

The challenges of regulation in a two-players market

Promoting competition and market entry in a post-merger situation

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What is the magical number of MNOs per market?

- 3-to-2 merger in the Albanian market in March 2022
- Magical number of MNOs per market: Commissioner Joaquín Almunia vs Commissioner Margrethe Vestager
- CJEU decision in Case C-376/20 P of July 13, 2023
 - “by holding, in paragraph 118 of the judgment under appeal, that the Commission is required to demonstrate with a ‘strong probability the existence of significant impediments’ to effective competition following the concentration and that ‘the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is “more likely than not”’, the General Court applied a standard of proof which does not follow from Regulation No 139/2004, as interpreted by the Court of Justice, and thus made an error in law.” (par. 88)
- Drivers of market consolidation
 - Squeezing of revenues
 - Inflationary pressures
 - CapEx (spectrum licenses, geopolitical tensions)

Merger review by the Albanian NCA (1) - Options

- Decisional practice of the EU commission in 4-to-3 mergers
 - Structural remedies: divestment of spectrum and/or finding a new competitor that would enter the market to replace the target (for ex. Hutchison 3G Italy/Wind/JV); or
 - Proving the target is not an “important competitive force, (27.11.2018, T-Mobile NL/Tele2 NL, case COMP/M.8792)” or
 - Offering convincing access remedies that would produce (or reinforce) strong and efficient MVNO competition (for ex., European Commission, dec. Art. 8(2) R. 139/2004 of 28.5.2014, Hutchison 3G UK/Telefónica Ireland, case COMP/M.6992)
- The road not taken by the Albanian NCA
 - No structural remedies, such as divestiture of spectrum holding
 - What can be inferred about the NCA’s view on the number of MNOs in the Albanian market?

Merger review by the Albanian NCA (2) – Grounds for approval

- Formal grounds for approving the merger
 - *“the company Albtelecom is not an efficient competitor according to the economic indicators”* (par. 90-91)
 - incurred losses for the last three consecutive years (2018-2020), the amount of the losses getting worse from year to year.
 - Negative return on equity (ROE) and return on assets (ROA) are negative for the years 2018-2022.
 - Struggling to keep up with the technological developments which are critical for the electronic communications market.
- Additional motives referred to incidentally
 - Combination of mobile and fixed network services
 - National security concerns

Merger review by the Albanian NCA (3) – The Duopoly and its discontents

- The NCA notices that both Vodafone Albania and the merged entity “are companies with a dominant position in the retail mobile service market, giving the mobile service market the characteristics of a *DUOPOLY* market.” (Duopoly is written in capital letters in the original text of the NCA decision) – discomfort of the NCA.
- Remedies “to the Duopoly”
 - Remedies adopted by the NCA (obligations on network access for MVNOs, cost-based pricing, and non-discrimination, which are to be monitored by the Competition Authority.)
 - Remedies recommended to the NRA by the NCA, essentially:
 - To impose access by MVNOs to the networks of the two operators, both of whom possess a dominant position in the market;
 - To make changes to the spectrum holding landscape in order to reflect the new market structure.

Spectrum aggregation in case of mergers: overlapping or exclusive jurisdiction between NCA & NRA

- NCA underlined that the merger would result in the accumulation of spectrum under the control of the merging companies, enabling them to hold 59% of the assigned spectrum compared to 41% in the hands of the other operator. (par. 63)
 - No action taken by the NCA based on this observation: Lack of jurisdiction, lack of means, immaterial?
 - According to the European Commission, the assessment of “*the competitive impact of the spectrum aggregation obtained by the merged entity, [...] falls under the exclusive jurisdiction of the Commission*”. (par. 525 of Case M.7018 - TELEFÓNICA DEUTSCHLAND/ E-PLUS, 02.07.2014)
- NRA is the public body in charge for safeguarding and promoting competition in spectral affairs (Council of Minister’s Decision No. 636, dated 29.7.2020 On the approval the multiyear program on spectral policy)

