EN

Case No COMP/M.6497 – HUTCHISON 3G AUSTRIA / ORANGE AUSTRIA

Only the EN text is authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Article 8 (2)

Date: 12/12/2012

EUROPEAN COMMISSION

Strasbourg, 12.12.2012
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PUBLIC VERSION

COMMISSION DECISION

of 12.12.2012

addressed to:

Hutchison 3G Austria Holdings GmbH

declaring a concentration to be compatible with the internal market and the EEA agreement
(Case No M.6497 – HUTCHISON 3G AUSTRIA / ORANGE AUSTRIA)

(Text with EEA relevance)

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TABLE OF CONTENTS

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings,[1] and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 28 June 2012 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,[2]

Having regard to the final report of the Hearing Officer in this case,[3]

WHEREAS:

1. THE PARTIES

(1) On 7 May 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 (the "Merger Regulation") by which the undertaking Hutchison 3G Austria Holdings GmbH ("H3G Austria Holdings", Austria) (the "Notifying Party"), the parent

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[1] OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

[2] OJ C ...,...200. , p....

[3] OJ C ...,...200. , p....

company of Hutchison 3G Austria GmbH ("H3G", Austria) and an indirect wholly owned subsidiary of Hutchison Whampoa Limited ("HWL", Hong Kong), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of Styrol Holding 1 GmbH ("Styrol", Austria) and its indirect wholly owned subsidiary Orange Austria Telecommunications GmbH ("Orange", Austria), excluding Yesss! Telekommunikation GmbH ("Yesss!"), by way of purchase of shares (together "the Parties").

(2) **HWL** is a multi-national conglomerate headquartered in Hong Kong. The operations of HWL and of its associated companies consist of six core businesses: ports and related services, property and hotels, retail, energy, infrastructure; and telecommunications. In the European Union, subsidiaries of HWL include mobile network operators in Austria, Denmark, Ireland, Italy, Sweden, and the United Kingdom.

(3) **H3G** is a mobile network operator (MNO) active in Austria under the brand name "3" and wholly owned by HWL.

(4) **Orange** is an Austrian MNO. Orange and its parent company Styrol are currently owned by Stubai S.C.A. ("Stubai"), a wholly-owned subsidiary of the private equity investment fund Mid Europa Partners ("MEP"), and Orange Belgium S.A., a wholly-owned subsidiary of France Télécom S.A. Yesss! Telekommunikation GmbH is a fully-owned subsidiary of Orange.

2. THE CONCENTRATION

(5) On 2 February 2012, H3G Austria Holdings, on the one hand, and Stubai and Orange Belgium S.A., on the other hand, entered into an agreement for the sale and transfer of the share capital of Styrol, the indirect owner of 100% of the share capital of Orange (the "Proposed Transaction"). Since H3G Austria Holdings will immediately sell Yesss! to Telekom Austria AG ("TA"),[4] there will be no effective concentration of economic power between H3G and Orange as a whole including Yesss!.[5] The onward sale of Yesss! therefore constitutes a separate transaction for merger control purposes.

(6) As a result of the Proposed Transaction, Orange (excluding Yesss!)[6] will be solely controlled by H3G Austria Holdings. The operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(7) Two further transactions are conditional on the Proposed Transaction but separate from it for the purposes of applying the Merger Regulation since

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4 See paragraph (8) and following.

5 See paragraph 32 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95 16.4.2008, p. 1. (the "Consolidated Jurisdictional Notice").

6 In the remainder of this Decision "Orange" shall refer to Orange only, excluding Yesss!, unless otherwise stated.

control of the assets concerned is acquired by an undertaking other than H3G.[7]

2.1. The acquisition of Yesss! by TA

(8) Firstly, H3G will immediately sell-on Yesss!, in a back-to-back operation,to TA, the telecoms incumbent which owns the mobile market leader A1 (the Yesss! Acquisition). Yesss! is a "no frills" mobile virtual network operator (MVNO) currently fully-owned by Orange and providing services on its network.

(9) Although the sell-on of Yesss! constitutes a separate concentration as the Yesss! Acquisition involves the ultimate acquisition of control by a separate undertaking, TA, both concentrations, H3G / Orange and TA / Yesss!, are inter-conditional. Completion of the H3G / Orange transaction is conditional upon the fulfilment of all conditions agreed between H3G Austria Holdings and TA in relation to the Yesss! Acquisition. One of these conditions is prior merger control clearance of the Proposed Transaction.

(10) The Yesss! Acquisition was notified to the Bundeswettbewerbsbehörde ("BWB") on 31 May 2012 which requested the Austrian Cartel Court ("Oberlandesgericht Wien als Kartellgericht erster Instanz") to open proceedings on 28 June 2012. The concentration subject to Union jurisdiction is the acquisition of Orange Austria (minus the "Yesss!" business) by H3G.

2.2. Acquisition of Orange assets by TA from H3G

(11) Secondly, TA will acquire from H3G certain sites, spectrum frequencies and intellectual property rights currently owned by Orange ("TA spectrum deal"). According to the Notifying Party, the transfer of frequencies must be approved by the Austrian Telecommunications Regulator ("Rundfunk & Telekom Regulierungs-GmbH" ("RTR") and "Telekom-Control Kommission" ("TKK")).

3. UNION DIMENSION

(12) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (HWL: EUR 26 597; Orange: EUR 485.1).[8] Each of them has a Union-wide turnover in excess of EUR 250 million (HWL: EUR […]*; Orange: EUR […]*). Even though Orange is active in Austria only, HWL does not achieve more than two-thirds of its aggregate Union-wide turnover within one and the same Member State. The Proposed Transaction therefore has a Union dimension.

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7 See paragraph 41 of the Consolidated Jurisdictional Notice.

8 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

4. PROCEDURE

4.1. General procedure

(13) Based on a market investigation, the Commission raised serious doubts as to the compatibility of the Proposed Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 28 June 2012 ("the Article 6(1)(c) decision").

(14) On 29 June 2012 the Commission held a state of play meeting where, at the request of the Notifying Party, some minimum requirements for a possible remedy solution were discussed with the Notifying Party.

(15) The Notifying Party submitted written comments in response to the Article 6(1)(c) decision on 11 September 2012.

(16) During the second phase investigation, the Commission sent several requests for information to the Notifying Party and to Orange, in particular the requests of 4 July 2012, 13 July 2012 and 27 July 2012. It also sent a request for information to the Notifying Party alone on 20 July 2012. The Notifying Party and Orange both responded to those requests.

(17) From 1 July to 19 July 2012 the Commission also sent requests for information to several competitors of the notifying party and potential (MVNO) market entrants.

(18) On 30 July 2012, the Commission adopted a decision pursuant to Article 10(3), second subparagraph, third sentence to extend the procedure by a total of 15 working days with the agreement of the Notifying Party. Accordingly, the legal deadline for the Commission to adopt a decision pursuant to Article 8(1), (2) or (3) of the Merger Regulation was extended to 27 November 2012.

(19) On 28 August 2012 the Commission adopted a decision pursuant to Article 10(3) second subparagraph, third sentence to extend the procedure by a total of 3 working days with the agreement of the Notifying Party. Accordingly, the legal deadline for the Commission to adopt a decision pursuant to Article 8(1), (2) or (3) of the Merger Regulation was extended until 30 November 2012.

(20) On 20 September 2012 the Commission sent a Statement of Objections ("the SO") to the Notifying Party under Article 18 of the Merger Regulation.

(21) On 5 October 2012 the Notifying Party submitted its response to the SO. Orange commented on the SO on 4 October 2012.

(22) On 10 October 2012, the Commission's Hearing Officer afforded the Notifying Party the opportunity to make itself heard in an oral hearing. Following their requests, T-Mobile Austria ("T-Mobile") and Tele2 as well as UPC (Liberty Global) were admitted as interested third parties to the Oral Hearing.

4.2. Referral Request

(23) On 29 May 2012, the BWB requested, on the basis of Article 9(2)(a) of the Merger Regulation, a referral of the Proposed Transaction from the Commission to Austria (the "Referral Request").[9]

(24) In the Referral Request, the BWB asserted that the Proposed Transaction threatened to significantly affect competition in the Austrian telecommunications market which presented all the characteristics of distinct markets in accordance with Article 9(2)(a). According to the BWB's assessment, the Proposed Transaction threatened to affect competition in two ways.

(25) The BWB's first concern relates to the loss of a competitor in an already highly concentrated market. The reduction from four to three MNOs might therefore reduce competitive pressure. In the BWB's view, H3G and Orange are also price leaders. Thus Orange's disappearance might also lead to a change of incentives for H3G to act less price-aggressively.

(26) Furthermore, the BWB is of the opinion that there are already indications of coordination in the market. In its view, the market structure after the merger would increase the potential for collusive behaviour while new market entries would be unlikely.

(27) The BWB did not send any reminder pursuant to Article 9(5) of the Merger Regulation after the Commission adopted the Article 6(1)(c) decision on 28 July 2012. The Commission therefore decided to deal with the aspects raised by the Austrian competition authority itself pursuant to Article 9(3)(a) of the Merger Regulation.

5. RELEVANT MARKETS

5.1. Introduction

(28) In previous Commission decisions[10] the mobile telecommunications services product markets have been defined as follows:[11]

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9 See Doc ID1863.

10 See Case No COMP/M.5650 – *T-Mobile/Orange;* Commission Decision of 27 November 2007 in Case No COMP/M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, OJ C 300, 12.12.2007, p. 4*;* Commission Decision 2007/193/EC of 26 April 2006 in Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring,* OJ L 88, 29.3.2007, p. 44; Commission Decision of 24 September 2004 in Case No COMP/ M.3530 – *TeliaSonera/Orange*, OJ C 263, 26.10.2004, p. 7*;* and Commission Decision of 16 September 2003 in Case No COMP/M.3245 – *Vodafone/Singlepoint,* OJ C 242, 9.10.2003, p. 5.

11 See also, to the extent relevant, the Commission's Recommendations of 11 February 2003 and 17 December 2007 on Relevant Product and Service Markets within the electronic communications sector: Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets within the electronic communication networks and services, OJ L 114, 8.5.2003, p. 45; Commission Recommendation (2007/879/EC) of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65.

(a) mobile telecommunications services to end customers (retail mobile telecommunications services market);

(b) wholesale access and call origination on public mobile telephone networks;

(c) wholesale market for international roaming; and

(d) wholesale market for mobile call termination

(29) The activities of H3G and Orange would, on this basis, overlap in the market for mobile telecommunications services to end customers. The Parties are also potential competitors on the market for wholesale access and call origination on public mobile telephone networks. There is also a link between the activities of H3G and Orange on the wholesale market for international roaming and the wholesale market for mobile call termination.

5.2. Product markets

5.2.1. Mobile telecommunications services to end customers

(30) The Notifying Party notes that, in previous decisions, the Commission did not further subdivide the market for the provision of mobile telecommunications services to end customers by type of customer (corporate or private, post-paid subscribers or pre-paid customers) or by type of network technology (2G/GSM or 3G/UMTS). The Commission therefore assessed previous cases on the basis of an overall market for the provision of mobile telecommunications services to end customers.[12] The Notifying Party argues that a similar approach should be adopted in this case.

(31) In Sections 5.2.1.1 to 5.2.1.6, the Commission considers whether for the purposes of this case it is necessary to further subdivide the market for mobile telecommunications services to end customers.

5.2.1.1. Private and business customers

5.2.1.1.1. The view of the Notifying Party

(32) As regards the possible sub-segmentation of the market for mobile telecommunications to end customers depending on the type of customer, the Notifying Party considers that the service provided to private and business customers is essentially the same and that there is supply side substitutability by network operators.

5.2.1.1.2. The Commission's assessment

(33) In previous decisions, the Commission did not subdivide the market between private and business customers.[13] In Case M.5650 – *T-Mobile/Orange,* the

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[12] See Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*; Case No COMP/ M.3530 – *TeliaSonera/Orange*; Case No COMP/M.3245 – *Vodafone/Singlepoint*.

[13] See Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*.

Commission found that although business customers were considered "heavy users" as opposed to private customers who use mobile telecommunications more scarcely, the service offered was substantially the same as that offered to private customers.

(34) In the light of the responses to the market investigation, nonetheless, the Commission notes that there might be distinct demand as between private and business customers. Business customers have, to some degree, different needs from private customers, can easily be identified and are therefore targeted with specific offers. Certain larger customers might even be offered tailor-made tariff plans and additional services. Whilst some business customers did suggest that they might switch to residential tariffs in the event that there were to be a small but significant non-transitory increase in the price of business services, the majority indicated that they would not do so.[14,15] Any such substitutability as there might be would, moreover, operate only in one direction, since private customers could not switch to business tariffs.

(35) Therefore, the Commission considers that due to supply side considerations there is an overall product market for private and business customers as regards mobile telecommunications services to end customers.[16]

5.2.1.2. Pre-paid and post-paid services

5.2.1.2.1. The view of the Notifying Party

(36) As regards a possible distinction between pre-paid and post-paid services, the Notifying Party submits that the line is becoming increasingly blurred as hybrid products, such as pre-paid customers paying by way of a debit order and post-paid customers paying by way of a pre-paid card are becoming more important. Moreover, there is an increasing number of offers under which post-paid customer are not bound to any commitment period.

(37) As regards supply side substitution, the Notifying Party submits that now all MNOs are active in both the pre-paid and the post-paid segment.

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14 Responses to Commission questionnaire 2 to Business Customers and Consumer Associations, Doc ID 508.

15 Consumer association's response to Commission questionnaire 2 to Business Customers and Consumer Associations, Doc ID 508; the questions were worded as follows: "In the Austrian retail market for mobile telephony, do you consider that the services offered to private/residential <u>post-paid</u> customers and business customers are different?" and "Would your company / consumers switch from a business tariff to a private / residential customer <u>tariff</u>, if the price of all available business tariffs increased on a non-temporary basis by 5–10% while prices of private / residential tariffs would remain constant?"

16 This does not necessarily imply that supply-side substitution is capable in this case of exercising a competitive constraint between the two segments. As further argued in the competitive assessment (Section 6), the Commission considers that this is not the case.

5.2.1.2.2. The Commission's assessment

(38) The Commission has previously found that the distinction between the two segments is becoming blurred due to the development of different types of offers.[17]

(39) In the light of the responses to the market investigation, the Commission considers that there are also some arguments in support of this position in this case, at least as regards retail customers (for large business customers pre-paid offers do not generally appear to be suitable). One consumer association noted that regardless of whether an offer was pre-paid or post-paid, "[f]rom consumers' point of view the lower offer is more attractive."[18] Furthermore it may be that some forms of pre-paid in fact allow for automatic top-up and in this respect are more similar to post-paid. On the other hand, for occasional use (by children, non-residents, etc.) post-paid would seem less suitable as an alternative, whilst pre-paid may be less suitable for intensive use and international roaming.

(40) The availability of handset promotions is also different between the two segments. Post-paid services have, until now, in the Austrian market, often been characterised by subsidised prices for handsets which are then offset against the revenues obtained by operators during the period (typically 24 months) in which customers are contractually locked into a given plan. Pre-paid services (and certain post-paid services like bob[19] which lack this characteristic) can be cancelled at any moment or use can simply cease, at which point no further payments are necessary.

(41) The Commission's conclusion is that pre-paid and post-paid are part of the same market, at least in view of supply-side substitution. At the same time, there is a distinct segment of demand which is often targeted by pre-paid offers where the user concerned makes infrequent calls but may themselves be called more frequently. The interaction between the pre-paid and post-paid segments will further be considered in the competitive assessment.

5.2.1.3. Type of Technology (2G, 3G and Future 4G Technologies)

5.2.1.3.1. The view of the Notifying Party

(42) The Notifying Party proposes that in this case it would also be inappropriate to draw a distinction based on the generation of network technology. It submits that to date, more than half of the SIM cards in Austria are already 3G cards. There are no new 2G-only offers on the market anymore. Further, cus-

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17 See Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*.

18 Consumer association's response to Commission questionnaire 2 to Business Customers and Consumer Associations, Doc ID 508; the question was worded as follows: "Would your company / consumers switch from post-paid / pay monthly services to pre-paid / pay-as-you-go subscription, if the price of all available post-paid services increased on a non-temporary basis by 5–10% while prices of pre-paid would remain constant?"

19 See Recital (110).

tomers cannot distinguish a voice call received on a 2G or a 3G network. Therefore, in its view, a subdivision of the mobile end-customer market by type of network technology is not appropriate.

5.2.1.3.2. The Commission's assessment

(43) In previous decisions the Commission considered that there was a single market for the provision of mobile telecommunications services to end customers, in so far as they could be provided on both a 2G and a 3G basis.[20] Even though voice telecommunications and data services, such as text messaging, access to e-mail services or general Internet access, can be provided on 2G or 3G networks, 2G networks provide a much lower speed. Other services, such as video telecommunications, mobile TV or other multimedia services, require the faster transmission speed which only a 3G network can provide. On the other hand, access to each of these technology layers is a function of the generation of handset which the end-user possesses, since users of 2G-only handsets cannot access 3G and a fortiori LTE[21] services.

(44) In the light of the responses to the market investigation the Commission considers that the subdivision of the mobile end-customer market by type of network technology is not appropriate.[22] For instance, the vast majority of market participants argued that, for them, a change to LTE was not important and that they were not willing to pay a premium for LTE technology.[23] Furthermore, one consumer organisation noted that "consumers do not differentiate based on technology but only with regard to their own needs. Even after the introduction of UMTS, there have been no specific UMTS tariffs. […] However customers will be ready to pay for more data volume if needed (as they already do)."[24] Moreover, in terms of coverage, LTE is expected to be

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20 See Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 24; Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring,* paragraph 18.

21 LTE stands for Long Term Evolution, marketed as 4G LTE. The technology is a standard for wireless communication of high-speed data for mobile phones and data terminals.

22 See responses to Commission questionnaires 1 to Competitors, Doc ID 496; 2 to Business Customers and Consumer associations, Doc ID 508; 3 to Distributors and Resellers, Doc ID 498; 4 to Network Operators outside Austria (MNOs and MVNOs), Doc ID 372; the question was worded as follows: "In the cases M.3916 – T-Mobile Austria/tele.ring and M.5650 – *T-Mobile/Orange United Kingdom,* the Commission concluded that there was an overall relevant market for the provision of mobile telecommunications services to end customers and did not further subdivide the market by […] technology (2G/GSM or 3G/UMTS networks). Do you consider this holds today?"

23 See responses to Commission questionnaire 2 to Business Customers and Consumer associations, Doc ID 508; the questions were worded as follows: "How important would it be for your company / consumers to switch to LTE?" and "Do you think that your company / consumers would be prepared to pay a premium for LTE?"

24 Consumer association's response to Commission questionnaire 2 to Business Customers and Consumer associations, Doc ID 508; the question was worded as follows: "Do you think that your company / consumers would be prepared to pay a premium for LTE?" ("Konsument[en] differenzieren nicht nach Technologie, sondern nach deren Bedürfnissen. Auch nach der Einführung von UMTS sind keine eigenen UMTS-Tarife entstanden. Es ist nicht zu erwarten,

complemented by 3G.[25] It is also important to note that LTE in Austria is not yet ready to be used for voice traffic and such a development is not expected before 2015; therefore voice traffic will need for the time being to fall back on the legacy 2G and 3G technology layers.

(45) Notwithstanding this, there are clear performance differences for data traffic over 2G, 3G and LTE networks, the importance of which to a given user will vary depending on that user's pattern of use. The Notifying Party is aware of the importance of network quality to users, particularly data-intensive users, and seeks to differentiate its service offering on this basis. For the moment, however, such commercial differentiation does not foreclose use of the latest available network technology layer to users with devices supporting access to that layer, and therefore a distinction for market definition purposes appears superfluous.

(46) The Commission therefore considers that in view of the limited customer differentiation between different types of technology and the fact that all MNOs offer a combination of mobile services over both 2G and 3G networks, there are at present no distinct product markets for different types of network services.

5.2.1.4. Voice telecommunications and data services

(47) Voice telecommunications and data services, such as access to email services or general Internet services, are often provided together as a bundled tariff plan offering. With the introduction of smartphones, a wide variety of data intensive applications has emerged through the use of mobile handsets. On the other hand, data consumption also takes place on a standalone basis, separate from voice services, through mobile broadband dongles, 3G/4G enabled tablets or mobile 3G/4G routers.

5.2.1.4.1. The view of the Notifying Party

(48) In relation to the different services provided over the mobile network (voice, SMS and data), the Notifying Party agrees with the Commission's previous practice, based on the definition of a single mobile telecommunications services market.

5.2.1.4.2. The Commission's assessment

(49) The Commission has considered whether there is an overall market for all mobile retail services which would encompass both voice and data services. Alternatively, the Commission considered whether the market should be subdivided into a market for voice retail mobile services and data retail mobile services. This latter market would include both mobile broadband over

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dass es eigene LTE-Tarife geben wird, allerdings werden die Konsument[en] bei Bedarf bereit sein, für mehr Datenvolumen zu zahlen (wie jetzt auch schon).".)

25 See MNO's response to Commission questionnaire 4 to Network Operators outside Austria (MNOs and MVNOs), Doc ID 372; the question was worded as follows: 21.1 "How long do you expect the LTE technology cycle to last? What do you con-sider to be the time horizon for LTE revenues?"

smartphones and over data-only devices. Finally, as another alternative, the Commission considered whether voice and mobile broadband over voice-enabled devices belong in one market and mobile broadband over data-only devices forms a distinct market.

(50) Voice and mobile broadband over smartphones are commonly acquired together in a bundle and used over the same mobile handset, which is often provided at a subsidised price as part of the bundled offering, whereas mobile broadband over data-only devices is purchased and consumed independently of any voice services. In the light of the market investigation, the Commission has confirmed the increasing importance of and demand for data services as well as the decrease in voice only offers (without data). A vast majority of the participants in the market investigation considers that (except for data-only devices) data and voice are usually purchased in a bundle. Some respondents even considered *"voice only [as] not relevant anymore"*.[26] A significant number of respondents highlighted that such combinations were required for smartphones.

(51) Notable exceptions to bundled services of voice and data were dongles, tablets and 3G/4G mobile routers which use data only services only.[27] Such devices do not necessarily support voice traffic (other than through Voice over Internet Protocol (VoIP)). Moreover, the market penetration of data-only devices is increasing, making it more attractive to devise tariff plans specifically suited to mobile broadband over data-only devices and indeed in some cases to offer such plans in a bundle with a device of the type in question. This fact is not altered by the consideration, put forward by the Notifying Party, that all SIM cards in Austria are technically capable of offering all services, since the accompanying tariff plans incentivise one type of use (in a data-only device) or the other (in a voice-enabled device, that is to say a phone).

(52) It follows that, from a demand perspective, services designed for use on a voice-enabled device are distinguished from services designed for use on a data-only device. However, the Commission considers that due to supply-side considerations and notably the fact that all providers (or at least all MNOs) offer both types of service, it is not appropriate to depart from its previous practice of defining a single market including all services provided whether for data-only devices or for voice-enabled devices.

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26 Business customer's response to the Commission questionnaire 2 to Business Customers and Consumer Associations, Doc ID 508; the question was worded as follows: "Do you think that data and voice are usually purchased together in a bundle or separately?"

27 Responses to Commission questionnaire 2 to Business Customers and Consumer associations, Doc ID 508; the question was worded as follows: "Does your company / Do consumers purchase mobile broadband services (whether 2G or 3G) in Austria in conjunction with voice services or separately?"

5.2.1.5. Fixed and mobile data services

5.2.1.5.1. The view of the Notifying Party

(53) The Notifying Party argues that mobile data services increasingly offer a substitute to traditional fixed line internet services. There is evidence that mobile broadband may provide an effective alternative to fixed line services for many Austrian residential customers. The Notifying Party considers, however, that a number of differences between the product offerings suggest that fixed line services are not fully substitutable with mobile data services and that substitution may be limited to certain types of internet use (such as residential use). Thus the Notifying Party believes that it is premature to decide on whether mobile data services and fixed internet services are part of a single product market.

5.2.1.5.2. The Commission's assessment

(54) The RTR/TKK in its Telecommunications Markets Ordinance has found that mobile broadband access by residential customers is a substitute for fixed line internet services.[28] The Commission does not dispute this finding in relation to Austria.

(55) However, for the assessment in this case, the question is the reverse, namely not whether fixed broadband is substitutable with mobile but whether fixed broadband services are a substitute for mobile data services in general or for mobile broadband specifically. The Ordinance does not cover this question.

(56) The results of the market investigation have shown that there is only limited substitutability for mobile data services by fixed broadband.[29] Mobile data services delivered on a smartphone in a bundle with voice services could not be fully substituted by fixed broadband in terms of their type of use (that is to say, in a mobile handset device). Most importantly, there is limited substitutability between mobile data over dongles, tablets, etc. and fixed broadband because of the restriction in mobility. Only mobile data services offer customers the possibility to access the internet universally whilst on the move. Customers for whom mobility is important (including in locations where Wi-Fi is unavailable or less satisfactory) would not consider fixed line services as an alternative.[30] Some respondents to the market investigation consider

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[28] See Novelle der TKMVO 2003 samt erläuternden Bemerkungen – "Breitbandmarktdefinitionsverordnung", Federal Law Gazette ("Bundesgesetzblatt") II Nr 38/2005 of 29.4.2005; 2. Novelle der TKMV 2008 samt erläuternden Bemerkungen", available at http://www.rtr.at/de/tk/TKMV2008 (retrieved 31 October 2012).

[29] MNOs' response to Commission questionnaire 1 to Competitors Doc ID 496; the question was worded as follows: 72 "Do you consider that, in Austria, retail fixed broadband services are exercising competitive constraints on retail mobile broadband services?"

[30] Whilst in certain countries there are relatively dense urban public wifi subscription networks, raising at least the possibility of substitution for certain users, this is not the case in Austria.

that mobile broadband is "indispensable for mobile devices, because users want to be independent from fixed broadband".[31]

(57) In the light of the foregoing the Commission considers that fixed broadband services are not a substitute for mobile data services and therefore do not form part of the same product market.

5.2.1.6. Conclusion

(58) For the purpose of this decision, the Commission considers that there is a single market in Austria for the provision of mobile telecommunications services to end customers.

5.2.2. Wholesale market for access and call origination on public mobile telephone networks

(59) Wholesale network access is provided by MNOs to MVNOs. This includes the provision of a range of wholesale telecommunications services on a mobile telephone network for the purpose of providing retail mobile telecommunications services to end customers. These services include wholesale network access and call origination, call termination and international roaming, whether for voice, SMS or data services. The wholesale market for these services is therefore (i) on the supply-side, the MNOs who own their mobile networks and (ii) on the demand-side, the MVNOs who seek access to the MNO network in order to provide their retail services.[32]

5.2.2.1. The view of the Notifying Party

(60) The Notifying Party agrees with the Commission's approach in previous cases and submits that the Proposed Transaction should be assessed on the basis that there is a market for network access and call origination on public mobile telephone networks.

5.2.2.2. The Commission's assessment

(61) In previous decisions, the Commission considered wholesale network access and call origination to be part of the same product market. It noted that wholesale network access and call origination were key elements required to provide retail mobile telecommunications services. These elements were typically supplied together by an MNO, hence both services could be considered as part of the same market.[33]

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[31] Business Customer's response to Commission questionnaire 2 to Business Customers and Consumer Associations Doc ID 508; the question was worded as follows: "To what extent is mobile broadband access an existing or rapidly emerging alternative to fixed broadband internet access?"

