Merger and Licence Transfer Framework

Final Report

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UGANDA COMMUNICATIONS COMMISSION

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Registered Office Address: Descartes House, 8 Gate Street, London WC2A 3HP United Kingdom

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1. Introduction

1.1. This report has been prepared by Cartesian for the Uganda Communications Commission (UCC) within the context of a wider engagement concerning market definition and market power assessment.

1.2. The purpose of this document is to propose a framework for the Ugandan Communications Commission (UCC) to apply for the control of mergers and licence transfers in the Ugandan communications sector.

1.3. The foundations for the framework are the Uganda Communications Act 2013 and the draft Competition Bill of 2004.[1, 2] Although the Competition Bill has not been enacted, it provides a useful strawman process for investigating proposed mergers.

1.4. Using these documents as a starting point, Cartesian has identified how the frameworks for market definition and market assessment may be applied in the context of merger control. Cartesian has also recommended a series of actions that the UCC could undertake to establish a merger control framework in lieu of a competition legislation.

1.5. In addition to the proposed framework for Uganda, this document includes a summary of the merger control frameworks that are applied in Australia, the European Union and the USA. These summaries capture the key points of each of the frameworks as a reference for comparison with the proposed framework for Uganda.

1.6. Finally, the document contains international case studies to illustrate specific ways in which regulatory authorities in various jurisdictions have addressed merger and licence transfer issues and challenges.

[1] THE UGANDA COMMUNICATIONS ACT, 2013
[2] THE COMPETITION BILL, 2004; Draft of 5 November 2004

2. Proposed Merger Control Framework for the Ugandan Communications Sector

General Principles

2.1. The primary purpose of merger control is to maintain an effectively competitive market. Competition is an important mechanism for driving economic progress. In a market with effective competition, competitive pressures force firms to innovate and become more efficient. This in turn can lead to lower prices for consumers, new services and higher quality. For this reason, effective competition is seen as highly desirable.

2.2. Mergers may lead to a substantial lessening of competition through concentration of market power. However, not all mergers will do so. A merger control framework therefore needs to identify those mergers which present risks and distinguish these from those which do not.

2.3. Aside from competitive issues, proposed mergers may also raise concerns from a consumer or public-interest perspective. Consideration should therefore also be given to these factors.

2.4. Whilst it is important for merger control to not unduly impede transactions that do not present issues, it is essential that authorities are provided with sufficient time to properly examine a proposed merged before reaching a decision. A balance must be found between the interests of the merging parties and those of other stakeholders in the market.

2.5. Where mergers will clearly not lead to a substantial lessening of competition (nor present other material issues), the merger should be cleared at the earliest opportunity.

2.6. To properly conduct an appraisal of a proposed merger, it is essential that the authorities are equipped with appropriate investigative powers, capabilities and resources.

2.7. In conducting an appraisal, it is necessary that confidential information is gathered from the merging parties and, potentially, from other market participants. The procedure must respect the confidentiality of this information.

2.8. For stakeholders to usefully contribute to the proceedings, the merger control framework must provide a mechanism for sufficient information to be shared without divulging genuine business secrets.

2.9. To be effective, merger control requires that authorities are empowered to apply sanctions to firms that are in breach of the regulations. This may apply, for example,

2.10. In the case where a merger proceeds without authorisation and is later found to be objectionable, it is necessary that the authorities have the power to conduct merger appraisals retrospectively where no notification was given by the merging firms.

2.11. There must also be a means of applying sanctions to firms that do not adhere to any commitments and obligations made to secure conditional approval.

The Uganda Communications Act

2.12. The Uganda Communications Act 2013 mandates that licence transfers require the written consent of the UCC.[3] Operators seeking to transfer a licence must apply to the UCC for consent and this application must be accompanied by an application for grant of a licence by the person to whom the operator intends to transfer the licence.

2.13. For the purposes of the Act, a licence transfer includes the acquisition of control of the licence holder. Control is defined broadly as the possession, directly or indirectly, of the power to direct or cause the direction of the management of the firm through whatever means.

2.14. In considering an application for a transfer of a licence, the UCC is required to have regard to the same terms and conditions as those that apply to the grant of a new licence, but the UCC may in its discretion refuse to grant the application.

2.15. Under the Act, in granting a *new* licence the UCC must take into account: (a) whether the applicant is an eligible person; (b) the capability of the applicant to operate a system or service for which a licence is sought; (c) the objectives of the Act; and (d) whether the grant of the licence is in the public interest. For the purposes of merger control, public interest should primarily consider the potential harm to competition, alongside any consumer and other public-interest matters.

2.16. Furthermore, the Act specifically prohibits activities which unfairly prevent, restrict or distort competition including those that relate to anticompetitive mergers and acquisitions in the communications sector.

2.17. Under the terms of the Act, the UCC shall grant its consent to transfer a licence within 45 days from the date of application. This is shorter than the 60 days allowed for a new licence request.

2.18. For the purposes of a licence transfer, 45 days appears reasonable if there are no competition issues to consider, i.e. there is no concentration of market power arising from the licence transfer. However, 45 days may be insufficient to properly assess a transfer that does raise competition concerns.

2.19. To address such situations, the draft Competition Bill (discussed below) proposes a longer timeframe in which mergers can be assessed, of up to 107 days. The timescales proposed in the Bill are more in line with the international examples of merger control frameworks provided in Section 4. In the case of the USA, there is an informal timespan of 180 days. In Europe, the EC procedure can take up to 160 working days.

The Competition Bill (Draft)

2.20. At the time of writing, the Competition Bill 2004 is in draft status and has not been approved by the Ugandan government.[4] That said, it can be used as a guide to what a future Uganda Competition Act in may look like.

