

IN SEARCH OF EFFICIENCY IN TELECOMS

AGREEMENTS BETWEEN UNDERTAKINGS UNDER EUROPEAN COMPETITION LAW

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Abstract

Agreements between telecom operators are allowed, as long as they do not distort competition (Article 101(1) TFEU). In this paper we explore the possibilities for undertakings to cooperate while competing for business. Telecoms are a regulated industry. Therefore operators are not only subject to competition rules, but also to ex ante regulation. However, both kinds of rule tend to play complementary roles. We cannot ignore that there are factors in the industry which may be likely to favour anti-competitive agreements. Notwithstanding this, many agreements are expected to improve efficiency or even enhance competition in the industry. In particular, co-investment agreements may facilitate the deployment of new networks. On the other hand, agreements which restrict competition can be allowed whenever their pro-competitive effects compensate for the restriction of competition (Article 101(3) TFEU). In this sense, most of the joint ventures have been cleared by the Commission due to their positive effects on competition. However, strengthening cooperation is not a way to avoid merger scrutiny.

Keywords: Telecoms; cooperation agreements; competition law; sector-specific regulation; mergers

1. INTRODUCTION

Cooperation agreements are becoming increasingly important in the European telecom industry. They are viewed as a means of *gaining efficiency* in the sector, in a moment in which European telecom operators face serious challenges. Firstly, they are suffering the pressure of American and Asian operators, which take advantage of their much more concentrated domestic markets. In contrast, the European Single

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Market is not yet a reality, since telecom markets are still shaped on a national basis.¹ Secondly, telecom operators have to face service competition from “over-the-top” (OTT) providers, which in a few years have become major players in the communications environment. Thirdly, next generation networks have still to be rolled-out in most areas. This requires huge investments, which at present might not appear justified by the growing expectations of the sector. Fourthly, innovation is essential in highly technological industries, which have to keep pace by improving new services. In this context, operators are trying to get a more flexible *ex ante regulation*, but at the same time they are intensifying their cooperation with other undertakings.

In this paper, we focus on the *possibilities but also on the limits to cooperation between undertakings under the European Competition law*. The starting point is that undertakings are free to make commercial agreements with other operators, as long as they do not distort competition. The ability to provide services to final consumers is usually based on a complex network of relations with other undertakings. That being so, almost every commercial contract can be said to somewhat limit competition², as it affects the partners’ ability to compete with each other or with third parties. Commercial agreements between undertakings are simply part of the game. However, at the same time, we cannot ignore the fact that telecoms are not an area free of risks of collusion. There are factors in the industry which are likely to favour anti-competitive agreements, such as a concentrated structure of a market with high barriers to entry, a homogeneous service, increasing competition forcing down prices, and a general deterioration in the finances of all market players. In short, in this paper we try to explore the chances for undertakings to *cooperate in developing networks or services while competing for business*.

Telecoms are a regulated industry, meaning operators are not only subject to competition rules, but also to *ex ante regulation (section II)*. However, both kinds of rules tend to play a complementary role. Having clarified this point, we start addressing the prohibition of agreements which have as their object or effect the restriction of competition (Article 101(1) TFEU) (*section III*). The point is that it is not easy to draw the line between lawful and anti-competitive agreements (*section IV*). Thus far, both the Commission and the European Courts in general have viewed agreements in telecoms positively. In particular, co-investment agreements may facilitate the deployment of new networks (*section V*). Agreements between undertakings which do not compete in the same market (vertical) are less likely to harm competition (*section VI*). Finally, agreements which restrict competition can be allowed though whenever their pro-competitive effects may compensate for the restriction of

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market, COM(2013) 634 final, 5.

² Bellamy & Child, *European Community Law of Competition*, 139 (6th ed., Oxford University Press 2008).

competition (Article 101(3) TFEU) (*section VII*). However, cooperation is not the back door for consolidation in the sector (*section VIII*).

2. SECTOR-SPECIFIC REGULATION

Agreements between telecom operators are not only subject to Article 101 TFEU, but also to the legal framework for electronic communications.³ Sector-specific regulation may set boundaries to commercial agreements, as happens with spectrum trading, which may be subject to prior authorisation by the regulator. On the other hand, many agreements are encouraged or even imposed by sector-specific regulation. Under certain circumstances, this is what happens with co-location and facility sharing.⁴ Operators of public communications networks shall have a right and, when requested by other undertakings, an obligation to negotiate interconnection with each other, to ensure provision and interoperability of services.⁵ National regulatory authorities are able to impose on undertakings that control access to end-users the obligation to interconnect their networks to the extent that is necessary to ensure end-to-end connectivity.⁶ National authorities may impose on undertakings having significant market power the obligation to meet reasonable requests for access to networks and facilities⁷ or with physical access to infrastructures within the buildings. In all these cases, we cannot properly speak of cooperation agreements made by the parties, in as much as some of them would not usually be made in the absence of regulation.

In case of conflicting rules, *taylor-made regulation has pre-eminence* over antitrust rules.⁸ However, in most cases both kinds of rules are likely to be *complementary*. At present, the European Commission and national regulators seem to have given way to a more realistic appraisal of the expectations for growth in the sector. In this sense, *cooperation between operators might help to achieve the sector-specific goals*. For instance, co-investment could reinforce the geographical segmentation of the markets⁹, which in turn could help to phase out regulation, at least in some areas. In

³ J.C. Laguna de Paz, "What to keep and what to change in the European Telecoms Policy", 49 CMLR, 1953 (2012).

⁴ Article 12 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁵ Article 4(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

⁶ Article 5(1)(a) of Directive 2002/19/EC.

⁷ Article 12 of Directive 2002/19/EC, Article 18 of the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communication networks and services provides for the provision of a minimum set of leased lines.

⁸ J.C. Laguna de Paz, "Regulation and Competition Law", 2 ECLR, 77–83 (2012).

⁹ NGA Recommendation (2010) para 28.

addition, cooperation may also be a means to comply with commitments related to population coverage, assumed by mobile operators on obtaining their licences. The goal is that spectrum rights holders provide the service using their own frequencies as soon as possible, no matter whether network deployment has been facilitated by cooperation agreements between telecom operators. In France, mobile network sharing deals are encouraged, in the terms of the 4G spectrum licences (2011).¹⁰ Under certain conditions, resource pooling agreements are viewed as a way to reduce the operators' costs and increase the benefits passed onto users.

3. PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.¹¹

On the one hand, Article 101(1) TFEU prohibits agreements which have *as their object* the prevention, restriction or distortion of competition, provided that they may affect trade between Member States. Agreements which have an anti-competitive object are those that by their very nature have the potential to restrict competition.¹² These agreements are identified by the Commission in its block exemption regulations and soft-law documents and, ultimately, by case-law. For instance, there is nothing controversial in considering as restrictions by object horizontal price-fixing agreements, whatever form they may adopt (“colluders are innovators”).¹³ Limiting competition in the terms and conditions offered to customers may be particularly significant in oligopolistic markets, because of the limited room for price cutting which exists in them.¹⁴

In these cases, the *anti-competitive effects do not need to be proved*.¹⁵ It is sufficient to establish that they have the potential to have a negative impact on competition.¹⁶ To this end, regard must be taken of the content, the objectives, and the economic and

¹⁰ “ARCEP welcomes the mobile network sharing agreement signed by SFR and Bouygues Telecom, and will perform a detailed analysis of it in the coming weeks” (31 January 2014), www.arcep.fr/index.php?id=8571&tx_gsactualite_pi1%5Buid%5D=1644&tx_gsactualite_pi1%5Bannee%5D=&tx_gsactualite_pi1%5Btheme%5D=&tx_gsactualite_pi1%5Bmotscle%5D=&tx_gsactualite_pi1%5BbackID%5D=26&cHash=ca8652592f1c1293767d4b8c6ed26b1a&L=1 (accessed 11 April 2014).

¹¹ Case C-234/89 *Delimitis* [1991] ECR I-935, para 21.

¹² Case 56/65 *Société Technique Minière (L.T.M.) contre Maschinenbau Ulm GmbH (M.B.U.)*; Cases C-501/06 P, C-513/06 P and C-519/06 P, para 55; Case C-8/08, paras 28 and 30.

¹³ Mark S. LeClair, *Exigency and Innovation in Collusion*, 8(2) *Journal of Competition Law & Economics*, 415 (2012).

¹⁴ R. Whish and R. Bailey, *Competition Law*, 538 (7th ed., Oxford University Press 2012).

¹⁵ Case C-8/08 *T-Mobile Netherlands BV and Others* [2009] ECR I-4529, para 30.

¹⁶ Case C-8/08, para 31.

legal context of which the agreement forms part.¹⁷ Whether and to what extent anti-competitive effects result is of relevance only for determining the amount of the fine and assessing any claim for damages.¹⁸ The prohibition does not depend on whether the consumer welfare has been affected.¹⁹ In *GlaxoSmithKline*, the Court stated that Article 101(1) TFEU “aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”.²⁰ For this reason, it is not necessary that end consumers are deprived of the advantages of effective competition in terms of supply or price.²¹ The subjective anti-competitive intent is not a necessary condition for assessing a restriction by object.²² Of course, where “the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition”, it is necessary to show that competition has in fact been prevented, restricted or distorted to an appreciable extent.²³ Finally, Article 101(1) is to be applied even in the case of agreements that have never been put into effect.²⁴

On the other hand, Article 101(1) TFEU also prohibits *agreements which have anti-competitive effects*. Restrictive effects are likely to occur, where it can be expected that, due to the agreement, the parties would be able to increase profitability by raising prices or reducing output, product quality, product variety or innovation.²⁵ To this end, it is necessary to examine the agreement itself and the economic context, the structure of the market and the actual conditions in which it functions²⁶, and the impact of the agreement on existing and potential competition.²⁷ The assessment of whether the agreement has restrictive effects on competition must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement (‘counter-factual’)²⁸, since those two factors are intrinsically linked.²⁹ It should also be tested whether the restriction of competition

¹⁷ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1), para 25.

¹⁸ Case C-8/08, para 31.

¹⁹ Case C-8/08, para 39.

²⁰ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, paras 62 to 64.

²¹ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, paras 62 to 64. The Court repeals the decision of the Court of First Instance, which had stated that agreements that restrict competition but do not reduce the consumer welfare were not prohibited under Article 101(1) TFEU.

²² Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para 22.

²³ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, para 55.

²⁴ Case 19/77 *Müller v Commission* [1978] ECR 131, paras 7–10; Case C-277/87 *Sandoz v Commission* [1990] ECR I-45.

²⁵ Guidelines to horizontal co-operation (2011), para 28.

²⁶ Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, para 10.

²⁷ Case C 234/89 *Delimitis* [1991] ECR I 935, para 21.

²⁸ Case *Société minière et technique*, paras 249–250; Case T-328/03 O2 (Germany) GmbH & Co. OHG, para 71.

²⁹ Case T-328/03, para 71.

could be considered as a commercial *ancillarity* to achieve a legitimate commercial purpose. This would make the agreement fall outside Article 101(1) TFEU.

In these cases, the enforcing authority has to *provide evidence of the anti-competitive effects of the agreement*. The reason being that Competition law enforcement touches on fundamental rights, such as private property, freedom of commerce and industry (Articles 16 and 17 of the Charter of Fundamental Rights of the European Union) or due process and fair trial (Article 6(1) ECHR). In fact, penalties for infringement of Articles 101–102 TFEU can be regarded as criminal in nature.³⁰ In this sense, in *O2 Germany*, the Court of First Instance annulled the Commission's decision applying Article 101(1) TFEU because of insufficient analysis.³¹ The Commission's reasoning was based on the general assumption that national roaming agreement between network operators who are licensed to roll out and operate their own digital mobile networks by definition restricts competition between them.³² The Commission took the view that the very nature of a roaming agreement brings about a restriction of competition by reason of the dependence on the visited operator which national roaming creates for the roaming operator. However, the Commission did not do the necessary analysis in order to reach such a conclusion. The Commission did not carry out an examination of the competition situation in the absence of the agreement, so that it could not assess the extent to which the agreement was necessary to penetrate an emerging market. It could not be ruled out that the roaming agreement, instead of restricting competition between network operators, was on the contrary, capable of enabling, in certain circumstances, the smallest operator to compete with the major players.³³

According to the *de minimis* doctrine, Article 101(1) TFEU does not apply to agreements which do not have an appreciable impact on competition or inter-state trade. However, most telecom markets are highly concentrated, so that agreements are likely to *appreciably restrict competition*, falling within the scope of Article 101(1) TFEU. In this regard, the first step is to define the relevant market³⁴, applying the methodology of the Commission's Market Definition Notice.³⁵ The Commission holds the view that agreements between competitors do not appreciably restrict competition if the aggregate market share held by the parties does not exceed 10% on any of the relevant markets affected by the agreement, or of 15% if they are not

³⁰ Case C-137/92 P-*DEP Hüls v Commission* [1999] ECR I-4383, paras 149–159.

³¹ Case T-328/03, paras 80–117.

³² Decision 2004/207/EC of 16 July 2013 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: *T-Mobile Deutschland/O2 Germany*) (OJ 2004 L 75, p. 32), paras 107–120.

³³ Case T-328/03, para 109.

³⁴ Case C-234/89, paras 15, 16 and 18.

³⁵ Guidelines horizontal co-operation (2011), para 43.

competitors.³⁶ If the involved parties have a low combined market share, the horizontal cooperation agreement will not be likely to give rise to anti-competitive effects.³⁷ “If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market”.³⁸ In this regard, we cannot forget that *market definition is made based on technologies rather than on services*. It means that agreements made by dominant operators in mobile markets cannot be deemed to appreciably affect competition when they enter in fixed markets.

