. These networks rapidly expanded, were interconnected and, in some parts, even competed directly.[2] In the United States, the proliferation of entrants gave way to market consolidation which was ultimately completed by the 1934 Communications Act that gave AT&T (the parent company of the Bell System of telephone networks) monopoly rights in return for undertaking to provide "universal access" to every house in the United States. In Europe, the national post offices became the monopoly providers of telephone services over time through a combination of market consolidation, restrictive licensing conditions and nationalisation.[3] As a result, the industry developed in Europe throughout much of the 20th century under state ownership while in the United States the industry operated as a regulated private monopoly.

The dominant position established by the incumbent operators in supplying local loops to customer premises still continues to characterise competition in the sector today. However, in the last decades of the 20th century, entry in relation to particular services and products was gradually liberalised and active measures undertaken to re-introduce competition in the sector. The landmark regulatory decision in the United States was the agreement (known as the Modified Final Judgment) reached in 1982 between the Department of Justice and AT&T that required AT&T to divest its interests in the Bell Operating Companies that provided local telephone services in return for being allowed to enter new markets including in information services.[4]

The Modified Final Judgment which came into force in 1984 led to the formation of seven Regional Bell Operating Companies (RBOCs) focused on local services and AT&T focused on long-distance services. It was only with the passing of the Telecommunications Act in February 1996 that the Baby Bells were given the potential to enter into long-distance services and subsequently all of the RBOCs did receive permission to provide long-distance services.

In Europe, liberalisation proceeded less uniformly. The United Kingdom was one of the first countries to allow new entry in fixed services with the granting of a licence in 1984 to Mercury (a subsidiary of the recently privatised Cable & Wireless). In 1991, the initial duopoly period in the United Kingdom came to an end with the liberalisation of the market to other new entrants. In most of Europe, entry was initially liberalised in relation to particular services with full liberalisation of telecommunications services and networks being undertaken by January 1, 1998 to comply with the European Commission's Directive 96/19. A number of the original EU Member States were allowed some delay in liberalisation and many countries in Eastern Europe only fully liberalised their telecommunications market as part of their accession to the EU in May 2004 and, for Bulgaria and Romania, in January 2007. Many of the incumbent operators in Europe were also privatised in preparation for market liberalisation.

The 1990s also witnessed the development of cable modem technology which enabled the European and North American cable TV operators to commence offering internet access services with cable broadband services being offered from 1997. With the upgrading of cable networks to offer broadband services, the networks also began to offer Voice over the Internet Protocol (VoIP) telephony services with take-up growing more rapidly from 2000 onwards. The competitive impact of cable networks on the overall communications sector has varied significantly across Europe, with cable network coverage being limited in many Member States and, in some countries, cable networks being owned by the fixed incumbent operators. In some countries, alternative technologies have also been significant.

Mobile markets have followed a separate course of development. In the 1970s, the mobile cellular systems were developed for commercial implementation using a system of multiple low-power transmitters to support large number of simultaneous calls with particular frequencies being used to carry different calls in different cell-site areas. The initial cellular system was based on the advanced mobile phone service (AMPS) standard and the FCC assigned spectrum for AMPS services in 1982 with separate licences for hundreds of geographic areas across the United States. In each area, one licence was awarded to the local fixed (wireline) operator and a second one to a competitor.

At the end of 1994, the FCC commenced auctions for spectrum for digital mobile services known as personal communications services (PCS). The PCS auctions bought substantial new entry with many subscribers being able to choose from six mobile providers (using AMPS or a variety of digital standards) in their local area.

An important initial development in the mobile industry in Europe was the decision of the national telecommunications authorities in Scandinavia in 1969 to commence the development of an analogue cellular standard through the Nordic Mobile Telephone Group (NMT-Group).[5] The NMT standard was introduced in the Nordic Countries in 1981, although some other parts of Europe decided to introduce the American AMPS standard.

To overcome interoperability problems with analogue systems, the Conference on European Posts and Telecommunications decided in 1982 to create the Groupe Spécial Mobile (GSM) to develop a non-proprietary and interoperable digital standard. Motorola, Ericsson and Nokia rapidly developed as leading providers of GSM technology with Siemens and Alcatel also being important players. The United Kingdom was one of the first European regulatory agencies to award GSM licences in 1989 with most other European countries awarding licences over the 1990s. The licensing process

2 A description of early local competition in telecommunications is provided in G.A. Woroch, "Local network competition" in *Handbook of telecommunications economics*, Vol.1 (2002).

3 In some countries, multiple operators continued in separate local monopoly areas.

4 The agreement was reached to settle an antitrust case brought by the Department of Justice alleging that AT&T had used its market power in the monopoly local telephone service to illegally limit competition in the markets for long distance services and customer premises equipment.

5 T. Dunnewijk and S. Hulten, "A brief history of mobile telecommunications in Europe", United Nations University Working Papers Series 2006-034 (2006).

across the European Union resulted in between three and five GSM mobile operators being presented in each Member States by 2000.[6]

The second wave of telecommunications consolidation

The liberalisation and new entry that occurred during the 1980s and 1990s created the market context in which the second large wave of mergers and acquisitions in the telecommunications industry took place in the second half of the 1990s.

The United States, which had been among the earliest countries to liberalise, led consolidation in the industry. During the period 1996 to 2001, there were more than 20 mergers and acquisitions in the telecoms sector that were worth over US$20 billion each with 14 of these taking place in the United States.[7]

The key drivers for the merger wave in the industry in the late 1990s were rapid technological innovation across communication sectors, significant deregulation and the privatisation of national monopolies, as well as the presence of strong financial market incentives leading to concentration.

This second wave of consolidation was characterised by newly liberalised companies expanding into related markets including long-distance, internet service provision, cable television provision as well as content services.

In the United States, a number of the Regional Bell Operating Companies (RBOCs) created by the AT&T Modified Final Judgment merged with each other in the late 1990s including Bell Atlantic/NYNEX in 1996, SBC/Pacific Telesis in 1997, SBC/Ameritech in 1999. The FCC noted serious concerns about the loss of potential competition through the RBOCs choosing to merge rather than to enter into each other's markets and compete. Nonetheless, the mergers were allowed subject to extensive conditions designed to foster local competition as well as increasing the incentives of the firms to expand into other regions. For instance, in relation to SBC/Ameritech in 1999 and Bell Atlantic/GTE in 2000, the FCC required functional separation of advanced services, access to line sharing at particular discounts and certain non-discrimination provisions.

A series of large mergers led to concerns about the loss in existing competition in relation to a range of different sectors including long-distance services (e.g. WorldCom/Sprint[8]), the internet backbone (WorldCom/MCI[9]), mobile markets (AT&T/TCI, SBC-Bell South, Bell Atlantic/GTE mergers[10]), cable and satellite television services (Primestar's proposed acquisition of the direct broadcast satellite assets of News Corporation and MCI[11]) and internet access (AT&T/Media One[12], AOL-Time Warner[13]).

Mergers between operators in separate geographic areas were generally allowed such as the 1997 Bell Atlantic/NYNEX merger in the United States involving two neighbouring local service providers. However in the proposed merger of the Norwegian and Swedish incumbent operators (Telia/Telenor), the European Commission identified a concern about the potential for the merger to block new entry. Vertical mergers, which would allow a firm dominant in one market to exercise market power in a neighbouring market, have also been a concern.

In relation to BT's proposed acquisition of MCI, the US Department of Justice sought in July 1997 to impose information reporting and other measures to prevent discrimination in favour of MCI in the market for international calls between the United States and the United Kingdom. The deal was eventually abandoned.

In Europe, large mergers occurred across all communication sectors and often geographic expansion featured prominently as one of the key drivers of consolidation. Fixed incumbents merged with other incumbents across countries, as in the Telia/Telenor venture (the merger was cleared subject to conditions—but the companies de-merged only a few months after the conclusion of the transaction) or with operators that were active primarily in adjacent markets, as in Deutsche Telekom/Voice Stream or Telefonica/Endemol and Telefonica/Lycos deals. Some large transactions involving incumbent fixed operators encountered political opposition and were abandoned, as in the case of proposed deals between KPN and Telefonica, and Telecom Italia and Deutsche Telekom.

The cable industry also experienced significant consolidation. For example, in the United Kingdom, significant infrastructure costs and competitive pressure (from telephony and TV operators) led to a wave of consolidation initially led by a group of larger cable franchises (including International CableTel, Cable & Wireless and Telewest Communications). Further consolidation took place subsequently when CableTel bought NTL and Telewest continued a programme of acquiring smaller franchises to grow coverage. At the end of the 1990s NTL bought Cable and Wireless's UK cable operations and Telewest gained full control of Cable London, consolidating the market to a structure dominated by the two largest players.

In parallel, the market for internet services also experienced consolidation as a significant number of mergers prompted by repeated acquisition of small ISPs by a relatively small number of companies—including Wanadoo (which merged with Freeserve in 2000), Tiscali and T-Online—led to the emergence of strong players with activities across a number of European countries.

6 European Commission, *Sixth Implementation Report on the Implementation of the Telecommunications Regulatory Package* (2000), p.36.

7 Reported in G. Le Blanc and H. Shelanski, "Telecom Mergers in the EU and the US", available at *http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueMetR/LeBlanc-Shelanski.pdf* [Accessed July 22, 2008]. The five largest mergers during this period were Vodafone–-Mannesmann, AOL–Time Warner, MCI Worldcom–Sprint, Vodafone–Airtouch and Vodafone AirTouch–Bell Atlantic GTE.