[32] Commission Decision of 20 August 2007 in Case No COMP/M.4748 – *T-Mobile/Orange Netherlands,* OJ C 243, 17.10.2007, p. 1, paragraph 17; Commission Decision of 1 March 2010 in Case No COMP/M.5650 – *T-Mobile/Orange,* OJ C 108, 28.4.2010, p. 4, paragraph 28.

[33] See Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 27; Case No COMP/M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 15.

(62) In the market investigation, market participants unanimously affirmed that this approach is also appropriate in this case.

5.2.2.3. Conclusion

(63) In view of the foregoing, the Commission considers that there is a distinct wholesale market for access and call origination on public mobile telephone networks in Austria.

5.2.3. Wholesale market for international roaming

(64) International roaming is a service which allows mobile subscribers to use their mobile handsets and SIM cards to make and receive calls, to send and receive text messages and to use other data services when abroad. In order to be able to offer this service to their customers, MNOs conclude wholesale agreements with one another providing access and capacity on mobile networks in the foreign country.[34]

(65) Demand for wholesale international roaming services comes first from foreign mobile operators who wish to provide their own customers with mobile services outside their own network and, downstream, from subscribers wishing to use their mobile telephones outside their own countries.

(66) Roaming agreements can be concluded with a preferred foreign operator which offers specific conditions, as can be seen in particular in the creation of international roaming alliances such as the Freemove Alliance or the Vodafone partners.

(67) Therefore the Commission concludes that there is a separate wholesale market for international roaming.

5.2.4. Wholesale market for mobile call termination.

(68) Call termination is the service provided by network operator B to network operator A whereby a call originating in operator A's network is delivered to the user in operator B's network. Call termination thus allows users of different networks to communicate with one another. Call termination is a wholesale service which the various network operators provide one another on the basis of interconnection agreements, upstream of the provision of telecommunications services to end customers.[35]

(69) As established in previous Commission decisions,[36] there is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the operator

[34] See Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 32.

[35] See Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 36.

[36] See Commission Decision 2001/98/EC of 13 October 1999 in Case No IV/M.1439 – *Telia/Telenor*, OJ L 40, 9.2.2001, p. 1; Commission Decision of 10 July 2002 in Case No COMP/ M.2803 – *Telia/Sonera,* OJ C 201, 24.8.2002, p. 19 and Commission Decision of 10 June 2005 in Case No COMP/M.3806 – *Télefonica/ Cesky Telecom,* OJ C 156, 28.6.2005, p. 3. See also Revised Commission Recommendation of 17 December 2007 referring to wholesale voice call termination on individual mobile networks.

of the network to which the recipient is connected. Each individual network therefore constitutes a separate market for termination. This applies both to fixed networks and to mobile networks.[37]

(70) Therefore the Commission concludes that there is a separate wholesale market for mobile call termination.

5.3. Geographic markets

5.3.1. Mobile telecommunications services to end customers

(71) The Notifying Party suggests defining the relevant geographic market for the market for mobile telecommunications services to end customers, in line with previous Commission decisions,[38] as national in scope.

(72) In the market investigation the vast majority of respondents considered the relevant geographic markets to be national, that is to say, limited to the territory of Austria but no smaller.[39] There appears to be no relevant commercial practice or ability to discriminate between users on the basis of their location within the Austrian territory.

(73) In view of the foregoing, the Commission concludes that in this case the market for mobile telecommunications services to end customers is national in scope (that is to say, Austria).

5.3.2. Wholesale access and call origination on public mobile telephone networks

(74) The Notifying Party likewise suggests defining the relevant geographic market for the market for wholesale access and call origination on public mobile telephone networks, in line with previous Commission decisions,[40] as national in scope.

(75) In its previous decisions the Commission defined the geographic scope of the product market for wholesale access and call origination on public mobile telephone networks as national. This is due to regulatory barriers as the geographical scope of the licences granted to MNOs is in principle limited to ar-

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37 See Commission Decision of 10 January 2006 in Case No COMP/M.4035– *Téléfonica /O2,* OJ C 29, 4.2.2006, p. 14, paragraph 9 and following; Case No COMP/M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 13; Revised Commission Recommendation of 17 December 2007 referring to wholesale voice call termination on individual mobile networks, p. 24.

38 Case No COMP/M.5650 – T-Mobile/Orange*;* Case No COMP/M.4748 – *T-Mobile/Orange Netherlands;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

39 Responses to Commission questionnaires 1 to Competitors, Doc ID 496; 2 to Business Customers and Consumer Associations, Doc ID 508; 4 to Network Operators outside Austria (MNOs and MVNOs) Doc ID 372; the question was worded as follows: "In the cases M.3916 – *T-Mobile Austria / Tele.ring* and M.5650 – *T-Mobile / Orange United Kingdom*, the Commission concluded that the geographic market for mobile telecommunications services to end customers should be defined in national terms (for example restricted to Austria). Do you consider this holds today?"

40 Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/M.4748 – *T-Mobile/Orange Netherlands;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

eas which do not extend beyond the borders of a Member State. Moreover, the coverage of mobile networks tends to correspond to national borders, with the result that the supply of access and origination at wholesale level is national in scope.

(76) In the market investigation the vast majority of respondents confirmed the relevant geographic markets to be national, that is to say, limited to the territory of Austria but no smaller.[41]

(77) In view of the foregoing, the Commission concludes that in this case the market for wholesale access and call origination on public mobile telephone networks is national in scope (that is to say, Austria).

5.3.3. *Wholesale market for international roaming*

(78) The Notifying Party suggests defining the relevant geographic scope of the market for wholesale international roaming, in line with previous Commission decisions,[42] as national in scope. The Commission has based this view on the fact that wholesale international roaming agreements can be concluded only with companies which have an operating licence in the relevant country and licences to provide mobile services are restricted to a national territory. This was also confirmed in the market investigation.[43]

(79) In view of the foregoing, the Commission concludes that in this case the wholesale market for international roaming is national in scope (that is to say, Austria).

5.3.4. *Wholesale market for mobile call termination*

(80) In line with the Commission's previous decisions,[44] the Notifying Party submits that the relevant geographic market for call termination in mobile (and fixed) networks is national in scope, since the concrete size of the market

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41 Responses to Commission questionnaires 1 to Competitors, Doc ID 496; 2 to Business Customers and Consumer Associations, Doc ID 508; 4 to Network Operators outside Austria (MNOs and MVNOs) Doc ID 372; the question was worded as follows: "In the cases M.3916 – *T-Mobile Austria / Tele.ring* and M.5650 – *T-Mobile / Orange United Kingdom*, the Commission concluded that due to regulatory barriers, since the geographical scope of the licences granted to MNOs is in principle limited to areas which do not extend beyond the borders of a Member State, the geographic market for the provision of wholesale access and call origination on public mobile telephone networks is national. Do you consider this holds today?"

42 Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/M.4748 – *T-Mobile/Orange Netherlands;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

43 Responses to Commission questionnaires 1 to Competitors, Doc ID 496; 2 to Business Customers and Consumer Associations, Doc ID 508; 4 to Network Operators outside Austria (MNOs and MVNOs) Doc ID 372; the question was worded as follows: "In the cases M.3916 – *T-Mobile Austria / Tele.ring* and M.5650 – *T-Mobile / Orange United Kingdom*, the Commission concluded that the geographic market for the provision of international roaming is national, on the fact that wholesale international roaming agreements can be concluded only with companies which have an operating licence in the relevant country and licences to provide mobile services are restricted to the national territory. Do you consider this holds today?"

44 Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/M.4748 – *T-Mobile/Orange Netherlands;* Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

corresponds to the geographic dimension of the network which, in general, is limited to the national borders. This is essentially owing to regulatory barriers as the geographic scope of the licences is in principle limited to areas which do not extend beyond the borders of a Member State. This view was confirmed by the results of the market investigation.[45]

(81) In view of the foregoing, the Commission concludes that in this case the wholesale market for mobile call termination is national in scope (that is to say, Austria).

6. COMPETITIVE ASSESSMENT IN THE MARKET FOR MOBILE TELECOMMUNICATION SERVICES TO END CUSTOMERS

(82) The following assessment focuses on the market for mobile telecommunications services to end customers.

6.1. Introduction

(83) The Proposed Transaction will bring together two of the four MNOs in Austria. H3G and Orange are, respectively, the fourth and third MNOs ranked by market share size in the Austrian market for mobile telecommunications services to end customers. Despite their lower market shares compared to the other two MNOs, TA and T-Mobile, the Commission considers that the transaction will lead to a significant impediment of effective competition.

(84) The market is already highly concentrated. The intended consolidation will eliminate a fully-fledged competitor from the market and reduce the number of market players from four to three. The competition concerns identified by the Commission in this case are a consequence of four essential factors: the market structure, the high diversion ratios between the Parties, the significant margins which they realise, and the pre-merger importance of the Parties with regard to the acquisition of new business.[46] The market structure means that competition concerns would arise as a result of the Proposed Transaction in particular owing to high barriers to entry, the absence of significant buyer power and the existence on the part of competitors of an incentive to follow price increases by the merged entity. Furthermore, the argument of the Notifying Party according to which the competitive constraint posed by Orange in the market is likely to deteriorate in the near to medium term cannot be accepted on the basis of the evidence.

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[45] Responses to Commission questionnaires 1 to Competitors, Doc ID 496; 2 to Business Customers and Consumer Associations, Doc ID 508; 4 to Network Operators outside Austria (MNOs and MVNOs) Doc ID 372; the question was worded as follows: "In the cases M.3916 – *T-Mobile Austria / Tele.ring* and M.5650 – *T-Mobile / Orange*, the Commission concluded that the geographic markets for wholesale call termination are national, since they correspond to the geographic dimension of the network which in general is limited to national borders. Do you consider this holds today?"

[46] With the exception of the business and prepaid segments as set out in Section 6.4.3.2.

(85) The qualitative, as well as quantitative, evidence collected by the Commission during its market investigation confirms each of the key elements in its analysis.

6.2. Factors likely to lead to a significant impediment to effective competition

(86) A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger. These effects are non-coordinated effects.

(87) Often, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, which, typically, would have an appreciably larger market share than the next competitor post-merger.

(88) However, as set out in recital 25 in the preamble to the Merger Regulation, mergers in oligopolistic markets, involving the elimination of important competitive constraints that the Parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to effective competition notwithstanding that they do not give rise to or strengthen a dominant position.

(89) Recitals 24 and 25 in the preamble to the Merger Regulation clarify that all mergers giving rise to such non-coordinated effects should be declared incompatible with the internal market.

(90) The Notifying Party argues that, with a combined market share of under 25%, there is a presumption that the Proposed Transaction does not raise competition concerns. It claims that the Commission's prior decisions under the Merger Regulation concerning non-coordinated effects are, with very few exceptions, associated with market shares indicative of dominance.[47]

(91) To support this point, the Notifying Party cites four decisions that involved concerns in the absence of dominance in which the Commission opened a Phase II[48] investigation or commitments were accepted in Phase I].[49] The Notifying Party distinguishes these cases from the case at hand. In none of

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[47] See paragraph 22 of the Notifying Party's "Response to the Commission's decision of 28 June 2012 pursuant to Article 6(1)(c) of Regulation 139/2004" of 11 September 2012.

[48] The expression "Phase II" refers to the in-depth proceedings the Commission opens once it has established that a notified concentration gives rise to serious doubts. Phase I therefore refers to the Commission's investigation preceding such a decision.

[49] See cases Case No COMP/ M.3916 – *T-Mobile/teleMobile Austria/Tele.ring;* Commission Decision of 12 March 2009 in Case No COMP/M.5355 – *BASF/CIBA*, OJ C 122, 30.5.2009, p. 5*;* Commission Decision of 12 November 2009 in Case No COMP/M.5549 – *EDF/Segebel*, OJ C 57, 9.3.2010, p. 9*;* Commission Decision of 22 December 2008 in Case No COMP/M.5224 – *EDF/British Energy,* OJ C 38, 17.2.2009, p. 8.

the four cases was the merged entity the smallest. Rather, the mergers in those cases gave rise either to the market leader or to the second largest competitor. The Notifying Party argues that the Commission has never previously raised concerns based on non-coordinated effects against a merger creating the smallest player with two large and viable competitors, even in cases which did not involve the creation or strengthening of a dominant position.

(92) The Commission considered the arguments and the decisional precedents cited by the Notifying Party. The Commission disagrees that any legal presumption exists for mergers based on allegedly low market shares. The "legal presumption" of the Merger Regulation cited by the Notifying Party[50] is in fact no more than "an indication" that the undertakings concerned may not be liable to impede effective competition if their market shares do not exceed 25% either in the internal market or in a substantial part of it.[51] The Merger Regulation does not contain any legally binding rule that concentrations leading to a combined market share of under 25% should be cleared as a matter of principle.

(93) Moreover, the Commission's precedents include a number of cases with low market shares where the Commission found concerns. In case M.5224 – *EDF/Segebel*[52] for instance, the market shares of the Parties were even smaller and the main competitor was much stronger than in this case. Nonetheless, the Commission identified serious concerns that the Parties remedied with commitments in Phase I. Case M.3916 – *T-Mobile/tele.ring*[53] – similarly a case without creation or strengthening of dominance – may result in the creation of the number two player in the market. However, it concerned a concentration of the market from five to four players. As regards case M.5224 – *EDF/British Energy,* the Commission found that the transaction would have been likely to raise serious competition concerns despite relatively low market shares[54] and cleared the case subject to remedies in Phase I.[55] For case M.5355 – *BASF/CIBA,* the Commission reasoned that while the Proposed Transaction would not significantly modify the structure of the ma-

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50 H3G response to the SO, paragraph 6.

51 See rec. 32 of the Merger Regulation.

52 See Commission Decision of 12 November 2009 in Case No COMP/M.5549 – *EDF/Segebel*, OJ C 57, 9.3.2010, p. 9, paragraphs 59 and following.

53 See Case No COMP/ M.3916 – *T-Mobile/teleMobile Austria/Tele.ring,* paragraphs 29 and following.

54 The Commission was concerned that the proposed transaction could have made it easier for the merged entity to withdraw electricity supplies from the market in order to increase price, that the merger would have led to a reduction of liquidity which could have had negative effects in both the wholesale and the retail supply markets, that the transaction would have led to a high concentration in the ownership of sites most likely to be suitable for new nuclear build, that the merged entity would have held connection rights beyond its combined capacity expansion plans, with the risk of unduly delaying power generation projects of its competitors.

55 The notifying parties committed to divest two power generation plants, to sell certain minimum volumes of electricity in the wholesale market for a certain period of time when the combined entity would have had the ability to internalise the use of electricity that it produces, to divest a site potentially suitable for building a new nuclear power station and to end one grid connection agreement.

jority of the relevant markets, it would still raise competition concerns in a number of relevant specialised markets,[56] and only cleared the case subject to remedies[57] in Phase I. Moreover, the concerns in many other cases focus on issues such as potential competition[58] or pipeline products[59] rather than on mere market share figures.

(94) The Commission considers that the case at hand can be qualified as a case leading to significant non-coordinated effects notwithstanding the absence of the creation or strengthening of dominance.

(95) The guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings[60] ("Horizontal Guidelines") list a number of factors which, taken separately are not necessarily decisive but may influence whether significant non-coordinated effects are likely to result from a merger. Not all of these factors need to be present for such effects to be likely. Nor should this be considered an exhaustive list.[61]

(96) The Commission notes that in the response to the SO, and in a somewhat more detailed fashion in a paper written by the Parties' economic advisors in response to the Article 6(1)(c) decision, the Parties argue that the Commission's analysis reflects a "structural presumption" as to the effect of a merger from four to three players in an oligopolistic industry, and that such a presumption is contrary to the Horizontal Guidelines and the Merger Regulation.[62]

(97) This claim is unfounded. First it must be recalled that the Commission can declare a concentration incompatible with the internal market only where it can demonstrate that the notified operation would significantly impede effective competition in the internal market. In that regard, according to settled case law, in the case of complex economic assessments, the burden of proof placed on the Commission is without prejudice to its wide discretion in that

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56 These markets were the following: DMA3 (dimethylaminoethyl acrylate – a chemical intermediate); synthetic dry strength agents (used in the paper industry); bismuth vanadate (a pigment); indanthrone blue (a pigment); SA (styrene acrylic – used as a glue for paper applications); HALS (hindered amine light stabilisers – used in plastics) and UV (ultraviolet light) filters for skin care products.

57 To resolve these competition concerns, the notifying parties proposed to divest i.a. production assets at Ludwigshafen (Germany), Ciba's entire EEA synthetic dry strength agent business and Ciba's global bismuth vanadate business.

58 See for example Commission Decision of 1 February 2012 in Case No COMP/M.6166 – *Deutsche Börse/NYSE Euronext,* for example paragraphs 535 and following, 543 and following, 702 and following, 862 and following, 893 and following.

59 See for example Commission Decision of 30 January 2004 in Case No COMP/M.1378 – *Hoechst/Rhône Poulenc,* OJ C 42, 18.2.2004, p. 22, paragraphs 26, 45, 71 and following, 115 and following.

60 OJ C 31 of 5 February 2004, p. 5.

61 Horizontal Guidelines, paragraph 26.

62 Response to the SO, paragraph 85.

sphere.[63] In the case at hand, the Commission has analysed the Proposed Transaction on its merits given the specificities of the case, and without any presumption as to its effect on competition.

(98) When examining a case, the Commission assesses all the facts, including the factors mentioned in the Horizontal Guidelines as being particularly relevant. As set out in the Horizontal Guidelines, "*it should be stressed that these factors are not a 'checklist' to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. Not all the elements will always be relevant to each and every horizontal merger, and it may not be necessary to analyse all the elements of a case in the same detail*".[64]

(99) Some of the factors cited in the Horizontal Guidelines as likely to influence the potential for significant non-coordinated effects and which are relevant in this case include the following:

- merging firms have a strong market position (discussed in section 6.4);
- the Parties are close competitors (section 6.5);
- the merger eliminates an important competitive force (section 6.6);[65]
- competitors are unlikely to increase supply if prices increase (section 6.9).[66]

(100) Other factors that the Commission takes into account when examining this merger are likelihood of entry (section 6.7.1) and countervailing buyer power (section 6.7.2). Finally, the Commission considers the claims of the Notifying Party as to the relevant alternative scenario for Orange absent the merger (section 6.10), the efficiencies claims put forward by the Parties (section 7) and certain claims made by third parties (section 10) .

6.3. Description of the market

6.3.1. Market players in Austria (MNOs, MVNOs, resellers)

6.3.1.1. MNOs

(101) On the Austrian market for mobile telephony services to end customers, four companies currently operate mobile telephone networks based on UMTS (3G) or GSM (2G) technology. They are TA (through its subsidiary A1), T-Mobile, Orange and H3G.

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63 See, to that effect, Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101, and the case-law cited, Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 38 and Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 63.

64 Horizontal Guidelines, paragraph 13.

65 Horizontal Guidelines, paragraphs 37–38.

66 Horizontal Guidelines, paragraphs 32–35.

(102) The four network operators offer their customers a wide range of services such as voice telephony and data services, international roaming, *etc.*, on both a subscription (post-paid) and a pre-paid basis.

(103) The player with the largest market share is A1, a subsidiary of the historical incumbent telephony operator Telekom Austria. A1 has been active in the Austrian market since 1996 and currently has […]* customers. A1 also operates the brands "bob" and "Red Bull Mobile".

(104) The operator with the second largest market share in terms of subscribers is T-Mobile, a subsidiary of Deutsche Telekom. T-Mobile has also been in the market since 1996 (until 2002 under the name "max.mobil"). T-Mobile has approximately […]* million customers. T-Mobile owns tele.ring, a second brand that used to be an independent operator until 2007.

(105) Orange Austria is the third largest MNO in Austria. It has been active since 1998 (until 2008 under the name "one"). Orange has about […]* million customers. Orange owns Yesss!, a second brand focusing on pre-paid no-frills customers.

(106) H3G, the fourth largest Austrian MNO, entered the market in 2003 as a pure 3G provider and has about […]* customers. In order to offer its customers 2G services throughout Austria, H3G has entered into a national roaming agreement with TA which is due to expire in December 2013 at the latest. As from the third quarter of 2012, a new national roaming agreement concluded between H3G and T-Mobile will replace the previous agreement with TA according to information provided by the Notifying Party.

(107) The Proposed Transaction would be the second consolidation in the Austrian mobile telecommunications market since the take-over of tele.ring by T-Mobile in 2006[67] and would further reduce the number of MNOs from four to three. Both H3G and Orange purchased some of the assets which T-Mobile was required to sell as a result of the Commission's conditional clearance decision in that case.

(108) Table 1 gives an overview of the current spectrum allocation and the allocation following implementation of the acquisition of Orange, the Yesss! Acquisition and the acquisition of Orange assets by A1.

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[67] Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

Table 1: Spectrum Allocation of Austrian MNOs pre and post-merger

Spectrum allocation - Today		Band				
		800 MHz	900 MHz	1800 MHz	2100 MHz (FDD)	2600 MHz (FDD)
Operator	TA		17	15	14,8	20
	T-Mobile		12,8	25,4	15	20
	Orange		4	29	14,8	10
	H3G		0	0	14,8	20
	Free/Unused	30		3,4		

Spectrum allocation - Post merger		Band				
		800 MHz	900 MHz	1800 MHz	2100 MHz (FDD)	2600 MHz (FDD)
Operator	TA		20,2	15	19,8	25
	T-Mobile		12,8	25,4	15	20
	H3G/Orange		0,8	29	24,6	25
	Free/Unused	30		3,4		

Source: RTR / Market investigation

6.3.1.2. MVNOs and second brands

(109) In addition to the MNOs and their second brands, there are two independent MVNOs active on the Austrian market which do not own their own network and are hosted by one of the MNOs. These MVNOs are: eety[68] and Vectone.

(110) Bob was launched by A1 (owned by the telecoms incumbent TA) as a no-frills offering in 2006.[69] The brand currently has about […]* subscribers and focuses on no-frills post-paid contracts.

(111) Tele.ring, formerly an independent MNO active in Austria since 2000, was acquired by T-Mobile (owned by Deutsche Telekom) in 2006.[70] The brand has [0-5]* million customers.

(112) Yesss! is Orange's no-frills brand focusing on pre-paid contracts. The brand was launched in 2005 and has about [0-5]* million subscribers.[71]

(113) Vectone is a niche MVNO catering to ethnic demand and offering cheap international calls. It is owned by Mundio Mobile Limited and provides its services using A1's mobile network. Vectone has an estimated market share of no more than […]*% in terms of subscribers.[72]

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68 Eety has about [0-100,000]* subscribers. Orange holds a […]*% stake in the company.
69 See Form CO, paragraph 163.
70 See Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*.
71 See Form CO, paragraph 163.
72 See Form CO, Table 5.

6.3.1.3. Resellers

(114) A significant number of independent resellers are also active in Austria. However, in practice, resellers account for a negligible portion of total subscribers. Resellers include the following operators: Yooopi.at, Woww, Billitel, Teleplanet, Red Phone KIKA, Data Mobile AG, You Talk, sBudget, Ge_Org, Silver:Mobile, Fixed line ISP Ferngas, Fixed line ISP Stadtwerke Schwaz, Fixed Line ISP Hall AG, volMobil, Sadtwerke Wörgl, Gemeinde Silbertal.

6.3.2. Regulatory requirements for setting up mobile telecommunications networks

(115) The legal requirements for setting up mobile telecommunications networks are contained in the Austrian Telecommunications Act of 2003 ("TKG 2003"),[73] essentially comprising four aspects:

- a general authorisation for the operation of telecommunications infrastructure and the provision of telecommunications services ("Allgemeingenehmigung"; section 15 TKG 2003);
- radio frequency licence(s) for the use of the allocated spectrum;
- the approval of the customer terms and conditions by the TKG;
- a number of ancillary regulatory requirements.

6.3.2.1. General authorisation

(116) MNOs have to procure general authorisations. Under this general authorisation scheme, the RTR must issue a certificate of acknowledgement within one week of the submission of a complete notification (Sections 15 and 16 TKG 2003).

6.3.2.2. Allocation of frequencies

(117) The allocation of radio frequency is a prerequisite for an MNO to be able to operate a mobile telecommunications network and to provide mobile telecommunications services.

(118) Whilst in principle any person can apply for an allocation of radio frequencies, in the case of an MNO, there will be eligibility criteria in order to participate in the auction, and it will need to substantiate its ability to provide telecommunications services from both a technical and an economic perspective.

6.3.2.3. Approval of customer terms and conditions

(119) Under Section 25 paragraph 1 of the TKG 2003, the customer terms and conditions must be notified to – and for operators having significant market power, approved by – the RTR prior to the launch of services and prior to making those terms and conditions publicly available.

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73 See "Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird (Telekommunikationsgesetz 2003 – TKG 2003)", Federal Law Gazette (BGBl.) I Nr. 70/2003.

6.3.2.4. Ancillary regulatory requirements

(120) In addition to requirements stated in Sections 6.3.2.1 to 6.3.2.3, MNOs must also apply for several ancillary regulatory authorisations.[74]

6.3.3. Regulatory requirements for installing new masts

(121) The construction and installation of new mast sites in Austria requires a number of approvals.

(122) There are national, state and municipal laws which apply to the erection of new masts and antennae in Austria. Broadly:

– the federal laws impose standards with respect to radiation emissions levels and equipment type approvals, as well as requirements relating to air traffic safety, protection of woods etc.;

– there are nine states in Austria, and the state laws regulate the construction permits which are administered by the local municipality and/or borough/county; and

– municipal laws protect the landscape, the overall appearance of the site, site preservation and other local zoning requirements.

(123) The erection of a rooftop mast site may require the following approvals (in addition to the construction permit):

– townscape authority approval ("Stadtbildbehörde"), relating to the appearance;

– protection of historical building approval ("Denkmalamt");

– flight safety approval ("Flugsicherheitsbehörde");

– military aviation approval ("Militärluftfahrtbehörde");

– railroad approval ("Verkehrsministerium");

– traffic law approval;

– sharing partner approval; and

– emission calculation approval.

(124) The erection of a new mast (that is to say, a greenfield site) may require the following approvals in addition to the construction permit:

– townscape authority approval ("Stadtbildbehörde"), relating to appearance;

– clearing approval ("Rodungsbewilligung – Naturschutzbehörde");

– nature conservancy approval ("Naturschutzbehörde");

– forestry law approval ("Naturschutzbehörde");

[74] These include: the allocation of number ranges; carrier codes; national and international signalling point codes; IP ranges; plant permissions for base stations; and type ratings for certain radio equipment.

– flight safety approval ("Zivilluftfahrtsbehörde");
– military aviation approval ("Militärluftfahrtbehörde");
– water right approval ("Wasserrechtsbehörde");
– railroad right approval ("Verkehrsministerium");
– traffic law approval;
– sharing partner approval; and
– emission calculation approval.

