

The Board referred to the misdemeanour nature of the behaviour prohibited under Law No. 4054, and stated that the principle of *ne bis in idem* was also applicable to the rules of Law No. 4054. In this respect, following the decision made in the Board's initial investigation, no findings indicating a violation that could be considered a separate act were identified. On the contrary, the Board indicated that the documents were based on behaviour which constituted a continuation of the act that had already been sanctioned in the Board's previous decision. Therefore, the Board considered that the documents and information regarding the second application, which constituted a violation under Law No. 4054, were part of a single act serving the same purpose and had already been sanctioned by the relevant Board decision.

Finally, based on the documents submitted to the records of the Authority, the Board determined that Samsung had interfered with the resale prices and violated art.4 of Law No. 4054. However, since the Board had already determined that Samsung had interfered with resale prices in violation of Law No. 4054 and had imposed an administrative monetary fine on Samsung, and the documents in the second application were not new findings that could alter the outcome, the Board concluded that there was no need to initiate a second investigation against Samsung in accordance with the principle of *ne bis in idem*.

The Board's decision is of importance as it provides a detailed insight into the application of the principle of *ne bis in idem* in the field of competition law.

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MERGERS

Merger control—decision—telecoms sector—four-to-three merger—relevant market analysis—approved with behavioural commitments

☞ Commitments; Competition and Markets Authority; Merger control; Mergers; Substantial lessening of competition; Telecommunications operators

Vodafone/Three merger approved with behavioural commitments

On 5 December 2024, the UK Competition and Markets Authority ("CMA") approved the merger of Vodafone and Three subject to behavioural commitments.¹ This is a departure from the CMA's longstanding preference for structural remedies and signals a willingness to show flexibility to support investment and innovation. This is also a seminal decision for the telecoms sector, where 'four-to-three' mergers of mobile network operators ("MNOs") have almost consistently been blocked by UK and EU competition authorities in the past or required structural divestments for the creation of a new player.²

¹ CMA Final report dated 5 December 2024 in Case ME/7064/23, Anticipated Joint Venture Between Vodafone Group Plc and CK Hutchison Holdings Limited Concerning Vodafone Limited and Hutchison 3G UK Limited ("Final Report").

² One exception is the unconditional clearance of the merger between T-Mobile and Tele2 in the Netherlands.

Background

Following its in-depth phase 2 review of the proposed merger of the UK telecom businesses of Vodafone Group Plc (“Vodafone”) and CK Hutchison Holdings Limited (“Three”), the CMA considered that the merger may lead to a substantial lessening of competition (“SLC”) in the retail and wholesale mobile markets in the absence of remedies.

In the retail mobile market (i.e. the provision of mobile services to businesses and consumers), the CMA identified price and network quality as the two most important parameters of competition. The CMA found that the merger was likely to lead to price increases for customers of the merged entity (~27 million subscribers) and potentially more broadly across the market.³ It also found that the parties’ expected efficiencies from the merger in relation to network quality, and the consequential benefits to customer experience, were overstated.

The wholesale mobile market consists of the provision of services to mobile virtual network operators (“MVNOs”) who do not own their own networks and rely on an MNO’s network to then provide retail mobile services to end-users. The CMA found that there is currently (pre-merger) limited competition in the wholesale mobile market: there are only four MNOs in the UK (BTEE, VMO2, Vodafone, and Three), and MNOs have an incumbency advantage as MVNOs face high switching costs. Following the merger, the CMA believed that: (i) the combined business would have reduced incentives to compete on the wholesale mobile market due to the loss of competitive constraint between the parties; (ii) the merged entity’s greater presence in the retail mobile market (with its combined subscriber base) may indirectly mean that it has fewer incentives to bid for MVNO contracts; and (iii) fewer bids by the merged entity on the wholesale mobile market may translate to a general reduction in competition from other MNOs on the wholesale market, as there would be greater demand from MVNOs for those MNOs’ services.⁴

The CMA also assessed whether the merger may lead to an SLC through the merged entity’s participation in two network sharing agreements. Vodafone has network sharing arrangements with VMO2 (Beacon) and Three has network sharing arrangements with BTEE (MBNL). The Beacon arrangements prevent Vodafone from sharing VMO2’s commercially sensitive information with its retail, wholesale, and strategy teams. The CMA reasoned that, in order to combine the information received from the MBNL arrangements (through Three) with information from the Beacon arrangements (through Vodafone), the merged entity would need to breach the Beacon ring-fence around commercially sensitive information. It found that the potential benefit to the merged entity of combining information from Beacon and MBNL would be limited and that the merged entity would not have an increased incentive to breach the Beacon ring-fence compared to the current, pre-merger position.⁵