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[3] THE UGANDA COMMUNICATIONS ACT, 2013

[4] THE COMPETITION BILL, 2004; Draft of 5 November 2004

2.21. The Bill calls for the creation of a Competition Commission to exercise competition powers in Uganda. This includes conducting inquiries into "combinations". A combination is defined in the draft Bill as:

> "acquisition by a person, directly or indirectly, of shares in the capital of an enterprise, or voting rights or, any assets of an enterprise, so as to acquire direct or indirect control of the enterprise; acquisition of control by a person or entity over an enterprise when that person or entity already has direct or indirect control over another enterprise engaged in production, distribution and trading of the same or substitutable goods or provision of the same or substitutable service; merger or amalgamation of two or more enterprises."

2.22. The Bill requires that combinations that meet specific criteria shall be promptly notified to the Commission by the firm acquiring control. The proposed criteria include asset and turnover thresholds; a market share threshold (35%) is separately proposed.

2.23. The Commission is then required to inquire into combinations referred to it "with a view to satisfying itself whether that combination causes or is likely to cause an appreciable adverse effect on competition within the Ugandan market."

2.24. The first stage following notification is for the Commission to direct the parties to the combination to publish details of the combination to bring attention to the public and stakeholders that would be affected by it. The Commission has up to seven working days to issue its direction after which the parties have a further ten working days to publish details.

2.25. Following publication, the Commission may invite other parties to submit objections to the combination within fifteen working days.

2.26. Within a following fifteen working days, the Commission may call for additional information from the parties to the combination. The parties have a further fifteen days to respond (i.e. 45 working days from the initial publication).

2.27. Having amassed the information above, the Commission will examine the case for a period of up to 45 working days. The Bill proposes a non-exhaustive list of factors which the Commission may take account of in its assessment. These are listed as follows:

(a) The actual and potential level of competition through imports in the market;

(b) The extent of barriers to entry to the market;

(c) The level of combination in the market;

(d) The degree of countervailing power in the market;

(e) The likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) The extent of effective competition remaining in a market;

(g) The extent to which substitutes are available in the market or are likely to be available in the market;

(h) The market share of the parties involved in the combination, individually and as a combination;

(i) The likelihood that the combination would result in the removal from the market of a vigorous and effective competitor;

(j) The nature and extent of vertical integration in the market;

(k) The possibility of a failing business;

(l) The nature and extent of innovation; and,

(m) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

2.28. Following its assessment the Commission will reach one of three decisions:

- The combination has no adverse effect on competition – in which case it shall approve the proposed combination;
- The combination may not have an adverse effect on competition – in which case it shall propose conditions under which it would approve the combination;
- The combination has or is likely to have an appreciable adverse effect on competition – in which case it shall direct that the combination shall not take effect.

2.29. In the case of conditional approval, should the parties to the combination not agree with the proposed conditions, the draft Bill provides the opportunity to apply to the Commission for further modification. If the Commission does not accept the modifications and the parties do not accept the Commission's conditions the combination shall not be approved.

2.30. Any appeal against the Commission shall be made to the High Court.

Jurisdiction

2.31. Given that the Competition Bill has yet to be enacted, there is no Competition Commission in Uganda at the time of writing. Nor is there a legislative framework in which to assess mergers and acquisitions.

2.32. In lieu of the Competition Commission, sectorial regulatory authorities such as the UCC are the most appropriate competent bodies to assess transactions within their sector.

2.33. The UCC has a *de facto* role in merger approval through its mandate to oversee licensing and transfer of licences in the communications sector. However, as indicated in the Uganda Communications Act section above, the timeframe permitted to assess a licence transfer is considerably less than the norm for a merger investigation.

2.34. We therefore recommend that in situations where licence transfers fall within the definition of combinations from the Competition Bill, that these be assessed by the UCC according to the proposed procedure and timescales within the draft Bill of 2004, as summarised above.

2.35. If and when the Competition Bill is enacted, responsibility for merger control will become vested in the Competition Commission. In countries where there is an established competition body, the process is typically conducted in combination with sectorial regulatory authorities such as the UCC. The sector-specific knowledge and expertise of such regulatory authorities can be invaluable in support of a merger investigation.

2.36. It is important, therefore, that consideration be given to prospective interaction between the Competition Commission and the UCC.

2.37. Where two or more authorities are responsible for investigating a merger or licence transfer, the authorities must ensure that a method for formally and/or informally coordinating research, analysis and approval is agreed in advance of any investigation.

Procedure

2.38. As explained in the preceding section, we recommend that in situations where licence transfers within the communications sector are also combinations, that these be assessed by the UCC according to the proposed procedure and timescales within the draft Competition Bill of 2004.

2.39. Under this overarching recommendation, in this section we identify actions which the UCC may wish to take in adopting the draft procedure.

2.40. First, we recommend that the UCC notify existing licensees of the procedure that will be followed and the criteria that will be applied, based upon the draft Bill. We further recommend that the procedure be published on the UCC's website such that prospective licensees are aware of the merger control framework that is in place.

2.41. Secondly, we recommend that the UCC clarify and communicate the notification requirements for combinations. Specifically, the criteria which triggers a notification and the information that parties to a combination must submit in their notification. An example of the information requested in the case of EC merger control is reference in Section 3.19.

2.42. Under the procedure outlined in the Competition Bill, the parties to the combination shall be directed to publish details of the combination for bringing it to the attention of the public and persons that would be affected by it. We recommend that guidance be given as to the minimum information acceptable for the published version of the notification. We also recommend that the UCC consider publishing such information on its website in addition to any other communication channels.