(125) Permission for the erection of new greenfield masts is often granted only on condition that the sites may be used by more than one MNO.[75] While passive site sharing[76] is permitted, or even encouraged,[77] by the telecoms regulator as long as two MNOs do not share more than 50% of their sites, the regulator considers active site sharing[78] problematic once each MNO involved independently operates less than 50% of its sites outside of the (active sharing) cooperation arrangement, but still only uses its own frequencies. The TKK further holds that active site sharing combined with spectrum sharing[79] may have an adverse effect on competition because it does not necessarily ensure sufficient competitive differentiation between the cooperation partners.

(126) The erection of a new mast site will also require the conclusion of rental agreements with the landlord(s) regarding the building or land on which the mast will be placed, as well as other agreements for rights of way, access to the site, laying power cables, temporary construction roads as required, etc.

(127) The rollout of new sites takes between 12 to 36 months.[80]

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75 See Form CO, para 681: In Austria, there are no statutory requirements or licence conditions which would mandate MNOs to share sites. There is, however, a right under Section 8(2) of the TKG for an MNO to require another MNO to share individual sites on request, which can only be refused on grounds of a lack of technical or commercial feasibility. The requesting MNO has to pay a fee of EUR 30 000 for the initial 8 years of sharing, with an additional fee depending on the dimension of the antenna. Whilst site sharing is encouraged by the authorities, with several regional authorities requesting MNOs to increase their site sharing ratio and to deconstruct redundant greenfield masts, any request for site sharing between MNOs will, however, be subject to the various planning, landlord and other approvals.

76 The TKK defines passive site sharing as the joint use of transmitter masts by mobile operators; Form CO, paragraph 686.

77 Passive site sharing reduces the number of necessary locations for masts and may therefore have a beneficial effect on townscapes and landscapes.

78 The TKK defines active site sharing as the joint use of electronic components such as transmission or switching equipment; Form CO, paragraph 689.

79 In the case of active site sharing combined with spectrum sharing, the MNOs share active network elements as well as each other's spectrum; Form CO, paragraph 691.

80 The success rate for erecting new greenfield masts is 25%, is 60% to 70% for masts in rural areas the success rate, but only 20% to 30% in urban areas. Upgrading existing sites takes takes between 6 to 24 months and shows similar success rates for urban and rural areas; see Form CO, Table 47.

6.3.4. *Spectrum auctions*

(128) In general, the Telecoms Office (which is a part of the Federal Ministry of Transport, Innovation and Technology) has responsibility for spectrum management and the administration of the National Frequency Usage Plan. Where wireless services are not provided to the public and where the radio frequency is not considered to be a scarce resource, the Telecoms Office issues the radio frequency assignment authorisation directly and without running an auction.

(129) Where market demand indicates specific radio frequency to be a scarce resource, such as in the case of the operation of a mobile telecommunications network, the Telecoms Office has to refer an application for radio frequency to the TKK, as assisted by its operational support unit RTR,[81] which then assigns the radio frequency to interested MNOs by means of a public tender and auction.

(130) The next spectrum auction concerning the 800, 900 and 1 800 MHz frequencies was originally scheduled to take place in September 2012.[82] However the TKK decided to delay the auction until 2013 in the light of the on-going merger proceedings in this case.

(131) At present the regulator envisages auctioning the following spectrum:

Table 2: Frequency Spectrum of Upcoming Austrian Auction

Frequency Bands	Blocks	Range
800 MHz Band	Six 2 x 5 MHz blocks (paired spectrum)	791–821 MHz (Downlink) and 832–862 MHz (Uplink)
900 MHz-Band	Seven 2 x 5 MHz blocks (paired spectrum)	880–915 MHz (Uplink) and 925–960 MHz (Downlink)
1 800 MHz-Band	Fifteen 2 x 5 MHz blocks (paired spectrum)	1,710–1,785 MHz (Uplink) and 1,805–1,880 MHz (Downlink)

Source: RTR

(132) Due to existing usage in the frequency bands 900 and 1 800 MHz, parts of the spectrum auctioned in those bands will only become available from 1 January 2016, 1 January 2018 and 1 January 2020. The currently unused upper end of the 1 800 MHz band (former DECT-guard-band) and the 800 MHz band will be available just after the auctioning procedure. Those frequencies are part of the so-called "digital dividend". The upcoming spectrum

81 For more information on these bodies see http://www.rtr.at/en/tk/Institutionen (retrieved 19 October 2012).

82 For a complete list of previous frequency allocation procedures in Austria see http://www.rtr.at/en/tk/FRQ_procedures (retrieved 19 October 2012).

auction will therefore define frequency allocation in Austria for the mid to long-term.

6.4. Market shares and market structure post-merger

6.4.1. Introduction

(133) The Commission has analysed the market shares of the Parties in a number of different ways to ensure its assessment is complete and reflects the particular characteristics of the market in question.

(134) Firstly, the Commission examined the overall market shares which are measured on the basis of the existing stock of customers. The Commission examined HHI[83] values and deltas, the relevance of which is referred to in the Horizontal Guidelines. The Commission then looked closely at the Parties' position in certain segments which are particularly relevant for growth and innovation (such as post-paid voice and data and data only) and which are likely to influence the overall market for telecommunications services going forward. Finally, the Commission considered the dynamic power of the Parties in the market arising from their current ability to attract new customers.

6.4.2. *Market shares on the overall market for mobile telecommunications services to end customers*

(135) According to the information provided by the Notifying Party, the Proposed Transaction would combine the smallest and second-smallest mobile network operators in Austria, with a combined market share remaining below 25%.[84] To this end the Notifying Party presents data based on existing number of subscribers and revenue, covering both voice-enabled and data-only devices. On such a basis, shares on the Austrian market for mobile telecommunications services to end customers would be as set out in Tables 3 and 4 (pre and post-transaction).[85]

Table 3: Total retail market by subscribers (both voice-enabled and data-only devices, pre- and post-paid)

Operator	Subscribers					
	2009		2010		2011	
	Subscribers	Share (%)	Subscribers	Share (%)	Subscribers	Share (%)

[83] The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the "delta") is a useful proxy for the change in concentration directly brought about by the merger; see Horizontal Guidelines, paragraph 16.

[84] Form CO, paragraph 12, 18.

[85] The figures in the tables below may not always add up to full numbers due to rounding.

	(m)		(m)		(m)	
H3G	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[10-20]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Combined	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**
TA	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
Yesss!	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[5-10]*%
TA and Yesss! combined	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
T-Mobile	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Vectone	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Total	[…]*	**100%**	**[…]***	**100%**	[…]*	**100%**

Source: Form CO, Annex 6.3, Table 1

Table 4: Total retail market by revenues (both voice-enabled and data-only devices, pre- and post-paid)

Operator	Revenues					
	2009		2010		2011	
	m EUR	Share (%)	m EUR	Share (%)	m EUR	Share (%)
H3G	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[5-10]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Combined	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**
TA	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
Yesss!	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
TA and Yesss! combined	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
T-Mobile	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Vectone	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Total	[…]*	**100%**	[…]*	**100%**	[…]*	**100%**

Source: Form CO, Annex 6.3

6.4.3. *HHI and other indicators of the competitive dynamics in the market*

6.4.3.1. HHI and delta values

(136) Although the combined market shares of the Parties would be below 25%,[86] the HHI and delta values are above those defined as initial indicators of the absence of competition concerns in the Horizontal Guidelines.[87]

(137) On the basis of the data provided by the Parties, the mobile retail market can be characterised as highly concentrated. The post-merger HHI value based on number of subscribers is [0-5000]. The Delta is [500-1000] compared to the pre-merger situation and [0-500] when focusing solely on the acquisition of Orange by allocating Yesss! to TA.

Table 5: HHI – Mobile end customer market based on number of subscribers (2009–2011)

HHI	2009	2010	2011
Pre-merger	[…]*	[…]*	[…]*
Pre-merger, adding Yesss! to TA	[…]*	[…]*	[…]*
Post-merger	[…]*	[…]*	[…]*
Delta	[…]*	[…]*	[…]*

Source: Form CO

6.4.3.2. Differential effects of the transaction according to market segments

(138) In order to assess the effects of the transaction on competition, and in view of the limited likelihood of significant demand side switching between some of the various segments given their very different characteristics, the Commission considered the effects of the Proposed Transaction both on the market for mobile telecommunications services to end customers as a whole and on certain important market segments within it.

(139) While from the supplier point of view the products (bundles of voice, SMS and data) are homogenous and technically substitutable, on the basis of demand-side characteristics the mobile market can be divided into at least four major segments, namely (i) business, (ii) post-paid voice and data (often with bundled handsets and lock-in periods), (iii) pre-paid voice and, to some extent, data (possibly including certain no-frills post-paid plans as well), and (iv) data-only plans (that is to say, plans for use on devices which do not

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[86] The market share below which according to Recital 32 of the Merger Regulation there is an indication that the transaction does not significantly impede effective competition. See also point 18 of the Horizontal Guidelines.

[87] Horizontal Guidelines, paragraphs 19 and following.

support voice services). These segmentations are widely used in the industry and also correspond to standard distinctions made for commercial purposes by the Parties. Within each of these segments there is further differentiation due to the marketing and pricing strategies of the MNOs.

(140) It is generally recognized within the Commission's merger control practice that, within a market, competition concerns may arise in relation to certain segments which have a particular importance for the market as a whole.[88] Post-paid bundles and data only tariffs are, by virtue of their characteristics and intended use, distinct segments of demand – a point the Parties have not seriously contested – and of particular importance in terms both of revenue and future market developments. It is therefore important that the Commission examines the effect of the transaction not only on the market as a whole, but also on each segment separately. An effect on important segments within the relevant market is, in the circumstances of this case, an effect on that market as a whole.

(141) The Notifying Party, in its reply to the SO[89], argues that the Commission's approach disregards the correct analytical framework for the assessment of a merger, which is that the Commission must have regard to the market share of Parties on the relevant market.

(142) The Commission considers the Notifying Parties' argument to be unconvincing. The Commission's conclusions as to the existence of a single overall market, as in previous cases, rest on supply side considerations, and more particularly on the technical possibility for any of the operators to enter or expand in any of the segments.

(143) The Commission Notice on the definition of relevant market for the purposes of Community competition law (Notice on the definition of the relevant market)[90] should not, and cannot, however be interpreted to assume that supply side substitutability, which rests on technical considerations of *possibility*, implies the *necessary* existence of a competitive constraint since the existence of an actual competitive constraint due to supply-side substitution requires not only the ability to enter or expand in the segment in question but also the incentive to do so. All the players who would seem most likely to do so are already present in the segment and have therefore determined the product offering and prices in that segment which they deem appropriate in the pre-merger situation. The question of incentive therefore needs to be analysed in this case on the basis of the competitive assessment. There cannot be

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[88] See Commission Decision of 17. November 2010 in Case No COMP/M.5658 – *Unilever/Sara Lee Body Care*, OJ C 23, 28.1.2012, p. 30, for example paragraphs 138, 176 and following, 514 and following, 579 and following, 675 and following, Commission Decision of 4 February 2009 in Case No COMP/M.5253 – *Sanofi-Aventis/Zentiva*, OJ C 66, 20.3.2009, p. 24, for example paragraphs 78, 80 and following; Commission Decision of 19 December 2008 in Case No COMP/M.5295 – *Teva/Barr*, OJ C 10, 15.1.2009, p. 1, paragraph 182.

[89] See H3G Response to the SO, section B.

[90] OJ C 372, of 9 December 1997, p. 5, paragraphs 20 and following.

a presumption of competitive constraint from the mere ability to expand in the relevant market.[91]

(144) In relation to pre-paid services, as a result of the simultaneous divestment of Orange's pre-paid Yesss! brand, the overlap between the Parties and their overall position post-merger in the pre-paid voice-enabled segment is limited ([10-20]*% by number of subscribers and [10-20]% by revenues).[92] Regarding business customers, although Orange is relatively well-positioned in the business segment with a [10-20]*% subscriber share, H3G has had less success in gaining market share in this segment, with only [0-5]*% of the total business subscriber base.[93]

(145) As a result, the Proposed Transaction is not expected to have a significant impact on pre-paid and business customers, at least in the short term.

(146) In the case at hand the Commission further examined the segment of post-paid private voice and data (that is to say, bundled offerings for use on voice-enabled devices) and the data-only segment. This all the more appropriate in this case, given that the segments in question are particularly important for the market as a whole and its near-term development.

(147) The post-paid private voice and data segment is the largest market segment, accounting for over two-thirds ([60-70]*%) of the total revenues of Orange[94] and almost two-thirds ([60-70]*%) of the total revenues of H3G.[95] Although the data-only segment is for the moment significantly smaller as a proportion of revenues ([20-30]*% of the revenues of H3G;[96] [5-10]*% of those of Orange[97]), it assumes particular importance, as data use is already the biggest driver of growth in the market, and this trend is expected to continue and in-

[91] Paragraph 2 of the Notice makes clear that the purpose of market definition is to establish which firms are capable of constraining the Parties. Even when there is no further demand segmentation, the fact that firms are capable of constraining Parties does not mean they will do so to a sufficient degree in practice.

[92] See Tables 22 and 5 of Annex 6.3 to the Form CO. The figures for revenues include pre-paid data-only services, for which the Parties have not identified separate figures.

[93] See Table 13 of Annex 6.3 to the Form CO.

[94] See Orange Financial report for Dec 2011 provided in response to the Commission's RFI of 4 July 2012 (calculated as total post-paid revenues for the year (tab 5) divided by total service revenues excluding Yesss! (tabs 1 and 1a)), From this the Commission has subtracted the proportion of revenue from business customers ([10-20]*%) implied by dividing Table 34 of Annex 6.3 to the Form CO by Table 2 of Annex 6.3 to the Form CO .

[95] Based on figures for 2011 in Annex 6.3 to the Form CO, Table 31 of Annex 6.3 to the Form CO divided by Table 2 of Annex 6.3 to the Form CO. The figure in Table 31 includes revenues from post-paid data-only, which amounted for H3G in 2011 to € […]* (see Annex 3.1 to H3G's reply to the Commission's RFI of 4 April 2012, tariffs marked as "data", excluding those marked as "ReLoad" and "SuperSIM" which are pre-paid); this amount has been deducted from the total.

[96] See Annex 3.1 to H3G's reply to the Commission's RFI of 4 April 2012, tariffs marked as "data".

[97] See Orange Financial report for December 2011 provided in response to the Commission's RFI of 4 July 2012 (calculated as total datacard revenues for the year (tab 7) divided by total service revenues excluding Yesss! (tabs 1 and 1a)), The datacard numbers may include some Yesss! prepaid data plans and thus may slightly overestimate the correct total.

tensify in the next few years. Indeed, LTE is a network protocol designed for data, in which voice is expected to occupy only a very minor share of total traffic.

(148) The following pie chart shows the revenue breakdown by segment for each of the Parties (H3G is the outer circle, Orange the inner):[98]

Figure 1: Revenue Breakdown by Segment

[…]*

Source: Form CO and own calculations (Orange in the inner circle, H3G in the outer circle)

(149) It follows that the post-paid segment is by far the most significant segment in the market and for each of the Parties. The data segment is relatively big for H3G, but modest for Orange, whereas pre-paid makes a small contribution to total revenue for both Parties. In terms of subscriber numbers, business is less than […]*% of the market total,[99] and by revenue pre-paid is less than 10% of the total.[100] The fact that there are some (small) segments on which significant concerns would (if considered separately) *not* arise cannot be used by the parties to argue that concerns would not arise on the market as a whole.

(150) The Notifying Party's argument in its reply to the SO that the Commission has focused on implausible and artificially designed market segments is therefore unfounded.

(151) The Commission also considered whether or not supply-side substitution, even if theoretically possible, would in fact provide an effective competitive constraint on pricing in these segments given the characteristics of the markets at stake, and concluded that this would not be the case.[101]

6.4.3.2.1. Post-paid private voice and data segment

(152) On the basis of a segmentation between pre- and post-paid, the Notifying Party reports the subscriber shares set out in Table 6 for the post-paid segment.

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[98] Pre-paid revenues are derived from the Table 5 of Annex 6.3 to the Form CO, from which has been deducted, in the case of H3G, prepaid data revenues from the tariff data referred to above. Business revenues are taken from Table 34 of that annex.

[99] For 2011. Source Annex 6.3 to Form CO, Table 13 of Annex 6.3 to the Form CO divided by Table 1 of Annex 6.3 to the Form CO.

[100] For 2011. Source Annex 6.3 to Form CO, Table 5 of Annex 6.3 to the Form CO divided by Table 2 of Annex 6.3 to the Form CO.

[101] In its response to the SO, the Notifying Party objected several times to the manner in which the Commission had carried out the competitive assessment, essentially arguing that once the Commission had concluded on a market definition based on supply-side substitution, it then had to presume that supply-side forces would discipline competitive conditions within any segment of the market even if, from a demand perspective, that segment might be distinct from the overall market. See also Section 6.9 for the reactions of other competitors post-merger.

Table 6: Post-paid private voice and data (subscribers)

Operator	Subscribers					
	2009		2010		2011	
	Subscribers (m)	Share (%)	Subscribers (m)	Share (%)	Subscribers (m)	Share (%)
H3G	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[5-10]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Combined	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**
TA	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
Yesss!	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Combined	[…]*	[40-50]*%	[…]*	[40-50]*%	[…]*	[40-50]*%
T-Mobile	[…]*	[30-40]%	[…]*	[30-40]*%	[…]*	[30-40]*%
Vectone	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Total	[…]*	**100%**	[…]*	**100%**	[…]*	**100%**

Source: Annex 6.3 to Form CO, Table 36

(153) On the basis of revenues, the Parties have been unable to split the data in this way. Table 7 therefore includes post-paid revenues both from the post-paid private voice and data segment and from data-only services.

Table 7: Post-paid private voice and data segment and data only segment (revenues)

Operator	Revenues					
	2009		2010		2011	
	m EUR	Share (%)	m EUR	Share (%)	m EUR	Share (%)
H3G	[…]*	[5-10]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Combined	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**	[…]*	**[20-30]*%**
TA	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Yesss!	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
TA and Yesss! Combined	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
T-Mobile	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Vectone	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%

Total	[…]*	**100%**	[…]*	**100%**	[…]*	**100%**

Source: Annex 6.3 to Form CO, Table 31

(154) From a comparison of Table 6 and Table 7 with Table 3 and Table 4 it can also be noted that, in 2011, the post-paid voice segment accounted for just over one-half of all subscribers (51.5%) but nearly two-thirds of total market revenues (64.8%).

(155) In terms of revenue from post-paid private customers, it can be seen that the combined share of the Parties is significantly higher than their share on the overall market. This is a consequence of the higher revenue per customer (and also high margins) that Orange achieves, which are much above the average. As a result, all three players remaining in the segment would, in terms of revenue, be broadly in the same order of magnitude.

6.4.3.2.2. Data-only segment

(156) The non-phone segment represents the overwhelming majority of data traffic over the networks of both the Parties and their competitors, although this proportion is declining due to the increasing use of data services on smartphones. In 2009, only 5.4% of total mobile data traffic was over voice-enabled devices, a proportion which rose to 17.3% in 2011. The non-voice segment has continued to grow over the period 2009–2011 at a compound annual growth rate (CAGR) of slightly over 50%, but in relative terms has become less important due to the growth at a CAGR of nearly 200% of data over smartphones. It is, however, possible that growth in the non-voice segment will again accelerate due to the increasing use by consumers of devices with integrated UMTS/LTE modems such as tablets: sales of tablets in Austria only really started in 2010, when according to GfK 48 000 units were sold; 179 000 were sold in 2011 and the 2012 prediction is for sales of 300 000 units (tablets typically consume more data per unit than phones).[102] It should further be noted that smartphones can also be used in so-called tethering mode to allow access from other devices via Wi-Fi.[103] It is therefore likely that both the smartphone and data-only segments will continue to contribute to rapidly growing demand by Austrian consumers for mobile data services in the coming years.

(157) The figures provided by the Parties were ostensibly based only on the number of dongles sold,[104] and therefore should have excluded use on other data-only devices, in particular tablets.[105] The Parties have argued that they could not distinguish "data-only" plans for use on, for example, tablets from other plans which incorporate voice functionality because all SIM cards allow for voice functionality. The Commission notes, however, that, even if this is technically true, tariffs designed for use on phones and those designed for use

102 Form CO, paragraph 595.
103 For locked handsets, this function can, however, be disabled.
104 It is assumed that all dongles are locked to the network operator.
105 The Commission's understanding is that certain mobile routers have an integrated data modem whereas others make use of a dongle.

on data-only devices are perceived and positioned differently in the market and it is unlikely that there is any significant degree of demand-side switching between the two. Furthermore, in response to the Commission's Request for Information ("RFI") of 4 April (tariff data) and 4 July 2012 (financial reports), both Orange and H3G provided data allowing a broader view of the data-only segment. Moreover the RTR has indicated that the data it collects is based on such a wider basis, and that it does not have data limited to dongles only.[106]

(158) The following table (Table 8) reports the total number of dongles (pre- and post-paid) as provided by the Parties. The shares for 2009 and 2010 do not give a total of 100% due to rounding errors in the Parties' data. According to the table, there has been only modest growth in the installed base of dongles over the period 2009–2011. It is, however, unlikely that almost all growth in the market over this period is due to competitors as the Parties' data would seem to suggest. As seen below,[107] data on new customers for the first five months of 2012 do not support such a picture, as it is H3G which is growing most quickly. Accordingly, the Commission takes the view that the position of the Parties in this market segment should be considered to be in the range of TA, with T-Mobile rather smaller.

Table 8: Data only (number of dongles, pre- and post-paid)

Operator	Dongles					
	2009		2010		2011	
	Dongles (m)	Share (%)	Dongles (m)	Share (%)	Dongles (m)	Share (%)
H3G	[…]*	[30-40]*%	[…]*	[20-30]*%	[…]*	[20-30]*%
Orange Austria (excl. Yesss!)	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[5-10]*%
Combined	[…]*	[40-50]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
TA	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Yesss!	[…]*	[5-10]*%	[…]*	[5-10]*%	[…]*	[5-10]*%
Combined	[…]*	[40-50]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
T-Mobile	[…]*	[20-30]*%	[…]*	[20-30]*%	[…]*	[20-30]*%
Total	[…]*	**108%**	[…]*	**94%**	[…]*	**100%**

Source: Annex 6.3 to Form CO, sum of Tables 29 and 44

(159) The Commission cross-checked the Parties' figures on data-only subscribers in the Form CO with the tariff data provided in response to its RFI of 4 April 2012, and which include both dongles and other data-only tariffs. The figures in terms of volume approximately tally. However, while the H3G subscriber figures are approximately correct for data tariffs as a whole, they appear to correspond to all data plans and not just dongles. Moreover, in terms of number of subscribers, Orange has [0-500000]* mobile broadband subscribers

106 See paragraph (220).
107 See paragraphs (171) and following.

according to the response to the RFI of 4 April 2012, which if included in Table 9, would give Orange a market share of [5-10]*%.

(160) This estimate of Orange's market share, moreover, is itself far below the figure of [0-500000]*datacards in December 2011 provided in Orange's reply to the RFI of 4 July 2012.[108] If that figure were taken and the market size correspondingly increased, Orange's market share in terms of number of subscribers would have been [10-20]*% and H3G's [20-30]*%, giving a total of [40-50]*% (leaving the Parties' estimates of competitors' shares unchanged).

(161) The claim of H3G in the response to the SO that its share in terms of revenue from dongles was between [20-30]*% in each of the quarters of 2011[109] cannot be verified by the Commission. The Parties did not supply an estimate of market share by revenue with the Form CO. The Parties furthermore do not say to which edition of the RTR Telekom Monitor they refer for the market size, but the RTR Telekom Monitor does not appear to contain such a figure, and indeed the word "dongle" is not even mentioned. This claim can therefore be rejected. The Commission has not been able to reconstruct a reliable view of the market based on revenue from dongles owing to limitations in the data it was able to obtain from the MNOs and for this reason has not based its conclusions on such a figure.

(162) In respect of the market segment for data-only devices, the Proposed Transaction would therefore bring about a combined share of around [40-50]*% in mobile broadband data usage in terms of number of subscribers.[110,111] In the response to the SO, H3G argues that, if the data segment is a growth segment (which it presumably concedes) "*the Commission should also accept that, consistent with its own guidelines, sales shares are an unreliable indicator of market power in such a segment in any event*".[112] However, the Horizontal Guidelines do not imply that in dynamic and growing markets market shares are necessarily unstable over time. The Commission notes in this regard that H3G already has what is considered (and claimed by them) to constitute the best network in Austria, a network which will become even better as a result of the Proposed Transaction. As such, the need for a prospective merger analysis reinforces the need to analyse the data segment.

(163) The Commission therefore considers that, for data-only devices, the Proposed Transaction brings about a significant change in the structure of supply.

6.4.3.2.3. Indications of market strength based on new business

(164) Although a presentation of the market based on existing customers already provides important indications as to the market position which the combined

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108 See H3G Reply to RFI of 4 July 2012, Annex 3.1.3, work sheet "datacard analysis".

109 H3G Response to the SO, paragraph 78.

110 The Commission has not been able to reliably reconstruct market shares based on revenue given inconsistencies in the data provided by the Parties and competitors.

111 See paragraphs (174) and following.

112 Response to the SO, paragraph 79. A similar claim is made at paragraph 72.

entity would have after the merger, in the market in question, existing market shares are not conclusive as to the nature of competition. This is because many customers are bound to long-term contracts, which means that, at any given time, only a fraction of the total customer base is contestable. At any given moment, competition occurs only in respect of those contestable customers and entirely new customers (those who are not yet mobile subscribers at all), whose numbers have been declining significantly in recent years as the market has matured.[113] Consequently it would take a number of years before trends in winning new business were reflected in overall market share. Therefore in order to form a view of the likely dynamics in the market for the years following the implementation of the Proposed Transaction, it is also necessary to consider measures of new business, not only of existing stock.

(165) The Horizontal Guidelines[114] state that "*some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way, in particular when the market is already concentrated*".

(166) This is the case as regards the Proposed Transaction. Due to limited churn and market saturation, it would probably take a long time for current gains of new customers to be reflected in market shares. H3G has already had a high rate of gross adds in the past and its market share has nonetheless only grown slowly.

(167) The post-paid segment in Austria is characterised by a high degree of handset bundling and relatively long lock-in periods, which are necessary to amortise the handset subsidy included in the customer acquisition costs.[115]

(168) It may be assumed that the tendency for customers to remain on a given tariff plan well beyond the minimum two-year lock-in period is partly due to consumer inertia and partly due to the opportunity cost of switching. In general, switching in medium-term contracts markets presents an opportunity cost because the decision to switch implies foregoing opportunities to switch in the future which may be more attractive. As long as a customer has not switched, those opportunities have a real option value to the extent that the customer is considering switching to a plan which includes a subsidized handset.

(169) The value proposition of doing so is less compelling to the extent that the existing handset remains satisfactory. The choice of a new plan and handset at any given point in time therefore entails foregoing options which might appear on the market during the lock-in period of the new plan as well as prematurely writing off the investment in the existing handset.

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113 Information on gross adds provided by the Parties and their competitors in response to the Commission's RFI of 8 May 2012 suggests that in the post-paid private voice-enabled segment, new customers accounted for nearly [50-60]*% of all business in 2009, a figure which has subsequently declined constantly to [20-30]% in 2011 and [10-20]% in 1Q2012.

