Review of the Swiss Competition Commission's 21 April 2010 decision regarding the merger undertaking of France Télécom SA and Sunrise Communications AG

Authors: Nicola Benz, Alessandro Celli, Bertold Müller and Boris Wenger
of Froriep Renggli, Attorneys at Law *

In its decision of 21 April 2010, the Swiss Competition Commission prohibited the planned merger between Sunrise Communications AG and Orange Communications SA. This was the second time only that the Competition Commission has refused to allow a notified merger and the first time that such decision has become effective. The present review contains a summarised translation of the Competition Commission's detailed reasoning, followed by a short assessment of the decision and its effects.

10012744/291335v1

Table of Contents

* Nicola Benz LL.B. (Hons), Dr Bertold Müller LL.M. and Boris Wenger J.S.M. are all members of the Froriep Renggli competition law practice group, under the leadership of Dr Alessandro L. Celli.

1 INTRODUCTORY REMARKS

1.1 The Planned Merger Undertaking: Parties, Reasons and Structure

On 26 November 2009, the Swiss Competition Commission (**Competition Commission**) received a notification pursuant to Art. 9 para 1 of the Federal Act on Cartel Law and Other Restraints of Competition (**Cartel Act**) regarding a concentration of undertakings. According to the notification, France Télécom SA (**France Télécom**) intended to acquire Sunrise Communications AG (**Sunrise;** together the **Merging Parties**). Sunrise and Orange Communications SA (**Orange**) would then have been merged (the **Merged Company**).

1.1.1 France Télécom Group and Orange

France Télécom Group (**FT Group**) provides a broad range of telecommunication services to private and business customers and to very large companies. FT Group's main areas of business are fixed line voice telephony, leased circuits, data transfer, internet, TV broadcasting and information services.

The FT Group operates the network of its (wholly owned) subsidiary Orange in Switzerland, sells and distributes Orange products in Switzerland and abroad, and provides – through Orange – a broad range of mobile telecommunication services to private and business customers. Orange's fixed line telephony and internet activities are marginal. Through its wholly owned subsidiary Orange Network SA, Orange has a GSM- and UMTS-licence and runs its own infrastructure for mobile telecommunication. Orange is FT Group’s only brand for internet, TV and mobile telecommunication services. By acquiring Sunrise, the FT Group aimed at strengthening its presence in the Swiss mobile telecommunication market and entering the fixed line market.

1.1.2 Tele Danmark Communications A/S and Sunrise

Tele Denmark Communications A/S (**TDC**) is the leading service provider of telecommunication services in Denmark, active also in the whole Scandinavian market and, via a minority participation, in Hungary. TDC owns 100% of Sunrise. Sunrise operates telecommunication networks (fixed line as well as mobile telecommunication) and provides further services regarding data transfer and internet (broadband and dial-up) to private and business customers in and from Switzerland.

1.1.3 Reasons for the Planned Merger

The Merging Parties mentioned various reasons for their planned merger undertaking (the **Undertaking**). They claimed to be active in a market dominated by Swisscom (Switzerland) AG (**Swisscom**), the former public PTT Telecom’s successor, who enjoys a much larger market share than any other telecommunications provider in Switzerland. Swisscom had inherited a comprehensive fixed network including a nationwide backbone and an extensive local loop. The Merging Parties identified Swisscom’s mobile telecommunication experience, gained prior to Diax/Sunrise and Orange receiving a GSM licence in 1999, as another competitive advantage. Thus, Swisscom was considered to have been able to focus on keeping and expanding its customer basis and infrastructure, while Orange and Sunrise had to invest substantially to establish their own networks, customer basis and capable team.

The Merging Parties further claimed that, as of today, Swisscom enjoys better UMTS coverage[1], since Orange and Sunrise lacked the financial means to keep up with Swisscom in terms of infrastructure. This situation will be further exacerbated by the forthcoming (and costly) introduction of the next mobile telecommunication generation LTE (Long Term Evolution).

The Merging Parties argued that Swisscom tried to hinder its competitors by (i) exacerbating and delaying interconnection negotiations and setting unreasonable interconnection requirements, (ii) impeding unbundled access to their local loop and (iii) abusing its dominant position on the mobile telecommunications market.[2]

The main rationale for the Undertaking was presented as follows:

(a) By way of using synergies[3], increasing economies of scale and creating added value, the Merging Parties claimed they would strengthen their position in the Swiss telecommunication market and vis-à-vis Swisscom in particular. Swiss customers and other market participants would benefit from increased efficiency, innovative and competitive products and services and, in general, a competitive market environment. Furthermore, combining the complementary business areas would improve a by then further diversified portfolio. The Merged Company would become both a strong number two in the Swiss telecommunication market (with a mobile telecommunication market share of 40 %) and potentially the leading alternative fixed line/DSL-operator (with a market share of 13 % in the broadband market). Profitability, efficiency and an increased common purchasing and sourcing policy would be furthered due to significant cost savings. Ultimately, customers would benefit from the increased competitiveness on the Swiss market.

(b) The range of products, network coverage[4] and customer experience would be improved, better hand sets offered and convergent offers made. The Merged Company would also be in a position to increase and improve its distribution network nationwide: while Orange and Sunrise operate around 80 sales agencies each, Swisscom has around 170.

(c) From a strategic point of view, combining complimentary activities would on the one hand lead to Orange benefitting from Sunrise's growing customer basis and experience in the fixed line market. On the other hand, Sunrise would benefit from Orange's financially strong and

[1] See the maps regarding coverage of Swisscom, Orange and Sunrise: http://maps.sunrise.ch/coverage.php; www1.orange.ch/residential_support_coverage_swiss-coverage.html; www.swisscom.ch/res/beratung-service/infrastruktur/mobilnetz/index.htm (last updated on 14 December 2009).

[2] The fast pace of development in telecommunications technology (e.g. UMTS, glass fibres, IP-TV) were also mentioned.

[3] The Merging Parties envisaged significant synergies in different areas such as IT, G&A and marketing.

[4] In particular with a view to the second and third generations of mobile telecommunications.

technically skilled parent company and FT Group's innovative and compatible product portfolio. Fusing the networks would, by the same token, facilitate sharing forthcoming investments and reduce operative costs in general.[5] This was considered all the more important by the Merging Parties as the standards for the fourth mobile telecommunication generation (LTE), which will replace the GSM and UMTS standards, are already available.[6]

1.2 Obligation to Notify the Planned Merger

The Undertaking was to consist of a main (share purchase) as well as an ancillary (non-competition clause) element. The FT Group and TDC notified the Competition Commission that they had (i) signed a binding agreement, (ii) negotiated the draft of a shareholders agreement and (iii) prepared a term sheet featuring the main rules for the Undertaking. Signing of the final version of the share purchase agreement was planned to take place on or before 15 February 2010. The FT Group and TDC had agreed that the latter's wholly owned subsidiary Sunrise was to be sold to the FT Group and then merged into Orange. Upon such merger, the FT Group would have held 75% and TDC 25% of the shares in the Merged Company.[7]

In respect of the non-competition clause, the parties to the shareholders agreement had agreed not to compete with the business of the Plus Group in Switzerland for a period of 0-3 years[8]. The Competition Commission reconfirmed its 2006 ISS/Edelweissfm decision according to which non-competition clauses may be legitimate in merger situations for a maximum of two or three years only[9]. The Merging Parties claimed that the non-competition clause would enable the FT Group to protect the full value of the purchased assets, including customer basis and know-how (technical aspects and distribution). As a consequence, the Competition Commission concluded that the envisaged non-competition clause in favour of the Merged Company was covered by the concentration privilege.

Notification of a concentration of undertakings is required if (i) in the last accounting period prior to the concentration, the companies concerned reported a joint worldwide turnover of at least CHF 2bn or turnover in Switzerland of at least CHF 500m and (ii) at least two of the companies concerned reported individual turnover in Switzerland of at least CHF 100m (Art. 9 para 1 lit. b Cartel Act). The worldwide turnover of the FT Group (including Orange) was CHF 79,429m in 2008. In Switzerland, FT Group's turnover (including Orange) was CHF 1,308m in 2008. Sunrise's worldwide turnover in 2008 was CHF 1,856m. All of its turnover was generated in Switzerland. Therefore, the thresholds were reached. The

[5] Around 25 % of the existing aerials could be taken out of service. With regard to the costs associated with operating the network, cost savings of up to 60 % were anticipated. Further synergy potential was identified in marketing, customer service, operations, etc.

[6] The Merging Parties expect these investments to be necessary already within the next two to five years.

[7] Further details as to the shareholding quota and aspects of the Merged Company's decision making process were notified but are subject to restrictions on the disclosure of business secrets.

[8] The exact time frame is subject to restrictions on the disclosure of business secrets.

[9] ISS/Edelweissfm, Law and Policy on Competition (LPC) 2006/4, p 689, recital 38. The concentration privilege is to be approved for two years if the value of a business is transferred, three years if know-how is also transferred.

Competition Commission further noted that no other provisions of law as per Art. 3 para 1 Cartel Act were applicable[10] and that the Undertaking had to be notified.

1.3 The Proceedings

Following preliminary investigations with the Merging Parties, various providers of telecommunication services and the Federal Office of Communication (BAKOM), the Competition Commission informed the Merging Parties on 28 December 2009 that it had decided to conduct an investigation of the Undertaking pursuant to Art. 33 Cartel Act. In the course of such investigation, Swiss and foreign providers of telecommunication services as well as the BAKOM were further interviewed. On 28 January 2010, various consumer protection organisations submitted their representations against the Undertaking.[11] Following further investigations, discussions and hearings with the Merging Parties, Swisscom, the Federal Communications Commission and the aforementioned consumer protection organisations, the Competition Commission decided on 19 April 2010 not to allow the Undertaking. Such decision was communicated to the Merging Parties on 21 April 2010, thus within the deadline of 29 April 2010 pursuant to Art. 20 para 1 and para 3 of the Ordinance on the Control of Concentrations of Untertakings (**Merger Control Ordinance)**.

2 THE COMPETITION COMMISSION’S CONSIDERATIONS

According to Art. 10 para 2 Cartel Act, the Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if (i) the investigation indicates that concentration creates or strengthens a dominant position liable to eliminate effective competition and (ii) does not improve the conditions of competition in another market in a way that the harmful effects of the dominant position can be outweighed.

According to Art. 4 para 2 Cartel Act, dominant undertakings are one or more undertakings in a specific market which are able, as suppliers or consumers, to behave to an appreciable extent independently of the other market participants (competitors, suppliers and consumers). The Competition Commission therefore concluded that the anticipated post-merger market position of the Merging Parties was to be assessed against actual and potential competitors and their capabilities to discipline the Merging Parties' actions. In this respect, the relevant factual and geographical markets were first to be defined.

The Competition Commission’s assessment of the Undertaking was based on the following line of reasoning:

1. Identification of the relevant and affected markets (see sections 2.1 and 2.2 below)

[10] See the decision termination mobile telecommunication, LPC 2007/2, pp 250ss, recital 48ss, and mobile telecommunication market LPC 2002/1, p 109ss, recital 54ss.

[11] The consumer protection organisations were asci, FRC and *Konsumentenschutz*.

2. Assessment of potential sole market dominance for each relevant and affected market individually (see section 2.3 below)
3. Assessment of potential joint market dominance for each relevant and affected market individually, taking into account potential symmetries, market growth, innovation, transparency, multi market relations, mechanisms of sanctioning, market opposition, competitors, justifications and conditions (see sections 2.4 and 2.5 below)

2.1 Relevant Markets

A product market comprises all goods or services that consumers and suppliers consider interchangeable as to their characteristics and intended use. The geographic market comprises the area in which consumers purchase and suppliers sell the goods or services covered by the product markets.[12]

The Competition Commission's constant practice in telecommunication matters distinguishes between the following product markets:

- (i) market for fixed line telephony;
- (ii) market for broadband internet;
- (iii) wholesale market for broadband internet;
- (iv) market for (TV-) value added services;
- (v) market for the distribution of mobile telecommunication services;
- (vi) market for mobile telecommunication hand sets;
- (vii) retail market for mobile telecommunication services; and
- (viii) market for mobile telecommunication termination.[13]

In the course of the proceedings it was also considered whether further product markets were to be defined in the area of mobile telecommunications.