4. DRAWING THE LINE BETWEEN HORIZONTAL COOPERATION AND RESTRICTION OF COMPETITION

EU and national authorities recognise the benefits of cooperation, as long as it does not restrict competition. Even horizontal cooperation can lead to substantial economic benefits, in particular if it combines complementary activities, skills or assets. It can be “a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster”.³⁹ The point is that, in many cases, *there is no clear distinction between agreements having an anti-competitive object or effect or even whether the agreement has anti-competitive effects at all*.⁴⁰

For instance, tacit collusion is prohibited by Article 101(1) TFEU. However, in the absence of documentary or other evidence of contact between the parties, it is not easy to decide whether parallel behaviours by firms in an oligopolistic industry like telecoms is attributable to an agreement or concerted practice between them or whether it is a natural effect of the structure of the market.⁴¹ In such cases, the structure of the market favours that competitors match the marketing strategy of the others. In *Wood Pulp II*, the court stated that parallel conduct does not prove a concerted practice, unless there is no other plausible explanation.⁴² In 2004, the Spanish authorities found that the application by the three mobile operators of coincident prices of text messages (SMS) and multimedia messages (MMS) was not the result of a restrictive practice, so they decided not to initiate proceedings. To this end, a series of circumstances were taken into account, such as the implementation of different policies by operators, the different market shares, and the emerging nature of the market, with an exponential growth of the demand, in which price was not a strategic competitive variable.

³⁶ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (2001), para 7.

³⁷ Guidelines horizontal co-operation (2011), para 44.

³⁸ Guidelines horizontal co-operation (2011), para 44.

³⁹ Guidelines to horizontal co-operation (2011), para 2.

⁴⁰ Bellamy and Child, 162 (2008).

⁴¹ R. Whish and D. Bailey, 99 (2012).

⁴² Cases C-89/85 [1993] ECR I-1307, para 71.

In another example, the exchange of information may lessen the decision-making independence of the parties, by reducing or removing the degree of uncertainty concerning the intended conduct of the undertaking.⁴³ An exchange of information that supports agreements which are in themselves anti-competitive also restricts competition by object. In *T-Mobile*, the issue was the exchange of confidential information between mobile operators at a meeting where the reduction of standard dealer remunerations for post-paid subscriptions was discussed. The Court stated that the existence of a causal connection between the exchange of information and the conduct of the undertaking can be presumed, even in case of a meeting on a single occasion, unless the parties prove the contrary.⁴⁴ The exchange of information can also be made by the way of public statements about future market behaviour (for example, at conferences or in trade journals).⁴⁵ However, sometimes the exchange of information may have beneficial effects for consumers, as long as it allows competitors to make rational decisions and to be more efficient.⁴⁶

Market sharing or non-compete agreements are also serious violations of EU competition rules, no matter whether they involve geographical market sharing or the division of the market according to other criteria (classes of customers). In this sense, in 2013 the Commission fined *Telefónica* and *Portugal Telecom* € 79 million regarding their agreement not to compete in the Iberian telecom markets, which was considered a market sharing clause, that is, a restriction by object.⁴⁷ In calculating the fine, the Commission took into account the fact that the agreement had not been kept secret, but was made public by the parties by putting it on their company's website and by informing the Spanish and Portuguese Stock Exchange Authorities. However, not every market-sharing agreement is anti-competitive. Co-investment partners could decide to roll-out their networks in a complementary manner, which includes a division of the network roll-out between them.⁴⁸ The German Cartel Office stated that complementary roll-outs do not constitute hard-core competition restraints, provided that market allocation agreements are present and reciprocal access to the network is ensured, resulting in partners remaining in competition at the retail level in the whole area of network roll-out.⁴⁹

⁴³ Case *Deere v Commission*, para 90; Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, para 81; Case C-8/08, para 35.

⁴⁴ Case C-8/08, paras 53 y 62.

⁴⁵ Netherlands Authority for Consumers and Markets (ACM), 21/11/2013, <https://www.acm.nl/en/publications/publication/12311/Investigation-into-mobile-operators-concluded> (accessed 11 April 2014).

⁴⁶ R. Whish and D. Bailey, 540–542 (2012).

⁴⁷ Case AT.39839 *Telefónica and Portugal Telecom*.

⁴⁸ BEREC report on Co-investment and SMP in NGA networks (2012) 40–41.

⁴⁹ Bundeskartellamt, Instructions on the competitive assessment of co-operations in optical fibre expansion in Germany, January 2010, URL: www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/100119Hinweise_Breitbandkooperation.pdf.

The assessment of whether an agreement prevents, restricts or distorts to an appreciable extent actual or potential competition may involve a significant *margin of appreciation*. In this context, it is worth pointing out that Article 101(1) TFEU may be applied not only by the European Commission, but also by national authorities (Articles 5 and 6 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty). The decentralized application of European Competition law involves the risk of inconsistency, as rules can be applied in a very different way across Europe.

In recent years, the European Commission has taken a more realistic approach to Article 101(1) TFEU, in particular to ensure that it is applied in accordance with sound economic principles.⁵⁰ In the same vein, from the end of the 1970s the USA courts have dramatically narrowed the circumstances in which the rule of *per se* illegality applies, so that the presumption is now that agreements should be analysed under the rule of reason.⁵¹ However, when law enforcement involves the need to make complex economic or technical assessments, the appraisal of the facts is subject to a more limited judicial review⁵², as courts only control whether the European Commission made a manifest error of assessment.⁵³ The reason is that, in these cases, there is often a margin of appraisal that can only be controlled by legal principles or by alternative technical reports to a certain extent. The assessment of each case must be done taking in to consideration of the particular agreement and the surrounding circumstances. Notwithstanding this, we can make some overall comments.

First, Article 101(1) TFEU aims at ensuring that undertakings compete in the market as independent economic operators.⁵⁴ To this extent, it precludes any contact between operators by which an undertaking may influence the conduct of its actual or potential competitors, taking into account the nature of the products or services offered, the size and number of the undertakings involved and the volume of the market.⁵⁵ It means that the agreement must reduce the parties' decision-making independence⁵⁶, either due to obligations contained in the agreement or by influencing

⁵⁰ R. Whish and D. Bailey, 116 (2012).

⁵¹ A. Jones, "The journey toward an effects-based approach under Article 101 TFEU – The case of hardcore restraints", Vol. 55, No. 4/Winter, *The Antitrust Bulletin*, 786–787 (2010).

⁵² Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 89; Case T-301/04 *Clearstream v Commission* [2009] ECR II-3155, para 95; Case T-398/07 *Kingdom of Spain v European Commission*, para 62; Case C-452/10 P, para 103; Joined Cases T-29/10 and T-33/10, *Netherlands and ING v Commission*, para 103.