114 Horizontal Guidelines, paragraph 37.

115 In this Decision the term "handset" is used in a broad sense to include all end-user mobile devices equipped with a SIM card, including tablets, dongles and mobile routers.

(170) It follows that limiting the analysis to historic market shares would not give a complete picture as to the change of the competitive structure that would result from the Proposed Transaction, and it is necessary to complement this with an analysis of current customer acquisition rates.[116]

6.4.3.2.3.1. New business for post-paid private voice and data

(171) In terms of new private post-paid subscribers, H3G and Orange are much more important than their installed customer base would suggest, notwithstanding claims by H3G, further discussed in section 6.6, that it is reaching network saturation. In particular, in 2012, as shown in Figure 2, in the post-paid segment H3G and Orange consistently obtained around [20-30]*% of the gross adds each (jointly between [40-50]*%).[117] On average, for the first five months of 2012, H3G gained [20-30]*% of gross adds and Orange [20-30]*%, a total of [40-50]*% together. T-Mobile gained [30-40]*% across its two brands (T-Mobile and tele.ring), and A1 [20-30]*% with its A1, bob and Red Bull Mobile brands.[118]

Figure 2: Gross adds in the voice segment

[…]*

Source: presentation by Orange of June 2012 "067_Weekly_market_highlights_A_Moderc_120612.pdf". Doc ID 2499, slide 3.

(172) In the Mobile Number Portability ("MNP") data for the whole period 2009–2012/Q1, [20-30]*% of all MNP switchers chose H3G and [20-30]*% chose Orange. It should be acknowledged that this data does not include entirely new users who may have a different pattern of preferences, though the proportion of users who are entirely new is declining rapidly over time. Figure 3 shows the proportion of total MNP switchers in each quarter (indexed from 1 to 13) which selected each of the parties, showing comparable numbers and no clear trend over time.

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116 Cf. Commission Decision of 15 October 2010 in Case No COMP/M.5948 – *Santander/Rainbow,* OJ C 320, 25.11.2010, p. 1 (paragraphs 13 and following), the Commission reported mortgage market shares on the basis of new business, in view of the fact that legacy stocks were not necessarily informative about future competition. In Commission Decision of 20 December 2011 in Case No COMP/M.6436 – *Volkswagen Financial Services/D'Ieteren/Volkswagen D'Ieteren Finance JV,* OJ C 52, 22.2.2012, p. 1 (paragraphs 19 and following), market shares were computed on the basis of new leasing business. In Commission Decision of 22 December 2005 in Case No COMP/M.3978 – *Oracle/Siebel,* OJ C 18, 25.1.2006, p. 23 (paragraphs 22 and following) and in Commission Decision 2005/621/EC of 26 October 2004 in Case No COMP/M.3216 – *Oracle/PeopleSoft,* OJ L 218, 23.8.2005, p. 6 (paragraphs 185 and following), market shares were calculated on the basis of new license sales. The same approach was taken in the Commission Decision of 24 March 2004 in the antitrust case COMP/C-3/37.792 *Microsoft,* OJ L 32, 6.2.2007, p. 23 (see Recital 431).

117 See presentation by Orange of June 2012 "067_Weekly_market_highlights_A_Moderc_120612.pdf".Doc ID 2499, slides 3 and 4. On the pre-paid segment, H3G and Orange also have a smaller share of the gross adds (roughly between [5-10]*%-[10-20]*% for H3G and [5-10]*% for Orange (excluding Yesss!). Gross adds is the term used in the industry for new customers to the firm in question, without deduction of those who leave.

118 Unweighted averages for the five months in question.

Figure 3: Proportions of Total MNP Switchers

[…]*

Source: Commission calculations based on MNP data (I mean 1st quarter = 1Q09 through 13th quarter = 1Q12)

(173) It follows from the foregoing that the Proposed Transaction would bring about a significant change as regards competition for new business in post-paid plans covering both voice and data, with the merged entity bringing together the two brands which together represent the first choice of nearly half the market.

6.4.3.2.3.2. New business for data-only devices

(174) In the data-only segment, notwithstanding already being the leading operator, H3G gained the second highest number of new customers both in the post-paid and pre-paid subsegments, just behind A1.[119] The Proposed Transaction, which would lead to a significant concentration in the broadband segment based on installed base, would also do so in terms of new customers as the number of new post-paid customers of H3G ranges between [20-30]*%-[30-40]*% (average [30-40]%) and those of Orange range between [10-20]*% (average [10-20]*%) of the total number of gross adds in the first five months of 2012, for a total of [40-50]*%.[120] In this segment also, therefore, the Proposed Transaction would bring together the first choice brands of nearly half the market.

Figure 4: Gross adds in the data segment

[…]*

Source: presentation by Orange of June 2012 "067_Weekly_market_highlights_A_Moderc_120612.pdf". Doc ID 2499, slide 4.

6.5. Switching and closeness of competition

(175) While the market structure gives an indication as to the overall competitive strength of the various market participants, this section focuses on the competitive constraints imposed by the Parties on each other.[121]

(176) In order for a merger to create significant non-coordinated effects, the products offered by the merging parties must be viewed as closest substitutes to each other by a significant group of customers. This is clearly set out in the Horizontal Guidelines, which state that "*a merger between two producers offering products which a substantial number of customers regard as their first*

[119] A1 would lead in pre-paid with inclusion of Yesss!.

[120] In the pre-paid data segment, H3G captured between [30-40]*% and Orange got [0-5]*% of the gross adds in 2012. In the pre-paid market, Orange is mainly present with its Yesss! brand that has a [20-30]*% share of gross adds and is not retained as part of the concentration which the Commission is required to assess. This segment is of much less weight in the total as only [5-10]*% of H3G dongle data volume is on prepaid plans, and almost none is for Orange (because the prepaid business was almost all Yesss); based on March 2012; see H3G's reply to the Commission's RFI of 8 May 2012.

[121] Horizontal Guidelines, paragraphs 28-30.

and second choices could generate a significant price increase".[122] It is not necessary for the group to constitute a majority of customers for it to be substantial. The Horizontal Guidelines also indicate that it is appropriate to look at diversion ratios as part of the evidence to be considered in this respect[123]. This is assessed in Section 6.5.1.

(177) In order to establish whether two firms are indeed close competitors, the Notifying Party claims, that, would require "*the identification of similar characteristic[s] between the Parties (which they do not share with the other competitors) in an area which is of decisive importance for a particular but significant group of customers*".[124] By emphasising that similar characteristics should not be shared with competitors, the Notifying Party implicitly suggests that the Commission would have to show that the Parties are indeed closest competitors in a number of dimensions.[125] The Horizontal Guidelines state that a transaction may already generate a significant price increase if only a "*substantial number of customers regard [the Parties] as their first and second choices*".[126]

(178) The Commission's analysis as regards the existence of a sufficient degree of closeness of competition to result in a significant effect on competition is based on the assessment of the MNP database and survey data, but also on the results of its market investigation and the review of internal documents submitted by H3G and Orange.[127] The purpose of the analysis is to show that there exist dimensions in which the Parties are close; the observed diversion ratios between them (that is to say, the proportion of customers of one which switch to the other) are consistent with evidence from other sources.

(179) The Notifying Party considers that "there are no two mobile network operators in Austria who are particularly close competitors to each other within the meaning of the Horizontal Merger Guidelines".[128] The Notifying Party also states that "the Austrian market is characterised by fierce price competition" and that "[a]ll operators contribute fully to this state of competition".[129] The Commission's assessment of the factual situation – as opposed to the standard of proof – in this regard appears to be similar to that of the Notifying

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122 Horizontal Guidelines paragraph 28.

123 Horizontal Guidelines, paragraph 29.

124 H3G´s response 4 October 2012 to the SO, para 89.

125 In that regard, the Horizontal Guidelines states in paragraph 28 that a merger will be less likely to significantly impede effective competition where there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers. However, this does not mean that a significant impediment to effective competition is unlikely (or impossible) whenever substitutability is lower between the products of the merging firms than those supplied by rivals.

126 Horizontal Guidelines, paragraph 28.

127 In the SO (see Section 6.1.1.2.3), additional evidence was presented relating to a pricing analysis carried out with reference to the tariff data collected by the Vienna Chamber of Labour. The Commission has, on further reflection, come to the view that this analysis is inconclusive as to closeness of competition.

128 Form CO, paragraphs 203 and following.

129 See H3G´s response 4 October 2012 to the SO, paragraph 121.

Party. The additional elements in support of the position taken by the Commission as regards closeness of competition are therefore mainly set out in this Decision in support of the Commission's view that the Parties exert a significant competitive constraint on each other.

6.5.1. *Diversion ratios*

(180) A specificity of the retail mobile telecommunications markets is that data on subscriber switching between firms is readily available as a result of regulatory provisions on number portability. The net effect of the pattern of preferences in the market is shown by the diversion ratios observed.[130]

(181) However, not all users port their numbers when they change providers. In particular, the Commission agrees with the Notifying Party that the subscriber number is likely to be unimportant to data-only users and, presumably, such users would be expected to figure scarcely in the database, if at all.[131]

(182) The Notifying Party also argues that "*the vast majority of switchers who use number portability are post-paid customers*".[132] Indeed, according to the data provided in Annexes 6(6) and 6(7) to the Form CO, switching to prepaid in the MNP database as a proportion of all ported numbers in 2011 was only [0-5]*% for H3G, whilst for Orange it was only [0-5]*%. Consistent with this, the use made by the Commission of the MNP data concerns the post-paid segment. The Commission has not been able to establish reliable quantitative estimates of switching in the data-only segment.

6.5.1.1. The view of the Notifying Party

(183) The Notifying Party considers that because all MNOs are similarly close competitors each switcher is equally likely to choose any mobile operator. The Notifying Party argues on the basis of the MNP data that (i) Orange attracts the lowest number of MNP switchers in the market and (ii) diversion ratios show significant switching between all operators.

6.5.1.2. The Commission's assessment

6.5.1.2.1. Evidence on switching from the MNP Data

(184) The MNP switching data, which covers the period from 2009/Q1 to 2012/Q1,[133] shows, as the Notifying Party acknowledges, that H3G is winning many more customers than it is losing. This pattern is consistent with H3G's growing subscriber base. H3G loses customers in similar proportions

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130 Horizontal Guidelines, paragraph 29.

131 Form CO, paragraph 205.

132 Form CO, paragraph 205. It is noted by the Commission that the very different attitudes this would seem to imply as between prepaid and postpaid customers is supportive of the view that they constitute largely distinct segments of demand. The only predominantly prepaid brand in the data segment is Yesss!, which represents only [0-5]*% of outward switchers and [0-5]*% of inward switchers. This disparity also suggests that users "graduate" from prepaid to postpaid far more often than they change in the other direction.

133 The data for the first quarter of 2012 covers only the first two months of the period.

to all competitors and wins customers in particular from TA, but to a lesser extent than TA's market share would suggest.[134]

(185) For the first time since 2010, the MNP data shows that Orange was also quite successful in the last quarter of 2011 and in the first two months of 2012. It gained [10,000-20,000]* MNP switchers and lost [10,000-20,000]* MNP switchers in the last quarter of 2011. In the first two months of 2012, Orange gained [10,000-20,000]* and lost [0-10,000]* MNP switchers.

(186) If, as the Notifying Party argues, switchers were (at least on average) equally likely to choose any mobile operator because they all offer very similar products, then each MNO would be expected to capture switchers proportionally to its competitors' relative market shares. The Notifying Party itself has acknowledged, however, that H3G's share of all switching customers based on MNP data is [30-40]% and its share of all customers switching from Orange is [20-30]*%. This is broadly consistent with market shares only on the assumption, apparently acknowledged by the Parties, that the correct measures of competitive strength are the shares based on new business.[135]

(187) The Commission would also point out that many factors contribute to the overall pattern of switching. The mere fact that switching occurs in roughly similar proportions to each of the other firms *on average* does not imply that products are perceived by individual consumers as homogenous or that they do not have preferences between them. For example the analyses carried out for H3G of brand positioning cited below[136] show clearly that each brand has a very distinct positioning based on a combination of its objective characteristics and customer sentiment. Roughly equal switching rates may also be the result of a process in which the strategic variables relate to product differentiation. Thus firms may offer products which are similarly differentiated from each other in terms of their characteristics, resulting in roughly equal switching rates between competitors, without this implying that there is no differentiation.

(188) If diversion ratios from Orange to H3G and from H3G to Orange were estimated based purely on market shares of existing subscribers, this would underestimate to a significant degree the actual closeness of substitution between the two companies and therefore the ability of the merged entity profitably to increase prices. The subscriber (respectively revenue) market shares would predict a diversion ratio of only [0.10-0.20]* ([0.10-0.20]*) from H3G to Orange and a diversion ratio of [0.10-0.20]* ([0.10-0.20]*) from Orange to H3G.[137] The switching data shows, however, a much higher diversion ratio

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134 For example, in 2011, A1's market share of subscribers in the mobile retail market was [40-50]*% and that of H3G was [10-20]*%. Therefore, on the basis of market shares, one would expect [40-50]*%/(1-10%) = [40-50]*% of H3G new customers to come from A1. However, the share of customers that switched to H3G from A1 in 2011 was only [30-40]*%.

135 The Parties acknowledge that diversion ratios are similar to shares of gross adds at paragraph 3.13 of the Compass Lexecon submission of 10 September 2012 on unilateral effects.

136 See Section 6.5.2.4.

137 Using the market shares given in Annex 6.(2) to the Form CO ([10-20]*% H3G, [10-20]*% Orange in terms of subscriber and [5-10]*% H3G and [10-20]*% Orange in terms of revenue)

of [0.20-0.30]* from H3G to Orange for the most recent twelve month period and [0.20-0.30]* from Orange to H3G.[138]

(189) The fact that approximately one third of Orange's post-paid customers switch to H3G confirms the significant competitive constraint imposed by H3G on Orange and similarly by Orange on H3G.

6.5.1.2.2. Evidence from surveys

(190) The Commission has also considered the arguments of the Parties whereby other estimates of diversion ratios might be more appropriate than the estimates furnished by the MNP data, in particular estimates of diversion ratios based on customer surveys. However, as set out in more detail in Annex I, the Commission has concluded that these alternative sources do not provide a better estimate than the MNP data, and are, in any case, broadly consistent with it. This is because the surveys mostly do not directly estimate the required diversion ratios, are based on small sample sizes (and therefore have high margins of error), and suffer in certain cases from systematic biases. There is therefore no reason to prefer estimates based on customer surveys to the estimates based on the MNP data.

6.5.2. Other evidence on closeness of competition

6.5.2.1. The view of the Notifying Party

(191) In the response to the SO, H3G argues that the internal documents submitted to the Commission confirm that all MNOs compete fiercely in all segments of the market and do not provide any support for the theory that H3G and Orange may be the closest competitors in relation to any dimension of competition.[139]

6.5.2.2. Analysis of market data

6.5.2.2.1. Private post-paid voice-enabled segment

(192) As seen from Table 11, H3G has a particularly aggressive offering towards data-intensive smartphone users, resulting in its increasingly positioning itself as the operator of choice for many such users.[140,141]

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one can compute the diversion ratio from H3G to Orange based on subscriber market shares as [10-20]/(100-10) = 0.10-0.20* and similarly for the others.

138 Data calculated for the last three quarters of 2011 and the first quarter (two months only) of 2012.

139 See H3G Response to the SO, paragraphs 139 and following.

140 At paragraph 69 of the response to the SO, the Notifying Party misrepresents the Commission's argument in the SO as implying there is a separate market for data over smartphones. It was, however, clear in the SO that this is not the Commission's position, and that data volumes are considered as one indicator of the strength of the Parties in post-paid bundles overall.

141 Table 11 is not, based on the information provided by the Parties, able to make a distinction between pre- and post-paid plans, but if one were to make such a distinction then to the extent that the Parties are less well represented in pre-paid, their importance in the post-paid voice enabled segment in terms of data volumes could only be higher. It is however likely that the vast majority of data over smartphones corresponds to post-paid plans, so that exclusion of prepaid plans would not be expected to significantly to affect the result. For 2011, post-paid

Table 9: Mobile data over voice-enabled devices (megabytes)

Operator	Units (MBs)					
	2009		2010		2011	
	m MBs	Share (%)	m MBs	Share (%)	m MBs	Share (%)
H3G	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[30-40]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[20-30]*%	[…]*	[10-20]*%
Combined	[…]*	**[20-30]*%**	[…]*	**[40-50]*%**	[…]*	**[40-50]*%**
TA	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
Yesss!	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Combined	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
T-Mobile	[…]*	[30-40]*%	[…]*	[20-30]*%	[…]*	[10-20]*%
Vectone	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Total	[…]*	**100%**	[…]*	**100%**	[…]*	**100%**

Source: Form CO, Annex 6.3, Table 21 subtracted from Table 49

(193) The Notifying Party has argued that these figures are partly influenced by the tariff structures, especially the offering by H3G of "unlimited" data plans,[142] and therefore are "*meaningless*" indicators of market strength.[143]

(194) The Commission is not, however, arguing that these figures are indicative of market strength; they are presented, rather, as an indication of market positioning.

(195) In this regard, Orange appears to be a particularly important competitor. The progression in H3G's share of total data consumption over smartphones comes at the expense of TA and T-Mobile, both of whom see their shares substantially decline. Orange, on the other hand, appears, at least so far, to have been able to withstand the competition from H3G for this class of user better.

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data excluding dongles was over [90-100]*% of the total data traffic for H3G. For Orange excluding Yesss, it was [90-100]*%.

142 It should be noted that on 17 October 2012, the H3G website did not offer a smartphone data tariff without throttling – the highest data use tariff (3Superphone XXL), both with and without handset and lock-in period, offers 6 GB, followed by throttling to 64 kbits per second. For an additional EUR 3 per month the option "Doppelte Highspeed GB" can be chosen which allows for a double allocation of data, but there is still throttling after the double allocation. It is only the data-only offerings of H3G which include (but are not limited to) tariffs without throttling. The Commission considers that it is not clear to what extent smartphone users would reach the typical usage ceiling of their plan in any case. Moreover, the vast majority of data traffic on the network (in excess of [80-90]*% in 2011) in any case is used by data-only devices, making the offering of smartphone data plans with high ceilings relatively inexpensive for H3G in terms of additional capacity load.

143 H3G Response to the SO, paragraph 60.

(196) In the Form CO, the Notifying Party offers the explanation that Orange's performance may be related to the co-exclusivity it obtained, together with T-Mobile, on sales of the Apple iPhone, which expired in Autumn 2010.[144] This co-exclusivity is, in turn, explained by commercial agreements with Orange's parent. While the Commission acknowledges that Orange might have profited from its parents' exclusive access to Apple's handset, Orange has meanwhile partnered with Samsung and opened a store in Vienna showcasing Samsung's handsets. Orange therefore seems to continue its path of product innovation with regard to telephony hardware despite losing iPhone co-exclusivity in 2010.[145]

(197) It follows that, contrary to what is claimed by the Notifying Party, the Proposed Transaction would bring about a considerable transformation in the structure of the market precisely in respect of those users who can be expected to drive a large part of future growth in the voice-enabled segment, namely smartphone users. According to data from GfK provided by the Parties, almost one in two of the 3.3 million mobile phones sold in Austria in 2011 were smartphones, amounting to a market penetration of 40%; for 2012, the ratio is nearly two in three.[146]

(198) The growth in consumer demand for mobile broadband over smartphones is in very sharp contrast to demand for voice services, which has only grown at an annual rate of 3.6% over the same period. As a result, it is clear that the vast majority of new demand is driven by demand for data services and smartphone handsets which, for many users, are progressively replacing simpler handsets based on older technology. A considerable part of new demand will therefore be directed towards those providers best able to meet that demand. The position of the Parties in this regard therefore assumes particular importance and may be expected to signalise their competitive strength in the offerings of post-paid voice and data bundles in the short to medium term.

(199) Analysis of data from the Parties confirms that data services over smartphones represent an important contribution to revenue and that this contribution continues to grow. Bearing in mind that there are costs which are specific to voice services such as interconnection costs, this means that data services are even more important to the profits of providers.

(200) The Commission requested the Parties to provide unbundled prices for voice, SMS and data. Orange, in its reply, indicated that it was unable to do so, and that the price it cited was a price only for out-of-bundle units. It is therefore not possible to calculate, for Orange, a breakdown of the revenue contribution from each of the three services without the Commission making certain assumptions on how to attribute the overall revenue. However, if usage is considered, the figures provided show that between May 2011 and May 2012

144 Form CO, para 280.
145 See also section 6.5.2.3.
146 Form CO, paragraph 594.

the average use of voice and SMS remained quite stable, whereas the use of data almost doubled.[147]

(201) In the case of H3G,[148] data revenues represented in January 2011 [10-20]*% of the same total, whereas by March 2012 they represented [40-50]*%, that is to say, more than doubled in their relative contribution to revenue.[149] Revenue from voice and SMS services grew at an average of EUR [0-1,000,000]* per month (almost all of which is due to outgoing SMS), compared to EUR [1,000,000-5,000,000]* additional revenue per month from smartphone data, which therefore grew nearly 3 times more quickly than other revenues.[150]

(202) This trend can be expected to continue, as also confirmed by H3G's own analysis, which states that […]*[151]

(203) In response to the SO, the Parties argued that they were unable to reconstruct the Commission's calculations on this point. The Commission's analysis is based on the Parties' reply to the RFI of 8 May 2012. The Parties provided an "effective price" for data per MB, as well as quantities consumed. The product of these two values provides the revenue from data. This is compared, for the post-paid segment, to the revenues from voice and SMS given in the same source.

(204) This calculation for Orange turned out to be incorrect as it had not provided the requested unbundled price. The contribution of out-of-bundle data is irrelevant to the analysis because it is out of bundle and not the total. However, H3G did provide such a price. In H3G's reply to the RFI of 8 May 2012, it raised no concerns about its ability to calculate an unbundled effective price. Moreover, it would appear that it also produces such an unbundled price for its own internal purposes. The Financial Reports provided in response to the Commission's RFI of 4 July 2012 contain such figures in Tab E. The claim in the response to the SO that "*it is not therefore possible to separate the revenues associated with data usage*"[152] is therefore directly contradicted by the evidence H3G itself has provided[153].

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147 Calculations based on Orange financial report for May 2012, provided in response to the Commission's RFI of 4 July 2012.

148 In the SO, (paragraphs 82-84), the Commission included a calculation of the relative price of data for Orange and H3G. This calculation was incorrect, as the Orange figure represented out-of-bundle data only, which is more expensive.

149 The calculation includes international roaming and other (non-specified) sources of revenue.

150 Calculations based on Annex 5.1 to H3G's response to the RFI of 8 May 2012, Doc ID 998.

151 Market Insights. Competition update. Recent Market Research. Document cw 21 (21. – 27.05.2012), provided in response to the Commission's RFI of July 2012, Doc ID 4122.

152 H3G Response to the SO, paragraph 58.

153 As a general matter, it is a routine exercise in management accounting to unbundle revenues from bundled products using a chosen revenue allocation key (such as the costs of each element of the bundle) in order to determine which are the contributions of each of the elements to revenue and profits. Whilst the allocation key may be chosen in different ways, the Commission's calculations here rest on data provided by H3G using, one would assume, the same methodology as used for internal management accounting purposes (and therefore generated

(205) In any case, as data consumption increases for both Parties relative to voice consumption, and there is a fixed relationship between them in terms of network usage, the statement that revenues due to data are increasing as a proportion of the whole is robust to any reasonable revenue allocation method. In this respect, the data calculations confirm a conclusive trend in the market.

(206) The Commission therefore takes the view that the position of the Parties in data services over voice-enabled (as well as data-only) devices needs to be given particular weight in assessing the impact of the Proposed Transaction on the relevant market.[154]

6.5.2.2.2. Data-only segment

(207) When looked at on the basis of data volumes over dongles, H3G represents a considerably greater proportion of overall data traffic than its market share on the basis of subscribers would suggest. This shows that the typical H3G customer has a distinctively intensive usage pattern. Orange, on the other hand, is the only MNO whose data traffic has been relatively static over 2009-2011, resulting in a diminishing proportion of the overall total.

Table 10: Data only volume

Operator	Units (MBs)					
	2009		2010		2011	
	m MBs	Share (%)	m MBs	Share (%)	m MBs	Share (%)
H3G	[…]*	[30-40]*%	[…]*	[30-40]*%	[…]*	[50-60]*%
Orange Austria (excl. Yesss!)	[…]*	[10-20]*%	[…]*	[10-20]*%	[…]*	[5-10]*%
Combined	[…]*	**[50-60]*%**	[…]*	**[50-60]*%**	[…]*	**[50-60]*%**
TA	[…]*	[20-30]*%	[…]*	[20-30]*%	[…]*	[20-30]*%
Yesss!	[…]*	[0-5]*%	[…]*	[0-5]*%	[…]*	[0-5]*%
Combined	[…]*	[20-30]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
T-Mobile	[…]*	[20-30]*%	[…]*	[10-20]*%	[…]*	[10-20]*%
Total	[…]*	**100%**	[…]*	**100%**	[…]*	**100%**

in tempore non suspect, that is information gained when the one who gives the information has nothing to gain by not telling the truth).

154 It should also be borne in mind that the definition of postpaid in the data segment includes certain types of plan, like A1's bob, which although technically postpaid do not feature lock-in periods and handset subsidies and thus are more comparable to pre-paid in their target customer base. The Commission's view is that this type of service is likely to compete for a distinct segment of demand and ideally the analysis would be carried out on contract bundles only. However, for reasons of data limitations it has not been possible to make this distinction in the figures used in this Decision.

Source: Form CO, Table 21

(208) The Parties' figures in the Form CO, if correct, would imply the figures in Table 11 for data use per installed dongle/datacard in absolute terms and relative to the average in the market.

Table 11: Private mobile broadband (data use per installed dongle)

Operator	MB per dongle					
	2009		2010		2011	
	MBs	relative	MBs	relative	MBs	relative
H3G	[…]*	[100-110]*%	[…]*	[140-150]*%	[…]*	[160-170]*%
Orange Austria (excl. Yesss!)	[…]*	[200-210]*%	[…]*	[200-210]*%	[…]*	[150-160]*%
Combined	[…]*	[120-130]*%	[…]*	[160-170]*%	[…]*	[160-170]*%
TA	[…]*	[70-80]*%	[…]*	[90-100]*%	[…]*	[80-90]*%
Yesss!	[…]*	[20-30]*%	[…]*	[30-40]*%	[…]*	[30-40]*%
T-Mobile	[…]*	[80-90]*%	[…]*	[70-80]*%	[…]*	[50-60]*%
Market average	[…]*		[…]*		[…]*	

Source: Annex 6.3 to Form CO, sum of tables 29 and 44, divided by Table 21

(209) Using the figures provided in the response to the RFI of 4 July 2012, the average use of an Orange datacard would be much closer to the average for the rest of the market, that is to say, 10,230 MB.

(210) On either calculation, the use made of an H3G dongle would have almost tripled over the period 2009–2011 whilst that of a T-Mobile dongle would have remained nearly constant. However, it seems unlikely that the level of use of an H3G dongle by existing subscribers should have increased so significantly over the period 2009–2011, whilst its share in number of subscribers remained largely unchanged. This is hard to reconcile with the claim that T-Mobile increased its number of subscribers despite the fact that the attractiveness of using its dongles remained stable (that is to say, declined in relative terms). This provides a further indication that the Parties have overestimated the market share in terms of number of dongles of T-Mobile.