2.1.1 Market for fixed line telephony

The Competition Commission confirmed its practice of considering fixed line telephony as a separate market of its own[14]. Mobile and fixed line telephony are not interchangeable for various reasons.[15]

The Competition Commission further noted that transmission of voice telephony is usually either done through copper cables[16] or based on internet protocol (IP). The latter alternative, which requires

---

[12] According to Art. 11 para 3 lit. a and b Merger Control Ordinance.

[13] Sunrise/Tele2, LPC 2008/4, pp 668ss; Swisscom/The Phone House, LPC 2008/2, pp 341ss; Expertise TDC Switzerland vs. Swisscom Fixnet re: faster access to bitstream, LPC 2008/1, pp 222ss; termination mobile telecommunication, LPC 2007/2, pp 241ss; Expertise interconnection proceeding, LPC 2006/4, pp 739ss; Swisscom Fixnet/Betty Holding, LPC 2006/3, pp 470ss; Swisscom Fixnet/Cybernet, LPC 2006/2, pp 249ss.

[14] Sunrise/Tele2, LPC 2008/4, p 669s, recital 25ss; Swisscom/The Phone House, LPC 2008/2, p 343, table 1; Swisscom/Cybernet, LPC 2006/2, p 252, recital 48 (with further comments).

[15] Fixed line telephony prices are usually cheaper. Furthermore, the increasing number of mobile telecommunication customers has not led to fewer fixed line customers.

[16] As used by Swisscom in its plain old telephone service (POTS).

broadband access, is offered by several providers of telecommunication services, amongst them cable network providers. The Competition Commission considered some Voice over IP (VoIP) applications to be comparable in terms of quality and reliability to cable transmissions.

The providers offer their fixed line telephony services exclusively in Switzerland, and are restricted to the Swiss market by law, which led the Competition Commission to define the relevant geographic market as national.[17]

2.1.2 Market for broadband internet

In the market for broadband internet, end customers request an internet connection. Dial-up and broadband connections are to be distinguished. The former use low copper cable frequencies, the latter higher frequencies. Only broadband connections support the use of internet and telephone simultaneously. The Competition Commission noted that dial-up connections could be substituted by a broadband connection, but not vice versa (asymmetric substitution). Another distinction concerned pricing: whereas dial-up connections are invoiced per minute, broadband services are usually charged by way of a monthly fee, notwithstanding the time used or data transferred.[18]

The relevant market was considered to comprise the technologies that are based on Swisscom's copper cable network (including bit stream access, ADSL and BBCS) as well as CATV, PLC and glass fibre[19]. The geographic market is, by law, of national scope only.

2.1.3 Market for (TV-) based value added services

The Competition Commission has previously defined a market for TV promotion platforms and platforms for value added services[20]. Whether such market was to be further sub-divided was left open in these proceedings due to a lack of anti-competitive concerns. The Competition Commission determined relevant markets for the German, French and Italian speaking parts of Switzerland.

2.1.4 Market for the distribution of mobile telecommunication services

In order to sell mobile telecommunication subscriptions, the providers need distribution channels, e.g. their own points of sale or third party sellers. The points of sales may be distinguished between “Street Channels” and “Direct Channels”. Street Channels are usually found in urban locations and have well

[17] Sunrise/Tele2, LPC 2008/4, p 670, recital 37; Swisscom/Fastweb, LPC 2007/2, p 314, recital 35 (with further comments); Swisscom Fixnet/Cybernet, LPC 2006/2, p 253, recital 54.

[18] Sunrise/Tele2, LPC 2008/4, p 669, recital 21ss.

[19] However, glass fibre was considered a different market: Sunrise/Tele2, LPC 2008/4, p 669, recital 24; Swisscom Fixnet/Cybernet, LPC 2006/2, p 250ss, recital 32ss (with further comments). The dial-up connections are nowadays of almost no importance which is why the Competition Commission did not further investigate this area.

[20] Services in these markets are offered in connection with TV shows. These services are accessed through fixed line connections or mobile telephony (e.g. by sending short text messages).

trained personnel.[21] Direct Channels mainly comprise the internet, telephone marketing and agreements reached by way of mail or on the street. The Competition Commission confirmed its previous classification according to which Street Channels constitute a product market of their own.[22] The market for the distribution of mobile telecommunication services was defined as national in scope.

2.1.5 Market for mobile telecommunication handsets

In the market for mobile telecommunication handsets, the Competition Commission again distinguished between Street and Direct Channels. Due to the complementary relationship between handsets and services provided, it is generally the same companies who are active in both markets. The European Competition Commission furthermore distinguished a market for mobile telecommunication equipment such as Bluetooth. Whether such distinction was justified was left open by the Competition Commission for a lack of anti-competitive concerns in this case. For the same reason, the relevant geographical market (national or global) was not determined.

2.1.6 Retail market for mobile telecommunication services (end customer market)

The Competition Commission confirmed its practice of distinguising between the wholesale and retail levels of trade in mobile telecommunication services[23].

The end customers' market counterparts are (i) the telecommunication services providers, (ii) resellers of SIM-cards (**Resellers**) and (iii) Mobile Virtual Network Operators (**MVNO**).

An end customer usually demands to be both reachable notwithstanding place and time and able to make phone calls wherever and whenever he so wishes. The Competition Commission identified (again) an asymmetric substitution between fixed line and mobile telephony. The underlying rationale was that, unlike a fixed line telephone link, the mobile telecommunication connection is generally linked to a specific person and not to a specific place. Whereas the Competition Commission has in the past distinguished between the transfer of data and voice transmissions[24], this was not considered necessary *in casu*. The market was defined as national in scope.[25]

[21] The biggest providers are Swisscom, Orange, Sunrise and Mobile Zone. Further specialist shops distribute subscriptions and handsets of the most important providers of mobile telecommunication services.
[22] Swisscom/The Phone House, LPC 2008/2, p 343s, recital 27ss.
[23] Swisscom/The Phone House, LPC 2008/2, p 345, recital 47; Mobilfunkmarkt, LPC 2002/1, p 118ss, recital 88ss. Furthermore, caller and receiver are distinguished: in Switzerland, the so-called cpp-principle (calling party pays) applies. If, however, the receiver is abroad, roaming charges also apply for the receiver.
[24] Termination mobile telecommunication, LPC 2007/2, p 254s, recital 80ss.
[25] Sunrise/Tele2, LPC 2008/4, p 670, recital 38s; Swisscom/The Phone House, LPC 2008/2, p 345, recital 58s; termination mobile telecommunication, LPC 2007/2, p 261, recital 136ss; Swisscom Fixnet/Cybernet, LPC 2006/2, p 253, recital 53s; Mobilfunkmarkt, LPC 2002/1, p 122, recital 105ss.

2.1.7 Wholesale market for access and call origination on mobile telecommunication networks

In the wholesale market for access and call origination on mobile telecommunication networks, Resellers and MVNO request services from network operators in order to resell them to end customers. The Competition Commission confirmed its practice of distinguishing between the markets for incoming and outgoing mobile telecommunication services[26]. As opposed to the wholesale market for incoming mobile telecommunication services (see 2.1.8 below), Resellers and MVNO may request services for outgoing calls from each and every network operator. Thus, the Competition Commission determined, in line with the EU Competition Commission[27], that there is one single market for access to mobile telecommunication networks. It was left open whether a distinction was to be made between voice and data services. The market was defined, again in line with the EU Competition Commission, as being national in scope.

2.1.8 Market for Mobile telecommunication termination

A call over the mobile communication network consists of origination, transit and termination. Termination ensures that a call is forwarded to a particular connection, where it can be picked up by the relevant end customer. Termination in mobile communication terms means termination of a voice call in the relevant telecommunication provider's network. In Switzerland each telecommunication provider is required by law[28] to terminate calls from other telecommunication providers into its own network.

Orange and Sunrise argued in their submissions that there is no separate market for mobile communication termination, rather mobile communication termination is just a necessary part of a mobile communication service. However, the Competition Commission continues to take the view that no substitution is possible regarding the termination of calls into a provider's mobile telecommunication network. Every mobile number is linked to one mobile telecommunication network, determined by the end customer's SIM-card. Therefore, there are four separate product markets for termination in Switzerland, namely Swisscom, Sunrise, Orange and In&Phone SA (**In&Phone**). This is in line with the market determination as applied by the EU Competition Commission and the Swiss Federal Administrative Court.[29] In geographic terms, the market was determined as national in scope.

[26] Mobile telecommunication market, LPC 2002/1, p 121, recital 94ss.
[27] T-Mobile/Orange Netherlands, COMP/M.4748, recital 17; see also 2007/879/EG of the European Commission dated 17 December 2007 regarding the relevant product and services markets of the electronic communication sector to be considered relevant based on the Guideline 2002/21/EC of the European Parliament and Council regarding common legal parameters for electronic communication networks and services, ABl L 344/65.
[28] Art. 11 para 3 Act on Telecommunications (FMG).
[29] See the Recommendation 2003/311/EC of the European Commission dated 11 February 2003 regarding the relevant product and services markets of the electronic communication sector to be considered relevant based on the Guideline 2002/21/EC of the European Parliament and Council regarding common legal parameters for electronic communication networks and services, ABl L 114/45, Exhibit, market 16, and Decision of the Swiss Federal Administrative Court of 24 February 2010, B-2050/2007, recital 9.8.

2.1.9 Wholesale Market for International Roaming

To enable international roaming, telecommunication providers conclude wholesale agreements with foreign operators regarding access to capacities on their respective networks. To ensure optimal coverage, several agreements are usually concluded.

For the first time, the Competition Commission determined a wholesale market for international roaming, following the European Competition Commission's latest decisions. The Competition Commission also distinguished between outbound and inbound traffic. The roaming market comprises the inbound traffic only. The outbound traffic is part of the retail market for telecommunication services. The Swiss Competition Commission further followed the European Competition Commission's assessment that all the providers of telecommunications services in a country compete on the wholesale market for international roaming.[30] The market was defined as being national in scope.

2.2 Anticipated position of the Merged Company in the various relevant markets

2.2.1 Not affected markets

An in-depth analysis is generally required only if an undertaking affects a market. According to Art. 11 para 1 lit. d Merger Control Ordinance, a market is affected in which (i) two or more of the companies concerned jointly hold a market share of 20 % or more in Switzerland or (ii) one of the companies concerned holds a market share of 30 % or more in Switzerland. If these thresholds are not met, it may be assumed that an undertaking is not objectionable. The Competition Commission's starting point, therefore, was the anticipated position of the Merged Company in the various relevant markets identified in 2.1 above. The following markets were found not to be affected, based on 2008 market shares[31]:

(i) market for fixed line telephony: market share of Sunrise[32] between 10 and 20%; market share of Orange between 0 and 10%;
(ii) market for broadband internet: market share of Sunrise between 10 and 20%; market share of Orange between 0 and 10%;
(iii) market for (TV) value added services: market share of Sunrise not in excess of 10%; Orange does not provide any 090-numbers and requires certain fees only (amounting to a market share of 0 to 10%);
(iv) market for the distribution of mobile telecommunication services: Orange and Sunrise only operate a certain number of points of sales; market shares of Sunrise and Orange between 0 and 20% each[33];
(v) market for mobile telecommunication hand sets: market shares of Sunrise and Orange between 0 and 10% each.