8 The Department of Justice also raised concerns with the impact of the merger on the markets for internet backbone services, international private line services, data network services and customised network services. The European Commission also opposed the merger on the basis of concerns about competition in internet backbone services.

9 WorldCom resolved the Department of Justice's concerns about concentration in the internet backbone services market by agreeing to sell MCI's internet backbone business to Cable and Wireless.

10 The Department of Justice required divestment of mobile assets in particular areas as part of these mergers.

11 The deal was abandoned following the filing of a civil antitrust suit by the Department of Justice which was concerned that the large cable operators who owned Primestar would remove the last remaining satellite competitor.

12 AT&T (which controlled the largest US provider of broadband internet access) resolved the Department of Justice's concerns by divesting Media One's interest in Road Runner, the second-largest US broadband internet access provider at the time.

13 In gaining clearance for the merger, the parties consented to open Time Warner's cable system to at least three non-affiliated cable broadband internet service providers and to offer the same price for AOL's DSL services in Time Warner's cable areas as AOL charges elsewhere.

The mobile markets also witnessed consolidation both domestically and often internationally. In the latter case, acquisitions served to expand international footprints as in the case of Deutsche Telekom/One2One, and notoriously in Vodafone/Mannesmann (in this case Vodafone created the largest mobile operator in Europe by mean of a $180 billion successful hostile bid).

Mobile operators also entered transactions that created ventures across markets, as in the Vivendi/Vodafone Vizzavi venture, though consolidation across convergent sectors (media content, internet, telephony and TV transmission) became a more prominent driver of consolidation in the 21st century during the third wave.

The third wave—consolidation in the 21st century

The collapse of equity markets in 2000 quickly altered the financial environment for telecommunications companies. Debt reduction became a key focus and companies sought measures to reduce costs and cap future investments.

One immediate consequence of the dotcom crash was a dramatic reduction in the number of telecoms mergers. Furthermore, as many countries held 3G auctions, telecom companies faced the resulting (high) licence fees and very significant investments in new networks and equipment.

In the US third wave, the largest number of mergers occurred in 2001. Over the following years most deals were domestic mergers and acquisitions, with about one case in four arising from either foreign acquisitions in the United States, or US acquisitions abroad from 2001 to 2004.[14]

The majority of mergers occurred within industries, but a growing number of vertical mergers were concluded as communications companies entered the "triple-play" service markets (internet services, telephony and TV services). In particular, while cable companies could relatively easily adjust their business to expand their offer, telecommunications companies often had to merge with cable or broadcasting companies.[15]

Mega-mergers in the US telecoms sector were approved by the Federal Communications Commission (FCC) as it believed the acquisitions delivered significant benefits to consumers in spite of significant consolidation. During 2005 the FCC approved the merger of Sprint and Nextel, and the mergers of SBC and AT&T ($16 billion) and Verizon and MCI ($8.5 billion). The FCC also approved the merger of AT&T and BellSouth on December 2006. All these transactions entailed only relatively minor undertakings and conditions.

Following these acquisitions, the number of nationwide mobile operators in the United States fell from six to four. Furthermore, the two largest mobile operators were controlled by the fixed incumbents—Verizon and SBC/Bell South.

In Europe consolidation often involved mergers of significant scale across European state boundaries and sectors, with transactions between fixed operators, fixed operators and mobile operators, as well as between converging businesses—mobile and fixed telephony and internet services.

The pressure to compete on a bundle of services across platforms has prompted a number of transactions to secure direct access to alternative infrastructure. Acquisitions took place across state boundaries, as in Swisscom/Fastweb, where the Swiss fixed incumbent acquired an Italian cable company active in telephony, broadband and TV services, as well as within European Member States, including Spain and the United Kingdom. In Spain, Orange (France Telecom) acquired Ya.com, Spain's third largest DSL broadband operator in 2007, and in the United Kingdom, the cable operator NTL acquired the MVNO Virgin in 2006 and BSkyB (the incumbent satellite operator and Pay TV provide) acquired Easynet in 2005.[16]

Incumbent fixed operators engaged in significant transactions affecting several national markets. Telia/Sonera and Telefonica/Cesky Telecom are examples of fixed incumbent mergers directly affecting the provision of telephony services in the incumbents' countries, while Belgacom/Swisscom and Portugal Telecom/Telefonica are examples of joint ventures that focused, respectively, on the provision of international (business) services and services outside the EU.

A number of prominent mergers between fixed incumbents and mobile operators took place since 2000, creating scope for increased geographic and product differentiation. These deals include France Telecom/Amena, Telefonica/O2, KPN/E plus and Telenor/Vodafone Sverige.

The mobile sector industry also grew increasingly concentrated within individual Member States with mergers between mobile operators. A comparison of the number of operators at the end of 2001 and at the beginning of 2008 shows fewer operators in a number of EU-15 states, including Austria, Denmark, Finland, Germany, Italy, the Netherlands, Portugal, and Sweden.[17]

During the third wave of European mergers cable consolidation continued. In the United Kingdom the national competition authorities cleared the merger between NTL and Telewest, the two leading cable network operators, creating a single UK cable infrastructure provider, while the European Commission cleared the cases UPC/Noos and LGI/Telenet. Cable markets in Germany, France, the United Kingdom and Spain became significantly more concentrated markets during this period.

Institutional framework for assessing mergers

In Europe, telecommunications mergers will be scrutinised either by the European Commission or, alternatively, by national competition authorities. The European Commission's jurisdiction over mergers is invoked where the proposed transaction has a "Community dimension", as defined by the combined aggregate turnover of the parties, or alternatively where a matter is referred to it by a Member State.

The European Commission assesses mergers in order to establish whether they are "compatible with the common market". In this respect, the Commission must assess, pursuant to Art.2(2) and (3) of the Merger Regulation, whether or not a concentration would impede effective

14 J. Kim, "Telecommunications Merger Trends in the Context of the Convergence—Using the U.S. Merger Cases", Telecommunications Policy Research Conference, 2005 (see Table 2).

15 Kim, "Telecommunications Merger Trends in the Context of the Convergence", Telecommunications Policy Research Conference (2005).

16 See *www.francetelecom.com* press release of June 6, 2007; Sky.com press release of October 21, 2005, "Recommended Offer for Easynet"; Virginmobile.com press release ?ransaction of April 7, 2006.

17 Comparative Assessment of the Licensing Regimes for 3G Mobile Communications in the European Union and their Impact on the Mobile Communications Sector European Commission Directorate-General Information Society, Final Report, June 25, 2002. Merrill Lynch European Wireless Matrix q1 2008.

competition, in particular as a result of the creation or strengthening of a dominant position, in the common market or a substantial part of it. Following the adoption of Horizontal Merger Guidelines, the essential test applied by the Commission is whether the proposed transaction would ''significantly impede effective competition''.[18] The same test is applied in the case of vertical mergers, though the Commission has indicated that such mergers are by their nature less likely to fail the test.

In the United States, telecom mergers are reviewed in parallel by the FCC and the DOJ. The latter's jurisdiction arises under s.7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition in any line of commerce. The FCC has a broader jurisdiction over the communications industry, and is able to refuse consent to any transaction which is not in the ''public interest''. Applicants to the FCC bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms. In assessing this, the FCC has adopted a ''sliding scale'' approach: the greater the likelihood and magnitude of harm, so too must the benefits be of substantial magnitude and likelihood.

Overview of European communications merger decisions

The authors now turn to look at the number and type of cases that met the relevant thresholds and were notified to the European Commission from 2001. Figure 1 below shows all mergers notifications to the European Commission in the telecoms industry from 2001 to 2007.[19] In three instances the concentration was referred to the relevant national regulatory authority and in further three cases the transaction aborted (one such case was the proposed merger between H3G and Ericsson).

Looking at the mergers which were considered by the Commission, a rapidly declining trend developed at the beginning of the new century, following the merger boom of the late 1990s, which culminated in over 40 notifications in 2000.

The slump in merger activity is well illustrated by the number of cases notified in the early years of the 21st century. While 30 concentrations were notified to the Commission in 2001, by 2003 only a dozen additional cases had been notified.

After 2003, merger activity in Europe then began to grow again. However, unlike the developments in the 1990s, the number of cases did not grow systematically year on year. Rather, the number of concentrations oscillated year by year. The chart shown in Figure 1 illustrates that the largest number of consolidations since 2001 took place in 2005, while in 2006 the number of cases fell before increasing again the following year to over 20 notifications.

Since 2001 a very small number of mergers notified to the Commission reached Phase 2 of the investigation, and not all of the decisions in these cases entailed remedies and undertakings. The Commission does not appear to have relied more or less heavily on undertakings and conditions in a particular period. As illustrated by Figure 2 below, it appears that the three concentrations subject to a Phase 2 inquiry have been evenly distributed over time. Commitments and undertaking were offered in six cases (or five per cent of all Phase 1 and Phase 2 investigations) which had been notified mainly at the start of the period considered.

The use of commitments and remedies across the period observed contrasts with the trend that developed during the 1990s. A study by Le Blanc and Shelanski (2002) on mergers notified to the European Commission in the telecommunication and postal sectors from 1996 to 2001 shows a gradually increasing reliance on commitments from 1998. Commitments were particularly frequent in cases cleared during Phase 1 of the Commission's inquiry. The

18 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ([2004] OJ C031/5–18).

19 To the best of the authors' knowledge, all cases concerning the telecoms industry as classified by the NACE are included in these statistics. This excludes cases concerning postal service markets.

