

A small problem with big telcos? Competition policy and the EU Digital Single Market

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Summary

The collapse of the proposed merger between Telenor and Teliasonera and the launch of antitrust proceedings against Sky and six Hollywood companies have highlighted DG Competition's ambition and prominence in the EU's 'Digital Single Market' (DSM). Its prioritisation of market competition and consumer interest is an important choice when set against the commercial interests of established industries and their arguments about consolidation and investment. Upcoming mobile telecoms merger cases in Italy and the UK will further test Commissioner Vestager's resolve and the outcome will send an important signal to the market of whether competition will continue to be given precedence over national consolidation in the DSM.

The collapse of the proposed merger between Telenor and Teliasonera and the launch of antitrust proceedings against Sky and six Hollywood companies have reinforced the way in which European Competition authorities have been marking out their own territory in the wider debate over Europe's 'Digital Single Market' (DSM). Competition policy is one of the few areas where the European Commission has direct power, and this is not the first time that it has pursued wider policy aims in this way. However, within the Commission there is not a single settled view on the DSM and its desired outcomes. So whose side is DG Competition on and how does it see its role?

The DSM is unusual as a European Commission initiative in that it has been feted across the political spectrum but this consensus masks major policy debates around what the DSM should look like. The recently agreed telecoms reform took two years to work their way through the legislative process, resulting in reduced ambition on the coordination of spectrum

allocation and a muddled solution on net neutrality. The negotiations over the new Data Protection Regulation and Directive have been subject to similarly tortuous negotiations within and between the co-legislators. In the upcoming review of the EU's copyright system, a plethora of national, consumer, incumbent and insurgent interests will be at stake. Fiercely contested issues like geoblocking will be on the table with a similar potential for legislative quagmire.

Backing the cross-border consumer...

On cross-border content, the first signs are that DG Competition's instincts are for the principle of a single consumer market. Its anti-trust case against Sky and six Hollywood studios accuses them of unfairly restricting the provision of pay TV services across national borders, particularly with regard to unsolicited sales in member states where Sky is not promoting its own service. While the case focuses on the provision of so-called "passive sales" rather than more ambitious policy solutions such as

creation of a single EU-wide content licence, the timing of the case - only months before expected legislative proposals on the same topic - represents something akin to legislative outsourcing to DG Competition.

It is in the telecoms sector that this pro-consumer agenda will be most rigorously tested. Larger incumbent operators have argued that competition policy needs to be applied on a pan-EU rather than national basis in order for European companies to be profitable enough to generate investment in infrastructure and to compete with large foreign competitors. This approach has received public backing from the senior figures in the Commission such as President Juncker and Commissioner Oettinger. However Commissioner Vestager appears to have pushed back hard, stating publically that “there is no guarantee that consolidation and higher prices will lead to increased investment”. She is supported by critics of in-market consolidation who claim that previous examples of mergers of mobile network operators (MNOs), such as in Austria, have led to substantial price increases for consumers and a failure to implement promised remedies.

...and national markets for telcos

TeliaSonera and Telenor were the first big test case for this argument. The merger would have created a consolidated 45% market share in Denmark. DG Competition objected - arguing that it would adversely affect consumer choice and prices unless remedies were provided that would allow for the emergence of a new mobile operator - and in doing so killed the deal. There are some doubts that the remedies could even be formulated to both satisfy DG Competition and ensure that the merger remained attractive to the companies concerned. In any event, the decision represents a toughening of the Commission’s approach and contrasts with previous decisions under Joaquín Almunia on Austria, Ireland and Germany to clear mergers on a “three plus remedies” basis - allowing the move from four to three mobile operators but imposing remedies to maintain a competitive market (see fig 1).

The focus now moves to the larger UK and Italian markets where major mergers are due to be considered between Three and O2, and Wind and Three Italia respectively. Vestager will face greater political pressure than in the smaller mobile market of Denmark. There is also likely to be much greater internal opposition within the Commission, where DG Connect look more favourably on in-market consolidation as a route to greater profitability of EU telecoms companies and, therefore, greater potential to invest in rolling out broadband infrastructure. DG Competition is also facing resistance from national competition authorities such as the UK’s Competition and Markets Authority who are consulting on whether it should have regulatory authority over the Three-O2 case rather than the Commission.

Nevertheless, Vestager’s insistence that there must be at least four MNOs in a smaller market such as Denmark has fuelled expectations that she will draw similar conclusions for Italy and the UK. If DG Competition continues to pursue a tough pro-consumer line in Italy and UK, it will be an important signal to the market that national-level competition is here to stay. The challenge remains to marry DG competition’s focus on competition at a national level with DG Connect’s concern for greater consolidation and generating globally competitive scale for European companies. A compromise may be found in allowing cross-border acquisitions to drive consolidation, rather than mergers within national markets. However, realising this vision will depend on appetite from commercial players, where the momentum is currently going in the opposite direction with large-scale EU operators seeing growth prospects outside Europe rather than in other member states.

The interventions on telecoms, e-commerce, online search and geo-blocking are important signals to businesses and other stakeholders that the focus of the DSM will be as much about competition policy as formal legislation. This is not the first time the Commission has overlapped its legislative and competition agendas when faced by intransigence from the Council or European Parliament. Previous

Case	Remedies Imposed by DG Competition
Hutchinson 3G / Orange Austria	<ul style="list-style-type: none"> ▪ Sale of spectrum to new MNO. ▪ Austrian authorities reserve additional spectrum for new MNO. ▪ Access for up to 16 mobile virtual network operators (MVNOs) to 30% of H3G’s wholesale network.
Hutchinson 3G / Telefónica Ireland	<ul style="list-style-type: none"> ▪ Access for two MVNOs to 30% of H3G’s wholesale network. ▪ H3G to guarantee continuation of Telefonica’s network sharing agreement with Eircom.
Telefónica Deutschland / E-Plus	<ul style="list-style-type: none"> ▪ Access for one to three MVNOs to 30% of Telefonica’s wholesale network. ▪ Sale of spectrum to a new MNO or for one of the existing MVNOs to become an MNO. ▪ Commitment to extend existing wholesale agreements with Telefónica’s and E-Plus’ partners.

Figure 1: Three cases that set the scene

instances include the interplay between the antitrust cases against MasterCard and Visa and the legislation, bordering on company-specific, to cap interchange fees. Other examples include the revision of the state aid guidelines for the financial sector in 2013 which trailed bail-in mechanisms before these had been legislated for in the subsequent Bank Recovery and Resolution Directive.

DG Competition's actions since Vestager's appointment are a clear break with half a decade of occasional tactical retreat on banking and state aid. They suggest that DG Competition sees Europe in terms of an increasingly open - and desirable - DSM for European consumers, but with national markets for telecoms companies. We might also cautiously conclude that the Commission's use of competition policy in this way suggests a lack of confidence in its ability to steer legislation through a newly assertive Parliament and re-assertive Council, and leads to some doubts over whether final legislative proposals will actually contain any meaningful clauses on geo-blocking. At the same time, this very recognition of its own limitations reveals the Juncker Commission as both resourceful and highly political.

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