[30] T-Mobile/Orange Netherlands, COMP/M.4748, recital 24ss (with further comments).
[31] With comparable market shares for 2006, 2007, 2008 and mid 2009. The exact figures are subject to restrictions on the disclosure of business secrets.
[32] Including Tele2 which was acquired in 2008.
[33] Swisscom/The Phone House, LPC 2008/2, p 346, table 3.

2.2.2 Affected Markets

The following markets were found to be affected:

(i) given the Merging Parties' combined 2008 market share of 30 to 40%, the retail market for mobile telecommunication services is to be considered an affected market, regardless of whether market shares are calculated on a network basis (i.e. number of customer contracts on a network) or brand basis (i.e. number of customer contracts under a particular brand);

(ii) due to an increasing number of Resellers and MVNO, Orange and Sunrise were in a position to increase their market shares, resulting in market shares of to 0 to 40% and 0 to 10% respectively. Thus, the wholesale market for access and call origination on mobile telecommunication services is to be considered an affected market;

(iii) since there is a separate market for mobile telecommunication termination for each individual mobile network, the market shares of Orange and Sunrise amount to 100% each in respect of their own networks;

(iv) with market shares of 30 to 40% (Orange) and 10 to 20% (Sunrise), the wholesale market for international roaming is also to be considered an affected market.

The following table summarises the above:

Market	Affected?
Market for broadband internet	no
Market for fixed line telephony	no
Market for the distribution of mobile telecommunication services	no
Market for mobile telecommunication hand sets	no
Market for (TV) value added services	no
Retail market for mobile telecommunication services	yes
Wholesale market for access and call origination on mobile telecommunication	yes
Market for mobile telecommunication termination	yes
Wholesale market for international roaming	yes

The Competition Commission's further analysis in 2.3 (potential single market dominance) and 2.4 (potential joint market dominance) focussed on the affected markets only.

2.3 Sole market dominance (*Einzelmarktbeherrschung*)

The Competition Commission analysed potential sole market dominance on each of the affected markets. In accordance with Art. 11 para 1 lit. e and f Merger Control Ordinance, the following data formed the basis for assessing sole market dominance:

(i) the market share of the companies concerned for the preceding three years and, if known, for each of the three principal competitors;
(ii) an explanation of the basis used for calculating the market shares;
(iii) information on companies that have entered the market in the preceding five years;
(iv) information on companies that might enter these markets within the next three years; and, if possible,
(v) the costs arising from such market entry.

The Competition Commission assessed both actual and potential competition for each affected market.

2.3.1 Retail market for mobile telecommunication services (end customers market)

During the years 2006 to 2008, Orange, Sunrise, Swisscom, Tele2 and In&Phone were active in the retail market for mobile communication services. Tele2 was taken over by Sunrise at the end of 2008. Following the Undertaking, only the Merged Company, Swisscom and In&Phone would remain on this market.

Orange and Sunrise hold a GSM and a UMTS license. In&Phone holds a mobile telecommunication licence which is, technology-wise, neutral.[34] Swisscom holds both a GSM and a UMTS licence and owns a comprehensive mobile network. Its strong position is furthered due to Swisscom also providing fixed line, broadband and TV services (Swisscom-TV). Furthermore, Swisscom's financial power allows for substantial investments and marketing and public relation expenditures.

Since 2005, several Resellers have also been offering mobile telecommunication services to end customers. These Resellers sell SIM-cards of mobile telecommunication providers, either with or without a respective hand-set. The Reseller's price levels tend to be lower than those of the providers. Except for the sale, no further contractual relationship exists between Resellers and end customers whether they use SIM-cards under their own brand (in particular Migros, Coop and Aldi) or not.[35] At the time of the decision, 17 Resellers were active in Switzerland.

[34] In&Phone is active as a niche player for business customers only. Its market share is marginal. Obviously, In&Phone has to rely on Orange, Sunrise or Swisscom to provide its customers comprehensive coverage. On 2 December 2009, In&Phone announced that it had bought Tele2's former locations of mobile telecommunication stations.

[35] Usually, Resellers sell prepaid services. Migros, however, has also been offering post paid products.

Furthermore, seven MVNO offer their services in Switzerland.[36] They are all active under their own brand but without a proper mobile network or a concession of their own. Contrary to mere Resellers, MVNO invoice independently and own some network components. This allows them more control over their services. The Competition Commission further stated that MVNO were generally in a position to compete with mobile telecommunication providers. Whether the MVNO were indeed competitive would mainly be dependent on the network access conditions.

In 2008, Swisscom's market shares in the end customer market (50-60%)were approximately 20 to 30 % higher than the assumed market share of the Merged Company (30-40%). Taken together, Swisscom and the Merging Parties had by far the largest market shares. The Competition Commission further noted that the market shares over the past three years remained very stable with Orange loosing market share slightly to Sunrise.[37] In terms of price competition, Sunrise was arguably the most active of the three major network operators in the end customer market.[38]

Thus, the Competition Commission concluded that the market featured a high degree of concentration. The Hirschman-Herfindahl-Index (HHI) further confirmed that the Undertaking would not drastically change the present market shares.[39]

With a view to actual competition, the Competition Commission concluded that Swisscom's strong position would likely impede the Merged Company from acting independently of its competitors. Despite the high market shares, a sole market dominant position of the Merged Company was considered unlikely.

Even though sole market dominance was considered unlikely, the Competition Commission still investigated two possible sorts of new market entrants: (i) new mobile telecommunication providers and (ii) Resellers/MVNO.

Market entry was considered possible yet difficult and unlikely to happen in the next three years.[40] Providers would face substantial hurdles (i.e. investments) to access the market if they were to build their

[36] The Competition Commission considered as MVNO the seven providers that offer their services independently. These MVNO are bound only by the access conditions to their operator's mobile telecommunication network. Following the BAKOM's definition, only Barablu AG meets the MVNO criteria.
[37] Both in terms of terminated minutes and of market share, Sunrise had slightly but steadily increased its market share.
[38] Analysing BAKOM's annual report on the development of costs in the mobile sector, Sunrise would seem to have offered the best tariffs between 2007 and 2009. This generally held true whether subscription or prepaid costs were compared and independently of whether customers with low, medium or high mobile phone use were considered.
[39] The other mobile communications providers (Resellers and MVNO) were not taken into account in the HHI-Index calculations. However, the HHI clearly shows the high degree of concentration in this market.
[40] The Merging Parties claimed that the Undertaking would not influence the barriers for market entry. The Competition Commission responded that the Undertaking could in principle lead to increased barriers to entry through the establishment of a second strong player who would be aiming at protecting its position.

mobile network from scratch.[41] The Competition Commission noted that in the past years no new service providers could establish themselves. To the contrary, two reputable foreign providers had to withdraw from the Swiss mobile market.[42] The Competition Commission further noted that In&Phone could be planning to develop an LTE based infrastructure. Thus, In&Phone was to be considered as a potential competitor who, for the time being, was active in GSM only.

Further Resellers and MVNO were expected to access the Swiss market since the related costs were marginal only. The Competition Commission pointed out, however, that a market entry was feasible only if the operators were willing to grant access to their network on reasonable conditions.[43]

Interim findings: Based on such preliminary investigation, the Competition Commission concluded that there were no reasons to believe that the Undertaking would create or strengthen a sole market dominant position. No further investigation pursuant to Art. 33 Cartel Act was necessary. Based on the high degree of concentration, however, the Competition Commission decided to investigate a potential joint dominant position of the Merged Company and Swisscom (see 2.4 below).

2.3.2 Wholesale market for access and call origination on mobile telecommunication

For the time being, only Orange, Sunrise and Swisscom offer access and origination on mobile telecommunication networks to Resellers and MVNO. Possibly, the Merged Company would be able to replace Swisscom as market leader in this market, but this would not enable the former to act independently due to Swisscom's remaining strong position. Thus, the Competition Commission concluded that no sole dominant position would be achieved. Still, the high degree of concentration, confirmed again by the Hierschman-Herfindahl-Index, was to be taken into consideration.

As for potential competition, the Competition Commission referred to its considerations regarding the end customer market. Of further concern was whether potential new providers could establish sufficient nationwide capacity to sell to new Resellers and MVNO, which typically require national coverage. The Merging Parties submitted that any new provider would need to maintain a nationwide roaming agreement in order to provide its own customers with full coverage, and so could offer the benefits of this

[41] Also, Swiss residents do not seem to be in favour of allowing new mobile communication antennae, so that it is very difficult to find new antenna locations. A comprehensive nationwide mobile network could hardly be run in an economic way. Against this background, Deutsche Telekom noted, upon request, that a market entry in Switzerland would be very difficult. Still, the Competition Commission considered a market entry as feasible if parts of an existing infrastructure could be taken over.

[42] Telefonica (who had purchased a UMTS licence in the year 2000 but never carried out the necessary investments) and Tele2 in 2008.

[43] There is no obligation on the network providers to grant access, probably not even by way of demanding interconnection from a market dominant provider. The Competition Commission questioned whether interconnection in the sense of article 11 para 1 lit. d FMG covers the wholesale market for access and origination on mobile telecommunication networks. Such issue has not yet been decided by the Communications Commission or its appellate courts. Furthermore, any proceedings to establish access by way of interconnection would involve significant procedural risks and costs for the MVNO.

to MVNO. However, this requires that MVNO are not excluded from the nationwide roaming agreement, as is already currently the case in some instances.

Interim findings: Again, the Competition Commission found no reasons to believe that the Undertaking creates or strengthens a sole market dominant position and therefore refrained from further investigating pursuant to Art. 33 Cartel Act. Based on the high degree of concentration, however, the Competition Commission decided to investigate into a joint dominant position by the Merged Company and Swisscom.

2.3.3 Market for mobile telecommunication termination

The Competition Commission confirmed its previous decision that Orange, Sunrise and Swisscom have a market share of 100% each in respect of their own networks. Still, and notwithstanding the monopoly for its own network, a telecommunication services provider must not necessarily be in a position to act independently and, as a consequence, be considered dominant.[44] The economic aspects of the relevant market, actual and potential competition in particular, were to be analysed on a case by case basis. Both market opposition and potential influence of the downstream market could further moderate a company's behaviour.

In past decisions, Orange, Sunrise and Swisscom were considered dominant on the market for mobile telecommunication termination.[45] The Merged Company, too, would be considered dominant. The relevant question was whether the Undertaking would increase such dominant position.

The Competition Commission followed BAKOM's assessment according to which the power to negotiate was distributed in a symmetric way amongst the three major operators. Due to the interdependencies on the various markets for termination (each operator is at the same time supplier and requester), the turnover shares of each operator were to be taken into consideration. Since Swisscom demands approximately 20 % of its termination turnover from Sunrise and Orange each, Swisscom would face an accumulated termination turnover in Switzerland of approximately 40 % from the Merged Company. Following the Undertaking, the market position of the Merged Company vis-à-vis Swisscom would thus be improved.

The Competition Commission further noted that the interdependencies on the termination market between Sunrise and Orange would cease to exist. Therefore, the Merged Company would be less dependent than Sunrise and Orange individually. The relevant figures of terminated minutes[46] underline such assessment.

---

[44] See Expertise, LPC 2006/4, p 744, recital 50; see also the Guidelines of the European Commission for the analysis of markets and substantial market power according to the legal parameters for the electronic communication networks and services (2002/C 165/03), p 16, recital 78. When assessing the potential dominance of an operator, the Competition Commission took into account inter alia whether the financial means of competitors were relevant with regard to such operator's pricing, advertising and capacity.

[45] Termination mobile telecommunication, LPC 2007/2, p 271, recital 194p; see Expertise, LPC 2006/4, p 752, recital 112.

[46] The exact figures were marked as business secrets.

The Competition Commission considered that potential competition would have no disciplinary effect on the wholesale market and so as irrelevant to the situation on such market. The Undertaking would however have consequences in this area for any new mobile telecommunication provider.