Figure 1: European Commission mergers: notifications and decisions concerning the telecom industry
Source: CEG analysis of EU cases published at http://ec.europa.eu/comm/competition/mergers/cases

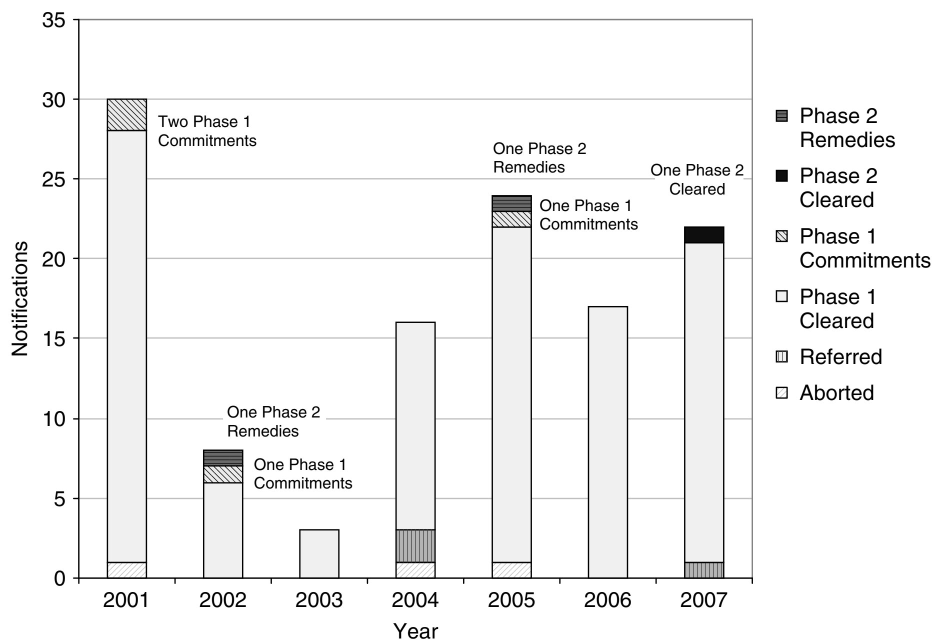
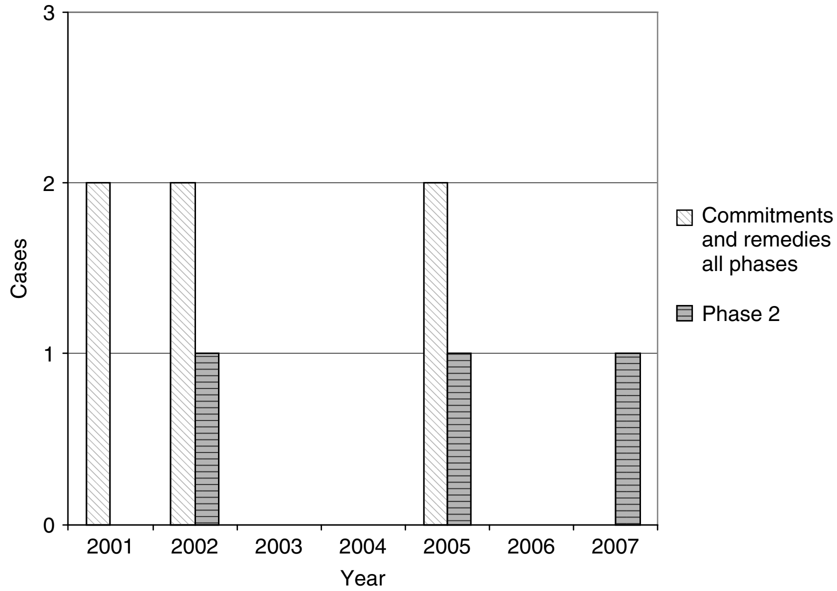


Figure 2: European Commission mergers: Phase 2 investigations and cases that involved commitments and remedies and investigations that reached Phase 2
Source: CEG analysis of EU cases published at http://ec.europa.eu/comm/competition/mergers/cases



authors argued that the increasing and significant number of cases involving commitment and remedies had been driven by the incentives faced by the merging parties to propose commitments in the early phase of the investigation. In contrast, since 2001 the Commission cleared four concentrations conditionally on undertakings in Phase 1 cases (again mainly in 2001 and 2002, with one case in later years). The authors note that the incentives to offer commitments depend, among other factors, on the nature of the concentration and the significance of the (predictable) competition concerns the merger might generate. As such it is difficult to assess whether the incentives for merging companies to offer undertakings have changed (i.e. whether firms have change their strategic approach in their dealings with the Commission), or whether the nature of the concentration notified simply posed fewer threats to competition than in the late 1990s. Nevertheless, a number of cases subject to the simplified procedure occurring in this period might support the latter hypothesis.

The following sections consider the merger regulation issues raised by the main types of mergers in the fixed services, pay TV and mobile services sectors.

Regulating fixed operator mergers and agreements

Since 2000, the market share of the fixed incumbent operators in their core fixed voice services markets have continued to fall gradually over time. At the same time, there have been a significant number of mergers involving fixed services operators. This section focuses on mergers involving fixed incumbent operators as these mergers have naturally tended to raise the most significant competition concerns.

Table 2 illustrates a number of different types of mergers that have been undertaken involving fixed incumbent operators. There have been cross-border mergers and joint ventures involving incumbent operators as well as domestic

Table 2: Mergers involving incumbent fixed operators

Type of merger	Examples	Factors driving merger	Competition issues raised
Fixed incumbent mergers	Telia/Sonera Telefonica/Czesky telecom AT&T/BellSouth	Seeking scale and geographic diversification	Vertical foreclosure through discriminatory access to termination services Horizontal overlap of some non-core services
Cross border JV	Belgacom/Swisscom Portugal Telecom/Telefonica	International business rationalisation	Limited concerns given competitiveness of international services
Cross-platform mergers	Eircom/Meteor Vodafone/Tele2 Italy & Tele2 Spain	Provision of convergent products	Potential vertical foreclosure effects
Expansion into related services	France Telecom/Equant Belgacom/Telindus	To meet demand of large corporates	Limited concerns given competitiveness of specific related services markets

mergers in which the incumbent operators have sought to expand their activities in related markets including into mobile services and converged services.
The following sections consider the competition issues raised by each of these main types of fixed operator mergers.

Mergers between national incumbents

Both European and US competition authorities have assessed mergers between incumbent operators (between national incumbent operators in Europe and between RBOCs in the United States). Such mergers can provide scale and scope economies as well as better position the operators to meet the demand for business customers who have their own activities located across the operators' coverage areas.

There have been few mergers between national incumbent operators in Europe to date, although incumbent operators have expanded into other countries. A notable example of a cross-border merger between national incumbent operators is the 2002 merger between Telia, the Swedish fixed incumbent operator also active in cable and mobile services, and Sonera, a Finnish provider of fixed local, national and international long-distance services as well as mobile and cable services (COMP/M.2803). Another European cross-border merger between incumbents was the 2005 acquisition by Telfonica, the Spanish fixed incumbent operator, of Cesky Telecom, the Czech incumbent operator. Again, both incumbent operators were also active in a range of other services including mobile services.

In the United States, there were a number of mergers between the seven RBOCs created by the AT&T Modified Final Judgment following the new Telecommunications Act coming into effect in 1996. A more recent example of the RBOCs merger is the 2006 merger between AT&T (which incorporated the original Southwestern Bell RBOC) and BellSouth.

Mergers between RBOCs could be expected to raise similar competition concerns as mergers between national incumbent operators in Europe and hence they provide a useful comparison of differences in the approaches by competition authorities on each side of the Atlantic. Cross-border merger between national incumbent operators in Europe and mergers between RBOCs active in discrete geographic areas generally do not raise horizontal concerns in relation to the operators' core fixed services.[20] However, these mergers have given rise to concerns in relation to (1) horizontal overlaps in relation to some of the operators' activities; and (2) the potential for vertical effects that might harm competitors in one or both home markets of the operators.

Horizontal overlaps are mainly addressed with divestments

Given the scope of activities often undertaken by incumbent operators, there is the potential for overlaps in relation to some services. The analysis of horizontal overlaps is relatively straightforward and where serious competition concerns have been found they have tended to be addressed by divestitures. For instance, in *Telia/Sonera*, the Commission raised concerns regarding competition in Finland in relation to the mobile services (where, in a market of four operators, Sonera was the largest mobile operator and Telia was the third largest) and public wireless LAN services (i.e. WiFi hotspots) where both parties were active.[21] In the course of the extended Phase I review, the Commission accepted the structural undertakings proposed by the parties to address the horizontal concerns. These included the divestiture of Telia's mobile and wireless LAN businesses in Finland together with a commitment to offer the purchaser of the business national roaming and access to international roaming services for a transitional period.

Horizontal overlaps have also been addressed through divestments. In *AT&T/BellSouth*, AT&T addressed a concern regarding the loss of competition to a number of buildings in which AT&T and BellSouth supplied the only direct connections by divesting some of their fibre capacity to these buildings.

Leveraging and downstream foreclosure

Call termination is a wholesale service that is provided by an operator to other networks so that the customers on those other networks are able to have calls connected with the operator's customers. For instance, when a Telia customer in Sweden called a Sonera customer in Finland, Sonera would provide termination to Telia in terms of carrying the second leg of the call across the Sonera network to its customer. The European Commission has taken the view that fixed or mobile call termination provided by a particular operator constitutes a market in itself on the grounds that someone wanting to speak to a particular operator's customer requires the use of that operator's network service. As such, operators are considered dominant in relation to termination services.