Options of the NRA post- merger (1): Divestiture of spectrum rights

- Options of the NRA
 - Divestiture of spectrum rights
 - Refraining from taking any action
 - Spectrum rebalancing
- After the merger authorization, Albtelcom and One Communications continued their distinct existence: two separate brands, two separate networks
- Divestiture of spectrum rights
 - Firstly, it should have been a study and argument explored by the NCA. Secondly, the NCA did not recommend this course of action.
 - A thorough economic analysis concludes that the current spectrum availability makes it impossible or nearly impossible the entry of a new network provider (Over-accumulation / hoarding of spectrum rights with anti-competitive effects)
 - It would have necessarily involved the government taking into account that, in absence of any buyer showing up, the government had to step in and indemnify rightsholders.
 - Jeopardizes efficient use of spectrum, service quality which relies on suitable and sufficient radio spectrum

Divestiture of spectrum rights to promote MNO entry

- Study on the possibility and obstacles of MNO entry
- Spectrum availability:
 - In the low-bands
 - In the 800 MhZ frequency band: 10 MhZ, initially set aside for assignment to Albtelecom, is available.
 - The 700 MhZ frequency band: still under administration of the broadcasters' authority. Its release is imminent.
 - In the upper mid-bands 3400 to 3800 MhZ (lately considered as the sweet spot for 5G deployment)
 - In the high-bands (the millimeter wave spectrum)
- Prima facie, a forward-looking analysis demonstrates that a potential 3rd entrant has sufficient access to adequate spectrum on all categories of frequency bands.

Options of the NRA post- merger (2): Refraining from taking any action

- Concern that the over-accumulation of spectrum, following a merger authorization, would produce anti-competitive effects has been rejected by the EC (for example Commission Decision of 1 September 2016 in case M.775 – HUTCHISON 3G ITALY/WIND/JV, par. 847)
 - (i) the transaction did not have any impact on the spectrum holdings of the competing MNOs, on the basis of which they were currently able to compete;
 - (ii) the merging companies would need to maintain both existing networks until the networks had been consolidated, and therefore would need more spectrum than the competing MNOs, which only operate one network;
 - (iii) a spectrum asymmetry in and of itself does not necessarily lead to competition concerns, but might actually stimulate competition among MNOs with differently sized spectrum holdings, since improved services stemming from an enlarged spectrum portfolio could force competitors to in turn improve their offerings, thus stimulating competition; and
 - (iv) a foreclosure or marginalisation of either of the competing MNOs due to the improved network of the combined entity was unlikely, as the other MNOs would hold sufficient spectrum enabling them to compete even post-transaction.