2.43. Additionally, the UCC may wish to publish a timeline for activities in the review of this merger and keep this updated as the investigation proceeds.

2.44. The draft Bill refers to "relevant markets" for the purpose of assessing the effect of the combination on competition. Where appropriate, we recommend use of the market definitions in the Relevant Markets Report prepared by Cartesian for the UCC.[5]

2.45. In order to assess whether a merger or licence transfer will impact the competitive levels in the market, we recommend using the approach set out in the SMP Assessment Framework prepared by Cartesian for the UCC.[6]

2.46. The SMP Assessment Framework can be used to assess the current competitive situation and the competitive situation that could be expected should the combination proceed. The

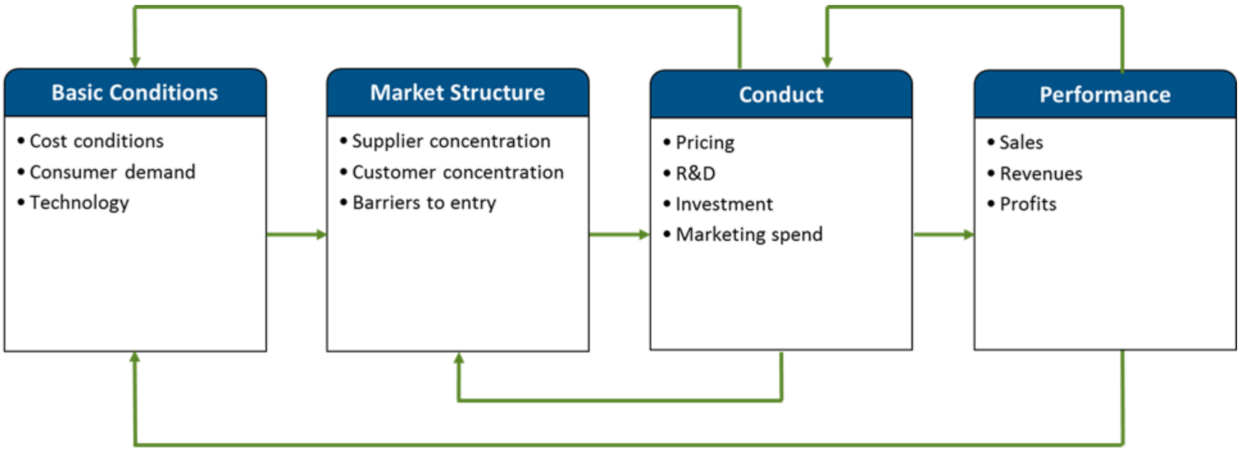
[5] Cartesian, "Relevant Markets Report". 8 December 2014.
[6] Cartesian, "SMP Assessment Framework". 1 October 2014.

framework provides a structured approach to consider the competitive dynamics present in the market.

2.47. To summarise the approach, the framework assesses the market from a number of perspectives and the inter-relationships between these:

- Basic market conditions;
- Market structure;
- Market conduct; and
- Market performance.

Figure 1. ***The Structure-Conduct-Performance Framework***



2.48. On the left hand side of the diagram are the *basic conditions*, representing the basic inputs required to provide a service, and consumer preferences and demand. As the diagram illustrates these basic conditions affect market *structure*, which in turn influences *conduct* and *performance*. Feedback loops show that the basic conditions can also be affected by the conduct of the firms.

2.49. Market structure, in turn, affects firm conduct. For instance, if there are economies of scale, then the average cost of a combination may well be less than that of the separate parties. This could lead the firm to profitably undercut its competitors. Likewise, if there are barriers to entry then a reduction of market participants through combination may enable a firm to independently raise prices above the competitive level.

2.50. Defining the structure of a market considers the degree of concentration of supply and demand and the presence of barriers to market entry. Structural factors are assessed using criteria which include:

- Market concentration;
- Sunk costs;
- Network effects and externalities;
- Economies of scope;
- Economies of scale; and,

- Extent of vertical integration.

2.51. The conduct of firms in the market follows from the market structure. Market conduct considers aspects such as firms' level of investment, product strategy, pricing behaviour and the mode in which they chose to compete. Whilst it is not possible to precisely forecast the future conduct of a combination, the framework can still be used to identify competitive risks.

2.52. Market conduct is assessed using criteria including:

- Scale and ability to access resources;
- Control of essential upstream inputs;
- Evidence of dynamic competition;
- Countervailing buyer power;
- Access to sales and distribution channels;
- Potential for market growth;
- Transparency of consumer information regarding retail products and services;
- Ease with which customers can switch between supplier; and
- Joint dominance.

2.53. Likewise, the risk of changes to market performance can be assessed. Criteria used to assess the performance of a market include:

- Excessive prices;
- Low uptake of services; and
- Quality of services and technology.

2.54. Note also that due to the degree of vertical integration typical in the telecoms sector, it may be necessary to also consider the impact on adjacent upstream/downstream markets.

2.55. Where competitive concerns are identified, as per the procedure in the draft Competition Bill, two options are open to the UCC: approval with conditions or outright rejection.

2.56. Approval with conditions will seek to modify the combination such that it will not detrimentally affect competition in the relevant market(s). This may require divisions of the combined firm, divestitures of customers, divestitures of spectrum, access obligations or other measures. Remedies to address market failure are further discussed in the *Reference to the Regulatory Remedies and Safeguards* report prepared by Cartesian for the UCC.[7]

2.57. We recommend that the UCC publish its final decision on its website in addition to any other communication channels.

2.58. Should the parties to a combination disagree with the final decision they may choose to appeal. Clarity should be given as to whether the appeal should be made to the High Court (as proposed in the Competition Bill) or to a tribunal and subsequently the Court of Appeal (as per the Communications Act).