In relation to cross-border mergers, the European Commission has investigated concerns that the merged entity might seek to foreclose a downstream retail calls market by raising termination charges and/or degrading the quality of termination provided where termination is an essential input for international calls. In *Telia/Sonera*, the Commission identified vertical concerns with respect to the upsteam markets for wholesale call termination to Telia's and Sonera's fixed and mobile networks and the provision of wholesale international roaming (i.e. the wholesale service provided by an operator in a visited country to enable customers of operators in other countries to make and receive calls while travelling). The Commission took the view that the operators' dominant position in these upstream markets would create a serious risk of the merged entity having the ability and incentive to harm competition in the downstream markets for mobile services and corporate communications services to firms with significant pan-Nordic communication demand.[22] The Commission also raised a potential vertical effect in relation to internet access services in Finland as a result of Telia's leading position as a fixed network provider in Sweden.

20 While the elimination of potential future entry could be a concern, the US FCC has taken the view that competitors including cable operators will exert an increasingly competitive constraint on voice services in the future.

21 In hindsight, the concern in relation to public WLAN services seems unnecessary given the competitiveness of such services.

22 The US FCC has tended to take a more relaxed approach to concerns regarding large business customers. In AT&T/Bellsouth, the FCC noted "competition for medium and large enterprise customers should remain strong after the merger because medium and large enterprise customers are sophisticated, high-volume purchasers of communications services and because there will remain a significant number of carriers competing in the market" (FCC 06-189, para.3).

In assessing such concerns, the Commission did recognise the need to examine: (1) the impact of regulation in preventing discriminatory access to termination services; and (2) whether any such discrimination would actually have a material impact on competition given traffic volumes. In *Telefonica/Czech Telecom*, the Commission considered that there would not be vertical concerns in relation to call termination given the low volume of traffic between Spain and the Czech Republic compared with the overall international call volumes of each country.

The Commission's decision in *Telia/Sonera*, however, shows no indication of recognising that the merger could be pro-competitive in the sense of promoting efficiency by eliminating "double marginalisation". In particular, vertical integration can lead to the integrated firm commercially setting a lower price for the bundled services than would be set by two independent firms that separately impose mark-ups in the price of the services. Thus in focusing on possible effects on competitors, the Commission showed little recognition of the more direct way in which vertical mergers could bring lower prices for consumers.[23]

The concerns relating to vertical foreclosure in *Telia/Sonera* were ultimately addressed by imposing behavioural remedies, particularly functional separation of the fixed and mobile businesses (including the appointment of an external director to their boards) and fair and non-discriminatory access conditions relating to the fixed and mobile termination services and international wholesale roaming services. To ensure compliance with the non-discrimination conditions, the Commission also required a fast-track dispute resolution procedure under which the access seeker would only need to produce evidence of a prima facie case which would be accepted by the arbitrator unless Telia could produce evidence to the contrary. Such a provision is clearly heavily weighted to the access seeker's benefit although it could be argued that it is appropriate to impose the burden of proof on the party with the greatest access to relevant information.

The Commission also noted that legal separation of the fixed and mobile networks was not considered sufficient by third parties and TeliaSonera committed to the legal separation of their network businesses from their retail activities, again with an external director appointed to each board.

The Commission also accepted Telia's commitment to divest its cable TV network in Sweden. The commitment was only nominally related to any competition concerns arising from the merger. Moreover, the Commission's vertical concerns were already addressed through specific non-discrimination provisions in relation to termination and wholesale roaming services. The apparent aim of the Commission was to use the opportunity of the cross-border merger to promote greater platform competition within Sweden (i.e. by creating an independently owned cable network in competition with the fixed incumbent network). In 1997, the Commission had proposed to issue a Directive requiring dominant telecommunications networks to divest their cable businesses. However, this proposal was abandoned in the face of opposition from particular Member State governments.[24]

The European Commission concerns regarding the risk of vertical foreclosure and failure to consider the potential for efficiency to be increased by the merger can be contrasted with the FCC's analysis of the *AT&T/Bell South* merger. The main FCC Commissioners and the Department of Justice concluded that the merger would be likely to result in cost savings and other efficiencies that should benefit consumers as well as faster service deployment.[25] It could be argued that termination is less of a concern in the United States as, while fixed termination charges are relatively low in both Europe and the United States, mobile termination charges in the United States are generally set in line with fixed termination charges and significantly below the level in Europe. Nonetheless, the FCC has recognised that the vertical integration "may reduce prices in the downstream market by eliminating 'double marginalization'".[26] In particular, the FCC explicitly recognised that the integration of the network originating a call and the network terminating a call might lead to lower prices to the benefit of consumers.

A relatively new issue considered in the review of the AT&T/Bell South Merger was that of "net neutrality". In particular, the Department of Justice and the FCC investigated whether there was a risk that the merged entity would discriminate to favour its own internet content over that of third-party internet content and service providers. The Department of Justice dismissed such concerns on the grounds that the merger would not significantly increase concentration in markets for broadband services or internet backbone services.[27] However, AT&T/Bellsouth provided a commitment to the FCC that for 30 months after the merger:

> ". . . not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/Bellsouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination".[28]

This "net neutrality" commitment has no foundation in any serious competition problem identified with the specific merger. Rather, in a similar way to the European Commission's requirement for Telia to divest its cable business, it represents the use of merger regulation to achieve other policy objectives.[29] In a specific case, extracting additional benefits may seem desirable for consumers (although it is questionable whether this would be the case with the net neutrality commitment[30]). However, the more

23 The European Commission's "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings", released in November 2007, suggest that the Commission may attach greater weight to efficiencies created by vertical integration than it has done in the past.

24 This is discussed in W. Lehr and T. Kiessling, "Telecommunications Regulation in the United States and Europe—The case for centralized authority" in S.E. Gillett and I. Vogelsang (eds), *Competition, Regulation and Convergence—Current Trends in Telecommunications Policy Research* (Mahwah, NJ: Lawrence Erlbaum Associates, 1999).

25 FCC, "In the Matter of AT&T and BellSouth Corporation—Application for Transfer of Control: Memorandum Opinion and Order", March 26, 2007, para.224.

26 FCC, "In the Matter of AT&T and BellSouth Corporation", March 26, 2007, para.211.

27 Statement of Assistant Attorney General, Thomas O. Barnett regarding the closing of the investigation of AT&T's Acquisition of Bellsouth, October 11, 2006.

28 FCC, "In the Matter of AT&T and BellSouth Corporation", March 26, 2007, p.154.

29 The FCC also secured a number of other commitments in relation to AT&T/Bellsouth including the repatriation of jobs to the US and a donation to a foundation for the purpose of promoting public safety.

30 For instance, the risk of too broad an application of a non-discrimination provision is that it impairs an operator's ability to

that merger regulation is made to achieve objectives that do not relate to preventing an increase in market power related to the specific merger, the greater the risks that some efficiency enhancing mergers will not take place and, on the other hand, that some anti-competitive mergers are let through to satisfy other objectives. For example, mergers may not proceed where regulatory bargaining over extraneous commitments breaks down. General policy objectives are likely to be better dealt with through considering general regulation on its own merits rather than opportunistically attaching commitments to mergers before the regulator for review.

Joint ventures between incumbents

As well as full mergers, incumbent operators have also entered into joint ventures in relation to the provision of certain services.

In 2005, Belgacom and Swisscom, the incumbent telecommunications operators in Belgium and in Switzerland, entered into a joint venture to provide wholesale international carrier services. The European Commission found that it did not give rise to any significant competition concerns given the parties small share of the market for international wholesale telecommunications carrier services at European or world levels. The parties would have a significant share of wholesale traffic on the Belgium/Switzerland route but the merger did not materially affect this share. Given the parties' small share of traffic and little change in shares from the merger, the Commission also did not find any vertical concerns.

Cross-platform mergers

The last few years have witnessed a growing trend towards mergers between operators using different technological platforms. In particular, providers are increasingly seeking to ensure that they are able to develop and offer products, and particularly bundles of services, that rely on integrated platforms including fixed and mobile voice, video and data services (triple play or, with mobility, quadruple play). A number of operators have introduced fixed/mobile convergent handsets that enable customers to use their mobile phone when close to home at fixed call prices but that switch to use of a mobile network when the customers is outside their home area. The European Commission has noted:

> "Along with the convergence of platforms, there is a clear trend towards bundled services, where operators offer a variety of services for a single global price often to the benefit of consumers."[31]

The importance of achieving a strong position in the increasingly converged communications sector has driven a number of mergers between individual platform operators. Fixed incumbent operators that had previously divested their mobile operations, such as Telecom Italia and eircom, have subsequently reacquired mobile businesses.[32] These mergers were reviewed by national competition authorities and approved with limited conditions (for instance, the Irish Competition Authority required eircom to maintain separate accounts for its fixed and mobile businesses). In 2007, Swisscom, the Swiss incumbent operator, acquired Fastweb, the Italian broadband and cable TV company. Swisscom saw the acquisition as enabling it to benefit from Fastweb's innovative technology and applications including IPTV.[33] This cross-border acquisition raised no significant competition concerns.

In the other direction, mobile operators have been acquiring fixed services businesses. For instance, Vodafone has abandoned its original mobile-only strategy through the acquisition in October 2007 of Tele2 Italy and Tele2 Spain, businesses providing fixed and broadband services in each country.[34] While the Commission's investigation of the acquisitions found that there were no horizontal concerns, it did examine claims by other parties in relation to potential vertical effects relating to the supply of termination as well as whether there was the potential for the creation of a collective dominant position on a market of integrated and convergent fixed and mobile services.