⁵³ J.C. Laguna de Paz, "Understanding the limits of judicial review under European competition law", Vol. 2, No. 1 *Journal of Antitrust Enforcement*, 215–218 (2014).

⁵⁴ Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73 *Suiker Unie and Others v Commission*, [1975] ECR 1663, para 173; Case 172/80 *Züchner* [1981] ECR 2021, para 13; Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, para 63; Case C 7/95 P *Deere v Commission* [1998] ECR I 3111, para 86; and Case C-8/08, para 32.

⁵⁵ Case C-8/08, para 33.

⁵⁶ Case C-7/95 P, *John Deere*, para 88; Case C-238/05, *Asnef-Equifax*, para 51.

the market conduct of at least one of the parties by causing a change in its incentives.⁵⁷ On the contrary, *there is no anti-competitive coordination, where operators keep their autonomy in running their business* (developing their own network, in taking technology decisions and commercial offerings). As case-law recognises, the requirement of independence “does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors”.⁵⁸

In *Télécom Développement*, the Commission cleared the agreements relating to the cooperation between the French national railway company (SNCF) and the new telecom operator *Cégétel* to set up a joint subsidiary *Télécom Développement* (TD) (1999). The Commission found that the agreements setting up *Cégétel* did not fall within the scope of Article 101(1) TFEU and Article 53(1) of the EEA Agreement. The joint venture was to set up and run a nation-wide, long-distance telecom network along the national railway network, without granting the joint venture exclusive rights. TD would not itself provide services for end-users, but it was intended to provide wholesale services not only for *Cégétel*, but also for other network operators and telecom services providers.

Second, horizontal cooperation agreements between competitors that, on the basis of objective factors, *would not be able to independently carry out the activity* covered by the cooperation, at least not in such an efficient way, will normally not give rise to restrictive effects on competition, unless the parties could have carried out the project with less stringent restrictions.⁵⁹ Agreements may include non-compete or exclusivity clauses, whenever they are necessary to achieve the intended goals.

The Commission approved the *GSM MoU Standard International Roaming Agreement* (1996), intended to draw up a standard form to be used on a voluntary basis to facilitate bilateral negotiations between operators wishing to conclude roaming agreements.⁶⁰ Such agreements were found necessary to coordinate GSM networks and offer subscribers the ability to use their phones when abroad. The Commission considered that the existence of a standard form facilitating such coordination offered a number of advantages for operators (reduces costs and negotiating, increases transparency and reduces the risks of discrimination) and consumers. Furthermore, amendments made to the agreement had ruled out some potential competition problems, such as maintaining the consumer’s freedom to take out a subscription with an operator in a country in which he is not himself resident. Discussions though continued with a view to finding a solution to the prices charged by operators themselves for roaming services, which were not determined on the basis of real costs.

In the *Iridium* decision (1996), the Commission also concluded that the creation of the company fell outside the scope of both Article 101(1) TFEU and Article 53(1) of the

⁵⁷ Guidelines horizontal co-operation (2011), para 27.

⁵⁸ Case C-8/08, para 33.

⁵⁹ Guidelines horizontal co-operation (2011), para 30.

⁶⁰ XXVIIth Annual Report on Competition Policy (1997), para 75.

EEA Agreement, since none of the strategic investors could be reasonably expected to separately assume the very high level of investments required and the very high risk of technical and commercial failure associated with such a new system.⁶¹ In addition, no investor had all the necessary licences to operate such a system. The creation of *Iridium* was intended to provide global wireless communications services (voice and data) using satellites. The company was owned by investors, telecom services providers and equipment manufacturers from around the world. On the one hand, the distribution of *Iridium* services was organized around gateway operators (including both the European participants), which were investors in *Iridium* and which had exclusive rights over their respective territories to install and operate the gateways and to act or designate others to act as services providers within the territory. The Commission concluded that the exclusivity granted to gateway operators was a necessary incentive for investors to assume these risks. On the other hand, *Iridium* might suggest pricing policies to its gateway operators. Each gateway operator would be expected to comply with these policies to the extent permitted by applicable law and regulation, but would otherwise be free to set their own tariffs. In this regard, the Commission accepted that the principle of uniform prices in different territories were appropriate to satisfy the customers' desire of receiving a single bill in a single currency, no matter where they get the service.

In *Cégétel + 4* (1999), the Commission found that *Cégétel's* restructuring fell outside the scope of the present Article 101(1) TFEU, as it created a more effective competitor to the incumbent operator in France than the parent companies would have been capable of doing separately.⁶² Except for mobile telecommunications services, the parties' market shares on the relevant segments were negligible. Even if some of the partners were incumbent operators in their home markets, they would have to be considered new entrants in France and in any other national telecom market in fixed voice. The Commission held that the general restriction of competition on the parent companies, by virtue of the non-competition clause, was regarded as ancillary to the operation. The parties assumed some commitments to meet the Commission's concerns regarding a possible restriction of competition in the mobile market.

Third, case-law tends to be tolerant with agreements, which are necessary for providing *new services or covering new areas* ("the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking").⁶³

In this sense, in the assessment of a cooperation agreement between competitors concerning infrastructure sharing and national roaming for the 3G of GSM mobile telecommunications in the German market, the Court took into account the specific

⁶¹ Commission Decision of 18 December 1996 (Case IV 35.518 – *Iridium*). OJ [1997] L 16/1987.

⁶² Case IV/C-1/36.592.

⁶³ Case T-328/03, para 68.

characteristics of an emerging market (“in the light of the specific characteristics of the relevant emerging market, O2’s competitive situation on the 3G market would probably not have been secure without the agreement, and it might even have been jeopardised”).⁶⁴ This could also be the case in the agreement made between the Spanish incumbent *Telefónica* with *Yoigo*, a mobile operator disposing of 4G frequencies ready to operate (2013). According to the agreement, *Telefónica* will be able to use the *Yoigo*’s frequencies to offer 4G mobile services, while the mobile operator can offer integrated services using the fixed infrastructure of the incumbent. On November 2013, the Spanish regulator and competition authority opened an investigation in to this agreement. Moreover, earlier in 2013 for a short time news spread, but later denied, that the main European mobile operators were considering pooling their networks.

Fourth, in a highly technological sector, *research and development* (R&D) cooperation may be essential for improving the development of new technologies and services. Telecom operators do not usually compete for the development of new technologies, as other undertakings in upstream markets do. In this sense, R&D horizontal cooperation may be an efficient way for telecom operators to develop new services, such as mobile phone payments. Most R&D agreements do not fall under Article 101(1)⁶⁵, especially when they do not include the joint exploitation of possible results by means of licensing, production and/or marketing.⁶⁶ R&D cooperation concerning new products is unlikely to give rise to restrictive effects on competition unless only a limited number of credible alternative R&D poles exist.⁶⁷ Notwithstanding this, agreements are more likely to give rise to restrictive effects on competition where the parties have market power on the existing markets.⁶⁸ In this regard, factors such as the following must be considered: whether the parties are able to carry out the activity independently; whether competition in respect of innovation is reduced; or whether the agreements bring with them market foreclosure risks. Due to the high concentration of the telecom markets, it may be necessary to offer some guarantees of non-distortion to competition, such as the openness of the project to all interested parties.