[7] Cartesian, "Regulatory Remedies and Safeguards". Draft of 24 December 2014.

3. International Examples of Communications Sector Merger Control Frameworks

Australia

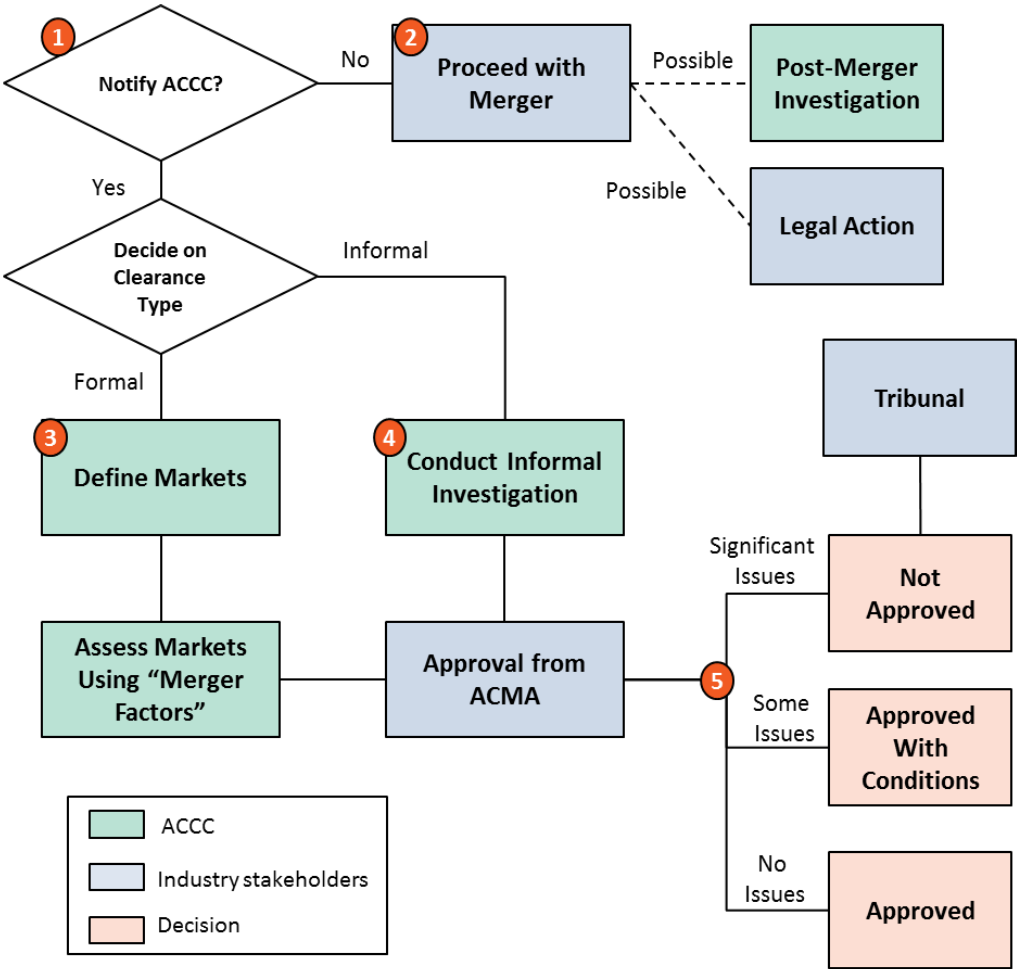
3.1. The merger control regime of the Australian Competition and Consumer Commission (ACCC) is defined by the Competition and Consumer Act (CCA) of 2010.[8] The CCA prohibits direct and indirect acquisitions of shares or assets that would or would be likely to have the effect of substantially lessening competition in a market in Australia.

3.2. The Australian Communications and Media Authority (ACMA), which is responsible for broadcasting and spectrum regulation in Australia, issues carrier licences. These do not have a stated term but require an annual upkeep and may be cancelled by the ACMA or surrendered by the licensee. Carrier licences are also not transferable in the view of ACMA.[9]

3.3. The ACCC uses its informal merger guidelines (last updated in 2011)[10] as an analytical and evaluative framework for considering any applications for mergers in Australia. The process used by the ACCC is shown in Figure 2 below.

[8] Competition and Consumer Act 2010. http://www.comlaw.gov.au/Details/C2013C00004
[9] http://www.iclg.co.uk/practice-areas/telecoms-media-and-internet-laws/telecoms,-media-and-internet-laws-and-regulations/australia
[10] https://www.accc.gov.au/system/files/Merger%20guidelines.pdf

Figure 2. ***ACCC Merger Review Process***



Source: Cartesian

3.4. The ACCC recommends that in certain industries, all mergers are notified (1), and that certain notification thresholds be used in all decisions whether to notify the ACCC of a merger. This threshold is such that the ACCC must be notified if the merger results in a market share of greater than 20% and if the products of the merging entities are substitutes or complements. Merger parties are not legally required to notify the ACCC of a desire to merge, and can proceed without notifying the ACCC.

3.5. Should the ACCC not be notified of a merger (2), it reserves the right to investigate the merger after the fact and taking legal action based on its findings. Additionally, no protection is given to the merged entity from other industry stakeholders taking legal action against the merged entity on the basis of the merger resulting in substantially lessened competition.

3.6. If the merger parties notify the ACCC of their intention, they may choose between applying for an informal or a formal clearance. The formal clearance avenue (3) results in a full investigation by the ACCC (and any necessary approval from ACMA) on the basis of several "merger factors" used to assess the potential competitive effects of the merger. These factors are listed below.