The Competition Commission also assessed whether the market opposition (the major telecommunication services providers) could serve as a sufficient counterweight thanks to their specific knowledge and professionalism. However, the Undertaking would result in a further concentration of the major telecommunication services providers and so a weakening of the counterweight. Given the obligation for interoperability pursuant to Art. 11 para 1 Act on Telecommunications (FMG), telecommunication services providers cannot threaten to terminate business relations. They might, however, render the services of a provider charging high termination fees unattractive through their own pricing policy. This could be done by introducing with a pricing scheme designed to discourage customers from calling the first operator's network, thus reducing the number of calls to that network and the length of the calls made.

Since the market opposition of Orange and Sunrise would primarily be Swisscom, the Merged Company's market position would be improved. This, however, would not result in the Merged Company being able to act independently, due to Swisscom's ability to retaliate against high termination fees as outlined above.

The Competition Commission further analysed the downstream markets as follows. Resellers and MVNO depend on their operators. Interconnection proceedings were no reasonable threat against the operators: the combination of substantial exposure (costs) and marginal benefits (all competitors would benefit in the same way, not just the party initiating the proceedings) may explain why, to-date, no interconnection proceedings in the mobile telecommunications sector were brought to an end.

Pursuant to Art. 10 para 2 lit. a Cartel Act, the Competition Commission further assessed whether the dominant position could eliminate effective competition. This was done by taking account of market developments and the Merged Company's standing in relation to international competition. Each market for termination was considered, as well as the interdependencies between the termination markets. The Merging Parties pointed out that (i) a 100 % market share could not be increased and (ii) there was no competition in the status quo ante. However, the Competition Commission did not *a priori* preclude the possibility of competition, notwithstanding a market share of 100%. Rather it found that the Merged Company would be able to save costs and would be strengthened by the so-called "club effects".[47] The Competition Commission thus confirmed its previous position regarding termination according to which Orange, Sunrise and Swisscom would not discipline each other. Furthermore, the number of potential claimants who could principally seek relief through interconnection proceedings would be reduced.

[47] Club effects are the positive externalities which may occur in the context of closed entities.

The Competition Commission nevertheless concluded that the relative improvement of the Merged Company’s standing vis-à-vis Swisscom would not materially alter the balance of power between the participants in the termination markets.

Interim findings: The Competition Commission concluded that the Undertaking would strengthen an existing dominant position in the termination market, but the existing competitive situation would not be materially changed as a result.

2.3.4 Wholesale market for international roaming

In respect of the wholesale market for international roaming, the 2008 figures suggested that the market shares for international roaming were roughly split between Orange and Sunrise on the one hand and Swisscom on the other hand (approximately 50 % each). Although the Undertaking would make the Merged Company's negotiation position stronger vis-à-vis foreign operators, this would not create a dominant position for the Merged Company. Swisscom and the market opposition, i.e. strong foreign mobile telecommunication service providers, would remain strong counterweights. Again, the Competition Commission noted a high degree of concentration and considered the emergence of a new market entrant in the next few years to be unlikely.

Interim findings: The Competition Commission concluded that there were no reasons to believe that the Undertaking creates or strengthens a dominant position and therefore refrained from further investigating according to Art. 33 Cartel Act. Based on the high degree of concentration, however, the Competition Commission decided to investigate whether a joint dominant position by the merged Company and Swisscom might occur.

2.3.5 Interim conclusion: sole market dominance

The Competition Commission concluded with a view to the end customer market, the market for call access and the international roaming market that there were no reasons to believe that the Undertaking would create or strengthen a sole market dominant position. Therefore, these markets have not been further investigated in accordance with Art. 33 Cartel Act. Potential joint market dominance, however, was to be looked into (see section 2.4 below). With regard to the termination market, the Competition Commission ascertained a potential strengthening of the Merged Company’s dominant position. Due to reciprocal dependencies of the mobile telecommunication services providers, however, the actual competitive situation would hardly be affected. No further investigations were necessary in this respect.

2.4 Joint market dominance

A merger may create or strengthen a joint dominant position of the merging parties. In such case, the Competition Commission is entitled to either prohibit the undertaking or authorise it subject to conditions or obligations if the requirements as set out in Art. 10 para 2 Cartel Act are met.

Remarkably, the Competition Commission considered only coordinated effects of the merger in its decision, and did not give any consideration to unilateral effects.

The starting point for the Competition Commission's assessment was whether there were incentives for collusive behaviour and whether such behaviour would be likely to be stable and permanent. The Competition Commission had set the cornerstones for assessing joint market dominance in its decisions regarding the planned mergers Migros/Denner and Heineken/Eichhof.[48] Based on an assessment of actual and potential competition between the Merged Company and Swisscom, the Competition Commission investigated a potential joint dominant position.

The Merging Parties claimed that a dynamic overall assessment of the competitive situtation in terms of time line and the interaction of various factors was required. Furthermore, the Merging Parties argued that the Competition Commission was to provide clear evidence that the Merged Company would be in a position to eliminate other companies as competitors. The Merging Parties asserted that an intervention was to take place only if the analysis proved that the Undertaking would not aim at furthering efficiency but at achieving better returns based on a monopoly. *Ex officio* the Competition Commission should look at the whole picture and, if the Undertaking was considered to create or strengthen a dominant position that could lead to the elimination of competition, the Competition Commission should balance any potentially negative consequences against positive consequences on other markets. Furthermore, the Merging Parties suggested that some of the parameters applied were ambivalent since they could be perceived as evidence both for collusive behaviour and for increased competition. The Merging Parties submitted that the positive effects of the Undertaking that had been identified in the notification had not been considered. The Competition Commission was requested to take into account in particular that two companies substantially weaker than Swisscom were planning to merge with the declared intent of improving their efficiency.

The Merging Parties questioned the Competition Commission's argument that the Cartel Act did not allow for increases of efficiency to be considered in merger control assessments. The Merging Parties submitted that proof of collusive behaviour requires not just an isolated consideration of the individual criteria. Rather, they are to be considered in the appropriate overall context. A simple economic analysis of individual factors often does not enable any conclusion to be drawn as to the overall net effect of these factors in any individual case with regard to the possibility that collusive behaviour will occur in future. The consideration of a checklist of individual factors one by one does not provide direct evidence of whether the central conditions for objecting to the Undertaking will be fulfilled. Rather a one-by-one assessment would usually result in the inference that an undertaking may lead to collusive market behaviour under certain market conditions.

The Merging Parties made reference to the practice of the European Competition Commission, which also takes into account the peculiarities and structure of the affected markets and whether collusive behaviour had already occurred prior to the planned undertaking. Since this was not the case in the situation under

[48] Migros/Denner, LPC 2008/1, p 184ss; Heineken/Eichhof, LPC 2008/3, p 422ss.

investigation, the Merging Parties claimed that collusive behaviour could not be expected in the future either.

The Competition Commission did not share these views because the planned undertaking itself could create the environment for collusive behaviour. The fact that no past collusive behaviour could be proven did not allow the automatic conclusion that no collusive behaviour would occur in future. It was considered sufficient that the parties involved would be put in a position to implicitly or explicitly coordinate their behaviour. Whether coordination had taken place in the past or whether and how effective competition could be eliminated in the future was not deemed relevant in assessing merger control issues.

In order to draw conclusions on potential collusive behaviour, the Competition Commission applied a dynamic overall assessment, as requested by the Merging Parties. The individual factors and the resultant effects were each described separately, but they were each weighed up in the overall context, which ultimately enabled a conclusion to be reached on the possibility of collusive behaviour. The objections as to efficiency and allegedly positive consequences were also assessed in the course of the investigation (see section 2.4.10 below).

The Merging Parties further claimed that, following Massimo Motta[49], the Competition Commission would have to prove that the relevant parties were communicating in order to be able to collude. Due to the difficult relationship between Swisscom, Orange and Sunrise, such communication was not to be expected. The Competition Commission, however, referred to the same source pointing out that companies were in a position to coordinate their behaviour merely by creating and maintaining certain conditions that would simplify collusion, without exchanging information on prices or quantities.

Economic literature suggests that coordinated effects in situations of collective market dominance are to be assumed if the benefits achieved by coordinated behaviour are greater than those if the competitor(s) avoid coordinating their behaviour.[50]

Activities of cooperation and coordination without legal form that have the goal of restricting competition in any way are considered implicit collusive behaviour. In particular, if companies are active in the market in a succession of time periods, the competitive situation takes on a time dimension that requires a dynamic view of the competition. Through the time dimension and the connected possibilities for competitors to react, there are stimuli that could stabilise implicit collusive behaviour. This manifests itself in price competition in a duopoly (the so-called Bertrand price duopoly) as follows: Assuming that both competitors acquire produce and distribute homogenous goods (e.g. SMS, voice telephony or mobile internet services) and thereby substitutable products, then if there is constant competition the resultant

[49] MOTTA MASSIMO, Competition Policy - Theory and Practice, Cambridge University Press, New York 2004, p 189.

[50] KÜHN KAI-UWE, The Coordinated Effect of Mergers, in: Handbook of Antitrust Economics, ed Buccirossi Paolo, 2008, p 107s; MOTTA MASSIMO, l.c., p 142.

market price will equal the marginal cost. Because the overall margin in this case is zero, the two firms will achieve an overall profit of zero. The balance between the competitors results in the Bertrand price duopoly in each competitor trying to increase its market share through price reductions. This however depends on the profit from the higher market share being higher than the loss of income resulting from the lower sales price. Only in these conditions does a competitor have the short-term incentive to reduce prices. As the other provider has the exact same incentive to reduce its prices, the end result in a Bertrand price duopoly will be the competitive price.

In such a situation, it is economically rational for both competitors to move from a balanced competitive situation into a balanced collusive situation and to agree on a market price that maximises their collective profits. Such agreements may be explicit or implicit. For example, one of the two participants in the duopoly (A) could raise his price slightly. The other participant (B) then has the possibility to keep the same price or to raise his price too. If B keeps the same price, he will enjoy a higher turnover for as long as A does not adapt his price. If however B also raises his price, he will make more profit from the same amount of sales for as long as A does not reduce his price again. As both participants benefit long-term from a price increase, collusive behaviour (explicit or implicit) would seem the most likely result, as far as the market conditions allow it.

To determine the possibility, likelihood and sustainability of a collective dominant position, the competitive conditions and occurrences on the relevant markets must be considered as a whole. In this regard, the market characteristics preventing or furthering collusion must be investigated on four separate levels. In addition to the stimuli to establish and maintain implicit or explicit collusive behaviour, the possibilities must be investigated for exposing and successfully punishing departures from collusive behaviour. In the opinion prepared by swiss economics for the Merging Parties and in the position paper of 11 March 2010 the following requirements for collusion were identified: 1) identity of the aim and the object of the collusion; 2) no incentive to depart from the collusive arrangement: the benefit of a departure must be smaller than the expected future disadvantage resulting from retaliation by the betrayed collusion partner; 3) a credible threat of sanctions in the case of deviance; 4) no possibility for third parties to infiltrate the collusion. However, it must be kept in mind that the requirements 2) and 3) are interdependent. If the benefit of departing from the balance of collusion is already lower than the benefit of the balance of collusion, even without the threat of sanctions, the balance of collusion will be stable without the need for a sanction mechanism. Also, collusive behaviour is only possible if the market conditions allow it. In accordance with the Competition Commission's previous practice, the following criteria were applied in determining whether collusive behaviour was possible: 1) number of companies involved (see section 2.4.1 below), 2) the market shares of the companies involved (see also section 2.4.1 below), 3) market concentration (see again section 2.4.1 below), 4) symmetries (see section 2.4.2 below), 5) market increase (see also section 2.4.2 below), 6) market transparency (see section 2.4.4 below), 7) multi-market relations (see section 2.4.5 below), 8) position of the market opposition (see section 2.4.7 below) and 9) potential competition (see also section 2.4.7 below).[51]

[51] Heineken/Eichhof, LPC 2008/3, p 541ss; Migros/Denner, LPC 2008/1, p 186ss and KÜHN KAI-UWE, a.a.O., p 105 – 144 or MOTTA MASSIMO, l.c., pp 142ss.