Thus far, the Commission has cleared cooperative agreements involving the most important mobile players in a market to foster or deploy specific technologies. For instance, *project Oscar* is an m-commerce joint venture by the three largest UK network mobile operators (*Vodafone*, *O2* and *Everything*), intended to create a mobile payments platform. The firms are aiming to release a unified smartphone-based service offering an alternative to cash, credit cards and loyalty cards (*Barclaycard*, *Visa*, *Paypal*, *Google*), as well as to create new forms of highly targeted advertising and services. The joint venture was cleared by the European Commission (2012), following

⁶⁴ Case T-328/03, para 114.

⁶⁵ Guidelines horizontal co-operation (2011), para 129.

⁶⁶ Guidelines horizontal co-operation (2011), para 132.

⁶⁷ Guidelines horizontal co-operation (2011), para 138.

⁶⁸ Guidelines horizontal co-operation (2011), para 132.

an investigation, since there were no significant competition issues. In this regard, it is worth stressing that the joint venture's services will be open to all telecom operators, including MVNOs, as well as to other players (banks, advertising agencies, retailers).

The R&D block exemption is hardly ever applied, as it requires that the combined market share of the parties does not exceed 25%. In this sense, the industry has criticized the lengthy review processes applied by competition authorities to telco alliances (*Oscar* and *Euro-5* initiatives), which hampers one of the most critical success factors in the provision of digital services, such a timely entering to the market.⁶⁹

Fifth, *standardization* plays a major role in the telecoms industry, as compatibility and interoperability with other products or systems are essential. In industries characterised by competition over networks, the Commission is prepared to accept that common standards are inevitable and benefit consumers, provided that the competitive process is safeguarded.⁷⁰ Agreements usually produce significant positive economic effects, by increasing competition, promoting economic interpenetration on the internal market and encouraging the development of new products or markets.⁷¹ Standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms ("FRAND commitment") will normally not give rise to competition concerns.⁷² However, standard-setting can also give rise to restrictive effects on competition, by raising barriers to entry or excluding competing technologies or companies and then by limiting product choice and innovation.⁷³

5. IN PARTICULAR, CO-INVESTMENT AGREEMENTS

Co-investment agreements are generally made between actual or potential competitors⁷⁴, with a view to reducing the costs of rolling-out new infrastructures. The issue is how to encourage investments in next generation networks (NGN) in a context where demand for super-high speed services is uncertain and regulation has not been phased out.⁷⁵ At present, EU policy tends to accept co-investment agreements as a means to facilitate the rolling out of new infrastructures. In fact, lowering the cost of broadband deployment has become one of the main objectives of the European Commission. The Digital Agenda goals can only be achieved if there is a high-speed

⁶⁹ BCG-ETNO, *Reforming Europe's Telecoms Regulation to Enable the Digital Single Market* (2013) [www.etno.be/datas/publications/studies/BCG_ETNO_REPORT_2013.pdf (last visited, on 20.9.2013)], 22.

⁷⁰ Bellamy & Child, 386 (2008).

⁷¹ Guidelines horizontal co-operation (2011), paras 263–266.

⁷² Guidelines horizontal co-operation (2011), paras 280.

⁷³ Guidelines horizontal co-operation (2011), para 264.

⁷⁴ BEREC report on Co-investment and SMP in NGA networks (2012) 33.

⁷⁵ J.C. Laguna de Paz, 1951–1976 (2012).

broadband infrastructure. Some voices warn that telecommunications are a natural monopoly, like water or electricity.⁷⁶ However, from the beginning, the European policy rejected establishing a model of competition in services, based on the structural separation between infrastructure and services. The model relies on vertically integrated telecom operators deploying competing networks. The point is that investments are not taking place at the expected level. It is not feasible for each operator to dispose of its own network. In this context, it is expected that co-investment agreements might play a significant role in the deployment of new networks.⁷⁷

In *fixed communications*, NGN co-investment agreements have been developed in several European countries: Switzerland, France, Portugal, Italy [*Telecom Italia-Fastweb* (2012)]. In the Netherlands, the SMP operator (*KPN*) chose to roll out FTTH exclusively via the co-investment scheme with *Reggefiber*. In Spain, all significant players announced they were involved in some kind of cooperation with competitors in 2013.

There are different degrees of cooperation. Operators may limit themselves to sharing the cost of digging or to deploying passive infrastructure. In these cases, each operator lays their own fibre lines, so that they engage in full facility-based competition.⁷⁸ There is also no risk of coordination in networks based on multiple fibre lines, which ensure that access seekers can obtain full control over them.⁷⁹ Under such conditions, co-investment agreements are more likely to lead to more timely and more intense competition on the downstream market. However, co-investment agreements might also allow operators to divide up the territory between them⁸⁰, so that operators will be investing in different areas and then giving access to each other on a preferential basis.⁸¹ In these cases, co-investment agreements could distort competition by including non-competing clauses, information exchange or by refusing to give access to third parties on a non-discriminatory basis. Notwithstanding this, in highly concentrated but competitive markets such as telecoms, except in under-served areas, anti-competitive agreements are very unlikely to happen, if all the major operators are not part of them. On one hand, consumers would change to other operators offering better conditions, so the agreement would not pass on harmful effects to consumers. On the other hand, most competition concerns would be solved if the involved undertakings take on the commitment to give access to competitors on a non-discriminatory basis. Furthermore, some of these competition concerns are likely to be addressed by *ex ante* regulation.

⁷⁶ Susan Crawford, *Captive Audience. The Telecom Industry and Monopoly Power in the New Gilded Age*, 17 (Yale University Press 2013).

⁷⁷ BEREC report on Co-investment and SMP in NGA networks (2012) 20.

⁷⁸ Marc Bourreau, Carlo Cambini, Steffen Hoernig, "Ex ante regulation and co-investment in the transition to next generation access", 36 *Telecommunications Policy*, 404 (2012).

⁷⁹ NGA Recommendation (2010) para 27.

⁸⁰ BEREC report on Co-investment and SMP in NGA networks, 40–41 (2012).

⁸¹ Marc Bourreau, Carlo Cambini, Steffen Hoernig, 404 (2012).