3.7. Merger parties may request informal clearance (4) from the ACCC, which is essentially the ACCC's view on whether it will seek an injunction to stop the merger from proceeding. If the ACCC determines that the merger will fall foul of existing regulation, the merger parties may undertake court enforceable conditions to address the ACCC's concerns or they may proceed with the merger regardless. The ACCC can, in the latter case, seek court approval to stop the merger from proceeding.

3.8. The ACCC has three options when requested to grant formal clearance by merger parties (5). It may approve the merger, which grants the merger parties legal protection from being sued by other parties for being in contravention of the CCA. Alternatively, the merger may be approved with conditions (that the merger parties must accept to proceed with the merger) or it may be denied. If denied, the merger parties may take their case to Tribunal for review of the ACCC's decision. For informal clearance, the merger parties may proceed with merger regardless of the ACCC's decision, though the ACCC's response to this will vary depending on this stand on the merger.

3.9. The merger factors used by the ACCC are very similar to those used in competition assessments, namely:

- Concentration and market shares
- Height of barriers to entry
- Actual and potential import competition
- Availability of substitutes
- Countervailing power
- Dynamic characteristics of market
- Removal of a vigorous and effective competitor
- Vertical integration
- Ability to increase prices or profit margins
- Other factors such as efficiencies and other government regulation (e.g. ACMA regulation)

3.10. As with competition assessments in market reviews, these criteria are neither weighted nor considered independently. They are assessed in aggregate to produce a general view of the merger's outcomes, rather than as an arbitrary checklist.

European Union

3.11. The EC Merger Regulation defines how mergers are controlled at an EU level.[11] The Regulation applies to mergers with an "EU dimension" (i.e. mergers of sufficient scale and scope to have a transnational impact within the EU) which are subject to examination by the European Commission (EC). Mergers that do not have an EU dimension are investigated by the relevant national competition authorities according to domestic merger control rules.

[11] COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

3.12. In addition to mergers between previously independent firms, the Regulation also applies to situations where there is an acquisition of control. Collectively, these are referred to in the Regulation as "concentrations".

3.13. The EC defines acquisition of control as "the possibility of exercising decisive influence on an undertaking". As such, this definition extends beyond ownership to include contracts and, in exceptional circumstances, other means of influence such as economic dependence.

3.14. The Regulation considers horizontal (within the same relevant market) and non-horizontal (across different relevant markets) concentrations differently. In horizontal concentrations, the entities being merged are actual or potential competitors. In non-horizontal concentrations, the Regulation defines two subcategories: vertical and conglomerate.

- Vertical concentrations are between a supplier and the purchaser of its products (i.e. within a supply chain).
- Conglomerate concentrations are between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers).

3.15. Non-horizontal concentrations are generally less likely to significantly impede effective competition than horizontal concentrations. This is because there is no loss of direct competition in the same relevant market and there are often substantial scope benefits to such a merger.

3.16. The EC, in the first instance, considers market share and concentration levels for both horizontal and non-horizontal cases, reflecting the reasonable future changes, such as the effect of a merger. After that, non-coordinated and coordinated effects are considered to identify areas in which the concentration may result in substantial lessening of competition in the relevant markets.

3.17. Figure 3 below outlines the potential non-coordinated and coordinated effects of horizontal and non-horizontal concentrations.

Figure 3. ***Coordinated and Non-Coordinated Effects in Horizontal and Non-Horizontal Concentrations***

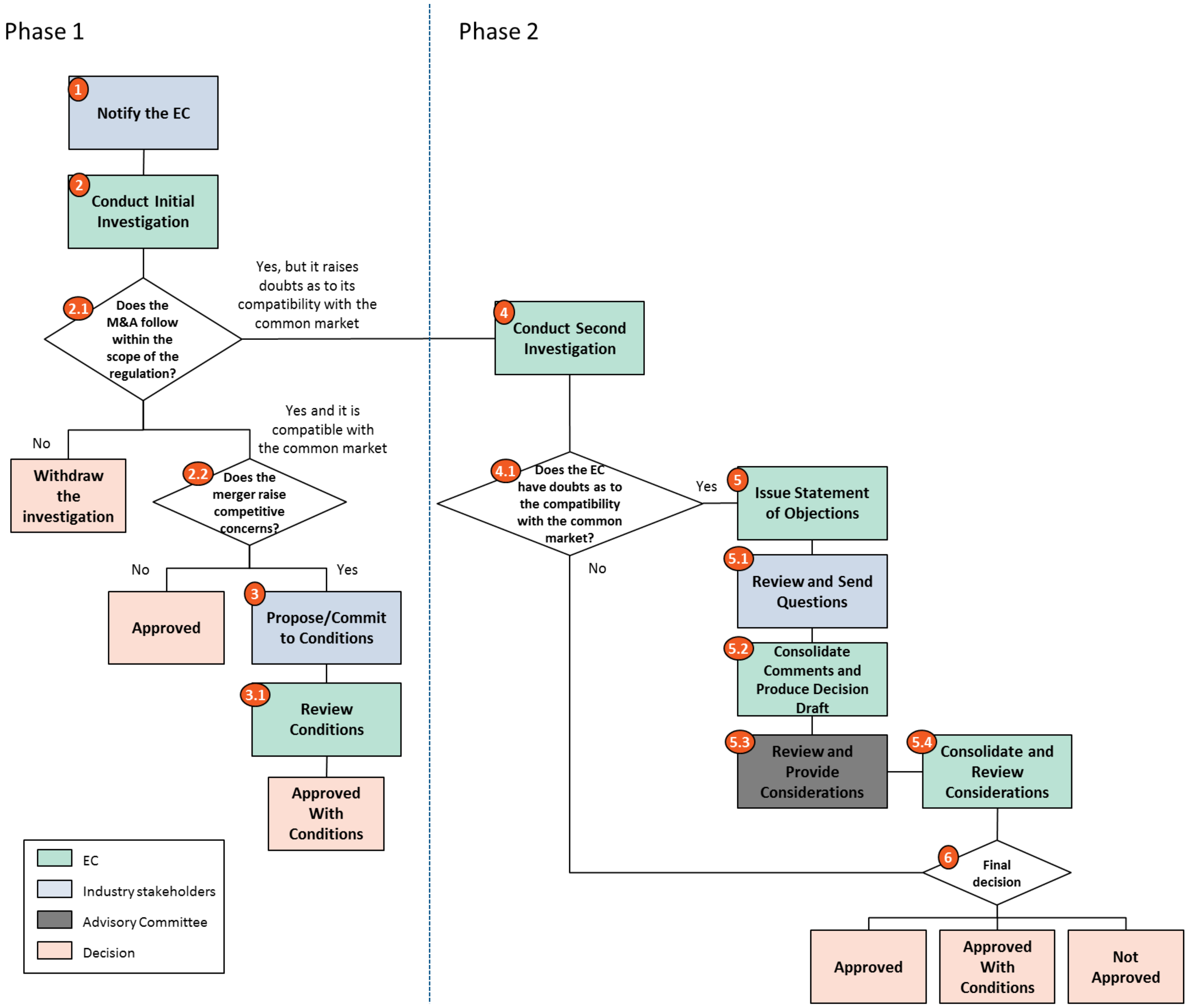
<table>
<tr><th></th><th>Coordinated Effects</th><th>Non-Coordinated Effects</th></tr>
<tr><td>Horizontal concentrations</td><td rowspan="2">• Increased likelihood of coordination to raise prices or limit supply
• Ease, stability and effectiveness of coordination</td><td>• Increased market power</td></tr>
<tr><td>Non-Horizontal concentrations</td><td>• Foreclosure</td></tr>
</table>

