

**Final Report of the Hearing Officer <sup>(1)</sup>****Hutchison 3G UK/Telefónica UK****(Case M.7612)**

(2016/C 357/07)

**I. INTRODUCTION**

1. On 11 September 2015, the European Commission (the 'Commission') received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation <sup>(2)</sup> by which CK Hutchison Holdings Limited ('CKHH'), through its indirect subsidiary Hutchison 3G UK Investments Limited (the 'Notifying Party' or 'Three') <sup>(3)</sup> acquires within the meaning of Article 3(1)(b) of the Merger Regulation, sole control over Telefónica Europe Plc ('O2') (the 'Transaction'). The Notifying Party and O2 will be referred to collectively as the 'Parties'.

**II. PROCEDURE**

2. The Commission's first phase investigation raised serious doubts as to the compatibility of the Transaction with the internal market and the EEA Agreement. On 30 October 2015, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation. The Notifying Party submitted written comments on 22 November 2015.

**Statement of Objections**

3. On 4 February 2016, the Commission adopted a Statement of Objections ('SO') in which it took the preliminary view that the Transaction would, through non-coordinated and coordinated effects in the market for retail mobile telecommunications services in the United Kingdom, as well as through non-coordinated effects on the wholesale market for access and call origination on public mobile networks in the United Kingdom, significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2 of the Merger Regulation.
4. The Commission set a time limit of 25 February 2016 to reply to the SO. The Notifying Party replied to the SO on behalf of the Parties on 26 February 2016. In its reply, the Notifying Party requested a formal oral hearing.

**Access to the file**

5. The Notifying Party received access to the file via CD-ROM on 4 February 2016. Additional access to the file was granted on 18 February, 29 February, 11 March, 23 March, 7 April, 15 April, 25 and 26 April 2016.

**Interested third persons and competent authorities of the Member States***Interested third persons*

6. Upon their requests, I allowed Sky UK Limited ('Sky'), Liberty Global Europe Ltd ('Liberty Global'), Iliad S.A. ('Iliad'), Vodafone Group Plc ('Vodafone'), Talk Talk Telecom Group PLC ('TalkTalk'), Tesco plc ('Tesco'), BT Group plc ('BT'), EE Limited ('EE', now 'BT/EE' <sup>(4)</sup>), Dixons Carphone plc ('Dixons Carphone'), UK Broadband Networks Limited ('UKBN'), Gamma Communications plc ('Gamma') and Wireless Infrastructure Group Limited ('WIG') to be heard as interested third persons in the current proceedings.
7. All these interested third persons received a non-confidential version of the summary of the SO and were given the opportunity to make known their views. Except for WIG, all interested third persons requested to participate in the formal oral hearing requested by the Notifying Party. I acceded to the requests from each interested third person.
8. A number of interested third persons have complained about the extensive redaction of the non-confidential version of the summary of the SO and their subsequent inability to comment fully on it and thus to properly exercise their rights in these proceedings. Vodafone and BT/EE have referred primarily to the SO sections concerning their respective network sharing agreements with the Parties. After the formal oral hearing, the Commission made

<sup>(1)</sup> 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').

<sup>(2)</sup> 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').

<sup>(3)</sup> On 9 March 2016, Hutchison 3G UK Investments Limited has changed the name of its legal entity to CK Telecoms UK Investments Limited, which is therefore the addressee of the decision.

<sup>(4)</sup> By the time of the oral hearing, BT had completed its acquisition of EE.

available new, less redacted, versions of the SO and granted the interested third persons the opportunity to supplement their views. In the case of Vodafone and BT/EE, redactions of the SO sections concerning their respective network sharing agreements were significantly reduced.

9. Upon its request, I admitted Arqiva Limited to the proceedings as an additional interested third person after the formal oral hearing.

#### *Competent authorities of the Member States*

10. The national competition authorities of each Member State were invited to the oral hearing. Upon request, on the basis of Article 15(3) of the Merger Implementing Regulation, I also invited the UK Communications Regulator ('Ofcom') to the formal oral hearing as another competent authority of a Member State.

#### **Formal oral hearing**

11. The formal oral hearing was held on 7 March 2016 and was attended by the Parties, as well as their external legal and economic advisers, the interested third persons Sky, Dixons Carphone, BT/EE, Vodafone, Tesco, Liberty Global, TalkTalk, Gamma, Iliad and UKBN, most of whom were assisted by external advisers, relevant Commission services, the competition authorities of 11 Member States (Belgium, Germany, Ireland, Spain, France, Italy, Latvia, the Netherlands, Finland, Sweden and the United Kingdom), and Ofcom (the United Kingdom).
12. The Parties requested and were granted closed sessions for parts of their presentations. Among the interested third persons, Sky and Dixons Carphone requested and were granted closed sessions for their respective presentations, but only with respect to the other interested third persons.

#### **Letters of Facts**

13. On 17 March 2016 and on 23 March 2016 the Commission addressed to the Notifying Party letters of facts where it pointed out additional evidence in the Commission's file in support of the preliminary findings of the SO. The Notifying Party submitted written comments to the letter of facts of 17 March 2016 on 29 March 2016 and to the letter of facts of 23 March 2016 on 4 April 2016.

#### **Commitments**

14. The Notifying Party submitted a first set of commitments on 2 March 2016. On 15 March 2016, the Notifying Party submitted a second set of commitments, which were market tested starting 18 March 2016. The Notifying Party submitted a final set of commitments on 6 April 2016.

#### **The draft decision**

15. After having heard the Parties and in derogation of the SO, the Commission no longer takes the view in the draft decision that the Transaction would give rise to coordinated effects in the market for retail mobile telecommunications services in the United Kingdom. In the draft decision, the Commission confirms the view that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation, through non-coordinated effects in the market for retail mobile telecommunications services in the United Kingdom, as well as through non-coordinated effects on the wholesale market for access and call origination on public mobile networks in the United Kingdom. Pursuant to Article 8(3) of the Merger Regulation, the draft decision therefore declares the Transaction incompatible with the internal market.
16. 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.

### **III. CONCLUSION**

17. Overall, I consider that the effective exercise of the procedural rights has been respected in this case.

Brussels, 29 April 2016.

Joos STRAGIER