(211) In this market segment, H3G is already the largest provider by a significant margin by volume and it would become even more important after the Proposed Transaction with the additional increment of around [10-20]*% from Orange. Both also continue to be dynamic competitors as they continue to gain shares in the segment […]*

(212) In response to the SO, H3G argues that "*In light of H3G's flatrate offer, it cannot be surprising that there is much more data traffic over H3G dongles than over T-Mobile dongles.*"[155]

(213) In support of the first point, H3G adds that "*[the high share measured by data volume] merely reflects that H3G accounts for a high proportion of da-*

[155] Response to the SO, paragraph 75, second indent.

ta-intensive customers as a consequence of the fact that H3G is the only operator in Austria who offers an unlimited data flat tariff. If anything, the corresponding large data consumption on its network is only a burden for H3G, but does not provide it with any competitive advantage or even market power. H3G does not receive additional revenues from this usage nor does it result in a larger number of subscribers."[156]

(214) Whilst it is true that H3G has made the commercial choice to appeal to potentially intensive data users by offering a data only tariff without throttling, it has provided no information to support the view that the offering of this tariff affects the quantity of data which a consumer chooses to use, much less that it is a "burden". Flat rate customers represent a proportion of H3G's total data customer base which continues to grow (Dec 2011: [20-30]*%). H3G also offers a cheaper tariff limited to 10 GB per month, which is well in excess of the average calculated in Table 12 which corresponds to only 2.8 GB per month. This tariff would therefore seem objectively likely to be sufficient for most customers (whether or not it is the tariff they actually choose).[157] This is entirely comparable with the cheapest tariff of T-Mobile, "All Inclusive Internet 3G", which offers a 10 GB allowance followed by throttling.[158]

(215) The average actual use of customers on a flat rate plan is not that much higher than this threshold, at 12.6 GB per month.[159] Even if one were to make the assumption that these customers, in the absence of a flat rate plan, would remain within a reasonable margin of the 10 GB threshold, for example using only half what they currently do, so an average of 6.3 GB per month, H3G would still have carried […]* MB in 2011, which would have been [30-40]*% of the total (with Orange an additional 10%).

(216) H3G also argues in the response to the SO that "*the Commission speculates that H3G has over-estimated the dongle share of T-Mobile. H3G does not know how many dongles T-Mobile sold and the figure provided was an estimate. H3G is astonished that, after almost five months of investigation, the Commission should raise such a point of fact so late in the process particularly given that the Commission has tools at its disposal to request from T-Mobile the number of dongles sold on the market. If the Commission had doubts about the H3G estimate it should (acting reasonably and in accordance with its duty of good administration) have asked T-Mobile to provide the accurate figure.*"[160] H3G goes on to state that *"Further, the Commission does not seem to have taken account of the high share of business customers accounted for by T-Mobile which may also contribute to explain the lower*

156 H3G Response to the SO, paragraph 77.

157 Calculations for 2011 based on the data provided by H3G in response to the Commission's RFI of 4 April 2012. This data further shows that flat rate subscribers represented, for 2011, [20-30]*% of revenue and [60-70]*% of network usage.

158 Information from www.t-mobile.at (retrieved on 23 October 2012).

159 Calculations for 2011 based on the data provided by H3G in response to the Commission's RFI of 4 April 2012.

160 H3G Response to the SO, paragraph 75, third indent.

usage of T-Mobile dongles since business customers include the "datalight" machine-to-machine (M2M) usage of dongles"[161].

(217) In this regard, it should first of all be noted that, in order to carry out a correct assessment of the Proposed Transaction, the Commission relies on the accuracy of the data provided by the Parties, which should make all necessary distinctions in order to allow that data to be correctly and meaningfully interpreted. The Commission notes that both H3G and Orange offer M2M services, and has no particular reason to believe that T-Mobile should be especially strong in this regard, *a fortiori* not to such an extent as to have a major impact on the calculated figures.

(218) The Commission did ask T-Mobile for information in order to check the estimates of the Parties. That information is consistent with its conclusions that the Parties overestimated T-Mobile's share, but was not required in order to draw that conclusion. The information provided by T-Mobile constitutes a commercial secret of the latter and the measures which would have been required to use the data would have been disproportionate to any benefit from doing so. The data was therefore not presented as evidence in the SO, and is not presented as evidence in this Decision.

(219) In the response to the SO, H3G goes on to claim that "*alternatively, the Commission could contact the RTR which has already collected this data*".[162]

(220) The Commission put this claim to the RTR, and it turned out that it is incorrect. The RTR informed the Commission that "*RTR collects following data: Number of subscribers having a data only tariff (without voice & SMS) including a data volume of at least 250 MB per month. There is no additional distinction in the data collection questionnaire between dongles and data cards.*"[163] Therefore, not only does the RTR not have the data which the Parties claim it should have, but in fact it collects, on a confidential basis, data for a wider data-only segment, just as the Commission requested from the Parties but was told they could not provide.[164]

(221) H3G goes on to state that "*should the Commission wish to rely on this objection in its final decision, H3G requests, in accordance with its rights of defence, to be able to provide written comments on this objection*".[165]

(222) H3G has no need to request permission to provide written comments on this or any other element of the Commission's evidence and reasoning. It has done so in response to the SO and remained free to do so during the remainder of the procedure. Its rights of defence have therefore been fully respected.

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161 H3G response to the SO, paragraph 77.

162 H3G response to the SO, paragraphs 77 and following.

163 Email of RTR dated 19 October 2012, non-confidential version of 24 October 2012.

164 See footnote 97 to the Form CO.

165 H3G response to the SO, paragraphs 77 and following.

6.5.2.3. Results of market investigation

(223) On the basis of the market investigation, the Commission considers that in terms of pricing and tariff structures and as regards smartphones and data services, Orange and H3G are close competitors, and on some important dimensions are particularly close. In 2011, H3G and Orange generated [50-60]*% and [60-70]*%, respectively, of their revenues in the private post-paid segment, suggesting that their most important tariffs fall into that segment.[166] This already suggests that they offer similar products in the sense that a large fraction of the Parties' tariffs is geared towards similar customer groups.

(224) During the Phase II market investigation the Commission sent a questionnaire to H3G and Orange's distributors and resellers asking them who they consider the leader in a number of different categories.[167]

(225) In the categories of flexible tariffs and residential customers, Orange came second (after H3G). Orange also came second after H3G in terms of overall satisfaction. Also, when asked which is the closest competitor to Orange, the majority of distributors and resellers who responded, replied it was H3G in terms of offer quality, low prices, flexible tariffs, residential customers, customer service (together with A1) and overall satisfaction. The only areas where another MNO was perceived as a closer competitor than H3G was "offer for business customers", where A1 was perceived as the closest to Orange (logically, as H3G is not very active in the business segment), marketing, where T-Mobile was perceived as the closest to Orange and network quality, where A1 was perceived as the closest to Orange.

(226) The Commission also asked distributors and resellers which MNO is the closest competitor of H3G in the same categories. The majority of respondents considered that Orange was H3G's closest competitor in terms of low prices, flexible tariffs and residential customers.

(227) These elements indicate that H3G and Orange are perceived by the industry as particularly close in relation to tariff flexibility, pricing and residential customers.

(228) In response to the SO, the Notifying Party argues that H3G and Orange "*pursue entirely different handset subsidy policies*" and that while deep subsidies are important for H3G, Orange "*focuses very much on SIM-only tariffs and sells two-thirds of its post-paid handset tariffs in this segment*".[168]

(229) This claim goes well beyond what was set out in the Form CO, and appears to be a recent initiative by Orange. It is in any case the perception of closeness by customers which is decisive.

(230) In the Form CO, H3G only said that "*in relation to premium Smartphone customers, H3G considers that T-Mobile is the operator who, besides H3G,*

166 See also section 6.4.3.2.

167 See results of "Q3- II – Fragebogen an Distributoren und Wiederverkäufer" of 11 July 2012, Doc ID 4333.

168 Response to the SO, paragraph 120, final indent, and paragraphs 150–156.

is most focussed on this segment with aggressive price packages (including handset subsidies) and thus arguably *a closer competitor to H3G than,* for example, *Orange in this respect*".[169] They also describe handset subsidies as one of "*many factors that are constantly changing in the market place*".[170]

(231) Based on Annex 6.11 to the Form CO, H3G argues only that "*Orange has a higher percentage of SIM only tariffs available*".[171] That annex appears incorrect, as it shows none of the other operators having SIM-only tariffs at all, although all of them, including H3G, do. In any case, no conclusions can be drawn based simply on the number of tariffs offered.

(232) The Commission also notes the recent opening by Orange of a flagship retail outlet cobranded with Samsung (currently one of the leading handset producers) in Vienna.[172] This is hardly proof either of a firm in decline on the high-end handset market or of one having abandoned the retail of handsets as a significant element within its business model.

(233) In the event that Orange had durably changed its business model towards SIM-only, it would be able to rationalise its distribution network considerably, since distribution outlets are particularly important to showcase handsets. There is no evidence of any plans in this direction, nor indeed of any decision by the Orange board to implement a strategic reorientation (as opposed to, for example, a simple commercial initiative responding to a particular, possibly temporary, perceived opportunity).

(234) Moreover, closeness of competition between the Parties does not require them to be selling identical products. Products may be very different, and still constrain each other significantly. In the case of SIM-only tariffs, these may be purchased for use with an existing handset which is out of contract, or the handset can be procured separately. In the latter case, the customer is able to reconstitute the product offering of bundled handset and tariff, and make a choice between the upfront financing required by separate handset procurement and the financing facility offered by a bundled tariff.

(235) It follows that the information put forward by the Notifying Party regarding the Parties' respective business strategies does not alter the assessment of the competitive impact of the Proposed Transaction.

6.5.2.4. Internal documents

(236) On 15 June 2012, the Commission sent an RFI to H3G and Orange requesting internal documents which discuss, amongst other things, the closeness of competition between the two Parties. A number of documents submitted in

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169 Form CO, paragraph 204 (emphasis added).

170 Form CO, paragraph 252.

171 Form CO, paragraph 255.

172 See http://www.vienna.at/samsung-und-orange-eroeffnen-shop-am-stephansplatz/3384574; http://diepresse.com/home/techscience/hightech/1300602/Samsung-auf-Untermiete-bei-Orange-in-der-Wiener-City; http://wirtschaftsblatt.at/home/nachrichten/oesterreich/1299936/Duell-Samsung-gegen-Apple-im-Wiener-Zentrum (retrieved 12 November 2012).

response to that request for information provide evidence that H3G considers Orange as a close competitor.

(237) Internal surveys, provided by the Parties, establish that customers perceive Orange and H3G to be close competitors.[173] Notably, consumers identify both H3G and Orange to be innovative players which set trends in the market.

(238) Figure 5 and Figure 6, drawn from internal documents of the Parties, are illustrative in this regard.

Figure 5: Limbic map, Positionierung der Marken

[…]*

Source: H3G Reply to RFI of 4 July 2012, Annex e (Confidential), Brand Personality.ppt, slide 18.

(239) […]*[174]

Figure 6: Positionierung – Ergebnisse einer Korrespondenzanalyse

[…]*

Source: […]*

(240) Figure 6 shows another perception of Orange's brand in the market which, once again, overlaps only with that of 3.

(241) In the response to the SO, H3G argues that "*this type of material can have no evidential value in a phase II merger control proceeding. The Commission's assessment must rely on objective and verifiable facts. The market research analysis is unscientific, subjective and largely speculative nature.*"[175]

(242) The Commission does not agree with H3G's characterisation of the market research analysis. H3G devotes a significant budget to this kind of analysis, which suggests it is considered to convey important commercial information.

(243) H3G goes on to argue that "*the extent to which brand is a relevant factor in the purchasing decision of customers is a question of the types of products*

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173 […]*

174 The Limbic Map is a tool created by the branding consultancy Nymphenburg and based on principles of neuromarketing. Its creators state that "*successful brand management means that only brands which occupy in the mind of the consumer a clear emotional field are able successfully to prevail against the competition. The experienced emotional core of a brand consists in the sum of motivations which consciously or unconsciously are addressed by the brand and brand communication. Limbic® makes it possible to illustrate successful positioning, to show overlaps in positioning, and to identify relevant differentiation vis-à-vis the competition. Emotional brand positioning and relevant differentiation are the basis to translate the brand into strategic and operational marketing and defines the presentation of the brand and the derived communication strategy*" (Commission's translation). See http://www.nymphenburg.de/branding.html (retrieved 24 October 2012). The scientific basis for and influence of these factors on the purchase decision is described in an article by leading neuromarketing practitioner Dr Hans-Georg Haeusel, see http://www.nymphenburg.de/tl_files/pdf/LimbicScience110220.pdf (retrieved 24 October 2012).

175 H3G Response to the SO, paragraph 101.

concerned. There are certain highly differentiated industries in which branding plays an important role, for example cars or clothes. Mobile telecommunications services is not such an industry. Advertising is essentially focused on pricing, tariffs and network quality. These criteria, and not brand positioning, are the primary drivers of the purchasing decision."[176]

(244) The Commission considers that these statements fail to recognise how brands are formed and contribute to the purchasing decision of consumers. Branding is valued by firms because it conveys information about the perceived value proposition of a product and influences the choice of consumers who are usually insufficiently informed and do not have the time to research all the characteristics of the product. Customers may not even realise this is the case.[177] The fact that consumers may not acknowledge that brand is important does not necessarily mean that it is not an important factor in their purchasing decision.

(245) Branding does not only concern luxury and status goods, as the Parties seem to imply. Rather, it concerns the relationship between the product and the customer and is part of the mental map which consumers use to navigate the purchase decision.[178] All of the characteristics cited by the Parties as determining consumer choice are therefore in fact part of the brand. This is because consumers usually do not know the real value of all the variables important to them, or even what variables are important and how to evaluate them: they have a perception and decide on this basis. Indeed, H3G very visibly insists on its network quality as a core component of its brand, doubtless well aware that "*among all brand associations, only perceived quality has been shown to drive financial performance*" and that indeed it is "*the single most important contributor to a company's return on investment, having more impact than market share, R&D, or marketing expenditures*".[179] The importance of network quality to individual customers will vary, and there is no single measure of product quality on which all consumers will agree.

(246) Indeed, the importance of brand in the mobile industry is particularly well-known to Hutchison, which created the Orange brand and subsequently sold it to Mannesmann in 1999. Orange – with its well-known brand slogan "*The future's bright, the future's Orange*" was described at the oral hearing by HWL[180] as "*the iconic mobile phone brand*".[181] At the time, Mannesmann

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176 H3G Response to the SO, paragraph 103.

177 See for instance G. Zaltman, *How Customers Think* (2003).

178 See for instance Chaudhuri and Holbrook (2001), "The Chain of Effects from Brand Trust and Brand Affect to Brand Performance", *Journal of Marketing*, April 2001, p. 81.

179 D.A. Aaker 1996, *Building Strong Brands*, p.17

180 Presentation "Hutchison's investment in Europe and 3G as market challenger" by Christian Salbaing, Deputy Chairman Hutchison Whampoa (Europe) Limited.

181 See Izbicki 2000, "Orange International: The Creation of a 21st Century Patent", available at http://the-sea.com/The_SEA_Innovation_Branding_Service_Product_Design/news/Entries/2011/1/10_Creation_of_a_21st_Century_Patent_-_Gold_Ward_IPA_Effectiveness_for_Orange_International_files/Orange%20–%20IPA%20case%20study%202000.pdf (retrieved 24 October 2012).

chief executive Klaus Esser said the purchase of Orange would give his company "*the strongest mobile brand in Europe.*"[182]

(247) The confidence expressed by H3G in the value of brand is confirmed by leading business scholars. In his classic textbook, Philip Kotler states "*The most lasting and sustainable meanings of a brand are its core values and personality*".[183]

(248) It follows that the proximity between the Parties depicted in Figure 6 suggests that many customers would have a tendency, all other things being equal, to view them as first and second choice, and be less willing to switch to the remaining competitors. It is not conclusive in this regard, as significant switching is also observed from and to the other competitors in the market. But it nonetheless shows a level of overlapping brand preference which is currently likely to act as a constraint on the pricing of the Parties and which would be eliminated by the merger. Indeed, given that Orange was itself a brand created by HWL, this similarity is not surprising.

6.5.3. Conclusion

(249) The Commission therefore concludes that the available qualitative evidence is consistent with the direct evidence furnished by the observed diversion ratios and supports the conclusion that the degree of such closeness, together with the other evidence presented in this Decision, is such as to predict a significant impediment to effective competition as a result of the merger.

6.6. H3G as important competitive force (Pre-merger v. Post-merger)

(250) The Commission also assessed the competitive strength of H3G on the relevant markets, its current relevance as a competitive force and whether the Proposed Transaction would limit its incentives to continue to operate as an equally important competitive force in the future.

6.6.1. The view of the Notifying Party

(251) The Notifying Party submits that H3G has been increasing its market share gradually to [10-20]*% since its market entry in 2002. However, it argues that H3G is overall not a more important competitive force than any of its competitors who are acting similarly aggressively on the Austrian mobile market. In its view, all MNOs participate actively in a battle for market share and no one is consistently more price aggressive than the others in all segments all the time. Rather, the MNOs each have different strategies for different purposes which themselves change from time to time.

(252) According to the Notifying Party, H3G puts particular focus on the data segment whereas tele.ring and Orange have a stronger focus on the voice seg-

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182 See The New York Times, 22 October 1999, available at http://www.nytimes.com/1999/10/22/business/worldbusiness/22iht-orange.2.t_0.html (retrieved 24 October 2012). When Vodafone acquired Mannesmann, it was required to sell on Orange, which was acquired by France Telecom and became its core mobile brand internationally.

183 Kotler et al, Principles of Marketing, 3rd European edition 2002, p.470.

ment.[184] In respect of its data offering, as well as in offering smartphone subsidies, H3G's offer is more aggressive than any of its competitors (with the possible exception of T-Mobile). On the other hand, the lack of its own 2G network gives H3G a cost disadvantage in targeting parts of the voice segment. Therefore, H3G is not the lowest priced competitor across all segments.

(253) The Notifying Party submits that, after the merger, the competitive constraints exercised by H3G on the market would increase, because it has clear incentives to continue its growth strategy. Furthermore, the Proposed Transaction would increase H3G's ability to win new subscribers; it would improve its coverage and network quality and bring about a faster roll out of LTE. Therefore, the Notifying Party submits that it would have all the necessary economic incentives to continue pursuing its growth strategy after the merger.

6.6.2. The Commission's assessment

6.6.2.1. Current competitive strength of H3G

(254) The Commission considers that the incentive to offer low prices depends *inter alia* on the existing customer base and on the number of new customers (and contract extensions) that an MNO expects to attract in a given time period.

(255) While lower tariffs (or subscription plans with higher usage limits and more features included) will attract more new subscribers, they typically also imply a lower profit margin per subscriber. An MNO that expects to acquire a larger share of new customers will therefore have a lower incentive to sacrifice profits on infra-marginal new customers in order to attract more new customers overall. Therefore, MNOs that expect to have more new customers will also offer less aggressive tariffs so as to earn a higher profit margin.

(256) At the same time, the incentives for an operator to attract new customers by offering aggressive prices depend on the size of the customer base as the Commission noted in its Decision in case COMP/M.3916 – *T-Mobile/tele.ring*.[185] Attracting new customers by bringing out new offers and adopting an aggressive pricing policy will reduce the profitability of the existing customer base over time as those tariffs and conditions will also have to be extended to existing customers.[186]

(257) As already set out in the Decision in case COMP/M.3916 – T-*Mobile/tele.ring*, this "*effect is not necessarily felt immediately: for a certain*

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184 See Form CO, paragraph 296 and following.

185 See Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*, paragraphs 74 and following.

186 The finding of significant switching costs in the mobile industry, and as a result of consumer inertia, has been described and measured in Kim (2012) "Dynamic switching decisions of consumers in the cellular service industry", available at http://www.kea.ne.kr/conf201206/papers/Kim%20Jiyoung-20120611.pdf (retrieved 24 October 2012). The author finds a significant tendency for customers to remain with their incumbent provider even if it would be beneficial to switch providers.

period it is possible to differentiate between tariffs for new customers and tariffs for existing customers (particularly where offers are confined to temporary benefits, such as a discount on the standing charge or an increase in airtime for the first few months). In time, however, lower tariffs for new customers always have medium-term implications for the customer base, as existing customers will not tolerate discrimination".[187] Hence, if existing customers whose minimum contract duration has already ended realise that their MNO offers very attractive tariffs, this may induce them to switch to those new offers. "*So, the bigger the customer base, the less likelihood of low price offers aimed at attracting new customers, as the threat of lost income from existing customers would no longer be offset by the additional income to be expected from new customers. Moreover, once a network operator has a certain number of customers, the flow of revenue from the existing customer base allows it to recover its investment in building up the network and its network operating costs".*[188]

(258) The aggressive commercial policy of H3G hitherto is evidenced by its lower margins (discussed in section 6.8) as well as its success in attracting data-intensive users in both the smartphone and data-only segments as set out in section 6.5.2.2.

(259) In the past, it may be considered that H3G chose to adopt an aggressive pricing policy *inter alia* for two reasons. First, H3G could not expect to obtain a large proportion of contestable customers. Secondly, a relatively small customer base presumably implied that new customers attracted by H3G's offers always more than offset any price cuts which in due course would have needed to be offered to existing customers (bearing also in mind that industry unit costs are declining).

6.6.2.1.1. Internal documents

(260) The Commission has also examined whether the claims by the Notifying Party are consistent with the evidence contained in the internal documents which it provided in the course of the market investigation.

(261) The review of the internal documents confirmed that H3G is currently competing aggressively on prices and that the […]*.[189] In particular, according to another internal document as regards post-paid voice services […]*.[190]

(262) H3G is further associated with the best network, lowest drop rate and non-accessibility and the best speech quality.[191]

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187 Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*, paragraph 77.

188 Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring*, paragraph 77.

189 See H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – 11-09-09 Chairman Presentation final, slides 46, 47, Doc ID 2574.

190 See H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – 16-05-12 Chairman Presentation_final1, slides 51–56 (Doc ID 2698).

191 See H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) - 11-10-13 CF_Network v02, Doc ID 2580.

(263) Furthermore, consumers experience H3G as a "modern, innovative" MNO which is involved in new technologies[192] For example, H3G was an early mover in the roll-out of LTE and the launch of innovative broadband services such as mobile TV and mobile video on demand (VoD) services.

(264) The success of H3G's data-focused strategy is evidenced by the fact that H3G is the only Austrian MNO that has been growing continuously since it entered the market, at the expense of all other MNOs, having achieved a market share of [10-20]*% today compared to less than 5% at the time of the Commission's *tele.ring* decision in 2006.

6.6.2.1.2. Conclusions on H3G as an important competitive force

(265) The Commission considers that H3G is currently a significant competitive force driving competition on the Austrian mobile telephony market and that it has "*more of an influence on the competitive process than [its] (…) market share (…) or similar measures would suggest*".[193]

6.6.2.2. Impact of the Proposed Transaction on H3G's incentives to compete

(266) The Proposed Transaction would eliminate the presence of two relatively small MNOs which are both winning a disproportionately large share of new customers, and create a new much bigger MNO with significantly changed incentives. In the past, H3G has expanded its customer base by offering innovative services and high end handset subsidies and Orange has (at least recently) also adopted an aggressive positioning on the market.[194] H3G and Orange (without Yesss!) had [10-20]*% and [10-20]*% of private customer subscriber shares respectively in 2011, while TA (including Yesss!) had [40-50]*% and T-Mobile [30-40]*%. The Proposed Transaction would more than double H3G's customer base from [0-2]* million to [2-4]* million subscribers and would bring H3G to the forefront of MNOs in terms of subscribers.

(267) After the merger, the merged entity would probably have reduced incentives to compete aggressively. First, the merged entity would expect to obtain a larger share of new customers and would therefore have less incentive to sacrifice profits on infra-marginal new customers in order to attract more of them. This effect is analysed in more detail and quantified for the private post-paid segment in Section 6.8. At the same time, through the merger the merged entity would expand its installed base of customers on which it would wish to protect its supra-competitive margin. This may dampen incentives to offer attractive tariffs in order not to run the risk of encouraging existing customers who are no longer locked into contracts to switch to cheaper tariffs. For both reasons, the gains from behaving more aggressively in terms

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192 See Brand Tracking (2008), Brand Tracking Wave 13_CATI, slide 40 and 49 (resp. voice and data) (H3G Confidential), Doc ID 4118 and Brand Tracking wave15 gesamt, slide 127, Doc ID 4119.

193 See Horizontal Guidelines, paragraph 37.

194 See Transcript of TA May 2012, http://www.telekomaustria.com/dateien/transcript-qu1-2012.pdf: "Orange are also selling these very cheap offers. It is either EUR 7.50 or EUR 8 and so that is really, really cheap, I believe too cheap for the market" (retrieved 24 October 2012).

of prices or output would be reduced after the merger. These predictions are consistent with and corroborated by a number of internal documents of the Parties.[195]

(268) The Parties argue that the MNOs' incentives would be fundamentally driven by the MNOs' cost structure and the gains from fully exploiting their capacity. Furthermore, MNOs could target new customers with new tariffs that would not be easily comparable for their existing customers. Moreover, the alleged cannibalisation effect would not apply to existing customers that are not contestable at a given point of time.[196]

(269) While it is true that the tariffs offered by the MNOs are affected by factors such as cost structure or possibly spare capacity,[197] this by no means implies that the changes in the share of new and existing customers would not also affect the competitive incentives of the merged entity.

(270) The Parties furthermore do not bring forward convincing arguments why old tariffs would be difficult to compare to new tariffs. Moreover, it appears implausible that there are consumer characteristics not already targeted by existing offers based on which MNOs could discriminate between existing and new subscribers.[198]

(271) The theoretical prediction of a change in incentives to aggressively compete is supported by a number of internal documents. In the SO,[199] the Commission assessed a presentation submitted by the Notifying Party, entitled "H3G – Acquisition of Orange Austia"[200] which sets forth the rationale of the Proposed Transaction. According to it, through the merger, H3G wants, among other things, to [the following part of the sentence discusses the effects of the Proposed Transaction in H3G's view].[201]

(272) In the reply to the SO, H3G claims that the statement […]*[202] […]*[203]

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195 See Section 6.5.2.4.

196 H3G Response to the SO, paragraph 197.

197 Effects of cost changes and capacity changes are discussed in Section 7 on efficiencies.

198 If MNOs had indeed the ability to win consumers without cannibalising infra-marginal customers (reducing profits on those customers which would anyway have chosen the MNO in question at the existing price level, but who, as a result of the promotion, can now benefit from a lower price than they would have been willing to pay), then according to economic theory there would be extremely fierce competition for customers and MNOs wouldn't be able to recover their investment costs. This however appears inconsistent with the observation that many MNOs generate positive EBIT (earnings before interest and taxes).

199 SO, paragraph 167.

200 See H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – 11-07-11 Chairman Presentation final: [the following part of the title of the presentation describes the effects of the Proposed Transaction in H3G's view], slide 68, Doc ID 2571."