The Merging Parties also submitted that collective dominance in this case would be impossible, as Swisscom and the Merged Company would need to agree on a list of at least 13 aspects in order to effectively behave in a collusive way. The Competition Commission, in turn, attested that such list could be used to product an explicit contractual agreement on collusion. For the creation and maintenance of implicit collusive behaviour however it would be sufficient for the collusion partners to have a common understanding of the aims to be achieved through collusion in order to be able to coordinate their behaviour.

The Competition Commission applied the abovementioned criterion to the markets identified in Clause 2.3 above: The retail market for mobile services for end customers, the wholesale market for access and origination on mobile networks and the wholesale market for international roaming. In order to assess the likelihood of coordinated behaviour on individual markets, it is necessary – due to the interdependencies – besides the analysis of individual effects on the affected markets, to carry out an overall assessment of the markets. As the Merging Parties state, this requires a "dynamic overall view" both in terms of time line – in that past, present and future competitive relations are to be reviewed – and in terms of the interplay of the various factors.

2.4.1 Number of Companies, Market Shares and Market Concentration

Based on a difference of more than 20% in terms of market shares, the Merging Parties claimed that the risk of collusive behaviour between Swisscom (market share of more than 60%) and the Merged Company (market share of less than 40%) would be significantly reduced. And with competitive pressure also from Resellers and MVNOs (with a market share of between 10% and 20%) collusive behaviour and coordination would be rendered very unlikely. The Merging Parties further asserted that the market shares would remain asymmetric, even following the Undertaking. In an asymmetric duopoly with no clear market leader, collusive behaviour could hardly occur.

The Merging Parties argued that Swisscom's market dominance was based on historical reasons rather than a lack of the other market participants' ambition to compete effectively. The Merging Parties purported that, to the contrary, competitors had tried to attack and destabilise Swisscom's market position by various means. The Competition Commission responded that it was not relevant how the incumbent market position was reached when assessing merger control issues.

Based on an analysis of prices and market dynamics, the Competition Commission concluded that, generally speaking, in the period from 2007 to 2009 Sunrise had been the most active force in the market and had exercised a certain competitive pressure in particular against Orange. Sunrise had slowly but steadily won market share from Orange and had ultimately overtaken Orange. An analysis of prices showed that Sunrise was to be considered a "maverick". This view was confirmed by an article from the online edition of the NZZ, according to which Sunrise in the third quarter of 2009 had been able to increase turnover and profit as a result of its significant price decreases introduced in 2008. France Télécom confirmed that Sunrise and Orange competed strongly with each other, although adding that it would be better for the Swiss market to have two participants who invested substantial sums rather than the current situation of one dominant provider and two other providers with smaller market shares and who also compete against each other.

To assess competition in the market for end customers, the various providers of mobile telecommunication services have first to be qualified. As in the assessment of single market dominance (see section 2.3 above), a distinction is to be made between operators with their own networks and those without (Resellers/MVNO). The Merging Parties based their line of argument on the European Competition Commission's T-Mobile/Orange Netherlands decision, according to which Resellers and MVNO were found to exercise substantial competitive pressure on network operators.[52] The Competition Commission stated, however, that Resellers and MVNO were only in a position to compete if they (i) had regulated access to the operators' mobile networks and (ii) were able to act independently in determining their own pricing.

The Merging Parties claimed that the Resellers and MVNO's market success, as demonstrated in a report by Comparis, gave proof of the retail market's dynamism. Resellers were able to effectively compete not only on price but also on other competitive parameters. According to a simulated comparison by Comparis, Aldi Suisse, Tele2, Migros, Orange, Coop Mobile and Cablecom Mobile provided the best offers. This showed according to the Merging Parties that there was effective competition between all mobile telecommunications service providers. The Swisscom CEO explained during a hearing on 8 March 2010 that the network operators are subject to ongoing pressure from the Resellers, because e.g. Migros is under pressure to have a cheaper offering than Aldi or Coop and transfers that pressure on to Swisscom. Furthermore, the big Resellers would try to play off the various operators against each other. However, the Competition Commission saw this pressure on the network operators as limited, because the Resellers are only competing against other providers of cheap offerings. Most of the mobile telecommunications service providers that were questioned responded that they only make their label or mark available for a tariff agreed with the relevant network operator and that they then sell the mobile telecommunication services of that operator on those conditions (pure resellers). They receive a commission on these sales calculated according to sales turnover.

In order to assess the actual competition situation on the end customer market, it is unavoidable that the individual mobile telecommunication service provider without their own network are qualified into two categories, based on the contracts concluded with network operators for use of their network, namely 1) pure resellers and 2) independent providers. In addition, a distinction has to be made between the pressure that a Reseller or MVNO exercises on the end customer market and on the network access market. Low end customer prices enable the Reseller or MVNO to achieve higher sales figures, whereas good conditions on the network access market result in better margins. If a Reseller or MVNO achieves better margins it still says nothing about his behaviour in setting prices for the end customer market.

[52] See T-Mobile/Orange Netherlands, COMP/M.4748, where upon the merger three operators remain with market shares of 48.5%, 22.3% and 25.5% (recital 31). Furthermore, the Competition Commission claimed that the market dynamic in the Netherlands was different to the situation in Switzerland (recital 44).

The Competition Commission defined a Reseller as a provider offering mobile telecommunication services to end customers, in its own name or in the name of a third party, for a tariff determined together with the network operator and who bears no risk of its own in offering mobile telecommunications services. Resellers receive a commission on sales of SIM-cards and call minutes. Resellers, therefore, are not in a position to compete with their network operators and are mere distribution channels. Against this background, the Competition Commission concluded that the services offered by a Reseller were to be imputed to the relevant network operator.

In order for a Reseller to be in a position to conclude a contract with a network operator, two economic conditions must be met. On the one hand, the Reseller must be able to offer a price on the end customer market with which he can earn a certain margin. On the other hand, the Reseller uses his image and his mark in order to achieve the highest possible margin from the network operator (e.g. in the form of commission). This means however only that the Reseller enters into competition with the network operator only in the Reseller's own price segment. The price level within this price segment is dictated to him by the network operator, because as a rule the network operator determines the end customer price of the Reseller either directly or indirectly via the purchase price. Against this background, a Reseller competes with other providers in its price segment only (without significant impact on overall price levels). The network operator – as explained in the party opinion from RBB Economics - can thus tap into new customer groups in other price segments without cannibalising its own offering. As such a strategy of market closure is to be attributed to the network operators, the negotiated end customer prices must be attributed to the network operators.

Out of the 17 active Resellers in the Swiss mobile market[53], Migros was the only one considered able to offer independent tariffs. In principle, Migros fixes the sale price for its uploadable credits on its own. Migros' leeway, however, is very limited too, because it can set its prices only within the boundaries of the commission it earns on turnover from the credits sold. Thus, none of the 17 Resellers can be considered as effective and independent competitors vis-à-vis the network operators in the market for end customers. This is implicitly confirmed by the Merging Parties in arguing that a multi-brand strategy is important for winning market share, because in this way new customer segments can be accessed that could not be reached at all or not so well with their own brands. Also, in the hearing of 8 March, the CEO of Sunrise pointed out the continuing atomisation (of the market), which forces a stricter market segmentation. Resellers are important trading partners for network operators, which increases competitive pressure. Also strong brands are important for the Merging Parties in order to avoid a shift of their own customers to Swisscom. With this the Merging Parties confirm that Resellers are principally an instrument for price differentiation and so not effective and independent competitors towards the network operators in the end customer market. Again, the Competition Commission concluded that a different

[53] Aldi Suisse AG (Sunrise), Red Bull Media House GmbH (Sunrise), […][(…)], Coop (Orange), Mobilezone AG (Orange), API Telekom (Schweiz) AG (Orange), COLT Telecom AG (Orange), VTX Services SA, etc. (Orange), e-fon AG (Orange), Zirkumflex AG (Orange), Reinvest select AG (Orange), Abalon Telecom AG (Orange), F.I.Z. GmbH (Orange), Netstream AG (Orange), Telebroke AG (Orange), Telecom Liechtenstein AG (Orange) and Migros Genossenschafts-Bund (Swisscom).

outcome would be possible if Resellers and MVNO were granted access to the mobile networks at cost oriented prices thereby enabling independent pricing. This would enable Resellers and MVNO to enter into actual effective competition.

The Competition Commission further denied the Merging Parties' argument that Resellers and MVNO have substantial power in negotiating the applicable tariffs with network providers. The Competition Commission reasoned that one had basically to assume the network providers would not offer Resellers contractual conditions or tariffs that would cannibalise their own offerings. The Resellers' potentially strong market position would be reflected only in the level of commission paid for use of their brand by the network operators. It can be ruled out that the Resellers have a disciplining influence on the operators. So for example Mobilezone admitted that the scope for negotiating price structures was rather small. Against this background it is also not correct to say that the Competition Commission Secretariat consistently underestimates the constantly growing importance of the MVNO and Resellers.

All seven MVNO operative in Switzerland have a marginal market share only. From the information obtained from market participants and an analysis of the contracts concluded between Resellers/MVNO and network operators, then based on the contract set-up, the lack of regulation and the relatively low profit margins, the Competition Commission concluded that the MVNO are very much dependent on the network operators. Due to their lack of independence from the network operators and their marginal market shares, the Competition Commission did not consider MVNO as competitors of or even as having a substantial influence on the operators.[54]

The Undertaking would reduce the number of competitors in the end customer market from three to two. This would facilitate coordination of prices amongst the remaining market participants.[55] At the same time, the uncertainty over whether a collusive balance could be maintained would be reduced – simply as a result of the smaller number of players potentially participating in the collusive behaviour.. Both incentives and opportunities to establish and keep up explicit and implicit collusive behaviour would be increased significantly.[56]

The Merging Parties further claimed that prices have dropped significantly due to Resellers and MVNO entering the Swiss market. The Competition Commission, however, assumed that the decrease in prices was rather due to a recent decrease of termination fees charged by Swisscom.[57]

The Merging Parties argued that global companies such as Apple with their newly developed hand-sets were in a position to put pressure on the network operators and turn them into mere service providers. The

[54] As a consequence, only three independent operators are active in Switzerland: Orange, Sunrise and Swisscom.
[55] France Télécom opined that it was better for Switzerland to have two strong competitors rather than the present situation in which a dominant operator and two competitors in fierce competition with smaller market shares.
[56] The Competition Commission did not preclude that new network operators (such as In&Phone) would enter the Swiss mobile telecommunication market. However, it was considered unlikely that the substantial financial investments required (in excess of CHF 1bn) could be raised.
[57] New termination fees were charged as of 1 June 2005.

Competition Commission took the view however that mobile internet and VoIP applications would not replace mobile telephones within the next two to three years. Also, network operators are for the most part already only access providers in the mobile internet area, and the introduction of newly developed mobile devices will not change that. Finally, it was not clear to the Competition Commission why the Merging Parties would be in a position to better withstand these developments merely thanks to an increased turnover and a broader pallet of products as a result of the Undertaking.

In respect of the wholesale market for the access and the origination of mobile networks, the Merging Parties claimed that network providers would try to do their utmost to facilitate the capacities needed. Resellers and MVNO were too important to be ignored as a means of gaining market shares. The Competition Commission, however, considered capacities as one aspect only. The conditions under which network access was granted were considered as even more important. The network providers have a large interest in offering network access conditions that do not weaken their own position on the end customer market and that deny the MVNO any possibility of effectively competing with the network providers on the end customer market. Following the Undertaking, most MVNO would be under the roof of the Merged Company. Whether Swisscom would compete by offering MVNO access to their network could not be anticipated. In fact, most Resellers and MVNO seemed concerned about the decrease of operators from three to two.[58] Some even voiced their fears that the Merged Company would terminate their agreements. The Competition Commission concluded that both incentive and opportunities for collusive behaviour would be increased for the two remaining operators.

