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Merger Control in Mobile Telecommunications in the European Union Law

- PhD Thesis Summary

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The motive for conducting this study was an explicit alteration of the European Commission's decision-making practice concerning merger control on the mobile telecommunication market which began in 2012. In the previous proceedings it could be noticed that the Commission had a liberal approach towards conducted mergers – each one of them was cleared (moreover, in two cases the consent was unconditional, with no remedies introduced) and only one proceeding was cleared in the Second Phase of the assessment. Proceedings after 2012 became more meticulous, all of them went to the second stage of the assessment and the conducted tests became more advanced and demanding with each proceeding. Three consecutive proceedings were approved, but included more elaborated remedies. In 2015 Telenor and TeliaSonera, two Danish operators, abandoned their merger due to a lack of perspectives for receiving clearance from the Commission. One year later, in case of British Hutchison UK and Telefónica UK, The Commission has blocked a mobile telecommunication operators' merger for the first time, while a merger in Italy was accepted under condition of divestiture of operators' assets (spectrum and sites) which were to enable a new, already approved operator to enter the market. No alterations in the European Merger Control Regulation took place at the time of this explicit change in the Commission's practice, which raises questions concerning the causes of such a pronounced evolution. The aim of this project is to verify the main research hypothesis:

The evolution of the European Commission's practice concerning merger control on the mobile telecommunication market is caused the Commission's attempt to use the instruments of merger control to replace the diminishing authority coming from sector-specific regulation in order to shape the competition in the market.

The aforementioned thesis is verified by conducting research towards answering the following questions:

- 1) What is the impact of the sector-specific regulation on the competition in the mobile telecommunications markets in the European Union?
- 2) Does the oligopolistic structure of mobile telecommunications markets justify a special approach to merger control?
- 3) Does EU competition law contain a comprehensive merger control system allowing for effective assessment of mergers in oligopolistic markets?
- 4) Is or should merger control be applied in a special way to mergers in the mobile telecommunications market?

In order to verify the hypothesis it was necessary to compare the evolution of the decision-making of the European Commission concerning matters of merger control in the mobile telecommunications against the developments in sector-specific regulations regarding the electronic communications sector, which has determined the internal systematics of the work, which is divided into six chapters.

The subject of the first one is to present the sector-specific regulation of the electronic communications sector and its evolutionary transformations, which allows to identify market-

shaping instruments that regulatory authorities had in the past, and which disappeared along with the reduction of the scope of the sector-specific regulation. The work contains an analysis of the processes of liberalization and harmonization of the telecommunications sector, the ongoing process of creating a single market for electronic communications, methods of market regulation both under sector-specific regulation and competition law, an assessment of the parallel functioning of both groups of regulations, as well as a detailed analysis of individual sector-specific regulation instruments. In particular, the historical method was necessary here, as it allowed to determine how the scope of sector-specific regulation has been limited with the development of competition. This makes it possible to assess how strong market-shaping instruments regulatory authorities still have at their disposal as part of sector-specific regulation and what powers have been lost.

In order to fully understand the mechanisms governing the mobile telecommunications market, it is necessary to present the specificity of the functioning of oligopoly markets, which is the subject of the second chapter. It is necessary to define the features of an oligopoly, to present the theoretical models of oligopoly (static and long-term) known to economics and to compare them with the models of the monopolistic market and the model of perfect competition, which allows to identify the challenges that such a market structure poses to competition law especially with respect to the mobile telecommunications market. This chapter also presents the instruments developed within the framework of economics, which allow to make a quantitative assessment of the oligopoly market.

The third chapter focuses on presenting the merger control system in the European Union law. The historical perspective allows us to determine from which moment we can talk about a comprehensive EU merger control system that allows the Commission to effectively control mergers on oligopolistic markets. The practice of the European Commission, the General Court and the Court of Justice in successive merger control cases has also been analyzed through the prism of key features of oligopolistic markets identified in the previous chapter.

The next part of the work, covering chapters four to six, contains a detailed analysis of decisions issued by the Commission in mergers of mobile network operators. The research takes into account all decisions regarding the concentration of mobile network operators issued in the current legal status, i.e. since the entry into force of Regulation No. 139/2004, and constitute a comprehensive analysis of the most important aspects of the decisions, such as the way of defining the relevant market, qualitative and quantitative assessment together with the assessment instruments used, prospective assessment of the impact of the merger on competition in the market, assessment of the benefits of the merger and the criteria for their acceptance or rejection, as well as the adopted countermeasures.

Chapter IV covers decisions issued in the years 2006 - 2010. The Commission issued decisions on four mergers of mobile network operators, allowing the merger in each case. In two cases, there were mergers of four to three operators, and in the other two, from five to four. In the case of mergers from four out of three operators, the Commission did not identify

any threats to competition, so it gave its consent without reservations, while in the case of mergers from five out of four operators, the consent required the acceptance of commitments meeting the identified concerns about the state of competition.

Chapter V presents decisions issued in the years 2012 - 2014. The Commission issued decisions on three mergers of mobile network operators, these were mergers of four to three operators. In each case, the Commission approved the mergers, but in each case, it identified threats to competition, so the consent required the acceptance of remedies addressing the identified competition concerns, which included, among other things, the introduction of new entities to the market, ultimately shaping the future structure market. The first decision in the Austrian case plays a key role in the decisions taken during this period. The Commission clearly expressed its dissatisfaction with the consequences of this concentration, and the commitments adopted in it were consistently developed in subsequent cases in order to prevent the negative effects that occurred on the occasion of earlier mergers.

The third distinguished period is analyzed in Chapter VI and includes decisions issued after 2015 and the Court's ruling regarding the Commission's decision on the Hutchison 3G UK/Telefónica UK merger. The first notified merger was canceled by the parties due to the lack of prospects of reaching an agreement with the Commission. The next merger was the first merger on the mobile telecommunications market to be blocked by the Commission. The assertive policy of the Commission, which required the introduction of a new infrastructure operator as a precautionary measure, influenced the form of the next two mergers, which were approved, and in the meantime, the Court upheld the parties' complaint and annulled the decision blocking the merger. This is the first judgment of the Court regarding merger in an oligopolistic market in history, where the theory of harm is based on the occurrence of unilateral effects, which is of particular importance not only for future merger in the mobile telecommunications market, but for all oligopolistic markets.

The study of substantive law rules is supplemented with a detailed analysis of case law and decisions issued on the merger control of mobile network operators, which allows to assess to what extent the Commission takes into account the case law regarding coordinated effects of mergers and how it interprets conclusions from the science of economics for the purpose of assessing unilateral effects, and whether there is a specific consideration of the sector-specific regulation of the electronic communications sector.

The conducted research yielded results concerning mergers in mobile telecommunication as well as other oligopolistic markets including a number of *de lege ferenda* postulates. The final conclusion of the study is that the change in the practice of the European Commission in the merger control on the mobile telecommunications market over subsequent decisions was not caused by a gradual reduction of the scope of sectoral regulation. Instead, an impact of new goals of sector-specific regulation and errors of law and assessment by the Commission have been recognised.

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