201 As set out in the response to the SO, paragraph 204, a possible "reduction of competition in the upcoming auction" in itself does not necessarily imply a negative impact on the mobile communications end consumer market.

202 H3G Response to the SO, paragraph 204.

203 H3G Response to the SO, paragraph 204.

(273) The Parties' explanations do not change the Commission's understanding of the statements mentioned in recital (271). First, it appears implausible that H3G would refer to H3G's own business becoming larger by pointing to […]. Second, the explanation provided corroborates the Commission's concern that H3G will have less need for organic growth after the merger and will therefore tend to compete less aggressively instead of pursuing the ambitious targets of its business plan through organic growth and thereby exerting considerable competitive pressure.

(274) Moreover, the Parties set out that the reference to EBITDA (earnings before interest, taxes, depreciation, and amortization) in the presentation[204] does not provide evidence for an increase in prices post-merger because (i) significant costs that drive the pricing incentives are recorded in the CAPEX (capital expenditure) accounts (which are not reflected in the EBITDA) and (ii) the cited figures refer to the stand-alone case and therefore are not indicative of the Parties' expectations post-merger.

(275) These counterarguments appear unconvincing given that the cited EBIT (earnings before interest and taxes) figures, which contain depreciation charges on CAPEX, exhibit a similar growth as the cited EBITDA figures. Moreover, an internal Excel file "BM 1+13 110610_out_2.xlsx"[205] contains the same figures as the cited presentation.[206] From these, it is apparent that the abbreviation "CONS" used in the presentation refers to the merged entity, contrary to the claim of the Parties that it refers to the stand alone cases.

(276) The Commission's concern that the merged entity intends to grow at a slower pace than both merging firms in the absence of the merger is further corroborated by the Parties' statement that "H3G expects revenue dis-synergies"[207] which is also evident from H3G's internal computations, most notably in a file[208] submitted as an Annex to the reply to the SO. From its sheet "JPM Case v91 Budget 2011" it is evident that by 2016, the merged entity plans to acquire more than 1.2 million customers less than H3G and Orange (excluding Yesss!) in a stand-alone scenario. Importantly, it is not decisive whether the merged entity suffers from "dis-synergies" of 1.2 million customers because of price increases (relative to the stand-alone scenario) or because customers perceive the offers of the post-merger brands to be less valuable (possibly because of less diversity of brands and tariffs) than those of the merging firms in a stand-alone scenario. What matters is that the joint offer will be less attractive so that the Parties expect to acquire fewer customers than in the absence of the merger.

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204 […]*

205 H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – BM 1+13 110610_out_.xlsx, Doc ID 3019, sheet "Merger Case".

206 See H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – 11-07-11 Chairman Presentation final: […]*, slide 68, Doc ID 2571.

207 H3G Response to the SO, footnote 201.

208 […]*, Doc ID 6207.

(277) […]*[209] […]*[210] […]* the Commission considers that these computations show that H3G contemplates that the merger may lead to higher prices relative to the stand alone scenario.

(278) These documents may be qualified as an indication that the Parties expect less competition post-merger. It also demonstrates that H3G's incentives would change after the merger and be expected to lead to less competition on the market for the provision of mobile telecommunications services to end customers. This is even more relevant as H3G has substantially increased its market share in previous years in relation to its competitors. A reduced need for organic growth may lead to less aggressive competitive behaviour by H3G.

(279) In a submission by H3G's economic advisors in response to the (alleged) "structural presumption" in the Article 6(1)(c) decision, the Notifying Party argues that "*as soon as H3G becomes capacity constrained, it will have little incentives to lower prices, as it will be unable to increase output*" and that this is "*relevant for the counterfactual scenario the Commission should consider*".[211]

(280) The Commission further notes that, if H3G were about to hit a capacity ceiling, this would rationally already be reflected in its pricing and tariff offers given that these engage capacity at least two years forward. However, there is no evidence that this has occurred in practice. Indeed, the proportion of H3G's customer base made up of flat rate data-only customers continued to grow through March 2012, as did their contribution to revenue, as shown in Figure 7 (month 60 on the x-axis corresponds to Dec 2009, month 87 to March 2012).

Figure 7: H3G's customer base made up of flat rate data-only customers

[…]*

Source: Commission calculations based on Annex 3.1 of H3G's reply to the RFI of 4 April 2012

(281) This development took place notwithstanding that the average monthly revenue from flat rate data subscribers fell more rapidly than the average for data subscribers as a whole.

Figure 8: Average monthly revenue from flat rate data subscribers

[…]*

Source: Commission calculations based on Annex 3.1 of H3G's reply to the RFI of 4 April 2012

(282) The claim that in the absence of the merger there would be a significant reduction in H3G's ability to compete aggressively on the market and that such reduction constitutes the relevant comparison for evaluating the effects of the merger can therefore not be sustained.

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209 […]*, Doc ID 6207.

210 […]*, Doc ID 6207.

211 Paragraph 4.6 of the submission of 10 September 2012 on the "structural presumption".

6.6.3. *Conclusion*

(283) The Commission considers that H3G is an important, if not the most important, competitive force in the market and that its incentive to remain a driving force, in the absence of substantiated efficiencies, would be reduced after the transaction.

(284) Moreover, there is a strong expectation that H3G would have less incentives to compete aggressively than the Parties would in the absence of the merger. That the resulting "stabilisation" of the market may be reflected in less choice or higher prices is explicitly set out in a number of internal documents[212] of both Parties and likely was taken into account by the Parties when assessing the impact of the merger.[213]

6.7. Absence of countervailing factors

(285) The Horizontal Guidelines set forth that unilateral effects may be reduced or entirely eliminated if certain countervailing factors apply, namely the likelihood that buyer power would act as a countervailing force, that entry would maintain effective competition, that the merger would bring about efficiencies to the benefit of consumers,[214] and that the "failing firm" defence might apply.

(286) Although the Notifying Party has raised the argument that Orange was experiencing financial difficulties, it has not formally raised a failing firm defence. There is therefore no need to discuss whether the criteria of the Horizontal Guidelines are fulfilled or not.[215]

6.7.1. *Barriers to entry and likelihood of new entry*

(287) The Austrian market for mobile telecommunications services to end customers is characterised by substantial barriers to entry.

6.7.1.1. Prerequisites for market entry

(288) The following steps would be required in order to enter the market as an MNO (including building an own network):[216]

- obtaining the right type of spectrum in order to establish a national mobile network on a commercially viable basis;
- complying with all regulatory requirements for setting up a mobile network;
- building an initial greenfield network with national or near-to national coverage; national (or near-to national) coverage is essential for viabil-

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212 See for example H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – 11-07-11 Chairman Presentation final: […]*, slide 68, Doc ID 2571; "M6497 - H3G Orange Austria - Response to SO - Annex 05 - The Apple Model.xlsx", Doc ID 6207.

213 See Recitals (254) and following.

214 For a discussion of efficiencies see Section 7.

215 See Horizontal Guidelines paragraphs 89 and following.

216 See Form CO, paragraph 617.

ity as customers will not subscribe to a network which cannot reach substantially all other mobile subscribers in Austria;

  - a greenfield network can be achieved through an own build or in combination with network sharing or national roaming;
  - the network also requires a backbone, a core network and an IT environment;

- marketing, sales, customer service and support structures and the investment to acquire customers;
- negotiating and entering into national interconnection agreements with all Austrian operators, national SMS and MMS interworking agreements, agreements with at least one IP (Internet Protocol) upstream provider, GRX (GPRS (General packet radio service) Roaming Exchange) provider and voice provider for calls to foreign destinations;
- implementing interfaces for mobile number portability, legal interception, data retention and information services; and
- entering into international roaming agreements, international SMS interworking agreements and international MMS interworking agreements in order to be able to provide international services.

6.7.1.2. Non-availability of spectrum

(289) As set out above,[217] a potential entrant would first of all need access to spectrum. Of the spectrum set to be auctioned in 2012, however, only the 800 MHz band is available immediately, with the rest only coming on line in a few years' time. That band, by itself, offers good propagation characteristics which makes it suitable for nationwide rollout, but is limited in quantity to 2x30 MHz and expected to be subject to high demand in the upcoming auction also from the existing operators. It is also hard to obtain planning permission for 800MHz masts in urban areas and it offers insufficient bandwidth to efficiently cover such areas. The lack of availability of sufficient spectrum by itself excludes new entry within a timescale sufficient to affect the competitive environment as it would result from the Proposed Transaction.

6.7.1.3. Return on investment

(290) Given the already high penetration rate, a new market entrant would have to grow a sufficiently large subscriber base almost exclusively based on customer churn from existing operators. This means that although it would need to incur significant upfront investment costs to build a new network, it could recuperate those investments only more slowly.

(291) The costs of MNO market entry are significant in the light of the prerequisites set out in recital 287. An MNO would need to build an entirely new national network, including a backbone, a core network and the IT environment. In addition, it would need to establish from scratch the necessary mar-

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[217] See Section 6.3.4.

keting, sales, customer service and support structures, and invest heavily in customer acquisition. By way of example, the total peak funding cost of H3G's market entry was approximately EUR 2 billion.[218, 219] This included the cost of its 3G spectrum licence, the capital expenditure in building its network, as well as all operating losses until the business became self-funding in 2010. Following its launch in 2003[220]

(292) H3G estimates[221] that the timeframe for a new MNO to build an initial green-field network would be at least 2 to 4 years. H3G also estimates that it could take a new MNO approximately 10 years to build a customer base with sufficient scale in order to pay for its running costs and to obtain a reasonable return on its investment.

6.7.1.4. Results of market investigation

(293) The overwhelming majority of respondents to the market investigation have indicated that it is extremely unlikely that a new player will enter the market as an MNO. A very large majority of responding business customers and consumer associations do not expect new entry in the future, given, among other things, the high investment costs for MNOs and the generally low price level. The Parties also argued in the Form CO that such entry is "unlikely, albeit not entirely excluded"[222] and have taken a similar position in remedy discussions.

(294) MNOs established in other Member States which might be viewed as potential candidates for entry have ruled out the possibility of a full MNO entry because of, amongst other things, the high costs involved in acquiring spectrum and building up new sites as well as the low retail price level in the Austrian market. The Commission considers that, in the absence of appropriate remedies, this would not change post-merger and therefore, the likelihood of MNO entry post-merger would remain very low.

6.7.1.5. Lack of MVNOs

(295) It is possible that entry as an MVNO might contribute, to some extent, to disciplining prices at the retail level, provided that MVNOs are able to gain access on sufficiently attractive terms to be able to offer a full range of services, including in the post-paid and data segments. However, as already noted[223] there are very few real MVNOs active on the Austrian market.

(296) Some potential MVNOs have indicated that there are artificially high barriers to entry as a virtual operator in Austria because the incumbent MNOs are

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218 Figure confidential to H3G, see Form CO, paragraph 619.

219 Peak funding refers to the amount of cash to be invested in a project (i.e. to cover capex, opex and working capital) before the project generates a positive cash flow. This measure is frequently applied in respect of projects with significant capital investment costs; see Form CO, paragraph 619.

220 Information confidential to H3G, see Form CO, paragraph 619.

221 See Form CO, paragraph 620.

222 Form CO, paragraphs 616–621.

223 See Section 6.3.1.2.

protecting their retail business through high wholesale access fees. The conditions currently offered by MNOs do not allow for sustainable full-service MVNO competition to emerge. A number of respondents consider that there is no reason why MVNOs cannot play a full role in the market and exert considerable retail competitive pressure. This, however, requires appropriate terms to be available on the wholesale market, which is a non-regulated market in Austria as in most other Member States.

(297) Liberty Global remarked that the current wholesale situation in Austria is "*suggestive of market failure. One might conclude that the MNOs are happy with the status quo*".[224] Lycatel pointed out that "[*g*]*enerally, this occurs where the MNOs simply are not prepared to enter into negotiations for MVNO access*".

(298) The Commission notes that Tele2 failed to set up a sustainable MVNO business and sold all its customers to TA in 2008. Other MVNOs have been trying to enter the Austrian market for a few years but argue that the wholesale arrangements offered simply prohibit the conclusion of MVNO wholesale agreements in Austria. The market investigation has revealed some complaints about the access rates and the unrealistically high volume commitments. According to a potential entrant MVNO, "MNOs always offered wholesale rates that, if they themselves applied these rates to their own offer, would not allow them to make any business at all".[225] In the market investigation, the MNOs' behaviour was described as a "margin squeeze".[226] It has been argued that MNOs impose such high rates in order to shelter their "no frills" brands (such as Bob and Yesss!) from competition. The barriers to entry could increase post-merger, as the potential MVNOs would have one less MNO to negotiate with for access.

(299) In addition, an MVNO entrant would require access to the portability database in order to launch its services in Austria (and elsewhere). MVNOs can create their own portability database, although this would require substantial investment and some delay, or they can negotiate with an MNO. One respondent to the market investigation stated that Orange was the only operator willing to offer this service.

6.7.1.6. Conclusion

(300) It is therefore unlikely (albeit not entirely excluded) that MNO or MVNO market entry would occur in Austria today.[227] Even if an MNO were to enter, moreover, it would need to await suitable spectrum allocation, build a radio network and then roll out its services to customers, all of which would take a

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224 See non-confidential reply of LGI to Q4 -III– Questionnaire to MVNOs regarding wholesale access, question 14, Doc ID 4686.

225 Minutes of telephone conference with potential entrant MVNO on 23 May 2012, Doc ID 5909 (non-confidential).

226 Minutes of telephone conference call with potential entrant MVNO on 4 June 2012, Doc ID 2297 (non-confidential).

227 See Form CO, paragraph 621.

considerable time. It is therefore not possible that, in the absence of appropriate remedies, any market entry would be sufficiently timely to exercise a disciplining effect on the price levels resulting from the merger.[228]

6.7.2. Countervailing buyer power

(301) On the market for mobile telecommunications services to end customers there is no appreciable countervailing buyer power to exercise competitive pressure on the MNOs to off-set the expected adverse effects of the merger.

(302) Competitive pressure exercised by customers is what is qualified in the Horizontal Guidelines as countervailing buyer power.[229] According to the Horizontal Guidelines, even an important player on the market may not be in the position to significantly impede effective competition if it cannot act to an appreciable extent independently of its customers. This countervailing buyer power is to be understood as the bargaining strength of the buyer vis-à-vis its supplier relative to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.

(303) Individual customers, including business customers, do not have a sufficient size and commercial significance to bargain prices. Even if some business customers may negotiate their contractual clauses and prices,[230] this fragmented group of individuals and businesses has no means to coordinate their behaviour in order to exercise noteworthy competitive pressure on their respective suppliers. Thus the conditions and the level of prices cannot be affected from the buyers' side. Those few customers who might be large enough to resist price increases to some degree would not shelter the remainder of the market from the exercise of market power.

(304) Finally resellers and distributors would also not resist price increases by the MNOs. Even if retailers had a certain purchasing power a price increase would, as such, not affect the retailers' economic interests. They can pass on price increases to end consumers and their contractual relationship with the MNO is usually based on commissions without an obligation to market defined quantities.[231]

6.8. Anticipated effect of the proposed transaction on prices in the post-paid phone segment (voice and data)

(305) The Proposed Transaction would result in a reduction of the number of MNOs in Austria from four to three in a market with significant barriers to entry. Furthermore, there is negligible presence of MVNOs in Austria. It is therefore necessary for the Commission to assess whether or not the Proposed Transaction would lead to a significant impediment to effective com-

228 See Form CO, paragraph 621.

229 Horizontal Guidelines paragraphs 64 and following.

230 According to the Notifying Party's estimates Austria's overall business segment amounts to roughly 20% of the revenues generated by the MNO on the market for mobile telecommunications services to end customers in 2011, Annex 6.(3) to the Form CO.

231 Responses to RFI of 11 July 2012 to resellers and distributors.

petition as a result of further concentration in what is already an oligopolistic market.[232]

(306) The Commission notes that the Proposed Transaction would combine the two smallest players on the market, based on overall existing market shares, resulting in a new player which would still be only the third largest MNO. However, the transaction would also transform H3G's position in the market, more than doubling its customer base from 0-2 million to 2-4 million subscribers, making it much more comparable in size to the two other remaining providers.

(307) This fundamental change is even more relevant since, prior to the Proposed Transaction H3G has substantially increased its market share through organic growth. A reduced need for such growth will tend to lead to less aggressive competitive behaviour by H3G. A higher subscriber base relative to the market size typically reduces the incentives to attract further customers, for example, by offering attractive retail terms. This is because an MNO with a relatively large customer base that offers attractive prices in order to attract further customers risks losing profits on its existing customers. Although many existing customers may not immediately be able to profit from the new rates due to contract lock-in, over time this risk of cannibalisation would be substantial.

(308) As shown in the following analysis (see Section 6.8.1), the Commission takes the view that the Proposed Transaction would result in a significant upward pricing pressure ("UPP") to the detriment of consumers, in particular in the post-paid private voice and data as well as the data-only segments of the market. The significance of the values deriving from the UPP analysis is convergent with the analysis of market shares based on customer acquisition rates discussed above.[233]

(309) The fact that the Parties represent the first and second choice of a significant group of customers as shown in Section 6.5 and that they can internalise the constraint they currently impose on each other by the threat of switching post-merger, and the absence of countervailing factors, means that a significant number of customers would face an increase in the quality-adjusted price. This would not only affect subscribers of the Parties, but also customers who prefer other brands that would be negatively affected by the knock-on incentive of competitors also to raise prices.

6.8.1. Post-paid private segment (voice and data)

6.8.1.1. UPP analysis

(310) UPP makes it possible to estimate to what extent the merged firm would have the incentive to raise prices post-merger given in particular prices, margins and diversion ratios observed in the market. This section analyses what it would be profitable for the merged entity to do. Its ability to act on those in-

[232] Recital 25 of the Merger Regulation.

[233] See paragraph (171).

centives depends on the existence or otherwise of countervailing factors which could frustrate a price increase and is analysed elsewhere in this Decision (Section 6.7 for barriers to entry and countervailing buyer power, and Section 6.9 for the reaction of competitors). In the absence of such countervailing factors, the Parties may be considered to have the ability to act in keeping with the economic incentives which they face.

(311) It is possible to compute the likely price increases which the Proposed Transaction would create the incentive to bring about based on the UPP together with an assumption on the cost pass-through rate (namely that resulting from linear demand).[234,235] The predicted price increase is likely to be less precise than a full merger simulation since it ignores the feedback effects between the two products and between the other rivals (these factors typically increase the magnitude of the predicted price increases further) and does not take any merger-specific efficiencies into account. However, these assumptions make it possible to go beyond the general UPP result directionality and to quantify the unilateral incentive for the merged entity to increase prices as a result of the merger.

(312) Key inputs to the UPP analysis are the diversion ratios between the Parties. For the post-paid segment, these ratios are estimated on the basis of the data available in the national MNP data.[236]

(313) Competition takes place for "contestable" users. As unit prices decrease in the industry and the functionality of handsets increases, the value of existing tariff plans and of the investment in a handset decreases over time, meaning that at some point there is always an incentive to switch. Therefore having the option to remain on an existing contract is not an effective constraint on current pricing behaviour.

(314) In Table 12, the estimated gross upward pricing pressure index ("GUPPI") is computed on a per-user basis using the Parties' figures for the average revenue per user (ARPU) and the diversion ratios implied by the MNP for the most recent twelve month period, that is to say, the last three quarters of

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234 Farrell, J. and C. Shapiro, (2010) "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition", *The B.E. Journal of Theoretical Economics*, Volume 10, Issue 1, observes that holding rivals' prices fixed, the single-firm pass-through rate is one-half with linear demand and higher with convex demand (for example with the one employed by the Notifying Party). Higher pass-through results in higher predicted price increases. Accommodating pricing responses by rivals can also raise the equilibrium pass-through rate.

235 See Hausman, J., S. Moresi, and M. Rainey (2010), "Unilateral Effects of Mergers with General Linear Demand", Economics Letters.

236 Technically, what is required are the diversion ratios in response to a price increase. Although observed switching may to some extent be driven by factors other than price, it nonetheless constitutes a reasonable estimate of the expected pattern of price-induced switching. This approach has also been used in previous decisions by the Commission. See for Case No COMP/M.5650 – *T-Mobile/Orange;* Case No COMP/M.4748 – *T-Mobile/Orange Netherlands*; Case No COMP/ M.3916 – *T-Mobile Austria/Tele.ring.*

2011 and the first quarter of 2012.[237] Using the contribution margin and taking the more recent figures for 2012, it shows a predicted price increase of [10-20]*% for a H3G customer and [10-20]*% for an Orange customer, both of which can be considered highly significant.[238]

Table 12: GUPPI Analysis

	H3G	*Orange*
ARPU	[…]*	[…]*
Post-paid Direct Margin	[…]*	[…]*
Post-paid Cont. Margin	[…]*	[…]*
MNP Diversion ratio	[…]*	[…]*
Predicted price increase using direct margins		
GUPPI	[…]*	[…]*
Predicted price increase	[10-20]*%	[10-20]*%
Predicted price increase using contribution margins		
GUPPI	[…]*	[…]*
Predicted price increase	[10-20]*%	[10-20]*%

237 Marginal cost may change post-merger if efficiencies were to lead to a lower marginal cost. On the issue of possible efficiencies from the proposed transaction see Section 7 below.

238 Both margins are computed by the Parties for their own commercial use *in tempore non suspecto* (see footnote 153). The contribution margin includes customer acquisition and retention costs and appears to be the more suitable measure given that competition takes place for new customers. Predicted price increases are computed based on equation 2 of the paper by Hausman, Moresi and Rainey cited in footnote 235, using gross adds as a proxy for quantities. The equation can be described as follows: Where p1 is the pre-merger price of firm 1, D12 the diversion ratio from firm 1 to firm 2, c1 the marginal cost of firm 1 and Q1 the sales of firm 1, and similarly for the variables relating to firm 2, all evaluated at the pre-merger equilibrium. The derivation of the formula is given in the paper cited. The calculation using equation 11, which requires the additional assumption of the cross-price derivatives of the demand functions being approximately equal but does not require quantities as an input to the calculation, gives an identical result for H3G and a figure of 7.33% for Orange.

$$\frac{\Delta p_1}{p_1} = \frac{2D_{12}\frac{p_2-c_2}{p_1} + D_{12}D_{21}\frac{p_1-c_1}{p_1} + \frac{(p_1-c_1)^2}{(p_2-c_2)p_1}\frac{Q_2}{Q_1}(D_{21})^2}{4 - 2D_{12}D_{21} - \frac{p_2-c_2}{p_1-c_1}\frac{Q_1}{Q_2}(D_{12})^2 - \frac{p_1-c_1}{p_2-c_2}\frac{Q_2}{Q_1}(D_{21})^2}$$

Source: Commission's own calculations based on H3G reply to RFI of 8 May 2012, Annex 5.1; Orange reply to RFI of 8 May 2012, Annex 5a; Annex 6.8 to the Form CO

(315) In the Commission's view, the use of ARPU is justified as a single measure of price in order to estimate the predicted price increase, in particular given limitations in the available data and the intractability of more complex models, by the following considerations. ARPU allows the use of a single value to conceptually represent the price of the "typical" phone bundle offered by each firm, which is demanded in unit quantities. Evidence provided by the Parties shows that only 10-15% of revenues from phone users are out-of-bundle and that this figure continues to decline.[239] It is also appropriate to work with the simplifying assumption that usage needs are exogenous and that customers choose between brands, that is to say, they choose the provider with the most interesting offer given these exogenous needs.

(316) Upward pricing pressure arises because, post-merger, the new entity would not lose all switchers after a unilateral price increase of one of its brands, but rather would retain a significant number and therefore internalise part of the losses which a price increase would otherwise bring about. For instance, if the merged entity were to increase the prices for Orange services relative to what Orange would have done in the absence of the merger, it would internalise the effect that some customers would switch to H3G's own brand. This would make a price increase of Orange tariffs profitable for the merged entity where it would not have been for Orange in the standalone scenario. A similar reasoning would apply to an even greater extent to H3G plans. Upward pricing pressure is to be understood relative to the direction which prices would have taken in the absence of the merger. To the extent that decreasing prices would be expected in the absence of the merger, upward pricing pressure does not necessarily mean that prices would increase as a result of the merger in absolute terms. The possibility to increase prices may also imply pursuit by the merged entity of fewer improvements in functionality of the services available than would have applied in the absence of the merger, resulting in consumer welfare losses by mechanisms other than price. Reduction of handset subsidies may also be a way to realise a price increase. In the Commission's analysis, upward pricing pressure is taken to encompass all mechanisms by which the merged entity could increase its margins relative to the pre-merger situation.

(317) It is important also to stress that the UPP methodology does not take into consideration the feedback effects of unilateral price increases by the merged entity on the two remaining rivals. Since an increase in prices by the merged entity would provide an incentive to TA and T-Mobile to follow suit, the expected consequence of the UPP on the Parties as a result of the merger is likely to be an overall increase in prices relative to the situation in the absence the merger. The UPP therefore underestimates the effect of the merger on the prices which the merged entity would adopt, and also does not quantify the extent to which the prices of competitors would be expected to rise in

[239] Replies to the RFI of 8 May 2012, annex 5.1, Doc ID 1451.

response. The UPP predicted for the Parties, in the short run, applies to new business and therefore on its own to about 40-45% of the contestable market.

6.8.1.2. Arguments put forward by the Notifying Party

(318) In response to the SO, H3G has argued that the Commission's contention that the Proposed Transaction will result in upward pricing pressure is "entirely flawed". Five broad arguments are made, namely:

(1) "*The Commission has limited its assessment to two segments (rather than the relevant market)*"

(2) "*The UPP framework relied on is overly simplistic and disregards important features of the Austrian mobile telecommunications industry*"

(3) "*As a consequence of these [alleged] deficiencies, the results obtained from the UPP analysis are implausible.*"

(4) "*The UPP framework is, in any event, an inadequate tool to predict pricing outcomes in a Phase II merger investigation.*"

(5) "*The UPP analysis conducted omits a consideration of merger efficiencies, which is a fundamental element of the UPP framework.*"[240]

6.8.1.2.1. The UPP analysis on the post-paid segment

(319) As regards the first objection, the Commission has already set out the reasoning behind its analysis of the post-paid segment, which is a distinct segment of demand and by far the most important segment by revenue in the overall market. The Commission has carried out the UPP analysis[241] on the private post-paid segment only. The reasons why the remaining competitors would not discipline a price rise are set out in Section 6.9.[242]

6.8.1.2.2. Appropriateness of the UPP framework

(320) As regards the second objection, the Parties break it down into five sub-claims, as follows.

(321) Firstly, they claim that "*pricing incentives in the mobile industry are fundamentally driven by the very large investments required to roll out and maintain a network. MNOs thus have an incentive to fully exploit their capacities by having a customer base as large as possible. This is reflected by the fact that they engage in price discrimination by offering a wide range of tariffs to appeal to different customer segments and to increase their customer base. These incentives are ignored by the UPP framework used in this case.*"[243]

(322) In this regard, the Commission has discussed in Section 6.6.2 the incentives faced by the MNOs. The Commission does not dispute that MNOs try to en-

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240 H3G Response to the SO, paragraph 230.