In the *mobile sector*, co-investment and network sharing agreements have become usual. The degree of cooperation also varies from sharing costs of renting space for antennas and towers, sharing base stations and underlying networks to a full network sharing deal. Mobile operators usually share passive infrastructure (towers, BTS shelters, power), but they could also share active infrastructure (spectrum, switches, antennae, microwave equipment). It is difficult to find common patterns explaining the undertakings strategies. However, we can summarize some ideas. First, we can typically find such deals between operators not disposing of one of the biggest market shares. The reason is that smaller operators are more likely to benefit from cooperation than bigger undertakings. Dominant operators are more reluctant to engage in such agreements, since the price they have to pay for reducing their investment and operating costs favours smaller operators, by lowering entry barriers. Second, network maturity is another factor to take into account. Deals may more likely occur in mature markets. On the contrary, the deployment of a new technology is a competitive factor which will be considered by operators. However, we can also find such agreements among the main operators to boost 4G network deployment in some countries. Third, another factor to take into account is fixed-mobile convergence. Infrastructure sharing agreements may facilitate entry into neighbouring markets. These agreements are more likely to happen between mobile operators willing to make investments in fixed networks. Convergence can force mobile operators to sign agreements with fixed operators or to deploy their own networks.

6. VERTICAL AGREEMENTS

Vertical restraints are generally less harmful than horizontal restraints and may provide efficiencies.⁸² Vertical agreements do not involve a combination of market power.⁸³ The companies involved in the agreement usually have an incentive to prevent the exercise of market power by either the upstream or downstream company, as it would normally hurt activities of the other.⁸⁴ Therefore, for most vertical restraints competition concerns are likely to appear only where there is some degree of market power at the supplier or buyer level, that is, where there is insufficient competition. In other words, agreements between telecom operators, on one side, and handset manufacturers, software undertakings, content providers, OTT players and financial institutions, on the other, are less likely to restrict competition.

In this sense, distribution or production agreements typically link handsets manufacturers with telecom operators, as telecom operators do not usually commercialize their own handsets. There is also a trend in smartphone makers to outsource with contract manufacturers, in an attempt to cut costs (*Apple, Blackberry, Nokia, HTC*). Subcontracting agreements whereby the subcontractor undertakes to

⁸² Guidelines on Vertical Restraints, SEC(2010) 411 final, para 6.

⁸³ R. Whish and D. Bailey, 624 (2012).

⁸⁴ Guidelines on Vertical Restraints (2010) para 98.

produce certain products exclusively for the contractor generally fall outside the scope of Article 101(1), unless it is imposed on the subcontractor the obligation not to produce for third parties.⁸⁵ There are also well known cases of OTT providers making deals with smartphone manufacturers to install operating systems. *Amazon* has recently signed an agreement with *HTC* to develop smartphones, to compete with *Apple* and *Google*. Cooperation agreements are also made to improve cloud services, such as the agreement signed between the Finnish *Nordic TeleCom* with *Cisco* (2012).

Telecom operators also make arrangements with and other players. In this sense, we find deals between mobile operators (*Telefónica*) and banks (*Caixabank*) to finance the acquisition of smartphones by customers. Such agreements are not likely to distort competition, since they do not refer to competitors in the same market.

Due to convergence with media and the internet, telecom operators have moved to a combined business model, which provides telephone, high-speed Internet access and content (triple play or quadruple play if we add mobile services). A recent example is the case of *BT*, whose broadcasting arm (*BT Sport*) signed a three-year deal with the *UEFA* to broadcast the *Champions League* and *Europa League* football matches live on an exclusivity basis from 2015. Moreover, network operators are sending a message to content providers that they need to work together to create higher-value services, to justify network investments and encourage end-users to pay for better quality services. This sort of cooperation sometimes involves exclusivity clauses. For instance, Spanish mobile operators (*Telefónica*, *Vodafone*) are dealing with music on streaming service providers (*Spotify*, *Napster*).

Research and development (“R&D”) cooperation between non-competitors does generally not give rise to restrictive effects on competition.⁸⁶

Finally, *outsourcing* agreements can also become relevant to the industry. Telecom operators usually contract out the deployment or upgrading of their networks to suppliers of telecom-network equipment. However, sometimes, they enter in to a more enhanced outsourcing. For instance, some Spanish telecom operators (*Jazztel*, *Ono*) have completely contracted out the operation to a network provider (*Huawei*). In another example, two Spanish mobile operators (*Telefónica* and *Yoigo*) agreed in 2013 to sell their shared radio sites to a third party (*Abertis*), which will provide the service to the selling parties and to other operators in the future.

7. PRO-COMPETITIVE EFFECTS WHICH MAY COMPENSATE FOR RESTRICTION OF COMPETITION

In the case that an agreement infringes Article 101(1) TFEU, it is necessary to assess whether it has *pro-competitive effects* which could compensate for the restriction of

⁸⁵ Guidelines on Vertical Restraints (2010) para 22.

⁸⁶ Guidelines horizontal co-operation (2011) para 130.

competition, as required by Article 101(3) TFEU. For the application of Article 101(3) TFEU, the agreement must meet four conditions: (i) it must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) while allowing consumers a fair share of the resulting benefit; (iii) provided that it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (iv) and it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The exemption may be applied to all kinds of agreements, including those which have an anti-competitive object. However, the latter are unlikely to satisfy the requirements for inapplicability.⁸⁷

Thus far, the Commission has applied the Article 101(3) TFEU exemption to the telecoms industry in a significant number of cases. The Commission granted the exemption to the joint venture (*Newco*) created by *BT* and *MCI* to provide international telecom services and outsourcing to big companies.⁸⁸ According to Article 101(1) TFEU, the agreement was found to restrict competition because the partners were actual competitors in the overall telecom market and potential competitors in respect of value-added services.⁸⁹ The Commission took the view that they could each have entered the international value-added market on their own, but instead agreed to jointly undertake this activity which eliminated all competition between them in that market. In addition, the strategic alliance had the object or effect of isolating the EEA territory against imports from outside. However, having taken into account its contribution to the creation of new telecom services for the benefit of European undertakings, the Commission exempted the *BT/MCI* agreement, after creating the possibility of passive sales by *MCI* inside the EEA as regards the services provided by the joint venture and after limiting the non-compete obligation of *MCI* in respect of *BT*'s core business inside the EEA to a period of only five years. This limited territorial protection was considered to be indispensable to permit the transfer of technology by the parents of the joint venture. *BT* and *MCI* further guaranteed access to their networks by third parties on a non-discriminatory basis.

In *Atlas*, the Commission granted a 101(3) TFEU exemption to a joint venture between *France Telecom* and *Deutsche Telekom* aimed at providing telecom services to large users in Europe (1996).⁹⁰ In the same vein, in *Phoenix/GlobalOne*, the Commission granted a temporary exemption to a joint venture, established by an alliance between *Atlas* and *Sprint* for the supply of telecom services worldwide (1996).⁹¹ These agreements raised competition issues in their relevant markets. For instance, in the market for the transmission of data via terrestrial networks both

⁸⁷ Guidelines Article 101(3) TFEU, para 46.

⁸⁸ XXIVth Annual Report on Competition Policy (1994), paras 158–159.

⁸⁹ OJ [1994] L 223/36.

⁹⁰ OJ [1996] L 239/29.

