

Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition

Commissioner Margrethe **Vestager**, in charge of competition policy, said: *“Commitments from the parties in merger decisions are crucial to ensure that effective competition is maintained after a merger or takeover, so that there is no harm to consumers. We need full compliance and take very seriously any case where companies may have failed to comply with their commitments, which is why we have sent today’s statement of objections.”*

On [2 July 2014](#), following an in-depth investigation, the European Commission approved under the EU Merger Regulation and subject to conditions, the proposed acquisition of E-Plus, the German mobile telecommunications business of Dutch Telecom operator KPN, by Telefónica Deutschland, a subsidiary of Telefónica, head-quartered in Spain.

The Commission cleared the acquisition subject to full compliance with commitments submitted by Telefónica. These commitments would ensure that new competitors would be able to enter the mobile telecommunications market in Germany and that the position of existing competitors would be strengthened.

The commitments consisted of three main elements, with Telefónica committing:

- 1) to sell, before the acquisition was completed, up to 30% of the merged company’s network capacity to one or several (up to three) Mobile Virtual Network Operators (MVNOs) in Germany at fixed prices. Such virtual operators offer mobile telecoms services to consumers by using the network of other operators;
- 2) to offer to divest radio wave spectrum and certain assets either to a new network operator or subsequently to virtual operators who used network capacity made available thanks to the commitments;
- 3) to extend existing wholesale agreements with Telefónica’s and E-Plus’ wholesale partners and to offer wholesale 4G services to all interested players at “best prices”. In addition, Telefónica committed to improve its wholesale partners’ ability to switch their customers from one MNO to another.

The Statement of Objections issued by the Commission today relates to the third element of the commitments, and more specifically to **Telefónica’s obligation to offer wholesale 4G services to all interested players at “best prices under benchmark conditions”**.

The Commission’s preliminary view is that Telefónica did not properly implement its obligations under the wholesale 4G access obligation by not including certain existing wholesale agreements in the benchmark. Had

Telefónica included such additional agreements, third parties would have benefited from more advantageous 4G wholesale access conditions. As a result of Telefónica's conduct, the ability of third parties to compete in the German market for mobile communication services was reduced.

Next steps

The sending of a Statement of Objections does not prejudge the final outcome of the investigation. Telefónica now has until 5 April to respond to the Statement of Objections.

If the Commission were to conclude that Telefónica did not respect a commitment that was part of the clearance decision approving its acquisition of E-Plus, it could impose a fine of up to 10% of Telefónica Deutschland's annual worldwide turnover and/or revoke the decision.

Background

This is the first time that the Commission has sent a Statement of Objections alleging that a company breached commitments it offered to secure the Commission's approval of a transaction under the EU Merger Regulation.

Other merger procedural cases

In May 2017, the Commission [fined Facebook €110 million](#) for providing incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation of Facebook's acquisition of WhatsApp. This decision had no impact on the Commission's October 2014 [approval](#) of the transaction under the EU Merger Regulation since the clearance decision was based on a number of different elements going beyond those linked to the incorrect or missing information.

In July 2017, the Commission sent three separate [Statements of Objections to Merck and Sigma-Aldrich, General Electric and Canon](#) alleging they breached EU merger rules: to General Electric and to Merck and Sigma-Aldrich for allegedly providing incorrect or misleading information, and to Canon for allegedly implementing a merger before notification and clearance. These investigations are ongoing.

In April 2018, the Commission imposed a [€124.5 million fine on Altice](#), the multinational cable and telecommunications company based in the Netherlands, for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the Commission.

Procedural background

A Statement of Objections is a formal step in an investigation, where the Commission informs the companies concerned in writing of the objections raised against them. The companies can then examine the documents in the Commission's file, reply in writing and request an oral hearing to present their comments on the case to representatives of the Commission and the

national competition authorities.

There is no legal deadline to complete the inquiry. The duration of the investigation depends on a number of factors, including the complexity of each case, the extent to which the companies concerned co-operate with the Commission and the exercise of the rights of defence.

The [EU Merger Regulation](#) allows for the possibility, following an in-depth investigation, to attach to a clearance decision conditions and obligations intended to ensure that the companies concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market (Article 8(2), second subparagraph)

The ability of the Commission to impose fines in the event of a failure to comply with a condition or an obligation pursuant to Article 8(2), second subparagraph, is laid out in Article 14(2) (d) of the EU Merger Regulation. The ability of the Commission to impose periodic penalty payments to comply with an obligation imposed by decision pursuant to Article 8(2), second subparagraph, is laid out in Article 15(1)(c) of the EU Merger Regulation. The possibility to revoke an Article 8(2) decision if the undertaking concerned committed a breach of an obligation attached to the decision is laid out in Article 8(6)(d) of the EU Merger Regulation.

More information will be available on the competition [website](#), in the Commission's public [case register](#) under the case number M.9003