As for the wholesale market for international roaming, the Competition Commission came to the conclusion that the Undertaking would increase market concentration. Most foreign mobile companies concluded an agreement with all three operators in Switzerland and passed on the charges directly to their customers. Foreign customers do not usually make a conscious choice for one or another roaming partner and so foreign operators often automatically offer a connection through a preferred roaming partner. Due to its stronger negotiating power, Swisscom's roaming conditions were generally better than those of its competitors. An increased market concentration might enable the Merged Company to better negotiate prices thanks to their increased standing.[59]

Interim findings: Reducing the number of operators from three to two would increase market concentration in all these markets. The influence of Resellers and MVNO was considered, contrary to what the Merging Parties claimed, as marginal only.

[58] Coop was the only MVNO expecting increased competition following the Undertaking.

[59] In contrast to what the Merging Parties claimed, the Competition Commission considered itself competent to assess potential impact on this market. Although collusive behaviour would indeed have its main effects abroad, the impact on the foreign end customer would occur in Switzerland.

2.4.2 Symmetries

Symmetry may affect various dimensions such as costs, interests, market shares, product portfolios or technological know-how. The more symmetric two market participants are, the less they can distinguish themselves via their products and services. In the event of a perfect symmetry on all levels, the remaining criteria is pricing. In such a scenario, the only remaining possibility to avoid reciprocal underbidding of prices would be implicit or explicit collusion.

The Merging Parties claimed that the former monopolist and current market leader Swisscom pursued different interests than the Merged Company. Swisscom was anticipated to remain keen on defending its dominant position whereas the Merged Company would try to focus on new strategies to increase its customer basis. Furthermore, Swisscom was considered to be active in the Swiss market only whereas Orange and Sunrise were part of European telecommunication services providers. These differences in interests would even lead to an increase in competition. The Merging Parties' prices, coverage and services were claimed to be significantly different from those of Swisscom. As a result, there was purportedly no symmetry in terms of products, costs or profitability. The Merging Parties further claimed that a difference in capacity utilisation, coverage, technology and financial power was to be taken into account. All these asymmetries would not be affected by the Undertaking. Finally, the hostile relationship between Swisscom and the Merging Parties would not provide a basis for present or future collusive behaviour.

The Competition Commission assessed potential symmetries on an overall basis. Collusive behaviour was considered possible even if the respective companies were not symmetrical in all respects and despite the hostile relationship between Swisscom and the Merging Parties in the past.

Generally, the Competition Commission considers issues of symmetry individually for each relevant market. Since the relevant markets were identical, potential symmetries in terms of costs and technologies were considered from an overall perspective. In terms of product symmetry and symmetry of interests, however, the Competition Commission assessed each market individually.

<u>Symmetry of costs</u>: The Competition Commission noted that, due to the Undertaking, the Merged Company could benefit from economies of scale which would improve their cost structures significantly, almost to the level of Swisscom's network costs. Thus, their cost structures could be expected to become almost symmetrical. The Merging Parties, however, pointed out that the cost structures would remain significantly different, not least due to the substantial costs caused by the Undertaking over the next two years.[60]

[60] The Merging Parties emphasised that ameliorating its cost structure was a core element for significantly improving the Merged Company's competitiveness.

The Competition Commission noted that whether cost savings would be used to attack Swisscom's position as market leader or whether collusive behaviour was more likely, was dependent on the stability of the market shares.

In terms of technological symmetry, the Undertaking would supposedly lead to an alignment of the networks of Swisscom and the Merged Company from a technical perspective. Following the Undertaking, the latter would initially suffer from operating redundant aerials, although the Competition Commission assumed that this could be dealt with in a relatively short period of time and also as Swisscom anyway has generous capacity reserves for peak times, the two remaining network operators following the Undertaking would quickly become aligned again also with regard to aerial locations. The Merging Parties claimed that the Undertaking was needed to fund the substantial technical investments (LTE) required to keep up with Swisscom. The Competition Commission concluded that a resultant increase in technological symmetry was undisputed and that such increased symmetry would generally facilitate collusive behaviour. The Merging Parties argument that the competition on technology in the telecommunications market was closely linked to the end user devices and telecommunications services was rejected by the Competition Commission, which considered the market for mobile devices to be too different from the mobile telecommunications market to allow such general comparisons between the market structures.

As for product symmetry, almost all mobile telecommunication service providers offer similar services and comparable hand-sets on the end customer market. The Competition Commission did not consider bundling of these basic services (voice, SMS/MMS and usually also mobile internet) or a combination of services (mobile telecommunications; broadband internet and fixed net) as independent products. These arguably new products, as claimed by the Merging Parties, were considered a means of pricing only. The Competition Commission did not agree that the different pricing for basic products and hand-sets was a sign for product asymmetry.

In the network access and roaming markets, the only product offered is use of the mobile telecommunications network of the relevant operator. The networks of Swisscom, Sunrise and Orange do differ in the quality of coverage, but the Undertaking would greatly reduce this difference so that also here product symmetry would be increased.

All in all, the Undertaking would further increase the already existing product symmetry by way of enhancing the Merged Company’s coverage, quality of customer service and transmission.

In terms of symmetry of interests, all three operators are companies limited by shares and thus striving to optimise their profits. The Competition Commission assumed that companies limited by shares would generally follow a strategy of maximising profits, and that if collusive behaviour was the strategy producing the highest profits, then the potentially participating entities would choose to follow that strategy of collusive behaviour.

In the end customer market, the main question was whether the Undertaking could be expected to produce shifts in the market shares or whether the market shares would remain stable. The former would facilitate competition, the latter collusive behaviour. Price competition would only make sense if, by decreasing prices, a significant number of new customers could be attracted. The additional turnover generated by acquiring a new customer basis would have to cover the reduced profit margin from lower prices. The Competition Commission considered the end customer market for post-paid subscriptions as rather stable due to subscriptions being concluded for 12 or even 24 months. Furthermore, customers switching operator would face substantial costs. The stable market shares in the past years suggested that the Undertaking would not lead to a substantial shift. The Competition Commission further voiced its concerns that the most active competitor would be gone if Sunrise was absorbed into Orange. Competition between Orange and Sunrise would fall away, too. Thus, the Competition Commission did not expect significantly lower prices for end customers, even if cost savings were possible. It cannot automatically be concluded that lower costs will be passed on as price reductions for end customers. Indeed the Merging Parties themselves submitted that the Merged Company would rather spend the cost savings on improved infrastructure and not on price reductions, which anyway would not result in any noticeable increase in market share. Notwithstanding a better cost structure for the Merged Company, the Competition Commission could not see how a reduction from three to two competitors would enhance competition.

The Merging Parties claimed that there was an inconsistency in the Competition Commission's argumentation in that competition in the end customer market could only occur via price but, due to the slow market reaction to price changes, competition on prices could not be successful. The Competition Commission explained that because a price reduction would initially at least lead to lower profit margins without any increase in market share, it was to be expected that network operators would behave collusively rather than competing on price.

Mobile tariffs have dropped significantly in the European Union over the past years. The Swiss operators were for the most part able to avoid this trend. As a consequence, the price level in Switzerland remains generally higher than in the rest of Europe. In the past, price reductions have not led to any significant change in market shares. Against this background, the Competition Commission expected competitors to avoid lowering their tariffs for as long as possible. This could best be achieved by way of (explicit or implicit) collusive behaviour.

The Competition Commission noted that Swisscom and the Merging Parties had taken different approaches regarding the network access market. Swisscom has to date only permitted one third party (Migros) to use the Swisscom network to offer services under its own name. The other Resellers and MVNO use the networks of the Merging Parties. Following the Undertaking, most Resellers and MVNO would remain linked to the Merged Company. Swisscom would remain in a position to underprice compared to the Merged Company, so increased competition following the Undertaking was considered unlikely.

Interim findings: In line with the relevant literature, the Competition Commission considered increased symmetry as generally facilitating collusive behaviour. Following the Undertaking, symmetries in terms of technology and costs would be significantly increased.

2.4.3 Market Growth and Innovation

The Competition Commission stated that it is easier to achieve (and uphold) a potential joint market dominance if market volumes and demand are stable. Customer behaviour could be anticipated more easily. In a dynamic market with great uncertainty (e.g. due to fundamental), market shares would tend to shift more easily.[61]

As for innovation, the Competition Commission denied the Merging Parties' claim that constant innovation was required. The Competition Commission classified these alleged innovations as being in relation to price and performance rather than technology. Such pricing and bundling[62], however, was considered to fuel the incentive for collusive behaviour. This was considered all the more dangerous *in casu* since incentives would be increased if one operator fell away.

New technologies in respect of hand-sets such as the iPhone affect all operators in Switzerland in the same manner. It was considered unlikely that a single operator would be able to introduce a new technology triggering a shift in market shares. Innovations in the mobile telecommunications market generally come from third parties such as manufacturers of end customer devices or transmitting entities (Nokia, Motorola, Apple etc.). Network operators all use more or less the same technologies and end customer devices (transmitting masts, GSM, UMTS, EDGE, HSDPA etc.). Again, the end customer market was qualified as stable.[63]

Only the introduction of LTE could be considered a proper innovation giving the first network operator to introduce this technology a first mover advantage in the area of data transfer and mobile internet. The Competition Commission expected, however, that all operators would almost simultaneously introduce such technology soon after the relevant frequencies became available. Thus, no asymmetries would result and it was not clear how the innovation would result in greater competition.

With the end customer market having reached a certain maturity, growth rates have been decreasing and for some providers (Orange) even negative. Market penetration is already at the very high level of 115.5 %. The Competition Commission did not consider the market as completely saturated, but as stable.[64]

[61] In saturated markets, shifts are mainly due to competing behaviour.
[62] The Competition Commission did not consider bundling as a product innovation.
[63] The Competition Commission left open whether “Livebox” was a real product innovation. It was anyway considered unlikely to produce a change in market shares.
[64] Reference was made to statements from Swisscom's CEO, who considered the mobile telecommunication market in respect of voice services as already saturated while the data transfer market was still developing. Regarding the latter, Swisscom’s CEO expected a significant drop in prices, as already noted due to the introduction of the iPhone.

It was argued that a stable market would mean any future loss of profit due to punishment of a non-colluding operator would be small, as the collectively available additional profits would not grow. This would make it relatively attractive not to collude, which would destabilise any collusion. However, due to the regular renewal of contracts, punishment for departing from the collusive balance in the form of a price reduction would not only concern newly acquired customers, but also existing customers. So the Competition Commission found that the future loss of profit as a result of such punishment could be very high.

The Merging Parties further claimed that many pre- and post-paid customers would regularly change their providers (high churn-rates). Their figures corresponded to the number of contracts terminated with a provider and newly entered into with a provider. The Competition Commission observed that the number of customers transferring their old telephone number to another provider constituted only a tenth of the number of contracts terminated or concluded. Based on the assumption that most transferring customers would take their number with them, the Competition Commission concluded that most customers terminating their contract were not in fact switching the operator.

The Merging Parties claimed that the Undertaking would lead to numerous innovations such as Livebox, "a very high speed access", direct access voice mail, enhanced call completion, high definition (HD) voice on mobile and Orange application shops. The Competition Commission, however, did not consider any of these as proper investments which would be able to change the present market conditions.

In respect of the market for network access, and given the market entry of Resellers and MVNO in the past few years, the Competition Commission expected further market entries. Therefore, the market for network access was considered to show potential for growth. Still, the operators' dilemma remains: increasing the customer basis (thereby increasing efficiency by way of better utilising network capacities) on the one hand versus the cannibalisation of their own services on the other hand.

Resellers have not provided competition for network providers, but rather a means of differentiated pricing. As Swisscom only works with Migros, all other Resellers would have to deal with just one network provider following the Undertaking. This would increase the market power of the Merged Company substantially.