3.18. All concentrations falling within the scope of the Regulation are required to be notified to the EC prior to their implementation. Notification follows the conclusion of the merger agreement, the announcement of a public bid, or the acquisition of a controlling interest. Notification may also be made in advance of concluding an agreement where there is good faith intention to do so.

3.19. Notification is made using a Form CO which specifies the information that must be provided by notifying parties of a proposed merger, acquisition or other concentration.[12]

3.20. There are two phases of proceedings as illustrated in **Error! Reference source not found.**. Phase I proceedings follow notification and are usually completed within 25 working days. Following the Phase I proceedings the EC may decide to conduct a second phase of appraisal. The Phase II proceedings are usually completed within 90 working days, however this may be extended up to 125 working days under defined circumstances.

Figure 4. ***EC Process for Merger Control***



Source: Cartesian

[12] Form CO can be found in Annex I of COMMISSION REGULATION (EC) No 802/2004, 21 April 2004

3.21. In Phase I proceedings the EC conducts a detailed appraisal of the concentration. This will involve requests for information, inspections, interviews and collaboration with national competition authorities within the member states.

3.22. The EC can make one three possible decisions following the Phase I investigation:

- The concentration does not fall within the scope of the Regulation;
- The concentration falls within the scope of the Regulation, but is compatible with the common market – in which case the EC shall decide not to oppose it; or,
- The concentration falls within the scope of the Regulation and raises serious doubts as to its compatibility with the common market – in which case the EC will initiate Phase II proceedings.

3.23. A decision in Phase I to not oppose a concentration may be conditional upon certain commitments offered by the merging parties to address potential competition concerns. In this case the EC may attach conditions and obligations to its decision not to oppose a concentration.

3.24. In Phase II proceedings the EC and competition authorities of the member states further examine the concentration. This may be supported through additional information requests, interviews and inspections.

3.25. Having examined the concentration further, if the EC still has doubts as to the compatibility with the common market, the EC will issue a statement of its objections. At this point the parties proposing the concentration will be provided access to the case file (subject to redaction of confidential information in third parties submissions) and an opportunity to respond to the objections.

3.26. The EC then considers the response to the objections alongside the other evidence gathered in the proceedings and forms a draft decision. An advisory committee reviews the draft decision and provides an opinion on it, prior to the adoption of a final decision.

3.27. The final decision following the Phase II proceedings may take one of three forms:

- The concentration is compatible with the common market, i.e. it is approved;
- The concentration is compatible with the common market following modification, i.e. it is approved subject to conditions and obligations;
- The concentration is not compatible with the common market, i.e. it is opposed.

3.28. Where the EC finds that a concentration has already been implemented and that is found to be incompatible with the common market, the Commission may require the parties to dissolve the concentration.

USA

3.29. The Federal Communications Commission (FCC) is the regulatory authority for the USA communications sector. As a part of its mandate, it reviews licence applications and proposals to acquire licence holders.

3.30. The FCC is given powers through an Act of Congress to review communications transactions in the USA. Its powers are subject to three considerations:

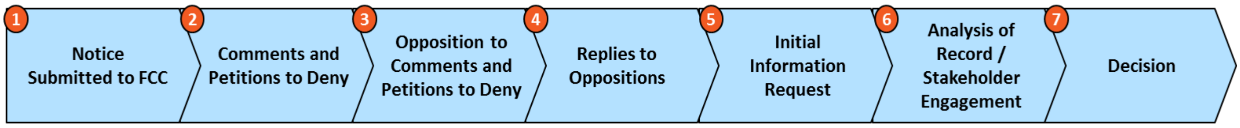
1. It is under instruction to conduct substantive reviews of any transactions in the communications sector;
2. It must conduct these reviews in an open and fair manner in keeping with a defined, legal process;
3. It must work in conjunction with other antitrust agencies to ensure that all aspects of public interest are considered and served through any review(s).