⁹¹ OJ [1996] L 239/57.

partners exceeded 70% market share in their respective countries, buttressed by a legal monopoly over the supply of infrastructure. Furthermore, *Atlas* provided for the elimination of a competitor of *DT* in Germany, namely *FT*'s local subsidiary. That being so, the Commission made the *Atlas/GlobalOne* authorization conditional on the granting of the first two infrastructure licences in France and Germany. In the course of the proceeding, both countries liberalized the alternative infrastructures, thereby making competitors less dependent on the networks of *FT* and *DT*. In addition, *DT* and *FT* postponed the transfer of their domestic data transmission networks to the joint venture pending full liberalization of infrastructure services in France and Germany. Furthermore, *FT* sold its subsidiary. Under these conditions, the Commission took the view that the two projects could compete with the few telecom services providers existing at world level without resulting in any elimination of competition.⁹² Exemption was also granted conditional on there being no discrimination or cross subsidisation.

In *O2 Germany*, the Commission took the view that the restriction of competition resulting from the roaming agreement could be compensated substantially by the overall pro-competitive effects of the agreement, so that it granted an exemption according to Article 101(3) TFEU.⁹³

As we have seen, *commitments* offered by the involved parties were decisive in allowing some agreements. In *Uniworl*d, *AT&T* offered commitments related to interconnection, access and accounting rates to a number of undertakings.⁹⁴ According to Article 101(3) TFEU, the European Commission granted a temporary exemption to *Unisource* (1997), which was a joint venture established by some telecom operators (*PTT Telecom* of the *Netherlands*, *Telia*, *Swiss PTT*, and *Telefónica*). The agreement involved non-competition and exclusive distribution clauses. After discussions with the Commission, the parties made changes to the original agreements to make the transactions acceptable under EU competition law. Moreover, in *Unisource/Telefónica* there were discussions with the Governments of the countries directly involved in *Unisource*, as a result of which there were commitments to liberalization of some telecom markets (Spain, Switzerland). The agreement fell within Article 101(1) TFEU and Article 53(1) of the EEA Agreement as it restricted actual and potential competition between its parent companies at European level and in respect of their respective domestic markets. The non-competition agreement was considered an ancillary restriction to the creation of the joint venture. On the contrary, the exclusivity agreements were caught by Article 101(1) TFEU as they have the object or effect of isolating each national market from imports of those services from other EEA Member States. These were not considered ancillary restrictions since other forms of distribution

⁹² XXVth Annual Report on Competition Policy (1996), para 67.

⁹³ Decision 2004/207/EC of 16 July 2013 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland/O2 Germany) (OJ 2004 L 75, p. 32), paras 123 and ff.

⁹⁴ XXVth Annual Report on Competition Policy (1996), para 68.

were possible. However, the Commission granted the exemption taking into account that *Unisource* would be able to satisfy, earlier than its parent companies acting separately, the demand for pan-European services. It would also facilitate the building of a trans-European network enabling *Unisource* to provide better services to customers throughout Europe. In addition, *Unisource* would lead to substantial operational cost savings, improved levels of services provided by competitors, improved distribution by ensuring that distributors will concentrate their marketing efforts on their respective territories. This would also lead to benefits for consumers shortening the time required by the parent companies each developing and marketing new telecom services. On the other hand, the competitive situation of the markets allowed other providers of telecom services to compete with *Unisource*. Finally, the exemption was subject to the following conditions: non-discrimination, non-misuse of confidential information, prevention of cross-subsidization and prevention of tying.

At present, however, Article 101(3) TFEU is directly applicable, since the 2003 framework reform has abolished the system of individual exemption granted by the Commission. Though block exemptions provide a safe-harbour, they are likely to play a minor role in such a concentrated sector as telecoms, which will normally lead the contracting undertakings to exceed the market share thresholds set up in the corresponding Regulations. In other words, *undertakings are fully responsible for appraising whether or not they fulfil the Article 101(3) TFEU conditions*. This appraisal involves complex evaluations of economic issues, so that uncertainty on the lawfulness of the conduct may subsist. Therefore, there is a risk that, once the agreement is being performed, the European Commission (Article 7 of Regulation 1/2003), the national competition authorities (Article 5 of Regulation 1/2003) or national courts (Article 6 of Regulation 1/2003) may declare its illegality. In this regard, it must be taken into account that the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision (Article 2 of Council Regulation (EC) No 1/2003). The Commission must adequately examine the arguments and evidence offered by the parties, to ascertain whether they demonstrate that the conditions have been satisfied.⁹⁵ Sometimes the arguments and the evidence may require the Commission to refute them, failing which it is permissible to conclude that the burden of proof borne by the person who relies on the exception has been discharged.⁹⁶ However, in spite of all these concerns, “since Regulation 1/2003 entered into effect, there has been nothing to suggest that the direct applicability of Article 101(3) is causing difficulties in practice: it would appear to be the case that lawyers and their business clients are able to deal with self-assessment”.⁹⁷ On the other hand, a fine may be imposed only when the infringement has been either intentionally or negligently committed (Article 23(2) of Regulation 1/2003).

⁹⁵ Case T-111/08, para 197.

⁹⁶ Case T-168/01, para 236; and Case T-111/08, para 197.

⁹⁷ R. Whish and D. Bailey, 167 (2012).

8. COOPERATION IS NOT THE BACK DOOR FOR CONSOLIDATION

Telecom operators see commercial cooperation, including network sharing, as a complement to, but not a substitute for, in-country mergers.⁹⁸ The reason is that it involves substantial transaction costs and cannot provide the same efficiency gains as mergers. In this sense, operators' associations are calling for a relaxation of European merger scrutiny to facilitate consolidation in the sector, which would improve the European operators' financial ability to compete.⁹⁹ In fact, there is a wave of consolidation in the European telecoms sector, where a number of mergers have been announced over the last few months.

If geographical markets could be defined at European level, most mergers would raise no competition concerns. Sometimes the European Commission has defined European-wide¹⁰⁰ or even world-wide geographical markets.¹⁰¹ However, the evidence is that there is not yet a Single European Market in telecoms. Customers cannot obtain services from any of the operators present in the EU, regardless of location, since they can offer their services only in the Member States where they operate. In addition, commercial and technical conditions are very different in each Member State. Furthermore, there are no pan-European players, since mobile operators which are active across several Member States, do not behave as true European operators. In fact, in the early autumn of 2013 the European Commission approved a new "telecoms package" intended to achieve this goal.¹⁰² The European Commission assessment was that the completion of a genuine Single Market for telecommunications services would not be achievable in a short time-frame.¹⁰³ "We do not expect market structures to change from one day to the next, and therefore we will likely continue to assess these mergers on the basis of national markets – at least for some time".¹⁰⁴ This being so, we can draw three different conclusions.