The European Commission dismissed concerns regarding the potential for discriminatory access to termination to be used to harm competition in retail markets on the grounds that: (1) the parties' share of subscribers was relatively low; and (2) the parties' fixed and mobile termination charges were subject to regulation. In relation to convergent fixed and mobile services, the Commission noted that the parties' share of the retail markets for fixed and mobile services was relatively low and that they would face significant competitors (including MVNOs) who were also able to offer similar convergent services. The Commission also concluded that the merging parties would not have the incentive to stop providing access to MVNOs and that there was no evidence that co-ordination was likely to emerge as a result of the merger.

While the European Commission continues to treat fixed and mobile markets as constituting separate markets, the existence of vertical relationships between these markets as a result of the termination of calls has led the Commission to find competition concerns where mergers involve one or both parties with a dominant position in their respective markets. Key issues in examining the potential for vertical foreclosure with respect to termination are whether any arrangement between the merging parties is able to be replicated by other players in the market and, even where it is not able to be replicated, whether the conduct would actually lead to material harm to consumers particularly in terms of higher prices.

Expansion into related services markets

Incumbent operators have also sought to expand into related services markets. Extending activities into markets for related services has helped incumbent operators offset declining revenues in their core fixed voice services.

In 2001, France Telecom acquired Equant, a provider of international data services to multinational companies. The

manage traffic on its network with the consequence that quality of service for end-customers deteriorates.

31 European Commission, 13th Implementation Report, Commission Staff Working Document, Annex 1, p.38.

32 BT remains the exception although it is widely expected to acquire 2.6 GHz spectrum later in 2008 so as to supply next generation mobile broadband services.

33 Swisscom media release, "Swisscom intends to acquire Fastweb, the successful broadband operator in Italy", March 12, 2007.

34 In 2006, Sonae (the second largest mobile operator in Portugal) made a takeover offer for Portugal Telecom (PT) with the aim of combining Sonae's mobile business with either PT's fixed or cable business as well as PT's mobile business. While the deal was approved by the Portuguese competition authority, it ultimately did not proceed for commercial reasons.

European Commission found the potential for the parties to have a combined market share of 50–60 per cent with respect to the market for cross-border managed data services at a pan-European level.[35] The main competitors were considered to be the Concert alliance (a grouping of AT&T, BT and their joint venture Concert), Infonet and WorldCom, Cable & Wireless, Telia and Deutsche Telekom. Despite the combined market share of the parties, the Commission's analysis of bids for customer contracts showed that sufficient competitors would remain as credible participants in future bids so that there would be no ability for the merged parties to leverage any market power in relation to the managed data network services market. The Commission's investigation of the market for global telecommunications services supplied to French business customers also found that there would be sufficient competitors for the customers that the merger would not give rise to competition concerns despite the large current market share of France Telecom.

In 2005, Belgacom acquired Telindus, a provider of IT services and networking products for large businesses. Despite Belgacom's position as the Belgian incumbent operator, the Commission found that the affected markets (i.e. for IT services, for networking equipment, and for private branch exchanges) were highly competitive and thus that the merger would not raise serious concerns.[36]

The Commission's decisions in France Telecom/Equant and Belgacom/Telindu indicate that even incumbent operators with high market shares in their core markets will be allowed to make acquisitions in other markets where the nature of the competitive process and/or market structure will act to protect competition.

Conclusions on fixed operator mergers

Cross-border mergers between national incumbent operators in Europe and mergers between regional Bell Operating Companies in the United States would not be expected to raise significant competition concerns and this has been borne out by the approach taken by the respective competition authorities. To the extent that there are overlaps in relation to certain services that do not form the core of the operators' businesses, these concerns have been resolved by divestitures.

A key difference arises between European and US authorities in relation to the assessment of vertical effects. The European Commission has raised concerns of foreclosure and sought detailed remedies including legal separation and non-discrimination conditions. The US authorities, on the other hand, have recognised the pro-efficiency benefits of vertical integration. Whether the Commission's new non-horizontal merger guidelines leads to the Commission's approach becoming closer to the US approach will only be known in time.

Mergers of incumbent operators into related services markets and mergers that do not involve incumbent operators have generally not raised competition concerns, although this finding is ultimately dependent on the nature of the competitive process and structure of the related market.

Pay-TV mergers

The history of pay-TV networks is one of progressive consolidation in Europe and the United States. The approaches taken by European and US competition authorities in assessing pay-TV mergers have shown significant differences.

Growth and consolidation of the pay-TV industry

Mergers and acquisition have led to regional cable operators merging to become national and, in some cases, international operators.

In a number of European countries, the largest cable operators cater for more than 70 per cent of all cable subscribers. Furthermore, in more than 12 countries, the leading cable operator reached a market share of more than 40 per cent by 2006.[37] Most mergers between European cable operators have been considered at a national level, although the European Commission did review a number of proposed acquisitions. The Commission cleared all transactions that were notified to the Commission, with the exception of cases referred back to the national regulatory agency.

In the United States, there has also been significant consolidation among regional cable operators. However, further consolidation among the largest operators will be difficult given that the FCC prohibits any single operator from supplying more than 30 per cent of US cable customers.

There have also been mergers between satellite pay-TV providers on both sides of the Atlantic.

Consolidation of the cable industry

European Commission reviews of cable mergers

The European Commission has tended not to find any significant horizontal competition concerns in relation to cable mergers as there is generally little geographic overlap between cable networks. For instance, the European Commission's review of the 2007 acquisition by the international cable services provider, UPC, of the Belgian cable operator, Telnet, found that the networks were geographically discrete except for the supply of cable services to the city of Leuven. Even with respect to Leuven, it was considered unlikely that two cable networks would be continued.

The Commission has also assessed potential vertical effects in relation to cable mergers. In *LGI/Telenet*, the Commission noted concerns that the merger would increase the bargaining power of cable operators with respect to content providers. Moreover, the Commission noted some concern that the merged entity would seek exclusivity clauses that would disadvantage non-cable TV suppliers. Despite this, the Commission cleared the merger, noting that other TV broadcasters and competitors were not concerned about such effects, that the parties' overall position in the market for wholesale TV services would not significantly change and that the emergence of TV over broadband (Belgacom TV) provided an alternative platform for TV broadcasters. Similar vertical concerns in the distribution of TV content were also dismissed in relation to the merger in the French cable industry, *UGC/Noos*, where the Commission noted that ''content providers generally viewed positively the

35 Case COMP/M.2257—*France Telecom/Equant*.
36 Case COMP/M.3995—*Belgacom/Telindus*.
37 Case COMP/M.3995—*Belgacom/Telindus*.

Table 3: Pay-TV mergers

Type of merger	Examples	Factors driving merger	Competition issues raised
Mergers of regional cable operators	LGI/Telenet UGC/Noos KDG/ish/KBW/iesy Telewest/ntl AT&T/Comcast Comcast/TWC/Adelphia	To achieve the scale to compete with other platforms	Concentration affecting competition in pay-TV markets
Satellite operators consolidating operations horizontally	News Corp/Telepiù EchoStar/DirectTV	Scale, increased bargaining rights for content	Merger to near-monopoly in geographic regions without alternative platforms (i.e. cable)
Content providers consolidating vertically into satellite providers	News Corp/Telepiù News Corp/Hughes	Synergies between content providers and platforms	Increased bargaining power and acquisition of content on favourable terms Vertical foreclosure through limiting access to content to downstream rivals

concentration, because they considered it could generate efficiencies and improve the penetration of cable pay-TV in France''.[38]

National reviews of cable mergers in Europe

The German competition authority, the *Bundeskartellamt*, examined in 2004 the proposed acquisition by Kabel Deutschland (KDG), Germany's largest cable operator, of the regional German cable operators, ish, KBW and iesy. The Bundeskartellamt found that the different transmission paths for TV signals (i.e. cable, satellite, terrestrial and digital video broadcasting-terrestrial) were not close substitutes and that content providers would want their programmes carried over multiple paths. The president of the *Bundeskartellamt* noted that the merger would significantly reduce the potential competition from independent cable operators extending their coverage areas. In relation to the broadband market, the *Bundeskartellamt* dismissed the idea that a national network would be required for an upgraded network. The *Bundeskartellamt* rejected the parties' proposed commitments to upgrade their networks as requiring ongoing monitoring. Instead, the *Bundeskartellamt* took the view that innovation would be better promoted through competing business models.

The *Bundeskartellamt* has subsequently permitted a number of mergers in the German cable industry, including the merger of ish and iesy in 2005 and KDG's acquisition of another regional cable operator, Orion, in 2008. While the *Bundeskartellamt* considered that the mergers would potentially harm competition in relation to supply of pay-TV content, the *Bundeskartellamt* took the view that this harm was outweighed by improving the ability of ish and iesy to compete with KDG in relation to ish/iesy. In relation to KDG/Orion, the *Bundeskartellamt* noted that harm in relation to the supply of content would be offset by increased competition in broadband services through better enabling KDG to compete with Deutsche Telekom.

The UK competition authorities have permitted the consolidation of the UK cable industry over time culminating in the merger of the final two cable operators, Telewest and ntl cleared by the UK Office of Fair Trading in 2005. The UK cable operators were established in separate franchise areas so that there was no direct loss in competition between them and nor did the competition authorities consider there would be any material loss in potential or indirect competition. A particular factor in the United Kingdom is the strong position of the satellite TV provider, BSkyB. With such a strong downstream competitor, there was little scope for the cable mergers to create market power for the cable operator relative to content providers. If a cable operator sought to limit its access to content so as to gain greater bargaining power with respect to content providers, it would risk harming itself through customers switching to other platforms (particularly BSkyB) that offer a greater choice of programmes.