241 The UPP framework was also used in the American AT&T/T-Mobile case; see paragraph (324).

242 That section also rebuts what is said at paragraph 251 of the response to the SO in relation to the third objection.

243 H3G Response to the SO, paragraph 234

gage in price discrimination in order to make better use of their network. At the same time, none of the MNOs fully exploits its network. An incentive to do so exists only insofar as this would not cannibalise infra-marginal customers (reducing profits on those customers which would anyway have chosen the MNO in question at the existing price level, but who, as a result of the promotion, can now benefit from a lower price than they would have been willing to pay). The argument of the Parties seems to be precisely the opposite of standard economic theory: pricing incentives are not driven by investments, but rather investments are driven by the profits which can be expected to be achieved. Once investments are sunk, they do not affect pricing incentives. The Parties fail to explain how any incentives not taken into account in the analysis would be expected to materially alter the results.

(323) Secondly, the Parties state that "*price is not the only parameter of competition. Instead, investments in network quality are also an important dimension of competition, as operators constantly need to invest in their networks to remain competitive. By contrast, the UPP framework is one-dimensional: it assumes that price is the only strategic variable considered by MNOs.*"[244]

(324) This claim by the Parties is similarly incorrect. The SO already made clear that the anticipated effect on price was to be understood in a quality-adjusted sense. This is equivalent to what was done in the *AT&T/T-Mobile* case in the US,[245] where a dollar equivalent value was computed for various properties of the service offered. The UPP framework is entirely open to an interpretation in terms of quality-adjusted prices.

(325) Thirdly, the Parties object that "*the SO's … [assumption] that it is appropriate to model the market as one where each MNO offers a single product where the price charged is the ARPU… does not match with reality.*"[246]

(326) The Commission is aware that the UPP analysis incorporates certain assumptions. This, however, is in the nature of all economic analysis. The justifications for those assumptions were stated in the SO.[247] The Parties did not show that there are relevant features of the market which make those assumptions not merely a simplification, but misleading in terms of results.

(327) In assuming a single product firm and using ARPU for revenue, the Commission's GUPPI analysis made similar assumptions to those contained in the model employed by the Parties' own economic advisors in *AT&T/T-Mobile* which are now criticised.

(328) The Parties argue (incidentally thereby giving support to the Commission's analysis based on segments) that "*(i) the pricing incentives provided by the Proposed Transaction may be quite different for each tariff and customer*

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244 H3G Response to the SO, paragraph 235.

245 See http://apps.fcc.gov/ecfs/document/view?id=7021717659 (retrieved 29 November 2012).

246 H3G Response to the SO, paragraphs 236–7.

247 See paragraph 202 of the SO.

segment, and (ii) the dynamics between the various tariffs offered by the same MNO must also be considered."[248]

(329) The Parties have not attempted to provide any indication of what the effect of adopting a more complex model would be, nor even any rationale as to why this would have an appreciable effect on the predicted price increases.

(330) The Commission also notes that tariff design is endogenous. New tariffs can be launched by operators immediately. It thus would make no sense to attempt an analysis of the effect of the merger on the pricing at the level of existing tariffs, since the merged entity would be at liberty to redesign all of its existing tariffs following the merger in order to optimise its portfolio of offerings.

(331) These objections by the Parties are therefore unfounded.

(332) H3G goes on to state that "*these assumptions are also inconsistent with the Commission's theory that H3G's incentives will dramatically change post-merger because of the increase in its customer base. That theory relies on an assumption that, if H3G offers more aggressive tariffs to new customers, existing customers on more expensive tariffs will also switch to the cheaper new tariffs, such that the margins earned on the old customers are cannibalised. That view is contradicted by the assumption, which is convenient in the UPP analysis used in this case, that there is no diversion between the tariffs of the same MNO.*"[249]

(333) However, the Commission's arguments regarding H3G's post-merger incentives captured by the UPP analysis do not rely on a desire to avoid cannibalisation of existing customers on "old" tariffs. It is likely, given the general downward trend of prices in the sector and upward trend of functionality, that most or all users who are out of contract would already have an incentive pre-merger to switch to a new tariff if they were aware of its existence. The UPP analysis implicitly takes that number of contestable customers as given and focuses on the cannibalization which would take place amongst customers already looking to switch.

(334) The dynamics of switching between old tariffs (those which a user signed up to at least two years previously) and new tariffs (those available to that same user today) at the same firm may lead to additional effects as set out in Section 6.6.2 that are not captured in the UPP analysis. If the customer base increases through the merger, the merged entity may have an additional incentive not to reduce prices in order to avoid incentivising its own customers not to switch to new tariffs.

(335) H3G argues that "*Orange's 2011 ARPU appears almost 30% higher than H3G's, and its contribution margin appears between two and three times as*

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248 H3G Response to the SO, paragraph 237.

249 H3G Response to the SO, paragraph 240.

large. It is quite implausible that these hugely differing average prices and costs should represent the 'typical phone bundles' of each firm."[250]

(336) The Commission is confident that H3G has carried out the necessary due diligence on its intended acquisition target and is therefore fully aware of both its average revenues per user and its contribution margins. The figures cited are a simple calculation from data provided by the Parties. The Parties do not substantiate why these figures are "quite implausible". To the Commission's knowledge, the figures correctly reflect the market situation.

(337) The fourth objection made by the Parties relates to the margins used in the calculations.[251] The Commission (unlike the Parties themselves) has carried out a series of robustness calculations on the UPP calculations, which are reported in **Annex II**. Those calculations show that, even if the Parties' arguments as to the appropriate margins to use were followed in their entirety, any reasonable computation based on the approach suggested by the Parties continues to show significant price effects.

(338) The fifth and final objection under this heading concerns the assumption on the pass-through rate, which according to the Parties has "no empirical support".

(339) The Parties provide no estimate of the pass-through rates applicable in their own industry, but merely refer to a couple of general multi-industry empirical studies, without reference to the industry structure. This cannot be taken into account as a basis for the Commission's assessment.

(340) In any case, if the implication is that firm-optimal pass-through is constrained by behavioural factors, this seems unlikely in the general context of declining quality-adjusted prices which characterizes the mobile telecommunications industry, since the increment over the hedonic price[252] in the absence of the merger is not observed by consumers.

6.8.1.2.3. SSNIP test objections

(341) In relation to the third objection, the Parties also state that "*In fact, if these results were correct, they would imply that H3G and Orange form a relevant antitrust market. This follows from the logic of the SSNIP test: the Commission's predicted price increases would mean that a hypothetical monopolist over the supplies of both H3G and Orange would find it profitable to increase prices by more than 5–10%. This is obviously implausible and inconsistent with the Commission's own relevant market definition in this case. Therefore, the results of this analysis should be disregarded.*"[253]

(342) The Parties attempt to argue here on the basis of a purely formal inconsistency in the approach to market definition based on the SSNIP test which, if followed, would lead to the conclusion that any merger which raises con-

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250 H3G Response to the SO, paragraph 241.

251 H3G Response to the SO, paragraphs 242–246.

252 See also Recital (350).

253 H3G Response to the SO, paragraph 252.

cerns on the basis of non-coordinated price increases could be qualified as a merger to monopoly in terms of the SSNIP test or conversely that no concerns could ever be raised over an oligopolistic merger short of monopoly.

(343) Such a conclusion would have no operational value or sense and is not what the Notice on the definition of the relevant market requires. That Notice states, at paragraph 16, that "*conceptually, this approach means that, **starting from the type of products that the undertakings involved sell and the area in which they sell them**, **additional** products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term*" (emphasis added). In other words, the smallest set of products considered to form part of the relevant market may be determined on the basis of a qualitative determination of the "type of products" concerned. It is not contested in this case that TMA and TA offer products of the same type as the Parties.

6.8.1.2.4. Correct UPP analysis application

(344) In relation to the fourth objection, the Parties state that "*the UPP framework was devised as a merger screen suitable to identify potentially problematic mergers and hence is useful as a phase 1 screen. The US competition agencies, which pioneered the application of the UPP framework in their investigations, also acknowledge that it is not a complete analysis of all the relevant factors.*" They go on to quote Carl Shapiro, former Deputy Assistant Attorney General for Economics of the Antitrust Division of the US Department of Justice, as having said that "*while this analysis can be highly informative, the Agencies understand full well that measuring upward pricing pressure, or even performing a full merger simulation, typically is not the end of the story, especially in rapidly changing industries. Repositioning, entry, innovation, and efficiencies must also be considered.*"[254]

(345) As stated in the introduction to this section at recital (310), the Commission fully agrees that it is necessary to look into all aspects of competition in the relevant market in order to draw definitive conclusions, and this is what it has done in this Decision.

(346) The UPP approach has been widely used, including in the mobile telecommunications industry in the recent *AT&T/T-Mobile* case in the USA. The Parties have no suggestion as to an alternative, better methodology which would have been available to the Commission in the context of this case.

(347) It is therefore clear that there exists no generally agreed and tested, robust alternative approach which could have been used to underpin the Commission's findings. The Commission has therefore done what was feasible given the available data. GUPPI is a generally accepted component of a merger analysis.

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[254] H3G Response to the SO, paragraph 253.

(348) The Parties do not show that there are specific characteristics of the sector in question which would render another approach more appropriate or results in a significant upward bias in the Commission's estimates. In the absence of an alternative quantification by the Parties and/or a compelling explanation of the rationale behind any claim that prices would not increase (or would do so only marginally), the Commission is of the view that its analysis has not been invalidated or even relevantly criticised by the Parties.

(349) If the assumption in the UPP calculation of constant marginal costs were incorrect because marginal costs actually decrease, this would mean higher marginal margins and so a *greater* incentive to raise prices.

(350) The UPP analysis does not say anything about what would happen to investment as a result of the merger. However, this does not mean that it presupposes price to be the "*main competitive parameter*". Firms make investments in order to achieve returns through the prices they are able to charge for the services those investments make possible. If the merger were to lead to lesser investment and therefore a lower level of services available at the same price, this would benefit the firm in the same way as raising the price and possibly be easier to implement. Therefore the UPP analysis correctly captures the relevant incentives relative to the situation in the absence of the merger, and uses prices as shorthand for quality-adjusted prices (sometimes called "hedonic prices") in a way which is perfectly familiar in economic analysis. This was explained in the SO[255] and is restated in recital (316).

(351) Indeed, the paper by Willig,[256] cited by the Parties apparently in defence in the response to the Article 6(1)(c) decision,[257] itself states that "*the same [UPP] methodology can be applied to a wide variety of settings with different characteristics and features in ways that yield related tools that only increase the possible analytic power and applicability of the entire approach.*" In relation to the use of quality-adjusted prices, it is even clearer that "*these are the correct measures of the impacts on consumers of possible combinations of concomitant changes in the nominal prices and in product characteristics*". Indeed, the only difference in the formula derived by Willig other than replacing natural by hedonic prices consists in efficiency terms, which the Parties in this case have failed to demonstrate.

6.8.1.2.5. Efficiencies and UPP analysis

(352) Regarding the fifth and final objection, the Commission agrees that it would be appropriate to include in the UPP analysis the effect of any efficiencies whose existence and merger-specificity had been demonstrated to the Commission by the parties to a Proposed Transaction. However, as further discussed in Section 7, the Parties have not provided sufficient evidence to recognize efficiencies in this case. Therefore there is no need to include effi-

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255 See paragraph 203 of the SO.

256 Robert Willig, 2011. "Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions," *Review of Industrial Organization,* 39, pp. 19–38.

257 See H3G Response to the Article 6(1)(c) decision, Annex 1, paragraph 4.16.

ciencies in the UPP analysis, since the existence and relevance of such efficiencies has not been established.

6.8.1.2.6. Predicted price increases

(353) Finally the Parties dispute the materiality of the price increases predicted by the Commission, stating that "*in particular, the SO states that the [predicted price increases] apply in the short run to new business and therefore to 40-45% of the contestable market. According to the SO, [10-20]*% of all existing post-paid customers switch to a new operator in a year. This means that, in the worst case scenario, the Commission's analysis predicts a non-material short term increase in the prices of post-paid private mobile services (only 1.1%, or 23% x 11% x 45%)*".[258]

(354) The Parties' reasoning is flawed. The number of customers who switch to a new operator is obviously less, and likely to be much less, than the number who switch (or at any given moment are considering switching) to a new plan at their existing operator.[259] Indeed, H3G has stated that the average customer remains on a given tariff for only [30-40]* months,[260] implying that infra-firm switching is at least twice as frequent as between-firm switching. The figure of [10-20]*% (see recital (168)) is therefore not an estimate of the size of the contestable market.

(355) More importantly, while in the first year only the potential switchers of that year would be affected by the price increase, gradually all customers would be free to switch and would therefore be affected by the expected price increase. In particular, customers who decided not to switch to a new tariff because new tariffs became less attractive would be worse off than they would have been in the absence of the merger where they would switch to cheaper new tariffs. Therefore, multiplying by the number of annual switchers is inappropriate.

(356) The Commission has also explained that the other operators would be expected to follow suit with price increases of their own and that the anticipated price increase is not a general equilibrium concept. Therefore total price increases in the market would be more significant than set out here.

6.8.1.3. Conclusion

(357) It follows from the above, together with the additional analysis of market structure and incentives,[261] that the Commission's analysis of upward pricing pressure in the post-paid segment contained in the SO[262] has not been rebutted by the Parties and can be relied upon for the conclusions drawn from it in this Decision.

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258 H3G Response to the SO, paragraph 257.

259 For H3G, this is shown by the graph included at paragraph 239 of its response to the SO.

260 Compass Lexecon submission of 10 September 2012 on unilateral effects, paragraph 4.30.

261 See Sections 6.4 and 6.6.2.2.

262 SO, section 6.3.1.2.

6.8.2. *Segment of data-only devices*

(358) It is considerably more difficult to carry out a reliable estimation of the price increases which the merger could lead to in the dongle segment owing to the lack of data on costs and switching. For this reason, only qualitative conclusions can be drawn.

(359) In respect of diversion ratios, Orange's existing market share by number of subscribers is low, at [5-10]*% in 2011. However, there are indications that the Parties may be closer substitutes than their respective market shares suggest. Moreover, the recent figures on gross adds in the data-only segment (see recital (174)) would imply much higher diversion ratios between the Parties even if all players in the market were in the aggregate similarly attractive. The implied diversion ratio from Orange to H3G would be [30-40]*% whilst that from H3G to Orange would be [20-30]*%.[263]

(360) Margins in this segment may also be quite high. There appear to be few or no direct costs as there is no interconnection fee, subsidies are much more limited and marketing expenses may also be lower as the dongle segment is relatively mature in terms of number of subscribers. On the other hand, a greater proportion of network costs should be attributed to the data-only segment so that, if it were deemed appropriate to consider a part of these as variable, margins would be lower. The Parties have not provided fully-costed margins on data-only products.

(361) As a result of this, the Commission considers that there is likely to be at least a degree of upward pricing pressure also in relation to the data-only segment. In any case, it is unnecessary to demonstrate or quantify this effect for the purposes of this Decision, since the Proposed Transaction leads to concerns on the (currently much more important in terms of revenue) post-paid voice and data segment which are sufficient to establish a significant impediment to effective competition on the relevant market.

6.8.3. *Conclusions*

(362) The Commission's analysis using the GUPPI approach predicts increases in quality-adjusted prices as a result of the Proposed Transaction of the order of 10–20% in the post-paid private segment. In the data segment, a robust prediction could not be obtained.

(363) The GUPPI approach looks only at the incentives faced by the Parties. As argued in Section 6.9, competitors would be expected to respond to price increases by the merged entity with price increases of their own. This would further relax pricing constraints on the merged entity, resulting in feedback effects which would be expected to further inflate the price increases predicted.

(364) The Commission has also argued in Section 6.6 that H3G is currently a particularly important competitor in the Austrian market, as a result of which prices in that market are very low compared to other Member States. As a re-

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sult of the Proposed Transaction, H3G's incentives will change. This change in incentives is only partially reflected in the UPP calculations and is an additional reason to expect quality-adjusted prices to rise compared to what would have happened in the absence of the merger.

(365) It follows that the data support a robust prediction of quality-adjusted price increases by the merged entity in the post-paid segment of the order of 10–20%.

6.9. Reaction by other competitors post-merger

(366) The Commission has also analysed how competitors of the Parties in the retail mobile telecommunications market can be expected to react to the Proposed Transaction.

6.9.1. MNOs

(367) Other competitors are unlikely to increase supply or reduce prices in response to a price increase by the merged entity. Even assuming competitors are not capacity constrained, it is unlikely that they would increase supplies in response to a price increase of the Parties. Since the products are endogenously differentiated in terms of their market positioning, generally accepted and robust economic theory demonstrates that the profit-maximising response of competitors to a price increase would be to increase prices themselves.[264]

(368) This prediction from theory is supported in this case by a certain amount of evidence that price increases by one MNO were followed in the past by price increases of the others. This occurred for example in the context of the service fee introduction whereby a flat fee payable by all post-paid customers was introduced in replacement of various fees previously charged for specific services such as replacement of lost SIM cards, with a net positive effect on prices. Such behaviour is consistent with the notion that the various products available in the market are strategic complements.

(369) The rationale behind this expectation is the following: if the merged entity were to raise prices, some customers would consider switching to one of the other two providers who would not have done so in the absence of the merger. The merged entity will make its calculation balancing this loss of revenue against the higher revenue on the customers who remain. These newly available customers then increase the demand faced by the other competitors, as a result of which they have an incentive also to increase prices themselves. If MNOs have incentives to respond to a price increase of their rivals by

[264] This general result was first described by Deneckere and Davidson (1985). "Incentives to form coalitions with Bertrand competition", Rand Journal of Economics, Vol. 16 no. 4, pp. 473–486. See also Davis & Garces, *Quantitative Techniques for Competition and Antitrust Analysis* (2010), pp. 50–53.

themselves increasing price, then prices are called "strategic complements".[265]

(370) In its response to the SO, the Notifying Party objects that "*whether prices are strategic complements depends on the specifics of the market setting, in particular, on the shape of the cost and demand curves*" and that therefore it would be *a priori* unreliable in the absence of further "*theoretical basis to argue that competitors are likely to increase prices in response to a price increase by a rival*".[266]

(371) However, the Commission notes that in standard models of oligopolistic price competition, strategic complementarity of pricing decisions always arises unless very extreme assumptions apply. The Parties cite in support a single paper by Buehler and Schmutzler which explores some of these extreme assumptions.[267] In a context that captures that subscribers make calls both within and across mobile networks, these authors do indeed find that the normally robust rationale of strategically complementary prices may not always hold. Nonetheless, they confirm that under standard and reasonable assumptions, strategic complementarity still holds provided that the network sizes of MNOs are not too different[268].

(372) After the Proposed Transaction, the MNOs would have rather similar market shares, especially in terms of new customers which is the best available measure for competitive strength. Therefore, and because strategic complementary of prices is rather robustly observed in oligopolistic models, the Commission considers that that paper provides no reason in this case to depart from the robust conclusion that competitors would be very likely to respond to a price increase by a competitor by increasing prices themselves.

(373) In its response to the SO, H3G states that "*the claim that A1 and T-Mobile will not increase supplies to cater for customers switching away from the merged entity in the event of a price increase is contrary to logic and contrary to economic theory. The SO (in effect) suggests that TA and T-Mobile would turn away new customers even if they had spare capacity available. This is implausible. Given that both A1 and T-Mobile will have spare capacity available, there is no logical reason for them to turn away additional customers if this would result in a positive margin*".[269]

(374) This claim is manifestly incorrect. Just as the merged entity, its competitors would also face the same trade-off between attracting additional new customers by practising lower prices and cannibalising the flow of customers

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265 See for example J. Bulow, J. Geanakoplos, and P. Klemperer, 1985, "Multimarket oligopoly: strategic substitutes and strategic complements", in: Journal of Political Economy 93, pp. 488–511.

266 Response to the SO, paragraph 227.

267 S. Buehler, A. Schmutzler, "On the Role of Access Charges under Network Competition", in: *J. Haucap, R. Dewenter, Access Pricing: Theory and Practice,* Elsevier 2007.

268 S. Buehler, A. Schmutzler, "On the Role of Access Charges under Network Competition", in: *J. Haucap, R. Dewenter, Access Pricing: Theory and Practice,* Elsevier 2007, p. 138.

269 H3G Response to the SO, paragraph 230.

who would anyway have switched to them (the so-called infra-marginal customers). If this were not so, it would be impossible for any player to recuperate its investments in network capacity, as competitors would force prices down to marginal cost.

(375) The Parties further claim in the response to the SO that, in effect, the elimination of a competitor would not matter because consumers have very weak preferences between operators and they all supply nearly the same thing. In the response to the Article 6(1)(c) decision, the Parties went as far as claiming that products were homogenous; in the response to the SO that claim is revised to one of their being "not very highly differentiated". The Parties state that "*the services offered by the mobile network operators are not sufficiently differentiated to provide the basis for some operators being markedly closer to each other than they are to the other operators. The SO has presented no evidence to support the view that mobile telecommunications services are highly differentiated. The contrary is true: mobile services are largely commoditised products and therefore the concept of closeness is meaningless in this industry: There is no evidence to suggest that customers disregard price over other factors when opting for their mobile network supplier. There are no significant differentiators affecting the product itself. All Austrian MNOs provide data, voice and SMS services which fully and adequately satisfy the requirements of a customer in need of mobile connectivity. The ultimate product is the same. There are no other factors, such as the geographic location of shops, which would suggest that product differentiation may play a significant role in this industry*".[270]

(376) This statement misrepresents the SO in several respects. The Commission has not argued that products are "highly" differentiated and does not dispute that the basic service offering is similar in a purely functional sense. However, such a conclusion could be drawn in many consumer markets in which branding and product differentiation are nonetheless of significant importance. It is not for the Commission's merger analysis to assess whether consumers have objective reasons for the preferences they display; it is assumed that, just as undertakings, they make the choices which maximise their own welfare. Although there are numerous differences in the service offerings proposed by each of the MNOs, and therefore numerous "objective" reasons for consumer preferences, the perceived emotional benefits of a product cannot be simply neglected as they are also reflected in consumers' willingness to pay. The discussion on branding is proof of the role that the emotional aspect of product differentiation plays in the choices of both firms and consumers. That dimension encompasses not only objective facts such as network quality but also the subjective meaning given by consumers to those facts.[271]

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[270] H3G Response to the SO, paragraph 148.

[271] Consumer preferences as expressed in brand choices are routinely taken as a starting point for the Commission's analysis, without any attempt to uncover the "objective" properties of the underlying products or the relative importance of "objective" and "subjective" brand charac-

(377) The Notifying Party further claims in the response to the SO that the "introduction of the service fee was the result of an industry wide shock (namely, the introduction of the iPhone and Android smartphones), which led to a sharp increase in requests for technical services and in the costs associated with those requests".[272] Therefore, the fact that several MNOs introduced the SIM card service fees shortly after TA could not be interpreted as an indication for strategic complementarity of prices.

(378) The notion of an industry wide cost shock is difficult to reconcile with further statements of the Parties on the introduction of the service fees. First, Orange does not mention increased costs for technical services as one of the reasons for introducing the service fees.[273] Second, to the extent that the costs of the MNOs are reflected in the charges for their technical service hotlines, even an increase in the demand for technical assistance does not create any need to recuperate those costs by means of a service fee.[274] In that context, a report by Orange states that only H3G includes the technical hotline in the services covered by the service fee.[275] Third, it appears that the demand for these services has evolved gradually rather than being an industry wide cost shock.[276] For these reasons, the alleged industry wide cost shock is unlikely to have caused the observed pattern of SIM card service fee introductions.

6.9.2. Other service providers (MVNO)

(379) It is possible that if access to the wholesale market were provided under certain conditions, a generalist and fully fledged MVNO might be able to compete directly and effectively with the MNOs. Under the wholesale access conditions that MVNOs can obtain now and would receive post-merger, the reduction in competition at the retail level ensuing from the Proposed Transaction cannot be fully and effectively offset by current or potential competition by MVNOs.[277] MVNOs do not have their own network and can only compete in terms of added value at the retail level if they have wholesale access on competitive terms, which is not the case today and would not be the case post-merger.

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teristics. See for instance Commission Decision of 17. November 2010 in Case No COMP/M.5658 – *Unilever/Sara Lee Body Care,* OJ C 23, 28.1.2012, p. 30.

272 Response to the SO, paragraph 227.

273 See Form CO, paragraph 471–472.

274 H3G states that it is the only MNO that offers a technical service hotline free-of-charge. See See reply of H3G to RFI of 11 May 2012, 10. Document "M.6497_Annex 1.10_Response to BWB's RFI re introduction of service fee (confidential).pdf" Doc ID 1805, p. 1.

275 See reply of Orange to question 1 of RFI of 11 May 2012, document "StellungnBWB1208vertraulich.pdf" Doc ID 1833, p. 5. The service fee of Orange appears to contain some technical services such as the "Smartphone starter package", while the service fees of T1 and TMA appear not to include technical services related to smartphones.

276 See reply of H3G to RFI of 11 May 2012, 10. Document "M.6497_Annex 1.10_Response to BWB's RFI re introduction of service fee (confidential).pdf" Doc ID 1530, p. 3. In that document, H3G states […]*

277 See Sections 6.3.1.2 and 9.1 for an overview of the MVNOs in Austria. It should be noted that there is currently only one independent MVNO in Austria and that the larger MVNOs belong to A1, T-Mobile and Orange.

(380) There is currently only one independent MVNO active on the Austrian market, namely Vectone Mobile, a provider specialising in pre-paid international calls.[278] The Commission considers that Vectone, which is not a fully-fledged MVNO, would not pose a competitive constraint in the event of price increases by the merged entity in particular in the key areas of concern in this case, namely smartphone bundles and data-only tariffs.

(381) Other service providers[279] referred to by the Notifying Party, such as *s-budget* or *Ge org:)*, are pure resellers of MNO services with very small customer bases. The Notifying Party submits that resellers account for a negligible proportion of total subscribers. H3G has sold only approximately […]* SIM cards via resellers in Austria, a negligible portion of the overall market consisting of […]* million subscribers.[280] Given the market positions of the service providers / resellers, it can be concluded that they only play a very limited role on the market, in particular when compared to the MNOs. This situation will in all likelihood not change in the foreseeable future.

(382) The Commission therefore concludes that the MVNOs and other service providers currently on the Austrian market are unlikely to become a competitive constraint to the merged entity after the merger.

6.10. Framework of analysis as regards the competitive constraint due to Orange in the absence of the merger

(383) According to paragraph 9 of the Horizontal Guidelines *"[i]n assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry*

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278 Bob, tele.ring and Yesss! are MVNOs currently owned by TA, T-Mobile and Orange respectively. They are part of these MNOs' multi-brand strategies and cannot be considered independent players on the market. As opposed to its competitors, H3G pursues a single brand approach and does not have its own MVNO. This will not change post-transaction, as H3G intends to sell-on Yesss! to TA immediately after acquiring Orange. Yesss! has a market share of […]*% in terms of subscribers and […]*% in terms of revenues.