3.31. The FCC's overarching concern is around competition (and the potential for substantial lessening of it), though it also places great import on any subsequent impact on consumers and the public interest. In some cases, this focus may diverge from those of other antitrust agencies that the FCC works with in reviewing a particular transaction. The FCC considers these additional considerations of consumer and public interest impact to be complementary.

3.32. The FCC prioritises fact-based and data-driven assessments. It has legal power to collect information, but critically places the burden on the applicant to demonstrate that any proposed transaction is in the public interest.

3.33. The main steps that the FCC follows in licence transfers are summarised in Figure 5 below.

Figure 5. ***FCC Process for Licence Transfers***



Source: Cartesian

3.34. Applicants for licence transfer and complex mergers are required to submit a public notice and application to the FCC describing the proposed transfer/merger (1). The application will, "address the relevant issues and provide sufficient support for agency analysis and meaningful public comment, with a complete and accurate identification of all relevant licenses and authorisations." A Protective Order limiting access to confidential information may also be issued at or around this time.

3.35. There is then an opportunity for other parties to submit petitions to deny (2). These are submissions made to the FCC in opposition to the proposed merger or licence transfer, including any relevant rationale and/or evidence. Persons and entities that file petitions to deny become parties to the proceeding. They may participate fully in the proceeding, including seeking access to any confidential information that may be filed under a protective order, seeking reconsideration of decisions, and filing appeals of a final decision to the courts.

3.36. Applicants are given time to respond to points raised in petitions to deny and may submit these for the FCC's consideration (3).

3.37. The petitioners are given one last chance to respond to the applicant's rebuttal (4) before the FCC begins its data collection and analysis phase.

3.38. The FCC collects relevant additional data (not submitted in initial application but considered necessary for analysis of transaction) from applicants and other stakeholders in order to analyse or validate any issues raised in the first phase of the process (5).

3.39. Data is analysed and stakeholders are engaged to discuss findings (6). Analysis and synthesis is refined where required and a report is compiled explaining the FCC's rationale and final decision.

3.40. The FFC issues an Order in regard to the application, granting approval, granting approval with conditions, or designating applications for hearing (7). In hearings, the facts of the transaction are examined in the traditional adversary process, and the FCC will render a decision on the merits of the case, after which judicial review is available to the applicants. Very rarely, denials without a hearing are issued by the FCC, and only under very specific circumstances.

3.41. This process is informally timed to take 180 days in total, though the FCC can publically extend these informal deadlines if sufficient delay to the process is encountered.

3.42. There are several aspects of the FCC's process that are of note. For complex mergers, the FCC engages the public using an electronic system to gather comments on the transaction. It also meets with stakeholders "ex-parte" (on a permit but disclose basis) whereby meaning that the FCC can meet and discuss the transaction with any person or entity without all the various parties being present so long as a summary of the discussion (and any associated materials distributed) are published publically within two days of the meeting taking place.

3.43. The FCC also coordinates with the Department of Justice (DOJ), which conducts confidential antitrust investigations and may also look into a deal that the FCC is reviewing, to ensure that any remedies devised individually are not excessive in aggregate and that duplicate work is avoided. This is enabled through informal coordination at both the senior and staff levels of both organisations.

3.44. The FCC is not limited to considering only the potential competitive effects of any merger or licence transfer. For example, criteria used in SBC / AT&T and Verizon / MCI applications included:

- How the transaction will affect the quality of and rates for telecommunications services;
- The trends within and needs of the industry, including the complexity and rapidity of change in the industry;
- Impact of the transaction on spectrum use and efficiency;
- Diversity of license holdings; and,
- National security, law enforcement, and public safety impacts of the proposed deal.

4. Examples of Merger and Licence Transfer Process and Decisions

Africa

Starcomms, Multilinks and MTS wireless (Nigeria)

4.1. In 2013, the Nigerian Communications Commission (NCC) has given Capcom – a new company formed from the merger of CDMA operators Starcomms, Multilinks and MTS Wireless – initial approval to operate in the country's telecoms sector.

4.2. The commission granted Capcom an interim approval for its rollout because it had confidence in its formation and organisational plan, based on the presentation it made to the NCC.

Airtel, Safaricom and Essar (Kenya)

4.3. ESSAR Telecom Kenya sold its 'yu'-branded telecoms business to its rivals Safaricom and Airtel Kenya in 2014. Under the terms of the transaction, Safaricom will buy ETK's network, IT and office infrastructure, while Airtel will acquire the company's subscribers.

4.4. The transaction was completed after ESSAR received the approval of the Communication Authority of Kenya (CAK), although the deal still needs to be filed with the Competition Authority.

Vodacom and Neotel (South Africa)

4.5. At the time of writing, the Competition Commission in South Africa is analysing the deal between Vodacom and Neotel.[13] Although the merger announcement did not go directly to ICASA (South African telecommunications regulator), ICASA claimed that the deal requires the go-ahead from the regulator in addition to the Competition Commission.

4.6. Both ICASA and the Competition Commission are still investigating the proposed acquisition.

North America

AT&T and T-Mobile (USA)

4.7. In 2011, AT&T and T-Mobile notified the FCC about their intention to merge the two operations.[14]

4.8. The FCC raised concerns about the merger between AT&T and T-Mobile. The concern was not merely that the merger would have reduced the number of major US mobile operators from four to three, but also that T-Mobile was an important competitor in the market and its "exit" of the market would cause the market to lose competitiveness.