Regulation of cable mergers in the United States

Cable mergers in the United States are subject to a number of regulations in addition to review by the Department of Justice and the FCC. In 1992, the FCC introduced a rule that no single company could serve more than 30 per cent of the homes passed by cable companies (subsequently changed to a limit of 30 per cent of total cable subscribers).[39] The rule was intended to protect TV broadcasters from being reliant on only a few cable operators. While the rule was overturned by a Federal Court in 2001, it was reinstated in December 2007 and also effectively applied in the intervening years by the FCC refusing to approve mergers that would result in the merged entity exceeding the limit.

Even putting aside the merits of a single subscriber cap applicable to the entire United States, it seems extraordinary that the level of a cap considered appropriate in the early 1990s should still be retained today despite the entry of direct broadcast satellite providers and a host of providers offering video over broadband. The US cap contrasts starkly with the recognition by European regulators of the impact of increasing platform competition in removing

38 *UGC/Noos*, at [23].

39 The 1996 Communications Act included a prohibition on cross-ownership of cable and telephone companies.

content foreclosure concerns. Moreover, the US cap does not simply prevent mergers that would violate the cap but also competitive efforts by cable operators in the downstream services markets that attract additional subscribers. Deterring such competitive activities is likely to harm consumer interests.

Within the rules established by the FCC and the Communications Act, there have been a number of mergers between cable operators in the United States. In 2002, the largest US cable operator, AT&T, merged with the third-largest US cable operator, Comcast, to serve around 29 per cent of US cable subscribers. AT&T's stake in the second largest cable operator, TWE, was required to be divested. The FCC rejected concerns of potential vertical effects including a concern that the merger might lead to exclusive content distribution agreements. Generally, the FCC took the view that claimed anti-competitive risks were either not merger-specific or were not demonstrated and that they were outweighed by the public interest benefit associated with accelerated deployment of broadband services.[40]

In 2006, Comcast and TWC jointly acquired the assets of Adelphia, formerly the fifth-largest cable operator prior to its bankruptcy. The FCC found that the merger could result in harm through the cable operators raising the cost to rivals of accessing their affiliated programming (particularly regional sports content which was often based on exclusive rights) as well as limiting the carriage of unaffiliated programming. The FCC imposed conditions to prevent exclusivity and discrimination against competing cable networks and satellite operators. The FCC also noted that there were a range of potential public interest benefits including new investment and upgrades to Adelphia's network as well as accelerated deployment of voice over the internet (VoIP) and advanced video services such as local video on demand programming.

Satellite mergers

In *News Corp/Telepiù,* the Commission considered a merger between two satellite platforms.[41] The Commission found that the merger between the only two satellite pay-TV operators in Italy raised serious horizontal competition concerns and described the transaction as a merger to "near monopoly".[42] Key to the Commission's finding was the lack of competing cable networks, regulatory and commercial uncertainty regarding digital terrestrial broadcasting, and the limited competitive constraint provided by free-to-air television. With respect to vertical issues, the Commission found that the merged entity would be able to exploit its near-monopoly over its technical platform to deny access to downstream competitors or raise their costs.[43] The Commission also dismissed the argument that national regulation would be sufficient to eliminate the risk of anti-competitive conduct.[44]

The Commission also found that the *News Corp/Telepiù* merger would give rise to a monopsony, that is, there would be a single buyer for premium content within Italy. The creation of a monopsony risked serious harm to not only content providers, but potential new pay-TV entrants who may be unable to secure content due to the monopsonistic buyer using its "hold back" provisions.[45] There was also a risk that content providers would be unwilling to provide content to small, "fringe" competitors who would not be able to come close to matching the subscriber numbers of News Corp.[46]

Despite the numerous competition issues, the Commission ultimately cleared the merger after News Corp agreed to substantial behavioural remedies and some limited divestments. The range of behavioural remedies included the merger party waiving its exclusive rights to all on-going content contracts, limiting new exclusivity contracts to two to three years' duration, a prohibition on "hold back" clauses, the requirement to grant cost-orientated access to the satellite platform and a prohibition on entering the market for digital terrestrial television.

The FCC blocked a merger in the US that gave rise to similar horizontal competition issues as arose in *News Corp/Telepiù*. In *EchoStar/DirectTV*, the FCC reached essentially the same conclusion as the European Commission in *News Corp/Telepiù* by holding that a merger between the two major satellite providers would create a monopoly in areas not served by cable. The FCC was not prepared, however, to accept remedies, and ruled that replacing facilities-based competition with regulation was undesirable.[47] This is an instance of the US authorities showing a greater scepticism of behavioural remedies, although there was a greater risk of the Italian operators not being sustainable absent the merger compared with the US ones.

Different issues arose in *NewsCorp/Hughes Electrics Corp*, where the FCC was required to consider a purely vertical merger.[48] In that case, no horizontal competition issues were found because News Corp had no substantial satellite platforms within the United States. Instead, News Corp distributed its content via cable and terrestrial networks. However, the acquisition of DirectTV gave News Corp access to the second largest distribution satellite network in the United States. The FCC found that it was likely that News Corp would withhold its programming from its downstream providers, and favour its own satellite platform. The FCC required that News Corp provide its content on a non-discriminatory basis to downstream competitors, subject to commercial arbitration.

Conclusions on regulation of pay-TV mergers

Cable operators tend to have geographically discrete networks so that mergers between cable operators have generally not raised significant horizontal concerns in Europe. Further, concerns about the loss of potential competition have also tended to diminish over time as European competition authorities have recognised that such competition is unlikely to develop. Instead, the authorities recognise the increasing importance of competition between different technological platforms and that cable consolidation can increase, rather than harm, such competition. Competition between platforms has also been important in addressing concerns about possible vertical foreclosure effects as cable operators that

40 FCC, Application for consent to the transfer of control of licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, November 13, 2002.
41 Commission decision of April 2, 2003, Case COMP/M.2876—*News Corp /Telepiù.*
42 Case COMP/M.2876—*News Corp/Telepiù* at [114].
43 Case COMP/M.2876—*News Corp/Telepiù* at [140].
44 Case COMP/M.2876—*News Corp/Telepiù* at [140].
45 Case COMP/M.2876—*News Corp/Telepiù* at [152].
46 Case COMP/M.2876—*News Corp/Telepiù* at [186].
47 FCC Press Release, 22 October 2002, available at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227263A1.pdf* [Accessed July 22, 2008].
48 FCC, *News Corp Ltd /Hughes Corp.*

seek to limit the content they carry would face the loss of customers to alternative platforms that retain a wider choice of programming.

The regulation of cable operators in the United States, on the other hand, would appear to carry a significant risk of harming consumers. In particular, the cap on any cable operator acquiring more than 30 per cent of US cable customers risks deterring pro-competitive activities of operators to grow their customer base and fails to take into account the increasingly competition between cable and other platforms. For mergers within the US rules, the FCC has recognised the likelihood of certain benefits. However, the FCC has also shown itself prepared to seek commitments to address concerns that vertically integrated providers may limit access to content to harm rivals in downstream markets.

In relation to satellite mergers, the European Commission accepted the merger of the only two satellite pay-TV providers in Italy, although it imposed extensive behavioural remedies. The FCC, on the other hand, rejected a merger that would have eliminated competition between two US satellite pay-TV providers. In a subsequent merger between a content provider and a satellite pay-TV provider, the FCC did show that it was prepared to accept behavioural remedies as well.

Regulating mobile mergers and agreements

The wave of 3G spectrum auctions beginning in 2000, and coming on the back of 2G auctions in the late 1990s, represented the high point for new entry into European mobile markets. The increased competition led to significant falls in service prices in both Europe and the United States in the early years of the 21st century.[49] Over this period, significant consolidation has taken place in the mobile industry on both sides of the Atlantic. In this section, the authors consider a number of domestic and cross-border mergers between mobile operators, and highlight the key competition issues which arose in those cases.

In comparison to fixed telephony markets, most European and US mobile markets are effectively competitive. In most European states there are three or more network operators, which compete not only with one another but also at the retail level with an increasing number of mobile virtual network operators (service providers). In the United States, more than 95 per cent of the population lives in areas with at least three mobile operators competing and more than half the population lives in areas with at least five competing operators.[50] Service providers are also an important feature of the US market. Most national regulators have found that there are no operators with significant market power in their national markets for mobile access and call origination. Indeed, the proposed Revised Markets Recommendations under the European Regulatory Framework[51] no longer includes the market for access and call origination on a mobile network. This suggests that this market is generally not expected to give rise to competition problems beyond those that can be dealt with via general competition law.

In some European countries, there have been concerns regarding access to wholesale network services for service providers, although many of these concerns have been addressed through commercial arrangements being agreed. In addition, in Europe, mobile termination charges continue to be subject to regulation.

Domestic mobile mergers

Analysis of horizontal competition concerns

Mergers between mobile operators can raise both horizontal and vertical competition issues. Vertical issues can arise from the need for operators to access the wholesale termination services of other operators so as to supply calls between their customers and the customers of the other networks. Vertical issues can also arise in relation to service providers that rely on access to the wholesale services of mobile network operators.

Horizontal issues arise where the merging parties are active in the same market. This section considers horizontal issues first.

As a preliminary matter, the authors note that the European Commission places a great deal of importance on market shares. Further, in markets where service providers have significant market shares, as in the *T-Mobile/Orange Netherlands* case, the Commission has tended to separately calculate market shares at both wholesale at retail level. In that case, a combined market share of 20–30 per cent at wholesale and retail did not raise competition concerns.[52] Similarly, in the *T-Mobile Austria/tele.ring* case, a market share of 30–40 per cent did not (of itself) raise competition concerns. By contrast, a combined market share of 55–70 per cent did raise competition issues in *Telia/Sonera*.[53] The Commission's focus on market shares may act to limit further mergers between operators active in the same country, particularly where one of the merging parties already has a significant market share. Most major European markets are now relatively concentrated, with the notable exception of the United Kingdom.

