SLAUGHTER AND MAY

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## European Commission gives green light to proposed acquisition of Tele2 NL by T-Mobile NL after Phase II investigation

On 27 November 2018, following an in-depth Phase II investigation, the European Commission **announced** that it has decided to unconditionally approve the proposed acquisition of Tele2 NL by T-Mobile NL.

### Background

T-Mobile NL, a subsidiary of Deutsche Telekom, and Tele 2 NL, a subsidiary of Tele 2 (together, the Parties) are respectively the third and fourth largest operators in the Dutch retail mobile telecommunications market. The proposed acquisition was **announced** on 15 December 2017 and is expected to be completed at the beginning of January 2019. Post-merger, the number of operators in the Dutch market would fall from four to three, and the merged entity would be the third largest player on the market after KPN and VodafoneZiggo.

### Phase I investigation

The proposed acquisition was notified to the Commission under the EU Merger Regulation on 2 May 2018. In June 2018, following the conclusion of its Phase I initial market investigation into the proposed acquisition, the Commission **identified** three key concerns:

- following the transaction there will be fewer players on the Dutch retail mobile telecommunications market, and the merged entity may have limited incentives to compete effectively with the other operators, leading to higher prices and less investment in mobile telecommunications networks;
- weakened competitive pressure and the increased likelihood of operators coordinating their competitive behaviour, which may raise prices on the retail market or hold back innovation; and
- prospective and existing mobile virtual network providers who use the physical networks of mobile network operators may face more difficulties in obtaining favourable wholesale access terms.

### Phase II investigation

The Commission then **opened** a Phase II investigation in order to determine whether its initial concerns would be confirmed, examining in particular the extent to which the Parties are close competitors, the importance of fixed/mobile bundles in the Netherlands, and the response of the merged entity's competitors. In opening the Phase II investigation, Competition Commissioner Margrethe Vestager noted that: "*Access to affordable and good quality mobile telecom services has become increasingly important in modern life. We are opening this in-depth investigation to ensure that the proposed transaction […] will not lead to higher prices or less choice in mobile services for Dutch customers*".

On completion of the Phase II investigation, the Commission concluded that the proposed acquisition would not raise competition concerns and it would not "significantly change the prices or quality of mobile services for Dutch consumers". The Commission's key findings are summarised below.

*Competitive market*

The Commission found that the Dutch mobile market is competitive, with high network quality and some of the lowest mobile prices in the EU. Whilst there will only be three mobile network operators following the proposed acquisition, the mobile virtual network providers increase the mobile service offering available to Dutch consumers.

*Significant price increases unlikely*

The market share increment brought by Tele2 NL is only around 5 per cent, meaning that the merged entity will have a market share of around 25 per cent. This limited market position, together with the uncertainty of Tele2 NL's role as an important competitive force in the Dutch market, means that the proposed acquisition is unlikely to lead to significant price increases.

*No increased likelihood of coordinated behaviour*

KPN and VodafoneZiggo, the other two remaining mobile network operators in the Dutch market, have different strategies and incentives than those of the Parties. Whilst KPN and VodafoneZiggo focus on selling "packages" of telecom services, the Parties mainly offer retail mobile telecommunications services. Consequently, the Commission found that coordinated behaviour between the market participants is unlikely.

*Potential change in conditions for virtual mobile network operators not a concern*

The Commission found that any changes in conditions that virtual mobile network operators may face following the proposed acquisition will "*not have a serious impact on the level of competition in the Dutch mobile telecoms market*".

**Conclusion**

Taking into account the findings set out above, the Commission concluded that the proposed acquisition does not raise competition concerns, and it was cleared unconditionally. The Commission further noted that, in its assessment, it cooperated closely with the Dutch national competition authority.

This is the first “four to three” mobile telecommunications merger to receive unconditional clearance from the Commission since Competition Commissioner Vestager took office in October 2014. Case *3GItaly/WIND/JV*, which created a joint venture to combine the Italian mobile network operating businesses of VimpelCom and CK Hutchison Holdings, was cleared by the Commission on 1 September 2016 on condition of the creation of a new mobile network operator entering the Italian market. Other recent notable cases are *Hutchison 3G UK/Telefonica* (in the UK), which was **prohibited** by the Commission in May 2016, and *TeliaSonera/Telenor/JV* (in Denmark) where the parties decided to **withdraw** the notification following the Commission opening a Phase II investigation.

# Other developments

## Merger control

### A positive sign: SAMR conditionally approves the merger of United Technologies

On 23 November 2018 the Chinese State Administration for Market Regulation (SAMR) conditionally **approved** the proposed acquisition of Rockwell Collins, Inc (Rockwell Collins) by United Technologies Corporation (UTC). Rockwell Collins and UTC are both US-based companies listed on the New York Stock Exchange, engaging in the manufacturing and sale of aviation components and defence products. The clearance is the last regulatory approval required in order for the deal to complete, and UTC **announced** the completion of the acquisition on 26 November 2018.