4.9. The FCC ultimately rejected the merger.

[13] https://www.icasa.org.za/Portals/0/Newsfeeds/VodacomNeotelTransaction.pdf
[14] http://transition.fcc.gov/transaction/att-tmobile.html#orders

T-Mobile and Metro PCS (USA)

4.10. T-Mobile made an offer to acquire Metro PCS in 2013. [15]

4.11. The FCC conducted an investigation and concluded that although the transaction raised horizontal competitive issues (less players in the market), it would allow the new company to be more robust to compete against the top three services providers.

4.12. Moreover, the transaction will enhance the ability of New company to compete against the top three nationwide service providers into new geographical markets, improve service quality, and deploy a more robust network nationally.

4.13. The acquisition was approved.

Sprint and T-Mobile (USA)

4.14. In 2014, Sprint communicated its intention to acquire T-Mobile. However, the possible merger has faced strong criticism from FCC which positioned that the deal will reduce the competition in the market.

4.15. In August 2014, Sprint withdrew its intention to acquire the company.

Europe

Hutchison and Orange (Austria)

4.16. In 2012, the EC granted conditional approval of the merger between Hutchison and Orange Austria. [16]

4.17. Since the Commission had concerns regarding the impact the merger would have in the market competitiveness, the new CSP was subject to specific commitments. Hutchison must:

- Divest radio spectrum to an interested new entrant in the Austrian market; and
- Provide up to 16 MVNOs (mobile virtual network operators) with wholesale access to 30 per cent of the capacity on its network over the next ten years - and had to sign at least one such agreement with an MVNO before the merger could be completed.

Orange and T-Mobile (UK)

4.18. In 2012 Orange and T-Mobile notified their intention to merge both operations in the UK. [17]

4.19. The EC processed the case and concluded that the retail mobile market in the country was likely to remain competitive after the merger. Therefore, the merger was approved.

[15] https://apps.fcc.gov/edocs_public/attachmatch/DA-13-384A1.pdf
[16] http://ec.europa.eu/competition/mergers/cases/decisions/m6497_20121212_20600_3210969_EN.pdf
[17] http://ec.europa.eu/competition/mergers/cases/decisions/M5650_20100301_20212_247214_EN.pdf

Hutchison and O2 (Ireland)

4.20. In 2013, the EC approved the acquisition of O2 Ireland by Hutchison (H3G). The approval is conditional upon a commitments package submitted by H3G.[18]

4.21. The Commission had concerns that the merger would remove an important competitive force from market to the detriment of consumers. To address these concerns, H3G submitted commitments ensuring that new competitors will enter the mobile telecommunications market in Ireland.

4.22. The merger was approved subject to the following commitments:

- H3G must sell up to 30% of the merged company's network capacity to two MVNOs in Ireland at fixed payments; and
- Offer Eircom the option to continue the network sharing agreement on improved terms.

Vodafone and Kabel Deutschland (Germany)

4.23. In 2013, the EC approved the acquisition of Kabel Deutschland (cable TV Company) by Vodafone. The basis for approving the deal was that both CSPs were complementary to each other.[19]

4.24. The EC's investigation confirmed that the activities of the merging parties were mainly complementary. While Kabel Deutschland primarily offers cable TV, fixed line telephony and Internet access services, Vodafone's core business consists of mobile telephony services.

Telefonica and E-Plus (Germany)

4.25. In 2014, Telefonica notified the EC about its intention to acquire E-Plus in Germany (i.e. the merger of two mobile CSPs).[20]

4.26. Initially, the EC had concerns that the merger would remove two close competitors and important competitive forces from the German market and that it would have further weakened the position of Mobile Virtual Network Operators (MVNOs).

4.27. In response to EC concerns, Telefonica proposed a series of commitments, including:

- Selling, before the acquisition is completed, up to 30% of the merged company's network capacity;
- divesting radio wave spectrum and certain asset;
- Extending existing wholesale agreements with Telefónica's and E-Plus' partners (i.e. MVNOs and Service Providers) and to offer wholesale 4G services to all interested players in the future; and
- Improving its wholesale partners' ability to switch their customers from one MNO to another.

[18] http://europa.eu/rapid/press-release_IP-14-607_en.htm
[19] http://europa.eu/rapid/press-release_IP-13-853_en.htm
[20] http://europa.eu/rapid/press-release_IP-14-771_en.htm

Vodafone and Wind Hellas (Greece)

4.28. Vodafone notified the EC regarding its intention of acquiring its rival, Wind Hellas, in Greece in 2012.

4.29. The EC had concerns the deal would reduce the market competition which led to Vodafone later withdrawing the merger proposal.

Orange and Jazztel (Spain)

4.30. The EC received Orange's proposal to acquire the Spanish fixed CSP Jazztel. [21]

4.31. The EC conducted an in-depth investigation to access the impact the merger would have in the market competition. In Spain, Orange operates mobile and fixed telecommunications networks while Jazztel operates a fixed telecommunications network and offers mobile telecommunications services on Orange's network.

4.32. At the time of writing, the EC is still analysing the cased, but its initial comments were that the acquisition will reduce the competition in the market, since it reduces the number of CSPs from four to three.

Vodafone and Ono (Spain)

4.33. In 2014, the EC cleared the proposed acquisition of ONO by Vodafone. [22]

4.34. The assessment conclusion was that both companies were largely complementary since Ono's main activity is related to fixed services while Vodafone is mainly active in mobile telecommunications.

[21] http://europa.eu/rapid/press-release_IP-14-2367_en.htm
[22] http://europa.eu/rapid/press-release_IP-14-772_en.htm

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