The MVNO could potentially be considered as competition for the network providers. However, given their insignificant market share, no substantial market growth was expected.

In the wholesale market for international roaming various operators compete to be included on a so-called "Preferred Roaming List (PRL)". Growth depends on the number of foreign operators. Most of the mobile telecommunication operators in the Western countries are established providers. Thus, the market would

---

Following the Undertaking, however, all remaining operators could offer the iPhone which would result, again, in stable market conditions.

seem saturated. The Competition Commission did not expect many new operators to be formed abroad. This situation creates an incentive for collusive behaviour, which would only be strengthened by the Undertaking.

Interim findings: The Competition Commission noted that the markets were quite saturated with no innovations expected which would alter the present market conditions. Against this background, co-ordinated behaviour of the two remaining operators would potentially be facilitated. Following the Undertaking, and in particular with a view to the market for network access, the joint dominant market position vis-à-vis Resellers and MVNO would be increased significantly.

2.4.4 Market Transparency

According to economic theory, a high degree of market transparency may promote collusive behaviour. The Competition Commission considered transparency with regard to prices as crucial. All operators would note immediately if a competitor lowered its tariffs and could then react swiftly to prevent their customers from switching to another operator. The Merging Parties stated that there was no transparency in the end customer market. Any transparency that there might have been was claimed to have no impact on the competitors' behaviour and it was argued that it should not change anything anyway, since operators were required to publicise their tariffs.[65] The Merging Parties further claimed that other elements which were relevant for competition such as coverage and quality of the network were not transparent. Finally, Resellers and MVNO as well as alternative solutions such as VoIP or Skype would render the market intransparent.

The Competition Commission did not follow these arguments referring to reports published by the BAKOM[66] as well as the website Comparis[67]. The market was considered transparent for the operators, less so for the end customers.[68] The operators benefit from various platforms, such as roundtables or conferences, which occasions they can use to exchange views with regard to technology, development and strategic decisions, thus facilitating transparency. Due to low market shares, the Competition Commission did not further take into account other factors which might increase transparency on the market such as the influence of skype, mobile VoIP telephony or segmented pricing.

In the end customer market, the Competition Commission noted high market transparency. Prices are visible to all via the internet. Tariff amendments, the launch of new products such as the iPhone and changes in the product structure (such as bundling) were usually announced in press releases. BAKOM

[65] The Merging Parties argued that their estimated market share with regard to business customers was so low because they did not know Swisscom's conditions.
[66] See the BAKOM's analysis of the tariffs under www.bakom.admin.ch/dokumentation/zahlen/00545/00722/00910/ (last visited on 12 February 2010).
[67] www.comparis.ch/telecom/mobile.aspx.
[68] The market conditions for the end customer were not considered relevant. The operators are relevant. Therefore, even if the EU decision regarding Orange Netherlands, according to which there is hardly any transparency for end customers, was right, the operators would still be in a position to compare the different offers.

regularly publishes reports comparing the individual providers and their cost structures. The website Comparis also provides a direct comparison service. The Competition Commission agreed, however, that there was less, yet still a high degree of, transparency regarding business customers.[69]

The market for the network access and the market for international roaming were considered less transparent by the Competition Commission, since the agreements between the various parties are not publicly accessible.

Interim findings: The Competition Commission concluded that the end customer market was transparent for the providers. Market participants were in a position to react swiftly, be it by way of amending tariffs in case of competition or by way of parallel conduct in case of collusion. Due to this high degree of transparency, combined with long term subscriptions (postpaid segment) and the operators' ability to react swiftly, decreasing prices would not affect the market shares. Therefore, collusive behaviour would seem very easy in the mobile telecommunication market. All the more so if the number of operators was reduced from three to two.

2.4.5 Multi Market Relations

In multi-market relations, the participants are active not only in the relevant markets but also in other markets in comparable positions vis-à-vis their competitors.[70] According to the economic literature, such multi-market relations may encourage collusive behaviour. The Merging Parties claimed that collusive behaviour in a duopoly had never before been proven without the existence of multi-market relations and interdependencies of the capital used. The study on which the Merging Parties based their arguments was published in 1997, using data from the period 1984-1988. The Merging Parties accepted that the argument of multi market relations was to be applied only with reservations.

The Competition Commission noted that Orange, Sunrise and Swisscom were active in several markets, national and international, and observed an interdependency in various aspects. The Competition Commission concluded that multi-market relations exist in particular in the following markets: the termination market where the same actors are at the same time supplier and consumer and the international roaming market. On the termination market, the price in the end customer market for telephone calls with another network are determined to a large extent by the termination fees. By keeping the termination fees high, the network operators can generate higher income in the end customer market for off-net calls by customers of other operators. On the network access market, operators may be tempted to grant access to MVNOs in a way that will not destabilise the balance of collusion on the end customer market. The Competition Commission feared that the two remaining operators would not grant network access to MVNO at market conditions. In order to act collusively on the network access market it would be enough that the MVNOs are only offered conditions that do not cannibalise the network

[69] Bigger customers would negotiate with all three operators, comparing their offers. Confidentiality clauses would not really hinder an exchange of information.
[70] Heineken/Eichhof, LPC 2008/3, p 457, recital 301; see also MOTTA MASSIMO, l.c., p 145.

operators' own offerings. This is the case even in a growing market and even if market transparency is lacking.

Interim finding: Multimarket relations exist and could facilitate collusive behaviour.

2.4.6 Sanctioning Mechanisms

The Competition Commission concluded that both Swisscom and the Merged Company would have various suitable and effective means to sanction undesirable behaviour by competitors. For example, network operators always have the possibility of threatening time-consuming and costly interconnection proceedings or intervention by the regulator. In the past, proceedings under Art. 11 of the Telecommunications Act have only rarely been conducted to their end. Art. 11 requires that providers give other providers access to infrastructure and services in a transparent, non-discriminatory way at prices related to the relevant costs. If a provider successfully claims under this Article, all other providers will be able to follow suit and so any advantage for the claimant provider will be very short-lived. However, such a claim could in some circumstances result in a substantial loss of profit for the defendant party and this makes the threat of a claim well suited for use as an effective instrument of sanction.[71]

On the other hand, temporary but substantial price reductions were found not to be an effective instrument of sanction, because end customers are tied into long contracts and would not be able to switch provider to benefit from a lower price. The Competition Commission was concerned however that the remaining competition regarding price, mainly upheld by the competition between Sunrise and Orange, would be adversely affected if they merged. The end of such remaining competition would provide Swisscom with the means and the mechanism to sanction any price reduction by the Merged Company and to uphold a collusive balance.

2.4.7 Position of the market opposition and potential competitors

Potential joint market dominance generally depends on the degree of concentration of the market opposition. A consumer, depending on his power to negotiate, could stimulate competition by threatening to switch supplier. *In casu*, the Competition Commission noted that the end customers would be mere receivers regarding tariffs with no power to negotiate them.[72]

The Competition Commission did not follow the Merging Parties' claim that Resellers and MVNO were sufficient for keeping up a certain competitive pressure. Neither did the Competition Commission agree that such competition forced the operators to provide competitive offers.[73]

---

[71] At least in the short run, the fees for termination could be used as an instrument for sanctioning too.

[72] The Merging Parties argued that the end customer would not have any power to negotiate with regard to pre- or post-paid products anyway, no matter whether the Undertaking was executed or not.

[73] The Competition Commission further considered as irrelevant the fact that mobile telecommunication services had not been considered a basic service in Switzerland due to the existence of sufficient competition. The mere fact

Market transparency for the end customer is low. The end customer does not have any power to negotiate with the operator. Not even big customers have a truly better position to negotiate, as they still represent only insignificant market shares.[74]

In the international market for roaming there is no market opposition disciplining the operators because roaming charges are passed on to the end customer, who generally accepts them as is.

On the wholesale market for network access, the Competition Commission noted that the position of the operators versus the Resellers and MVNO was strong. Despite the strong brands and resultant bargaining power of the MVNOs, granting network access was still a profitable business for the operators.[75] The Undertaking would furthermore lead to a high degree of concentration.

Interim findings: While the Undertaking would undermine the position of the market opposition on the end customer market and the market for network access, coordination amongst the remaining operators would become easier.

2.4.8 Potential Competition

Potential competition was not expected. Due to the high costs for initial investments and the high degree of market concentration, market entry for new operators was considered difficult.[76] The barriers for market entries would even be increased following the Undertaking because two strong players would aim at protecting their positions.

2.4.9 Interim Findings and Dynamic Overall Assessment

The Competition Commission investigated whether incentives for establishing or keeping up implicit or explicit collusive behaviour existed and whether deviating from such collusive behaviour could be sanctioned. Contrary to what the Merging Parties claimed, the Competition Commission considered the opportunity and willingness for such collusive strategy as sufficient proof and did not request actual evidence for such behaviour.[77] Generally speaking, the Competition Commission identified various

---

that a basic service is guaranteed was not considered relevant for the situation on pricing or the presence of sufficient competition.

[74] The turnover of the three biggest customers is still less than 1% of the total turnover of each operator. With two remaining participants in the market, big customers would have even less choice.

[75] This was considered true, in particular, since it was not clear whether MVNO have a legal right to access mobile networks.

[76] The Competition Commission did not expect In&Phone to be able to establish itself as operator. The Resellers and MVNO were not considered effective competition.

[77] Thus, the Competition Commission assessed whether the potential collusion partners could act in consort regarding the most important aspects such as pricing.

factors (the decrease in number of providers, an increase in symmetry in terms of technology and costs, saturated markets with a high degree of transparency, multi-market relations, a weakened market opposition and no potential competition) which could increase the risk of collusive behaviour in the context of joint market dominance of the Merged Company and Swisscom.

In fact, the end customer market was considered stable and rather saturated.[78] The remaining operators following the Undertaking were likely not to compete. This was considered true, in particular, because the end customer market was the operators' main source of income. Collusive behaviour was furthermore facilitated due to an inferior market opposition, the observability of the market and suitable sanctioning mechanisms.[79]

The Competition Commission did not preclude that for a certain period of time different tariffs for new customers and incumbent customers would be applied. Aggressive tariffs, however, would ultimately lead to a decrease in profitability with regard to the existing customer basis. A sustainable decrease in prices in order to broaden the customer basis would become less profitable, and so less probable, the bigger the customer basis is.[80]

Thus, the Undertaking would increase the joint market dominance of the operators, thereby potentially eliminating competition in the end customer market.

With regard to the market for international roaming, the Competition Commission did not expect that a joint dominant market position would be increased by way of the Undertaking. The international operators were considered to provide strong market opposition. Furthermore, Swisscom and the Merged Company were expected to be disciplined through their membership of international roaming alliances.

The Undertaking was expected to affect the conditions in the market for network access. This, in particular, as Swisscom had hardly been active in said market. The creation of a duopoly would further weaken the Resellers' and MVNO's position to negotiate and would enable coordination amongst the duopolists.

[78] The operators were competing in respect of the existing customer basis rather than new customers. No qualitative or technical differences were expected, which is why competition was considered to occur mainly on price. Whether an operator is in a position to lower its tariffs depends on its cost structure. Both remaining operators would be able to lower their prices until break even would be reached. Therefore, lowering tariffs would rather lead to a decrease in profitability rather than a broadened customer basis.

[79] The Competition Commission further investigated market trends and the operators' position in relation to the international competition (Art. 10 II lit a Act on Cartels). Internationally, tariffs on the end customer market have constantly dropped. In Switzerland, however, the price level was above average. In a duopoly situation, the Competition Commission expected the difference between the price levels in Switzerland and abroad to increase.

[80] Sunrise being the most active player in the market was considered to have the opportunity to attract customers from Orange and Swisscom. Following the Undertaking, the Merged Company could only try to lure away Swisscom's customers. Introducing price leaders was not accepted as a means of sustainably altering the existing customer basis. Price leaders are already in use in the market and have not resulted in any significant changes in market shares.