SAMR found that the parties overlapped horizontally in 12 markets, and had a further nine vertical relationships. SAMR defined the geographic market for all 21 products as global, due to the fact that both Rockwell Collins and UTC operate internationally and sell their products on a global basis, adopt a global sourcing strategy, and do not significantly vary pricing across different countries. SAMR identified competition concerns in a number of markets, including trimmable horizontal stabiliser actuators (THSAs), throttle quadrant assemblies, rudder brake pedal systems, pneumatic wing ice protection systems, avionics equipment, engine nacelle, auxiliary flight control actuators, ice detection systems, power generation systems, fire prevention systems, and global atmospheric data sensor, atmospheric data calculator and integrated atmospheric data systems.

SAMR imposed a package of divestment and behavioural remedies, including divestment of the Rockwell Collins’ THSAs, pilot control systems (including throttle quadrant assemblies) and SMR technology businesses along with UTC’s developing oxygen systems business. These divestments are broadly consistent with those also imposed by the European Commission and the US Department of Justice.

In addition, SAMR imposed behavioural remedies on ten categories of products in China, requiring UTC not to tie-in or bundle certain product groups and to continue supplying the products in substantially the same manner in China. The parties may apply to SAMR to lift the conditions after five years from the date of the announcement (i.e. from 23 November 2023 onwards).

There are a few points of interest in SAMR's substantive analysis, which was data-intensive. SAMR looked at tender data, engaged in economic analysis and considered pipeline products and likely new entry. In calculating market shares (which exceeded 50 per cent in many relevant markets), it looked at the merchant market (excluding captive sales).

With a total review period of 12.5 months, this was the fourth longest review resulting in a conditional clearance by SAMR. There were concerns that the political tensions between China and the US would adversely affect SAMR's review. For example, the decision states that the final remedy package was submitted on 2 August 2018, but the transaction was not cleared until more than three months later. However, the fact that this high profile transaction was ultimately cleared is a very positive sign amidst fears that Chinese merger control could be used as a tool against the US in the ongoing trade war between the two countries.

## Antitrust

### European Commission opens formal investigation into airline ticket distribution services

On 23 November 2018 the European Commission **announced** an investigation into possible anti-competitive behaviour by Amadeus and Sabre, leading suppliers of reservation systems that enable travel agents to compare airline services and reserve tickets for customers. The investigation will focus on Amadeus and Sabre's agreements with airlines and travel agents, and in particular whether certain contractual terms may restrict the ability of airlines and travel agents to use alternative providers.

Amadeus and Sabre supply Global Distribution Systems, which aggregate information about flight schedules, seat availability and ticket prices to allow travel agents to compare, reserve and issue tickets.

The Commission highlighted two potential concerns flowing from the arrangements: (i) these arrangements might create "barriers to innovation"[1] and make it harder for new ticket distribution services to enter the market or customers to switch provider; and (ii) distribution costs for airlines may increase, which may ultimately be passed on to consumers.[2]

Sabre responded to the announcement by the Commission, suggesting that full content, or parity clauses, in their agreements "*are in the best interests of consumers and serve to provide them with comparability and transparency*" and that travel agency contracts are also pro-competitive.[3] Amadeus has also responded to the market, noting the "*non-discriminatory and neutral market access*" it aims to provide.[4]

There is no formal deadline by which the investigation must be concluded and both Sabre and Amadeus intend to cooperate fully.

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[1] Commissioner Margrethe Vestager, commenting on the investigation.
[2] Commissioner Margrethe Vestager, commenting on the investigation.
[3] Sabre **press release**.
[4] Amadeus **press release**.

# Regulatory

## Ofgem issues consultation on supplier licensing review

On 21 November 2018 the UK Office of Gas and Electricity Markets (Ofgem) **published a consultation** on proposals to strengthen the criteria used to assess supply licence applications. The current regime was established in 2003 and Ofgem's last substantial review occurred in 2010. The consultation comes in the context of increased entry by small and medium suppliers, which Ofgem notes has created some risks for consumers, particularly in relation to supplier failure and poor customer service.[5]

Ofgem aims to drive up standards in the sector, to protect against poor customer service and to raise standards around financial resilience. Licensing requirements are intended to ensure new entrants are adequately prepared, resourced and fit to operate. Ofgem considers that applicants should be able to demonstrate an understanding of costs and risks and have proof of sufficient operational and financial resources.[6] It is also suggested that licensing take place closer to the time of proposed market entry.[7]

Ofgem is also considering introducing new ongoing requirements for financial resilience, to supplement new entry requirements and provide an indication of the potential risks to consumers on an ongoing basis: options might include introducing new reporting obligations, prudential/financial requirements and/or an ongoing "fit and proper" licence requirement.[8] Market exit will be the subject of a separate consultation, which will look at protecting customer credit balances.[9] An informal review of certain elements of the Supplier of Last Resort process is also in progress.[10]

The deadline for responses to the consultation is 23 January 2019 with a new regime covering application, ongoing requirements and arrangements for managing failure and exit expected to be implemented in Spring 2019.

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[5] Ofgem Consultation: **Supplier Licensing Review**, pages 13-14.
[6] Ofgem Consultation: **Supplier Licensing Review**, pages 24-27.
[7] Ofgem Consultation: **Supplier Licensing Review**, pages 28-29.
[8] Ofgem Consultation: **Supplier Licensing Review**, pages 31-35.
[9] Ofgem Consultation: **Supplier Licensing Review**, pages 36-37.
[10] Ofgem **press release**.