First, consolidation between *undertakings which do not operate in the same geographical market* (cross-border consolidation) is not likely to raise competition concerns. It was for this reason that the European Commission cleared the acquisition

⁹⁸ BCG-ETNO, 2013, 46.

⁹⁹ BCG-ETNO, 2013, 43–46.

¹⁰⁰ Case T-342/07, *Ryanair/Aer Lingus*.

¹⁰¹ Commission decision of 2 October 1991, Case IV/M.53, *Aerospatiale Alenia/de Havilland*.

¹⁰² However, BEREC has expressed its concern on the proposed regulation, which "represent(s) a shift away from the current approach (based on pro-competitive regulation) towards one that favours market consolidation". BEREC statement on the publication of a European Commission proposal for a Regulation on the European single market, BoR (13) 104.

¹⁰³ A more positive view of the situation of the European telecom markets can be found in BEREC views on the proposal for a Regulation "laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent" BoR (13) 142.

¹⁰⁴ J. Almunia Speech/13/697 (13/09/2013).

of UK cable operator *Virgin Media* by the US-based company *Liberty Global*, in particular because the parties operate cable networks in different Member States and because of the merged entity's limited market position in the wholesale of TV channels in the UK and Ireland.¹⁰⁵ In general terms, it can be expected that undertakings will be willing to enter in new markets. However, it has been doubted that consolidation between fixed operators may bring scale benefits, since fixed costs are intrinsically linked to local networks.¹⁰⁶

Second, consolidation between *undertakings which operate in the same geographical area, but do not provide services* in the same market are not likely to raise competition concerns. In September 2013, the European Commission approved the acquisition of *Kabel Deutschland* (cable) by *Vodafone* (mobile), taking into account that the activities of the merging parties were mainly complementary.¹⁰⁷ In markets where the parties' activities overlap, the increase in market share is insignificant, meaning that the merger does not appreciably alter competition. In March 2014, *Vodafone* also acquired the Spanish cable operator *Ono*.

Third, consolidation among *players which operate in the same geographical and in the same product market* is more likely to raise competition concerns. Competition authorities are reluctant to admit mergers which would reduce the number of players, dropping from three or four network providers in each market. Notwithstanding, mergers between operators which do not have the biggest market shares could be found to improve competition in the market. This could be the case of the *H3G*'s acquisition of *O2 Ireland*¹⁰⁸ or the case of the *Telefónica*'s acquisition of *KPN*'s business in Germany.¹⁰⁹ It should be noted that according to the Commission Guidelines, the merger is not likely to lead to competition concerns, where the market share of the undertakings concerned does not exceed 25%.¹¹⁰ On the contrary, mergers resulting in firms holding market shares between 40% and 50% lead to the creation or the strengthening of a dominant position.¹¹¹ Market share is not the only criterion. In making the appraisal, the European Commission has to take into account the factors mentioned in Article 2(1) of Mergers Regulation, including the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition. From this point of view, mergers may be in line with the requirements of dynamic competition and are capable of increasing the

¹⁰⁵ IP/13/326 15/04/2013.

¹⁰⁶ BEREK, BoR (13) 142, 2.

¹⁰⁷ IP/13/853 (20/09/2013).

¹⁰⁸ Commission has opened an in-depth investigation into *Hutchison 3G UK*'s acquisition of *Telefónica Ireland*. IP/13/1048 (06/11/2013).

¹⁰⁹ Commission has opened an in-depth investigation into *Telefónica Deutschland*'s acquisition of *E-Plus*. IP/13/1304 (20/12/2013).

¹¹⁰ EU Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) 7, para 18.

¹¹¹ EU Guidelines horizontal mergers (2004) 7, para 17.

competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community.¹¹² In this regard, the French government appears to be supporting consolidation using the argument that the number of mobile operators needed to come down to three.¹¹³

As a second best option, cooperation might be an alternative, but *not the back door for consolidation*. European merger scrutiny involves a material approach, which does not leave room for consolidation by establishing a full joint venture. Joint ventures performing on a lasting basis all the functions of an autonomous economic entity (“full-function joint ventures”) constitute a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Therefore, they are subject to the mergers scrutiny.

9. CONCLUSIONS

- (1) Operators are free to make commercial agreements with other operators, as long as they do not distort competition. It is for undertakings to decide whether cooperation can be a more effective way to satisfy consumers. On their part, the role of competition authorities and courts is to ensure that cooperation between operators does not prevent, restrict or distort competition.
- (2) Agreements between telecom operators are not only subject to Article 101 TFEU, but also to sector-specific regulation. In case of conflict, sector-specific regulation has pre-eminence over antitrust rules. However, in most cases both kinds of rules are likely to be complementary. Moreover, cooperation between operators may help to achieve the sector-specific goals.
- (3) In many cases, there is no clear distinction between agreements having an anti-competitive object or effect or even whether the agreement has anti-competitive effects at all. In recent years, the Commission seems to have embraced an approach more based on the economic effects of the conduct, which may favour horizontal cooperation agreements. Either way, the enforcing authority has to provide evidence of the anti-competitive effects of the agreement.
- (4) Market definition is based on technologies rather than on services. It makes that most telecom markets are highly concentrated, so that agreements between undertakings operating in the same market are likely to appreciably restrict competition.
- (5) There is no anti-competitive coordination, where operators retain their autonomy in running their businesses. Agreements between competitors that would not be

¹¹² EU Guidelines horizontal mergers (2004) 13, para 76.

¹¹³ “French government says will pursue telecom market consolidation”, www.reuters.com/article/2014/04/09/us-france-telecommunications-government-idUSBREA3824T20140409 (accessed 10 April 2014).

able to independently carry out the activity, at least not in such an efficient way, will normally not give rise to restrictive effects on competition. Case-law also tends to be tolerant with agreements, which are necessary for providing new services or covering new areas. R&D horizontal cooperation may be also an efficient way for telecom operators to develop new services.

- (6) Co-investment agreements are likely to lead to more timely and intense competition when partners and access seekers can obtain full control over the infrastructure. They may also facilitate mobile operators' entry in to fixed networks. Most competition concerns would be solved if third-party access on a non-discriminatory basis would be granted by commitments of the undertakings or by *ex ante* regulation.
- (7) Vertical agreements are very unlikely to distort competition. Notwithstanding this, the agreement may promote or distort competition, depending on their content.
- (8) Thus far, most anti-competitive agreements have been cleared by the Commission taking into account their positive effects. In many cases, commitments offered by the parties were decisive. At present, however, Article 101(3) TFEU is directly applicable, so that undertakings are fully responsible for appraising whether or not the agreement satisfies the conditions for the application of the exemption. Block exemptions are likely to play a minor role in a very concentrated sector.
- (9) Cooperation may be an alternative, but it is not the back door for consolidation, since joint ventures performing on a lasting basis all the functions of an autonomous economic entity are subject to merger scrutiny. Mergers between undertakings which operate in the same geographical and product market are more likely to raise competition concerns.

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