The increased market concentration would enable the Merged Company to independently set the conditions for access. Today's competition between Orange and Sunrise would fall away, with Swisscom remaining reluctant to be more aggressive in the market for network access.

Based on an assessment of the relevant economic literature, the Competition Commission concluded that the following aspects were to be considered in a dynamic overall assessment: 1) incentives to establish or keep up collusive behaviour, 2) the means to discover contemporary deviations from collusive behaviour and 3) the ability to sanction such deviations in order to maintain the balance of collusion.

Incentives to establish or keep up collusive behaviour: In the end customer market, the services offered are mainly homogeneous and competition happens by way of pricing. Collusive behaviour would seem a common feature. All the more so, since the end customer market reacts slowly to tariff amendments. Because price changes have a greater effect on turnover the larger the customer base is, the incentives for collusive behaviour increase with an increased customer base, and at the same time the opportunities for effective competition decrease. In the course of the Undertaking, the number of operators competing in the end customer market would be reduced from three to two. The two remaining competitors would come closer to each other in terms of technology, cost structures, products and interests. Other competition (Resellers and MVNO) was considered weak, new market entries were not expected. Given the market's maturity, a new customer basis would be gained from competitors only. The market position consisting of Resellers and MVNO would hardly have a disciplining effect. Neither the international roaming market nor the market opposition were in a position to discipline the remaining operators. Against this background, incentives for collusive behaviour would be increased. It was also considered unlikely that potential increases in efficiency from the Undertaking would be passed on to end customers.

Means to discover deviations from collusive behaviour: The mobile telecommunication market was considered very transparent by the Competition Commission. Therefore, changes in pricing and price strategy can be spotted very quickly.

Ability to sanction deviation: The Merged Company was considered to have effective sanctioning mechanisms at hand, to be used against Swisscom (by way of interconnection proceedings and temporary increase of termination fees). The most important mechanism was the Merged Company's inherent threat to match any drop in price levels, to remove any hoped for benefits from a deviation from the collusive balance.

2.4.10 Potential Justifications: enhancement of competition in other markets and improved efficiency

The Merging Parties claimed that the Undertaking would have a positive effect on other markets than the ones investigated, by improving coverage, enhancing services and products, and ameliorating the level of services and the distribution network..[81]

The Competition Commission rejected such argument with regard to improved coverage on the grounds that in areas where Sunrise and Orange do not offer coverage, the shift would be from an acter with potential sole market dominance (Swisscom) to a collective dominance, which would not alter the competitive situation significantly. Decent improvements would be expected to take place with regard to convergent offers, but the Merged Company would not enter markets in which neither Orange nor Sunrise are active at present. The improvements that may occur would not outweigh the massive negative effects of a joint market dominance in the retail market for mobile telecommunication services and the wholesale market for the access and origination of mobile networks.

As regards potential advantages of efficiency, the Competition Commission concerned itself – based on Art. 10 II lit. a Cartel Act – with the so-called CSDP-test ("Creation or Strengthening of Dominant Position").[82] If a merger would result in a single entity with a monopoly position (sole market dominance) and/or two or more entities that can collectively dominate the market (collective market dominance), the merger is to be prohibited. Arguments of efficiencies, as used in the European Union (SIEC or SLC-test), could indeed be considered if they are such as to prevent the elimination of effective competition.[83] The Competition Commission noted, however, that savings from efficiencies were only taken into account when the merging parties wer able to show that and in what way the savings from their undertaking would increase competition. The Competition Commission concluded however that these tests could not be transferred without further assessment of the Swiss market since the European merger control regime is conceptually different from that in Switzerland. Even if they were to be applied *in casu*, it was considered unlikely that the Merging Parties would pass the benefits stemming from increased efficiency on to the end customers.

As a consequence, the Competition Commission did not see any improved competition or increased efficiency which would justify the Undertaking. Finally, the Competition Commission argued that the Merging Parties could combine their networks without merging, thereby achieving synergies and sharing the forthcoming LTE-investments in another way.[84]

---

[81] The Merging Parties claimed that their main goal was to improve efficiency which would, in terms of welfare, outweigh potential negative effects stemming from possibly creating symmetrical conditions in the affected markets.
[82] See the Synthesis Report of the Task Force Cartel Act under: www.weko.admin.ch/dokumentation/00216/index.html?lang=de (last visited on 14 April 2010), recital 230.
[83] An argument of efficiencies aims at taking into account a certain trade-off between anti-competitive effects such as increases in price due to an improved market power and pro-competitive effects such as a decrease of prices due to synergies.
[84] The President of the Federal Communications Commission shared this assessment.

2.5 Potential Conditions

On the occasion of the 22 March 2010 hearing, the president of the Federal Communications Commission suggested various conditions. These conditions were rejected by the Merging Parties who, in turn, proposed various other conditions.[85]

The Competition Commission came to the conclusion that these other conditions would not sufficiently address the Competition Commission's concerns regarding joint market dominance and the resultant elimination of effective competition so that the Undertaking could be allowed subject to conditions.

3 THE COMPETITION COMMISSION’S DECISION

For all of these reasons, the Competition Commission concluded that the Undertaking would lead to a joint market dominant position of the Merged Company and Swisscom in the end customer market and in the market for network access. Effective competition could be eliminated, particularly because the current “maverick” player would disappear from the marketplace, and such negative effect could not be outweighed by the strengthening of competition in another market. The Competition Commission further noted that no suitable conditions had been suggested that would allow the Undertaking to be approved.

Against this background, the Competition Commission did not authorise the Undertaking 41-0594 France Télécom SA/Sunrise Communications AG. The decision was signed by the Competition Commission’s then president, Prof Walter A. Stoffel, and its director, Dr Rafael Corazza.

Having decided not to authorise the Undertaking, the Competition Commission rejected the Merging Parties' request to remove the suspensive effect of a potential third party complaint.

In terms of costs, the Competition Commission charged CHF 5'000 for the preliminary investigation and another CHF 182'000 for the in depth investigation, based on 910 hours spent at an hourly rate of CHF 200. The Merging Parties were held jointly liable for this sum.

4 AFTERMATH

The Merging Parties appealed against the above decision to the Federal Administrative Court in Berne within the 30 days deadline in accordance with Art. 31 Act on the Federal Administrative Court.

On 3 June 2010, however, the Merging Parties withdrew their appeals. Thus, the decision is effective. The Merging Parties claimed that they would each continue to provide their services in Switzerland. The Merging Parties regretted that they could not agree conditions with the Competition Commission which

[85] These conditions were marked as a business secret.

would have addressed the latter's concerns. Orange claimed inter alia that the Merging Parties (i) had offered to grant Cablecom, the largest TV cable network provider, access to their mobile telecommunication networks and (ii) agreed to the Federal Communications Commission setting the termination fees.[86] The Merging Parties argued that the former would have facilitated a third major provider, the latter would have allowed for lower tariffs.

On 8 June 2010, the Federal Administrative Court terminated the pending proceedings in this matter. No costs were charged to the Merging Parties since, inter alia, the appeals were considered as founded.

On 22 June 2010, Orange Switzerland announced major investments in respect of its mobile telecommunication services.[87] Simpler and more transparent tariffs were envisaged. Orange Switzerland further announced that it would focus on its core competences and growing market segments. With a view to business customers, emphasis would be on small and medium sized customers.

On 7 July 2010, Sunrise announced that it would make the new i-phone 4 available to its customers. Experts now expect increased competition, with Sunrise trying to lure away customers from Orange on the basis of its superior network in terms of data download for smartphones.

TDC confirmed on 17 September 2010 that Sunrise was to be sold to CVC Capital Partners (CVC), a London based private equity firm, for CHF 3.3 billion.[88] CVC further announced that the present investment strategy was to be continued, the management to remain unchanged.[89] CVC claimed it intends to invest increasingly in setting up new shops and targeting young customers. Price cuts, however, were not envisaged.[90]

The CVC-transaction is subject to the Competition Commission's approval, although there is unlikely to be much concern, given that the competition situation would hardly be affected. The Competition Commission already reacted in an affirmative way emphasising CVC's deep pockets, which could prove crucial for Sunrise to manage the coming challenges in terms of infrastructure.

[86] Bilanz 12/2010, p. 13.

[87] Investments in LTE technology, High Definition Voice, higher transmission rates for mobile telecommunication EDGE, Orange-Smartphones, etc of CHF700m in the course of the next five years which is almost double as much as in the past years.

[88] The purchase price is purportedly less than the sum according to the Undertaking. Some experts, though, estimate that Orange would have paid CHF 2.8 billion only (see Panagiotis Spiliopoulos in „Sunrise-Kaeufer peilt Boersengang an", NZZ online edition, 19 September 2010 (last visited on 24 September 2010)).

[89] "Sunrise geht an CVC Capital Partners"; NZZ online edition, 18 September 2010 (last visited on 24 September 2010).

[90] „Sunrise-Kaeufer peilt Boersengang an", NZZ online edition, 19 September 2010 (last visited on 24 September 2010).

Experts expect CVC to re-sell Sunrise in the course of the next few years, either by way of IPO or private sale.[91]

5 ASSESSMENT

This is only the second time that the Competition Commission has prohibited a merger. The first prohibition (Berner Zeitung/20 Minuten, RPW 2004/2, 529) was overturned by the appellate courts (RPW 2006/2, 347; 2007/2, 331). Sunrise/Orange is therefore the first prohibition to be given legal effect.

From an overall perspective, the Competition Commission's decision is convincing. Significant differences to the Migros/Denner decision justify a different approach *in casu*. No further market entries are expected, resellers and MVNOs may not be considered proper competition and market shares have been – and may continue to be – very stable. In short, the Undertaking could lead to a stable duopoly situation, thereby facilitating collusive behaviour.

However the decision has been criticised by both academics and practising lawyers in Switzerland, mainly with the argument that the prohibition failed to meet the high Swiss intervention thresholds pursuant to Art. 10(2) Cartel Act (creation or strengthening of a dominant position which significantly impedes competition; see the decisions of the Federal Supreme Court in the Swissgrid and Berner Zeitung/20 Minuten cases, RPW 2007/2, 324 and 331). In particular, the critics say that the strict evidentiary requirements for a prohibition were not fulfilled. They conclude that, if anything, the Competition Commission should have permitted the merger subject to conditions (cost controlled network access for Resellers/MVNOs), which would have been a less intrusive way to achieve the same effect. Indeed, the Competition Commission itself seems to hint at several points in its decision that this condition may have been sufficient to allow the merger.

The Competition Commission's assessment that three competitors are favourable to two may hold true in the particular circumstances of this case. However, it would hardly be fair to conclude from this case alone that, in general, a situation with three competitors better encourages competition than a duopoly with two strong players. Assuming that Orange and Sunrise will remain active in Switzerland and continue to invest, as suggested both in their press releases and in the announcements made by CVC following its acquisition of Sunrise, the situation has at least not worsened. On the other hand, CVC does not offer enough synergies or economies of scale to catapult Sunrise into a significantly better position.

Whether the Competition Commission's decision is generally in line with international developments, the decision in the T-Mobile/Orange case in the Netherlands in particular, is difficult to assess. Given the substantially different markets, and thus starting points, a reliable comparison is not possible. The Swiss Sunrise/Orange decision is also of only limited use as a comparison for determining similar cases under

---

[91] „Sunrise-Kaeufer peilt Boersengang an", NZZ online edition, 19 September 2010 (last visited on 24 September 2010).

EU law, due to the unique characteristics of the Swiss test for intervention pursuant to Art. 10(2) of the Cartel Act. And finally, bearing in mind the regulated environment of the Telecommunications Act, in which the players in this case operate and where coordinated effects are perhaps inevitable, the decision cannot be automatically applied to all future “three to two” mergers in Switzerland either.

****