In contrast with the European Commission's focus on market shares, mergers in the US are subject to cross-cellular ownership rules and spectrum aggregation limits.[54] The first rule limits a company which owns one cellular licence in a geographical area from owning a second licence within that same area, whereas the second rule limits the total spectrum a firm may hold within a geographic area. The FCC applies these limits as an initial test, but as indicated in the *SBC/BellSouth* merger, its "competitive assessment of the mobile voice sector does not end with a finding that these rules are satisfied".[55] The FCC does tend to examine particular "overlap" regions and ensure that neither spectrum

49 See, for instance, European Commission, *Progress Report on the Single European Electronic Communications Market*, 13th Report, 2007, p.4 and FCC, *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services—Twelfth Report*, p.8.

50 FCC, *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services—Twelfth Report*, p.5.

51 Commission Recommendation of December 17, 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, 2007/879 ([2007] OJ L344/65.

52 Commission decision of August 20, 2007, Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [34].

53 Commission decision of April 26, 2006, Case COMP/M.3916—*T-Mobile Austria/tele.ring* at [65].

54 47 CFR §22.942; 47 CFR §20.6.

55 *SBC Communications Inc/BellSouth Corp,* Memorandum Opinion and Order, FCC 00-81 (September 29, 2000) at [24].

nor licences become overly concentrated.[56] Thus, in the *T-Mobile/SunCom* merger the FCC applied a screen where it first examined HHI ratios in different regions, followed by an examination of spectrum aggregation. On the basis of these two tests, the FCC considered that a reduction in competition was unlikely.[57]

In *Cingular/AT&T Wireless*, a combination of the second- and third-largest national players in the United States in 2004, the FCC noted concerns in a small number of local markets (22 out of 734 cellular market areas examined). As a result, business unit divestments were required in 16 markets, 10 MHz of spectrum was divested in each of two local markets that covered dense urban areas, and in the remaining four markets of concern the merging firms were required to convert minority holdings into passive interests.[58] In addition, the parties committed to a general requirement to divest spectrum in excess of 80 MHz held by the merged entity in any county.[59] Business unit divestments were generally required in local markets where the number of rivals was reduced from three to two, or where the combined entity had both a high market share and a limited number of competing carriers.[60] In the subsequent *Sprint/Nextel* merger in 2005, although the deal was a major national aggregation (five to four), no significant remedies were imposed. The decision not to impose remedies reflected the fact that both the merging parties had generally been late entrants in local markets, and hence were not leading market players, combined with the observation that there would be ''multiple other substantial carriers in each overlap market with the capacity to add subscribers''.[61] In both transactions the FCC noted that the deals were likely to deliver significant benefits to consumers, although in the case of *Cingular/AT&T Wireless* these were not sufficient to outweigh the competitive concerns found in a small number of local markets.

Given that there are usually comparatively few network operators in national markets (generally either three or four), the potential for collective dominance may be a concern. The Commission held in *T-Mobile/Orange Netherlands*, however, that complex pricing in mobile retail markets makes it difficult for parties to a co-ordinated agreement to monitor prices and retaliate against defection.[62] Furthermore, the Commission has noted that MNOs face an incentive to utilise their network as much as possible, with this incentive being inconsistent with coordinated effects.[63] In this respect, the Commission has observed ex post that the merged firm in the *KPN/Telfort* case competed more aggressively for retail customers, while also increasing sales to service providers, as a result of the merger increasing its network capacity.[64] The Commission has also noted that ''fringe'' competitors (usually service providers) can exert considerable competitive pressure on network operators and thereby undermine any tendency to co-ordination.[65]

In *T-Mobile Austria/tele.ring*, the European Commission argued that the merger would lead to unilateral effects. T-Mobile Austria and tele.ring were the number two and four players in the five-operator Austrian mobile industry. The Commission focused on evidence on the competitive impact of tele.ring and concluded that tele.ring was behaving as a maverick with a significant impact on the pricing of T-Mobile and Mobilkom. In particular, the Commission attached significant weight to comparisons of prices between the mobile operators, the history of tele.ring in being able to take market share from the more established operators, and evidence on the levels of switching between different combinations of operators.

It is not clear, however, that the Commission's concerns were actually about potential unilateral effects as opposed to a concern about a risk of co-ordination between Mobilkom and T-Mobile post-merger. For instance, the Commission noted ''the . . . creation of a market structure with two leading, symmetric network operators''.[66] The Commission's focus on the competitive impact of tele.ring as a maverick is also consistent with a concern that co-ordination may be facilitated through the loss of tele.ring as an independent entity. So-called maverick firms can have a greater competitive impact than might be expected by examining market shares alone, primarily because they have different objectives from the other firms (e.g. a smaller market share and a greater need to grow to achieve efficient scale). Maverick firms can disrupt and prevent co-ordination of other firms. By contrast, unilateral effects occur where the merging parties are particularly close competitors, and the removal of this price constraint results in a sustained, profitable price increase.

With respect to vertical issues, a key competition concern is that the merged firm would deny service providers access to wholesale services. However, the European Commission has generally come to the conclusion that such a refusal to grant access would be unlikely in the cases it has considered. The Commission has noted, for example, that where MNOs have unutilised capacity, they may be able to earn additional revenue at relatively low cost from supplying wholesale services to service providers.[67] In this regard, the Commission has indicated that the increased roll-out of 3G networks (and the significant increase in capacity that results) further improves the incentive for MNOs to offer wholesale services to service providers.[68]

Remedies and the relevance of the operator's size

When mergers occur between MNOs within the same country, the remedies imposed on the parties reflect two separate themes. First, in keeping with its practice in other industries, the European Commission will seek to avoid behavioural remedies. Where competition concerns are serious, the Commission is likely to require a structural remedy. This is in keeping with the DOJ's approach, which requires divestments

56 See for example the FCC's subsequent analysis in *SBC Communications Inc/BellSouth Corp*, Memorandum Opinion and Order, FCC 00-81 (September 29, 2000) at [25]–[29].
57 *T-Mobile USA, Inc/SunCom Wireless Holdings*, Memorandum Opinion and Order, FCC 08-46 (February 8, 2008) at [11].
58 *Cingular/AT&T*, Memorandum Opinion and Order, FCC 04-70 (October 22, 2004).
59 This implies a maximum spectrum holding of about 40% of the spectrum available at the time, based on figures quoted by the FCC in the subsequent *Sprint/Nextel* transaction. See *Sprint/Nextel,* Memorandum Opinion and Order, FCC 05-63 (August 3, 2005) at [5].
60 *Cingular/AT&T,* Memorandum Opinion and Order, FCC 04-70 (October 22, 2004) at [193]–[194].
61 *Sprint / Nextel*, Memorandum Opinion and Order, FCC 05-63 (August 3, 2005) at [3].
62 Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [43].
63 Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [44]–[45].
64 Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [44].
65 Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [45].
66 Case COMP/M.3916—*-Mobile Austria/tele.ring* at [125].
67 Case COMP/M.4748—*-Mobile/Orange Netherlands* at [44]–[45].
68 Case COMP/M.4748—*-Mobile/Orange Netherlands* at [44]–[45].

in areas of the United States where significant overlap occurs.[69] Secondly, the remedies imposed are likely to be far more significant when one party of a merger is the leading operator in a country.

The Commission has for example cleared a number of mobile mergers between the third and fourth players in a national market including *Wind/Blu* in Italy, *TPG IV/APAX/Q-Telecom* in Greece, *TeliaSonera/Orange* in Denmark and *T-Mobile/Orange Netherlands*.[70] None of these transactions resulted in substantial remedies being imposed on the parties (although TeliaSonera was required by the national regulator to hand back one of its 3G licences in Denmark following the acquisition of Orange Denmark). The European Commission has even welcomed such mergers as potentially leading to entities that could compete more strongly against the leading players.[71] Likewise, the FCC in the United States has indicated that mergers which expand a network's coverage, and provide a broader ''in-network'' service across the country, are likely to promote competition.[72]

On the other hand, transactions which involve a leading operator have resulted in significant commitments being required from the parties. For instance, in the acquisition by Pirelli and Edizione of joint control of Olivetti and Telecom Italia in September 2001, the parties were required to divest Blu, the fourth 2G operator in the Italian market.[73] In the *Telia/Sonera* merger, where Sonera was found to be dominant in Finland, the Commission required the divestment of Telia's mobile business in that country.[74] Similarly, in 2006, the Portuguese Competition Authority (ADC) provisionally approved a merger between the largest and the third largest MNOs, Sonaecom and Portugal Telecom. The remedies imposed were extensive, and included the divestment of spectrum and base stations to a new entrant, and the provision of network sharing to that entrant. Additionally, the merged firm was required to host at least one MVNO, and cap its retail prices at a European benchmark level.

The remedies imposed in the *T-Mobile Austria/tele.ring* case on the other hand appear unusual, in that neither party was the leading operator in Austria yet extensive divestments were required. T-Mobile was required to divest selected mobile transmission sites to H3G and ONE, the two smaller players in the market. Further, the rights to use some 3G spectrum was required to be divested to H3G, while rights to other 3G spectrum had to be sold to a smaller competitor to be approved by the Commission.[75]

It is important to highlight the role of national telecommunication regulators in the imposition of remedies. National licensing authorities generally have the power to approve or reject transfers of spectrum licences and this has led to them being involved in the assessment of mergers. The involvement of licensing authorities may diminish in future as spectrum trading rights are introduced across Europe.