Commitments

The CMA identified a package of behavioural commitments that it considered capable of addressing the SLC arising from the merger in both the wholesale and retail mobile markets. Specifically, the parties would be required to deliver a joint network plan, including network investments, upgrades and integration over an 8-year period, referred to as the Network Commitment.⁶ The CMA considered that the Network Commitment would resolve the SLC in the following ways:

³ Final Report, paras 8.341–8.345.

⁴ Final Report, para.9.286.

⁵ Final Report, paras 12.56 *et seq.*

⁶ Final Report, paras 16.110 *et seq.*

- Increased network capacity, leading to downward pricing pressure. In this regard, the CMA took into consideration an agreement between Vodafone and VMO2 (Beacon 4.1), parts of which were related to and largely conditional on the merger. The merger-related aspects of the Beacon 4.1 agreement involved: (i) provisions relating to the delivery of the merged entity's joint network and the integration of that network with Beacon; and (ii) the transfer of certain spectrum assets (i.e. the licence to use certain radio frequencies needed for mobile telecommunications) to VMO2.⁷ The CMA considered that the increase in the merged entity's network capacity, in conjunction with VMO2's increased capacity as a result of Beacon 4.1 would lead to both the merged entity and VMO2 seeking to fill that additional capacity by making attractive offers to customers, leading to downward pricing pressure.⁸
- Increased network quality through improved coverage, reduced congestion, and greater availability of high-capacity spectrum. The CMA again considered the multiplicative effect of the quality improvement as a result of Beacon 4.1, meaning that VMO2's network quality would also be enhanced.⁹

These benefits would not, however, be realised during the initial few years of the Network Commitment. As a result, during this initial period, anticipated to last approximately three years (subject to the parties achieving their 'Year 3' target under the Network Commitment), additional commitments were required in the remedy package. These include: (i) price caps on certain plans offered to retail customers; and (ii) pre-agreed non-discriminatory wholesale terms for MVNOs, as well as a requirement for the parties to extend existing contract terms for any MVNO contracts that came up for renewal.

Implications

The CMA's decision comes at a time when EU and UK political dialogue is focused on encouraging investment and competitiveness, and ensuring that competition policy supports those goals.¹⁰ The commitments offered by Vodafone and Three largely formalise their post-merger plans to invest in the merged entity, albeit that the CMA had limited confidence in those plans being fully realised in the absence of specific commitments.¹¹ This is a novel approach to addressing SLC risk which threads the needle between consolidation in concentrated sectors and large-scale infrastructure investments which may not materialise in the absence of such consolidation.

While the CMA's decision in this case is certainly a significant shift in its decisional practice, it is worth noting that certain case-specific factors may have played a role in the CMA's acceptance of behavioural commitments:

- The transaction relates to a regulated sector, in which implementation of the commitments would be overseen by Ofcom.

⁷ See further, Final Report, para.5.95.

⁸ Final Report, para.16.196.

⁹ Final Report, paras 16.204, 16.206.

¹⁰ European Commission (Report by Mario Draghi), "The Future of European Competitiveness", September 2024 and Global Competition Review, "Keir Starmer pressures CMA to promote economic growth", 14 October 2024.

¹¹ Final Report, Summary, para 48 "However, we have concluded that the Parties are not likely to deliver the full [Joint Business Plan] (in the absence of remedies) [...] We found that if we apply a number of alternative assumptions that we consider reasonable, the case for the implementation of the [Joint Business Plan] in full becomes substantially less commercially compelling." Final Report, para.16.106 "the Parties offered a Network Commitment that would deliver the key elements of the Merged Entity's [Joint Network Plan / Joint Business Plan] (i.e. a behavioural commitment)."

- The parties had a partially pre-agreed 'remedy' in the shape of Beacon 4.1, which included commitments around joint network delivery as well as a spectrum sale. As explained above, the CMA noted the multiplicative effects of Beacon 4.1 in terms of improved network capacity and network quality, which meant that VMO2 (and not just the merged entity) would also have an enhanced mobile network.

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