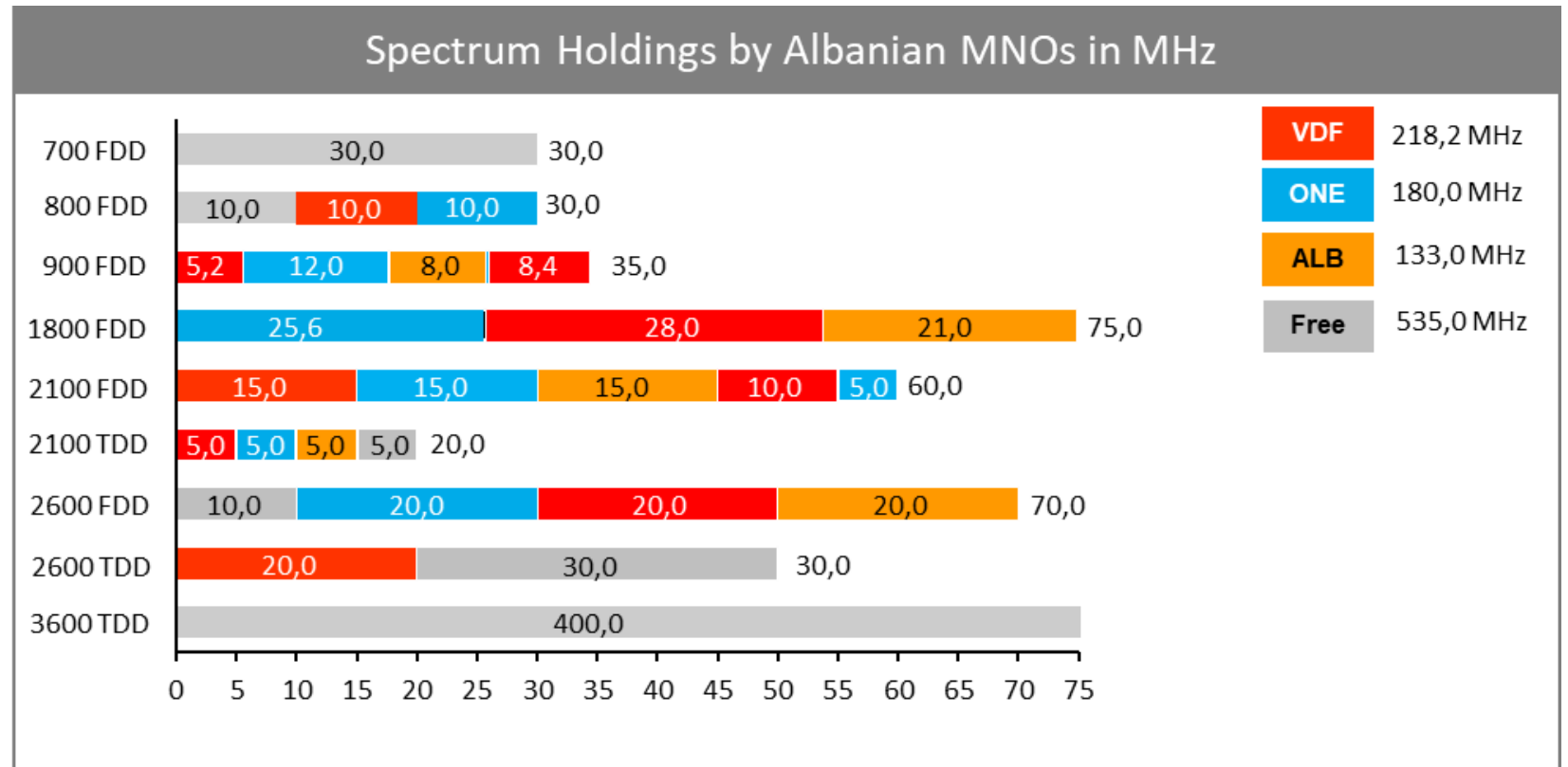
Options of the NRA post- merger (3): Spectrum rebalancing & reshuffling

- Policy divergence between competition authorities & spectrum authorities
- EC's viewpoint: "*BNetzA assesses whether the spectrum asymmetry resulting from the aggregation obtained by the merged entity impedes upon the **efficient use of frequencies** and **whether it constitutes a discrimination**, as the aggregation of spectrum does not stem from a non-discriminatory, objective and transparent award procedure*" (par. 525 of Case M.7018 - TELEFÓNICA DEUTSCHLAND/E-PLUS, 02.07.2014)

Albanian law:

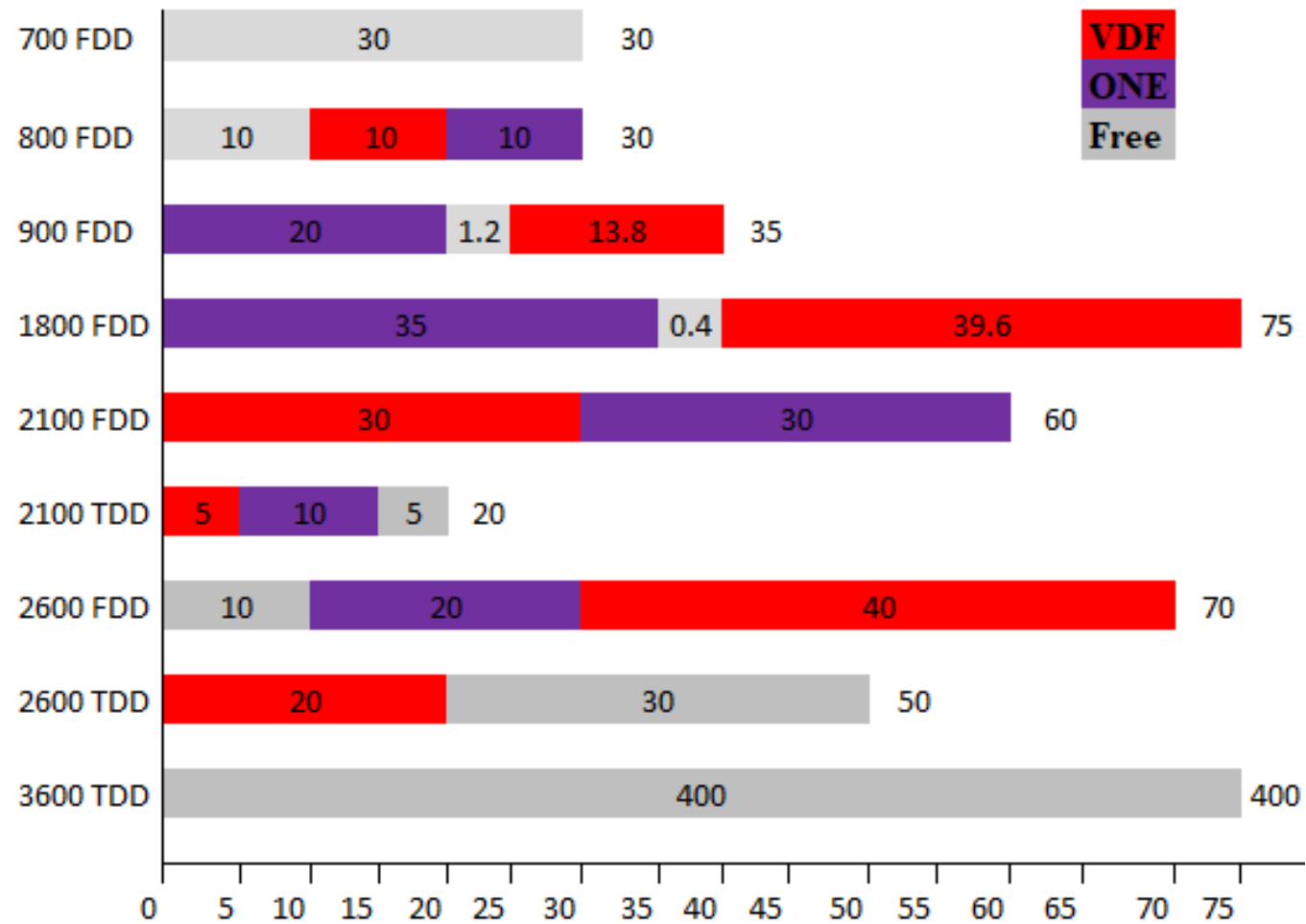
- The assignment of frequencies is based upon the principles of objectivity, transparency, proportionality and non-discrimination (Art. 66 of Albanian law on electronic communications)
 - One sole network provider would accumulate the total of the spectrum which had been assigned to two network providers
- Obligation to ensure efficient use of the frequencies (art. 65 of the law)
 - Patchwork of spectrum assignments jeopardizing the efficient use of the spectrum

Spectrum holding pre-merger



Merged entity (ONE + ALB) comparatively larger holdings in the lower mid-bands (especially 1800FDD and 2100FDD)

Spectrum holding post-rebalancing & reshuffling



Finalization of the merger: impact on prices and service quality

- BEREC Report on Post-Merger Market Developments (2018)
 - Quality of service
 - Retail prices
- Timeline:
 - Merger authorization (March 8th, 2022)
 - Establishment of the merged entity (January 1st, 2023)
 - Cutover, migration of mobile users from Altelekom network to ONE's network (April 8th, 2023)
 - Physical transfer of spectrum from the merged entity to the other operator (April 30th, 2023)
 - Reshuffling (May 25th, 2023)
- Initial assessment

Promoting market entry: MVNO entry

- **2nd NCA recommendation to the NRA:** To impose access by MVNOs to the networks of the two operators, both of whom possess a dominant position in the market;
- Legal basis for regulatory access by MVNOs:
 - Competition obligation, arising from a merger review case
 - Condition in a spectrum license
 - Imposing obligations and conditions when assigning spectrum rights, such as “ensuring wholesale access” (Council of Minister’s Decision No. 636, dated 29.7.2020 On the approval the multiyear program on spectral policy
 - Regulatory measure based upon a market analysis
 - Assessment of the three-criteria test
 - One of the criteria to justify regulation is the inadequacy and insufficiency of competition rules.

Conclusion: Regulation & Competition in the new EECC era

- Mobile networks, empire of competition policy
- The impact of the European Electronic Communications Code (EECC) on the interaction between competition policy and regulation
- From misunderstanding to effective cooperation
 - Classical institutional setup: sectoral regulation & competition authority
 - Who is subsidiary to whom?