

Final Report of the Hearing Officer ⁽¹⁾
(M.8864 — Vodafone/certain Liberty Global Assets)
(2019/C 382/06)

Introduction

1. On 19 October 2018, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation ⁽²⁾ pursuant to which Vodafone Group Plc ('Vodafone' or 'the Notifying Party') would acquire sole control of Liberty Global Plc's ('Liberty Global') telecommunications businesses in Czechia, Germany, Hungary and Romania (the 'Target Business') ⁽³⁾ (the 'Transaction'). Vodafone and Liberty Global (including the Target Business) are designated hereinafter as the 'Parties'.

Procedure

2. The Commission's first phase investigation raised serious doubts as to the compatibility of the Transaction with the internal market. On 11 December 2018, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation, to which the Parties responded on 7 January 2019.
3. On 18 January 2019, the Commission adopted two decisions pursuant to Article 11(3) of the Merger Regulation following the failure of each of the Parties to provide complete information in response to a request for information (the 'Article 11(3) decisions'). The Article 11(3) decisions compelled their addressees to submit complete information to the Commission and had the effect of suspending the time limits set out in Article 10(3), first subparagraph, of the Merger Regulation. The suspension of the time limits expired once both Parties complied with the Article 11(3) decisions, at the end of 8 February 2019.

Statement of Objections

4. On 25 March 2019, the Commission issued a Statement of Objections ('SO') pursuant to Article 18 of the Merger Regulation and Article 13(2) of the Merger Implementing Regulation ⁽⁴⁾. In the SO, the Commission took the preliminary view that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2 of the Merger Regulation due to (1) horizontal non-coordinated effects (i) in the retail supply of fixed internet access services in Germany; (ii) in the retail supply of 2P bundles including fixed telephony services and fixed internet access services in Germany; and (iii) in the market for the wholesale TV signal transmission in Germany; as well as (2) vertical non-coordinated effects in the retail supply of TV signal transmission to MDU customers in Germany as well as in the potential regional market corresponding to the Unitymedia's footprint.
5. The Parties submitted their written reply to the SO on 8 April 2019. None of the Parties requested to be heard orally.

Interested third persons

6. Upon their reasoned request, I admitted 18 undertakings as interested third persons in the present proceedings pursuant to Article 5 of Decision 2011/695/EU. These included competitors and/or entities having contractual relationships with the Parties as suppliers or customers as well as associations representing such undertakings.
7. All interested third persons were provided with a non-confidential version of the SO and given a time-limit within which to submit their written comments pursuant to Article 16(2) of the Merger Implementing Regulation.

⁽¹⁾ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

⁽²⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1) (the 'Merger Regulation').

⁽³⁾ In Czechia, the Target Business operates through UPC Česká republika, s.r.o., in Germany through Unitymedia GmbH ('Unitymedia'), in Hungary through UPC Magyarország Kft and in Romania through UPC Romania S.R.L.

⁽⁴⁾ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1) (the 'Merger Implementing Regulation').

Access to the file

8. The Parties were first granted access to the file on 25 March 2019 and thereafter on a rolling basis. Access to confidential information relied upon by the Commission in the SO was granted to the Parties' economic advisors in a data room.
9. On 16 April 2019, I received a request for access the Commission's case file from an undertaking that I had admitted as one of the interested third persons to the proceedings. Such access request had been first addressed to DG Competition, which rejected it on 12 April 2019. I responded to the request on 23 April 2019, finding that there is no legal requirement to provide access to the case file to the undertaking concerned. In essence, Article 11 of the Merger Implementing Regulation distinguishes, for the purposes of the right to be heard, third persons from notifying parties, other involved parties ⁽⁵⁾ and parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of the Merger Regulation. The right to be heard of third persons in merger proceedings is laid down in Article 18(4) of the Merger Regulation and Article 16(1) of the Merger Implementing Regulation. The latter defines the content and scope of interested third parties' right to be heard, stating 'that the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views'. Within the bandwidth of its discretion and in line with the case law ⁽⁶⁾, the Commission provided a non-confidential version of the SO to all interested third persons allowing them to understand the theories of harm and their component parts and giving them the possibility to make their views known. While the addressees of a statement of objections and the 'other involved parties' have a right of access to the file according to Article 17(1) and (2) of the Merger Implementing Regulation, a third party to the proposed concentration — such as the undertaking concerned — does not have the same right of access to the file.

Commitments

10. On 6 May 2019, the Notifying Party submitted commitments pursuant to Article 8(2) of the Merger Regulation in order to address the competition concerns identified by the Commission.
11. On the basis of feedback obtained from the market testing of these commitments by the Commission, the Notifying Party submitted a revised set of commitments on 11 June 2019 ('Final Commitments').
12. In the draft Decision, the Commission finds that the Final Commitments are suitable and sufficient to eliminate the significant impediment to effective competition to which the Transaction would give rise and that these commitments therefore render the proposed concentration compatible with the internal market and the EEA agreement.

Draft Decision

13. I have reviewed the draft Decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which the Parties have been afforded the opportunity of making known their views.

Conclusion

14. I conclude that the effective exercise of procedural rights has been respected during the present proceedings.

Brussels, 3 July 2019.

Joos STRAGIER

⁽⁵⁾ According to Article 11(b) of the Merger Implementing Regulation, 'parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration', constitute 'other involved parties'.

⁽⁶⁾ See, for example, case T 213/01 and T 214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission*, EU:T:2006:151, paragraph 107.