Claims of merger-specific efficiencies

The European Commission has generally rejected claims of merger-specific efficiencies in the mobile sector. For example, in *T-Mobile Austria/tele.ring*, the Commission held that any cost reductions would relate to fixed costs which were unlikely to be passed on to consumers. The Commission also argued that the larger an operator became, the less inclined it would be to aggressively reduce prices.[76] In contrast, the FCC has identified efficiencies in relation to a number of mobile mergers. In the *Sprint/Nextel* merger discussed above, the FCC undertook substantial analysis and concluded that the merger would lead to improved service quality and coverage, more rapid access to 3G services, improved scale and operating efficiencies, and improved inter-modal competition.[77] Some of the efficiencies were expected to result in lower marginal costs including lower costs for backhaul traffic, costs for IT, billing, customer case, sales, marketing costs and roaming expenses. Again, it appears that the FCC's public interest test results in a fuller consideration of likely benefits as well as costs from a merger compared with the approach taken by the European Commission to date.

Cross-border mobile mergers

A significant number of cross-border mergers between mobile operators have been examined by the Commission since 2000 (and, indeed, even before 2000). Given the European Commission's finding that mobile services markets are generally national in scope for mobile services,[78] competition concerns in relation to cross-border mergers have been focused on vertical issues. In particular, competition concerns have arisen in relation to wholesale international roaming services and the termination of international calls, both services that are required by operators in selling a full suite of mobile services to their customers.

69 DOJ, ''Justice Department requires SBC to divest Cellular properties in deal with Ameritech and Comcast'' (March 23, 1999), available at *http://www.usdoj.gov/opa/pr/1999/March/108at.htm* [Accessed July 22, 2008].

70 Commission decision of December 9, 2007, Case COMP/M.2958—*Wind/Blu*; Commission decision of September 9, 2004, Case COMP/M.3530—*TeliaSonera AB/Orange A/S*; Commission decision of January 13, 2006, Case COMP/M.4036—*TPG IV/APAX/Q-Telecom*. Blu had previously been divested as part of the Commission's clearance of the acquisition by Pirelli and Edizione of joint control of Olivetti and Telecom Italia in September 2001 (given Telecom Italia's leading market share in the Italian market).

71 For instance, see the comments in Commission decision of January 13, 2006, Case COMP/M.4036—*TPG IV/APAX/Q-Telecom* at [18]–[19].

72 *T-Mobile USA, Inc/SunCom Wireless Holdings*, Memorandum Opinion and Order, FCC 08-46 (8 February 8, 2008) at [10].

73 Commission decision of September 20, 2001, Case COMP/M.2574—*Pirelli/Edizione/Olivetti/Telecom Italia*.

74 Commission decision of July 10, 2002, Case COMP /M.2803—*Telia/Sonera*.

75 Case COMP/M.3916—*T-Mobile Austria/Tele.ring* at [185].

76 Case COMP/M.3916—*T-Mobile Austria/tele.ring* at [47].

77 *Sprint Corp/Nextel Communications, Inc,* Memorandum Opinion and Order, FCC 05-63 (August 3, 2005) at [129]–[144].

78 The Commission has also discussed on occasions a potential emerging market for pan-European mobile communications services, as well as pan-Nordic mobile services. Thus in the Commission decision of October 24, 2005, Case M.3920—*France Telecom/Amena* at [21]–[22], the Commission stated: ''in previous decisions the Commission has discussed the existence of a possible market for pan-European mobile telecommunication services to international mobile customers, in particular multi-national corporations (MNCs). This market would essentially enable multinational companies to strike better price deals through European-wide requests of proposals, and to rationalize more effectively their mobile phone expenses thanks to the combination of billing systems. It would also possibly include advanced services such as messaging services and content/data services and the possibility for roaming customers to move from a country to another with no difference in the service.'' See also Commission decision of January 10, 2006, Case COMP/M.4035—*Telefonica/O2* at [26]–[32]; and the detailed discussion in Commission decision of May 25, 2005, Case COMP/M.3776—*Vodafone/Oskar Mobile*.

Wholesale roaming services

A cross-border mobile merger can potentially impact the market for the wholesale provision of roaming services in either or both countries as well as the retail markets in the home countries in which retail roaming services are sold. An example of this occurred in *France Telecom/Mid Europea Partners (MEP)/One*.[79] In that case, the acquiring firms had a substantial European business, but no presence in Austria. Conversely, the target company, One, had a negligible position outside Austria. The Commission considered the potential for competition to be harmed in relation to:

- the retail markets in which either party was active and in which customers would acquire retail roaming services while travelling which rely on wholesale roaming services provided by operators in the visited countries; and
- the wholesale roaming services markets in which one of the parties was present as a supplier of wholesale roaming and the other party was present as an acquirer of wholesale roaming so as to supply their own retail services.

The Commission noted that the potential for harm in these markets ''crucially depends on the volume of roaming traffic''.[80] A critical factor in this regard is the particular relationship between two countries. For instance, the markets in which France Telecom's subsidiaries were present were found to account for only a relatively small proportion of the roaming traffic of Austrian end-customers. On the other hand, the Commission has previously regarded the close economic and cultural ties in the Nordic region as making international roaming particularly important there.[81] Further relevant factors are the relative ease with which operators can switch between providers of wholesale roaming services in response to a price increase,[82] and the incentive for mobile carriers to provide seamless roaming services.[83]

An additional focus of the Commission has been the impact of mergers on roaming alliances.[84] Roaming technology, including over-the-air programming of SIM cards, has developed greatly since 2000. This development has enabled operators to direct most of their customer's roaming traffic to a chosen network (although customers are able to override the network's choice), using ''preferred operator'' lists on a customers SIM card. Concomitant with these technological developments has been the formation of ''roaming alliances'' such as Starmap and Freemove. These organisations direct participating operators' traffic to other operators in the alliance on a condition of reciprocity.

The operation of these alliances was a serious issue in the O2/Telefonica merger.[85] Telefonica was a member of the FreeMove alliance along with three other large European incumbent operators: France Telecom (Orange), Telecom Italia (TIM) and Deutsche Telekom (T-Mobile). O2 was a member of the Starmap alliance, along with a number of smaller network operators. Following the merger, the Commission was concerned that Telefonica would shift O2 into the Freemove alliance. This would mean that the number of independent/Starmap networks in the United Kingdom, Germany and Ireland would be reduced (in Germany and Ireland from two to one, in the United Kingdom from one to zero).[86] This, the Commission argued, would reduce the prospects of non-alliance members concluding reciprocal roaming agreements in those countries. Not only would these non-alliance members have to purchase roaming independently rather than collectively, but they would lose the corresponding revenue from O2 customers roaming onto their networks. On the basis of these concerns, the Commission required that Telefonica exit the FreeMove alliance.

In *T-Mobile/tele.ring*, the Commission arrived at a different conclusion in relation to roaming alliances. In particular, the merger of T-Mobile and tele.ring would still leave one member of the Starmap alliance in Austria. The Commission saw the presence of a single Starmap or independent network in a country as being sufficient to allay competition concerns. The Commission was also persuaded that, unlike the United Kingdom in the *Telefonica/O2* case, roaming arrangements in Austria were not considered as critical for general business customers.[87]

In short, the two key questions in cross-border mobile mergers have been:

- whether operators are able to get access (either independently or through a roaming alliance) to wholesale roaming services in the countries in which the merged party operates, and on similar terms to the access provided by the merged party to its related international companies; and if not
- the potential impact on competition of the discriminatory conduct, particularly taking into account the significance of roaming in the country in which access is impeded as compared to all roaming services acquired by customers in the home country.

The introduction of wholesale price caps on international roaming services in June 2007 significantly reduced the ability for operators to distort competition through discriminatory access to roaming services as all operators are now able to access relatively low priced roaming services.[88]

Termination of international calls

In a number of cases, the Commission has expressed concerned that international termination of calls might be foreclosed by a merger. One potential anti-competitive strategy is uniform price increases for terminating international calls in a particular market. Even were the related parties to pay the increased price, this would simply act as an internal transfer, whereas it would represent a real cost for

79 Commission decision of September 21, 2005, Case COMP M.4809—*France Telecom/Mid Europa Partners/One*.
80 Case COMP M.4809—*France Telecom/Mid Europa Partners/One* at [19].
81 Commission decision of July 10, 2002, Case COMP /M.2803—*Telia/Sonera* at [101].
82 Case COMP/M.3916—*T-Mobile Austria/tele.ring* at [170].
83 Case COMP/M.3776—*Vodafone/Oskar Mobile* at [23]; Commission decision of March 7, 2002, Case COMP/M.2726—*KPN/E-Plus* at [10]–[11].
84 See, for example, Case COMP/M.4035—*Telefonica/O2*; Case COMP/M.4748—*T-Mobile/Orange Netherlands*; Case COMP/M.3916—*T-Mobile Austria/tele.ring*; Case COMP M.4809—*France Telecom/Mid Europa Partners/One*.
85 Case COMP/M.4035—*Telefonica/O2*
86 Case COMP/M.4035—*Telefonica/O2* at [50].
87 Case COMP/M.3916—*T-Mobile Austria/tele.ring* at [173].
88 Regulation 717/2007 of the European Parliament and of the Council of June 27, 2007 on roaming on public mobile telephone networks within the Community ([2007] OJ L171/32); noted in Case COMP/M.4748—*T-Mobile/Orange Netherlands* at [70].