279 Service providers or resellers are "partial MVNOs". From the MNO's perspective, there is no difference between a service provider and a reseller as regards network access and the terms may sometimes be used interchangeably. However, in general, a pure reseller obtains all of its offering (network access, back-office functions (billing etc.), SIMs, handsets) from the MNO whereas a service provider may only obtain network access and certain back office functions from the MNO and will obtain handsets and other equipment directly from suppliers. In each case, the partial MVNO will be responsible for branding and marketing towards customers. Partial MVNOs do not own any network infrastructure. There are no service providers on the Austrian market. However, over a dozen independent resellers are active on the Austrian market; see Form CO, paragraph 126.

280 See Form CO, paragraph 165 (H3G confidential).

or exit of firms if the merger did not take place when considering what constitutes the relevant comparison."[281]

6.10.1. The view of the Notifying Party

(384) The Notifying Party submits that it could be reasonably predicted that the competitiveness of Orange "*will suffer in the coming years compared to the status quo. On this basis, it would not be appropriate, for the purposes of the merger assessment, to compare the post-merger situation merely with the status quo*".[282]

(385) Specifically, the Notifying Party argues that Orange has been financially constrained and will not be in a position to invest in spectrum and the upgrade of its network with regard to both 3G and the new 4G/LTE technology.[283] Necessary capital expenditure for the upgrade of infrastructure and acquisition of spectrum would amount to EUR […]*. However, due to its high net debt, Orange would breach certain debt covenants which it has already entered into in 2012, and waivers of those covenants which have been granted would expire should the merger not go through. The difficult financial situation would likely prevent Orange from bearing significant future investments.

(386) In its response to the SO,[284] the Notifying Party further criticises the Commission's assessment of Orange as a viable competitor on a stand-alone basis going forward. In particular, it claims that Orange has persistently lost market shares. Moreover, Orange is not more price aggressive than the other competitors but rather an operator of limited and decreasing attractiveness from the perspective of end customers.[285]

(387) A further submission of Orange elaborates on the Commission's failure to take into account the claim that its network is lagging behind and that significant investments would be needed to upgrade it.[286] […]*[287]

(388) The Parties further claim that the Commission was selective in the choice of internal documents, quoted them in a misrepresentative manner and was merely speculating on Orange's possible strategies in the absence of the Proposed Transaction. In particular, they claim that it is up to the Commission to demonstrate how a network sharing agreement would affect competition on the retail level.[288]

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281 Horizontal Guidelines, paragraph 9.

282 H3G's Submission of 13 April 2012, p. 1, Doc ID 125.

283 Form CO, paragraphs 279 and following.

284 H3G Response to the SO, paragraphs 159 and following.

285 Form CO paragraphs 269 and following.

286 Submission of Orange of 4 October 2012 "on the treatment of the counterfactual in the Commissions Statement of Objections", response to the SO, p. 11–12.

287 […]*

288 Submission of Orange of 4 October 2012 on the treatment of the counterfactual in the Commissions SO, response to the SO, p. 13 and following.

6.10.2. The Commission's assessment

(389) For the purpose of its analysis, the Commission assesses a future hypothetical scenario, namely the likely market outcome in the absence of the merger. In accordance with paragraph 9 of the Horizontal Guidelines, as a starting point the Commission assumes that the status quo would continue to apply and departs from this assumption only if changes can be reasonably predicted.

6.10.2.1. Absence of a failing firm defence

(390) Neither the Notifying Party nor Orange put forward a failing firm defence in the sense evoked at paragraphs 89 and following of the Horizontal Guidelines. Nor do they suggest that, in the absence of the merger, Orange would not continue to compete on the relevant market in the near future.[289]

6.10.2.2. Development of Orange's market share

(391) In the past, against the background of H3G's rapid growth in the Austrian mobile telecommunications market, Orange's position as number three was not affected despite the alleged limited decline in market shares. Moreover, an internal study carried out by Orange[290] shows that the number of its subscribers recently increased, when comparing the first quarters of 2011 and 2012.

6.10.2.3. Further current indicators of Orange's competitive position

(392) Available indicators do not suggest that Orange's competitive position is expected to deteriorate significantly in the near to medium term. Notwithstanding the alleged weaknesses of Orange,[291] Orange is doing well or is currently even number one in a number of important competitive aspects. According to the Austrian regulator's assessment on customer satisfaction Orange has recently been voted number one on the Austrian market.[292] Business customers contacted during the Commissions market investigation considered Orange as an important price innovator and a provider of very flexible tariffs.[293]

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[289] According to paragraph 89 and following of the Horizontal Guidelines, the Commission may clear a merger if the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This would require that the following three conditions are met: First, the allegedly failing firm would in the near future have to be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there has to be no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would have to inevitably exit the market.

[290] See "Mitbewerbsvergleich Q1 2012, Market Intelligence, 22. Mai 2012", p. 4, Doc ID 2345.

[291] Form CO, paragraphs 266 and following; H3G Response to the SO, paragraphs 159 and following.

[292] http://www.orange.at/Content.Node/unternehmen/nummer-1-bei-zufriedenheit/ (retrieved 25 October 2012).

[293] See responses to Commission questionnaire 2 to Business Customers and Consumer Associations; the question was worded as follows: "Please rate [...] the Austrian main retail mobile network providers (A1, T-Mobile, Orange, H3G) in terms of […] price innovation [and] tariff flexibility", Doc ID 508.

[…]*[294] Overall the internal documents submitted by H3G and Orange do not suggest that Orange would, in the absence of the merger, no longer be willing and able to act as a viable and serious competitive constraint on the Austrian market.[295]

(393) The fact that competitors are rated in some internal documents as being […]*[296] is not proof that the Commission was selective in its findings to show the competitive impact of Orange, nor does it contradict the finding that in the absence of the merger Orange is expected to remain a serious competitive force on the Austrian mobile telecommunications market.

(394) Benchmarks show Orange's network to be in a state acceptable to customers. […]*[297][…]*[298]According to the latest Connect test of January 2012, the other MNOs improved their networks in 2011 relative to Orange so that it was ranked only fourth.[299] Yet, Orange's network quality appears to be still good enough to attract significant numbers of new customers. Whilst it may be the case that, as argued by Orange, in order to avoid future degradation of competitiveness due to a relatively less strong network, investments might be necessary in the absence of the merger, there is no convincing proof that this would be impossible to achieve. Furthermore, there is no evidence to suggest that, hitherto, the network of Orange has in any way been constrained by external, imperative factors.

(395) The Commission therefore takes the view that even if Orange's network currently has some quality and coverage deficits, this results from autonomous commercial choices which reflect the company's intended market positioning and the trade-off which it has chosen to make between the costs and benefits of further investments. Those choices appear to be fully compatible with the role it plays as a competitor and in no way necessarily to prejudice that role in the medium term.

6.10.2.4. Orange's plans in the absence of the merger

[The following section discusses Orange's business plan absent the proposed transaction. The Commission analysed in particular Orange's intentions with regard to network development and strategic positioning within the market.]

(396) […]*[300][…]*[301][…]*[302][…]*[303][…]*[304][…]*[305]

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294 See Orange's reply to the RFI of 4 July 2012 […]*

295 […]*

296 H3G´s internal documents do not show that Orange is more competitive than other market players, response to the SO of 4 October 2012, paragraphs 186 and following.

297 The following were criteria assessed: Service speed, Web Copernicus, Web YouTube, home page, Email receive, Email send, File download (mean data rate), File upload (mean data rate), Latency (RTT), YouTube video time to start. See Orange's reply to RFI of 4 July 2012, 110921_Shareholder Committee Meeting_Update Network_EG.ppt, slide 7, Doc ID 4901.

298 See Orange's Reply to RFI of 4 July 2012, 021_Benchmarking_Report_April_2011_T-MOBILE.ppt, slides 4, 6, and 14, Doc ID 4898.

299 See Form CO, Annex 6.(4).

300 Orange's reply to RFI of 4 July 2012, Business Plan Workshop Tuesday 3 May 2011, Doc ID 4902.

(397) […]*[306][…]*[307][…]*[308]

(398) […]*[309][…]*[310][…]*[311][…]*[312][…]*[313]

(399) […]*[314][…]*[315][…]*[316][…]*[317][…]*[318][…]*[319]

(400) […]*

6.10.3. Conclusion

(401) On the basis of the above, the Commission concludes that, the relevant comparison for evaluating the effects of the merger is constituted by the competitive conditions existing at the time of the merger as set out in paragraph 9 of the Horizontal Guidelines, namely that Orange would remain a comparably relevant competitor on the Austrian market for mobile telecommunications services to end customers as it has been to date.

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301 […]*

302 H3G Response to RFI of 15 June 2012 (questions 1 and 2a-e) – Pnl_Hutch_Orange_Combo_vSENT, Doc ID 3641.

303 See Orange's reply to RFI of 4 July 2012 -, Business Plan Workshop Tuesday 3 May 2011, slide 14, Doc ID 4902.

304 *Ibid.*

305 Orange's response to RFI of 4 July 2012 – Question3_3.1_3.1.3, 131_LT BPlan Oasis base case FC 04_2012 SCM_HC.ppt, slide 54, Doc ID 4913.

306 Submission of Orange of 4 October 2012, response to the SO, p. 11–12.

307 Orange's response to RFI of 4 July 2012 – Question3_3.1_3.1.3,,"071_111021_Original Minutes SCM.pdf", page 6, Doc ID 4913.

308 Orange's response to RFI of 4 July 2012 – Question3_3.1_3.1.3, " 127_120523_Original Minutes SCM Orange.pdf", page 3, Doc ID 4913.

309 See Annex 5.4.(15) to the Form CO, "Project Trident- Hundertwasser Synergy case on 8 July 2011", p. 20, Doc ID 405 (Orange confidential).

310 In another internal document from June 2012, the Orange management is contemplating issuing a RAN tender despite the on-going merger proceedings. See Orange's reply to RFI of 4 July 2012, 120620_Shareholder_Network_tender.pptx, Doc ID 4902.

311 By acquiring the 2.6 GHz frequencies, Orange had taken an investment decision in full knowledge of the fact that the regulator would impose a coverage obligation.

312 Orange's reply to RFI of 4 July 2012111021_Overview Network projects.ppt, slide 5, Doc ID 4901 Compare also for an earlier version Orange's reply to RFI of 4 July 2012, 110712_Shareholder_Meeting_Network_Update_Cobra_Viper_Final.ppt, slide 5, Doc ID 4901.

313 […]*

314 […]*

315 […]*

316 […]*

317 […]*

318 […]*

319 […]*

6.11. Conclusions on non-coordinated effects

(402) The results of the market investigation[320] and its own analysis therefore lead the Commission to conclude that the elimination of Orange as an independent network operator and provider of mobile telecommunications services to end users, and the reduction of operators from four to three would significantly impede effective competition in the internal market by means of non-coordinated effects in the Austrian market for the provision of mobile telecommunications services to end customers.

7. EFFICIENCIES

(403) Prior to the SO, the Notifying Party did not raise a formal efficiency defence but submitted that the Proposed Transaction would allow H3G to increase the role it plays as a competitive force on the market.[321]

(404) The Notifying Party argued that, after the merger, H3G would have clear incentives to continue its growth strategy and would increase the number of its sites by approximately 50% which would amount to a significant expansion of the implemented capacity. In addition, as a result of the Proposed Transaction, H3G's competitive position would improve in at least four aspects compared to the standalone scenario. In particular, H3G would immediately achieve better coverage and significantly improved network quality, the nationwide rollout of LTE services could be speeded up significantly, the increased scale would facilitate future investments and the development of new services and H3G would be able to offer services in the low end voice pre-paid segment based on inexpensive 2G handsets.

(405) Moreover, the Notifying Party has claimed that, as a general matter, in oligopolistic markets with economies of scale, a reduction in the number of competitors may increase consumer welfare.[322] This is not disputed by the Commission. However, if such an increase in consumer welfare were to materialise, it would need to be on the basis of efficiencies. Under the Horizon-

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320 Responses to Commission questionnaire 2 to Business Customers and Consumer Associations, Doc ID 508; the questions were worded as follows: "Would the Proposed Transaction remove an important competitor?" and "In your opinion, what impact, if any, will the Proposed Transaction have […]?".

321 Form CO, paragraphs 334 and following. The Notifying Party expressly pointed out that its reply to the 6(1)(c) decision did not address the points raised in Section VII of the 6(1)(c) decision concerning the procompetitive effects of the transaction (see " M.6497 - Submission 11_9_12.PDF", Doc ID 5955, p. 5).

322 See also Commission Decision of 13 January 2006 in Case No COMP/M.4036 – *TPG IV/APAX/Q-Telecommunications,* OJ C 56, 8.3.2006, p. 11, which concerned the takeover of a very small operator (2.5% by revenue or 6.5% by subscription) whose customers were to 90% pre-paid and which did not provide full nationwide coverage. The Commission concluded that the transaction would not lead to a major change in the structure of the market but could even enhance competition by creating a stronger player in a better position to compete with the large incumbents. The situation was therefore very different from this case in which two fully-fledged MNOs intend to merge and where the market is about to lose the competitive pressure exercised by a viable competitor.

tal Guidelines, the Commission's practice is to assess efficiencies as a countervailing factor and the burden of proof rests upon the Parties to the Proposed Transaction to establish the existence and significance of the efficiencies to the necessary standard of proof.[323]

(406) In order for the Commission to take into account pro-competitive effects under the Merger Regulation, efficiencies must be verifiable, likely to be passed on to consumers and merger specific to the extent that no other practicable less anticompetitive alternatives exist to achieve the same benefits.[324]

(407) Prior to the SO, the Notifying Party did not sufficiently address, let alone prove, that the requirements to acknowledge such efficiencies under the Horizontal Guidelines were met.[325] Despite the statement in the Article 6(1)(c) decision that efficiencies would have to be substantiated, the Notifying Party did not bring forward further evidence in its response to the Article 6(1)(c) decision.[326]

(408) In its response to the SO, the Notifying Party eventually claimed efficiencies as a formal defence.[327]

7.1. Capacity increase

(409) The Notifying Party argues that by combining H3G's and Orange's networks, the merger would increase the capacity of the merged network by […]*% by 2014 compared to the two standalone networks in the absence of the merger.[328] This substantial increase in capacity would be made possible by multiplying the amount of spectrum by the number of sites where the spectrum would be deployed. This capacity increase would allow for considerably faster and higher quality services in H3G's network and would allow H3G to address the problem of imminent bottlenecks in its network effectively. In particular, the number of H3G's congested sectors would be reduced through the merger.[329]

7.1.1. Verifiability

(410) The Notifying Party claims in its reply to the SO, that the increase in implemented capacity is readily verifiable and cites a financial model, […]*, in support of this assertion.[330] The Notifying Party further submits that the scale

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323 Horizontal Guidelines, paragraph 87.

324 Horizontal Guidelines, paragraph 78.

325 In Form CO, Section 9, there is only a reference to other sections of the Form CO without any attempt to provide information as to whether the three necessary cumulative criteria for efficiencies (verifiability, merger specificity, benefit to consumers) are met.

326 See page 5 of the response to the Article 6(1)(c) decision: "This submission does not address the points raised in Section VII of the Decision concerning the procompetitive effects of the Proposed Transaction."

327 See Section 7.

328 See Form CO, paragraphs 371 and following.

329 See Annex 8.(3) to Form CO, Figures 3, 4 and 6.

330 See H3G Response to the SO, paragraphs 268–272.

of the network update following the transaction is described in more detail in Annexes 6 to 10 to its response.

(411) In its response to the SO, H3G submits that it is self-evident that increased capacity will benefit consumers by reducing bottlenecks and improving the speed of the network and cites two studies in support of its theory according to which, among other things, 7 out of 10 data consumers consider network quality to be a "very important" selling point.[331]

(412) In substance, while the evidence put forward suggests that some network related efficiencies may be attained through the merger, they have not been convincingly verified. The […]* submitted by H3G mainly capture the cost implications of merging the networks.[332] While Annexes 8 and 9 to H3G's reply to the SO contain information on the quantity of devices that have been ordered for the merged network, the relation to the computation of the "implemented capacity" provided in Annex 8.3 to the Form CO is at best vague.[333] Furthermore, the Notifying Party has failed to underpin its assumptions with sufficient evidence from internal documents as regards the network size of the merging firms in the stand-alone scenario.

(413) Finally, the claim that H3G's network is already close to congestion does not seem to be in line with the recent mobile network quality results published in the "CONNECT" test where H3G had the best network quality in Austria.[334]

7.1.2. Merger specificity

(414) As regards merger specificity, the Horizontal Guidelines state that efficiencies are taken into consideration provided that there are no other less anti-competitive means to attain the claimed efficiencies.[335] The Horizontal Guidelines require that the alternative must be "realistic and attainable".[336]

(415) The Notifying Party claims that in order to improve capacity neither building more sites, nor acquiring more frequencies from a competitor (or, presumably, in the upcoming auctions), nor relying on domestic roaming and/or spectrum sharing are "realistic and attainable" alternatives and presents a number of reasons why any of those alternatives would be more costly for H3G. However, the Notifying Party also argues that capacity constraints can be

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331 See paragraph 294 of H3G's response to the SO.

332 […]*

333 For example, it is unclear why on p. 24 of Annex 8 to the reply of the SO, there seems to be rather flexible per radio unit frequency configuration GSM/LTE on the 1,800 MHz band while in Table 6 of Annex 8.(3) 20 MHz of the 1 800 MHz band seem to be devoted to LTE.

334 See http://www.connect.de/ratgeber/mobilfunk-netztest-oesterreich-2012-1368672.html (retrieved 26 October 2012). In 2011, H3G's network was certified by the independent network test of the German magazine "Connect" as the best network in any of the German-speaking countries, being Germany, Austria and Switzerland; see Form CO, paragraph 212.

335 Horizontal Guidelines, paragraph 85.

336 See Horizontal Guidelines, paragraph 85.

treated by punctual interventions and that for this reason certain network costs should be considered as variable.[337]

(416) In particular, the Notifying Party argues that H3G has its own and very particular network vision and therefore, if it were to enter into a collaborative network-sharing arrangement, it would have to make compromises which are incompatible with its business strategy.[338] Moreover, H3G had already attempted to negotiate a network sharing agreement with T-Mobile over the course of many years, but ultimately those negotiations had failed, among other reasons, due to the lack of a similar network strategy.[339]

(417) The Commission, however, cannot rule out alternatives just because they might be more cumbersome or expensive for H3G to implement. If some other alternative is realistic and attainable, only the incremental benefit from a full merger can be considered as a merger-specific efficiency. The mentioned alternatives are plausible means of reducing capacity constraints. These are established business practices in the industry concerned. Thus more evidence would be needed to show why these measures would not be realistically chosen in the absence of the merger.

(418) In particular, a domestic roaming agreement with other MNOs, a joint venture to develop LTE, large scale network sharing or even a merger only of the Parties' networks with the commercial and retail assets of Orange remaining active in the market as an independent MVNO[340] cannot be excluded as possible outside options. These less anti-competitive means of achieving hypothetical efficiencies would not change the number of retail players.

(419) As regards network sharing, the observation that […]* Moreover, it suffices that any of the Parties – not necessarily involving H3G – could plausibly achieve similar efficiencies by network sharing. Even if H3G were unlikely to enter into a network sharing agreement because of its particular business strategy, it appears plausible from internal documents that Orange and T-Mobile could have an incentive to enter into such an agreement.[341]

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337 See paragraphs 258 and following of H3G's response to the SO.

338 H3G's response to the SO, paragraphs 287–289.

339 The Notifying party also contends that the Austrian telecoms regulatory authority TKK would view network sharing agreements critically. The fact that the TKK was closely involved in past detailed network sharing discussions (see for example H3G reply to Question 9 of RFI of 27 July 2012) shows that large scale network sharing is not ruled out *per se*. The TKK also sees network sharing as a viable alternative to the merger; Stellungnahme der Telekom-Control-Kommission zum Auskunftsverlangen der Europäischen Kommission (Doc ID 5890, p. 3).

340 Orange remaining active at the retail level would allow all the efficiencies claimed by the Parties to be realised at network level. Orange as an MVNO would differ from a new MVNO that enters the market because Orange could make use of its existing sales channel and existing customer base and would therefore presumably attract more gross adds than an MVNO entrant. Moreover, due to its size it would have more bargaining power and thus likely achieve more favourable access terms in the long run.

341 Notably, a network JV between T-Mobile and Orange was an alternative already considered by Orange. It would appear that on 25 July 2011, all preparations for such a JV were com-

(420) The claim that H3G's endowment constitutes an imminently binding capacity constraint, and that it cannot be relieved by measures other than acquisition of spectrum and sites is not substantiated by the Parties.[342] On the one hand, the Notifying Party argues that H3G would only build a small number of new sites in the absence of the merger.[343] On the other hand, it argues that H3G will likely experience congestion by 2014 under such a scenario. It has not been substantiated why H3G would not have incentives to build more sites (especially more than 700 LTE sites when UMTS is congested), acquire additional frequencies from competitors or rely more intensely on domestic roaming. The Parties have not produced evidence by, for example, independent network engineers to prove the binding nature of the constraint.

7.1.3. *Benefit to consumers*

(421) H3G submits that, given that the improved network quality is a demand-side efficiency, a quantification of the benefit to consumers is neither necessary nor possible.

(422) Moreover, the Notifying Party claims that H3G would hit a capacity ceiling if the capacity were not to be increased through the merger.[344] This would imply that, since H3G would be approaching a constraint, its pricing would become less competitive in the absence the merger.[345]

(423) The Commission considers that subscribers can benefit from higher network capacity only insofar as this has a positive effect on network quality (for example, through less congestion), or induces H3G to offer lower prices. A subscriber does not derive any benefit from the fact that the network has more capacity *per se.*

(424) Moreover, the fact that higher network quality would be experienced directly by subscribers does not mean that they would have a net benefit from the merger. In particular, if not constrained by enough competitive pressure, the merged entity could in principle increase prices so as to partially or wholly claw back any benefits at the customer level.[346] Although this issue was set out by the Commission at the Oral Hearing, H3G has not brought forward any justification of why benefits from additional network capacity should remain with consumers.

(425) While the assertion of more aggressive pricing in the absence of imminent capacity constraints may be true in the abstract, the Notifying Party has not provided sufficient evidence to prove that such will in fact be the case.

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pleted in order to launch integration in the last quarter of 2011. See slide 2 of Annex 5.4.(2) to the Form CO, […]* and Section 6.10.

342 A discussion of the traffic capacity implications of network size is available at http://www.nokiasiemensnetworks.com/system/files/document/Mobile_broadband_A4_26041.pdf (retrieved 26 October 2012).

343 Form CO, paragraph 514.

344 See response to the SO, paragraph 265.

345 See Form CO, paragraphs 505 and following.

346 See also Commission Decision of 1 February 2012 in Case No COMP/M.6166 – *Deutsche Börse/NYSE Euronext*, paragraph 1178 and following.

(426) For example, to the extent that the capacity constraint is already imminent and could not be addressed in any other way, then prices should already reflect it. No evidence of this happening or being discussed has been pointed out in that regard, although it would have been possible for the Parties to do so. It follows that the claim that H3G's pricing behaviour will imminently be affected by its capacity limits cannot be sustained.

(427) Therefore, while the alleged effects of both increased network quality and more aggressive pricing as a result of more available network quality appear theoretically appealing, the Notifying party has failed to meet the required burden of proof for these efficiencies to be taken into account.

7.2. Faster LTE rollout

7.2.1. Verifiability

(428) The Notifying Party alleges that the Proposed Transaction will allow H3G to roll out LTE nationwide within a short time period. In support of this claim it provides evidence of internal documents outlining the company's plans with regard to LTE rollout.[347]

(429) However, H3G does not take into account the possibility that, currently, Orange could itself roll out LTE on the 1 800 band. While financial constraints are argued by Orange to be an issue, there are some internal documents that show that a planning basis exists.[348] H3G has also failed to assess the benefit to consumers of a faster rollout of LTE by itself.

7.2.2. Merger specificity

(430) The Parties have argued in the Form CO why, in the absence of the Proposed Transaction, the LTE rollout would happen more slowly, less effectively and less cost-efficiently.[349] The Parties have also explained why, […]*.

(431) However, there are other alternatives that would allow for LTE rollout […]*

(432) Although these alternatives may be less advantageous for H3G, they pertain to industry standard practice and must therefore be taken into account in this analysis.[350] The Commission therefore holds that faster LTE rollout is not merger specific.

7.2.3. Benefits to consumers

(433) The Notifying Party suggests that the Proposed Transaction would enable H3G to modernise Orange's 2G network to the faster LTE technology, providing consumers with much better service far sooner than would have been possible in the absence of the Proposed Transaction.

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347 See references in H3G's response to the SO, paragraphs 298 and following.

348 […]*

349 See Form CO, paragraphs 309 and following.

350 See also non-confidential RTR reply to Question 5 by email of 24 October 2012.

(434) As explained in recital (424), the issue of claw back still arises and the Notifying Party has not shown to what extent this efficiency, if it arose, would fully benefit consumers.

7.3. Improved network coverage

(435) The Notifying Party claims that the coverage of the combined network would be superior to the current coverage of H3G's and Orange's network and alleges that the Commission does not challenge that the efficiencies relating to improved network coverage are verifiable, merger-specific and benefitting consumers.[351]

(436) The Commission's reservations also prevail with regard to the question of improved network coverage.

(437) As to the verifiability of improved network coverage, the Notifying Party's assertions that the coverage of the unified network would increase after the merger from […]*% (H3G) and […]*% (Orange) for 3G coverage respectively to […]*% of the population are a mere statement of intent and not a verifiable piece of evidence. Furthermore, H3G has also failed to show an identifiable positive impact on consumers which is not marginal.

(438) Moreover, increased network coverage can – just like faster LTE roll-out or capacity increases – also be attained through other means which are perfectly attainable and realistic albeit perhaps less attractive to H3G. The Notifying Party can build new sites, or enter into a network sharing agreement with another MNO or acquire frequencies in the 800 MHz band which has better propagation characteristics to cover rural areas. The same holds true for Orange. Therefore, the merger specificity of the claimed improved network coverage is not established.

(439) Finally, the Commission does not, in principle, doubt that improved network coverage could benefit consumers, but considers that this cannot be taken as granted for the reasons set out in recital (423).

7.4. Reduction of alleged scale disadvantages

(440) H3G claims that as the smallest operator in the market it has considerable scale disadvantages *vis-à vis* A1 and T-Mobile. The Proposed Transaction would improve H3G's competitiveness in various ways, including by facilitating the upcoming investments and generating cost savings that would be used to develop new services and to price more competitively.

(441) H3G claims that its […]* shows substantial network related OPEX and CAPEX savings compared to the expected aggregated expenditure under the two stand-alone networks.[352]

(442) While the Notifying Party verifies the level of network related savings by means of internal documents, it has failed to prove merger specificity. As ex-

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351 See paragraphs 308 and following of H3G Response to the SO.

352 See H3G Response to the SO, paragraph 312 and Annex 12 to the response. The Notifying Party only focuses on network-related efficiencies.

plained in recitals (418) and (419), there are other plausible alternatives such as network-sharing that would have to be considered. Only the efficiencies in addition to savings realised by those alternatives could potentially be considered as merger-specific. Given that it remains unclear to what extent the claimed cost reductions are indeed merger specific, the Commission cannot take into account those alleged benefits.

(443) Finally while the Commission acknowledges that, in theory, consumers may be able to profit from "new services" or "more aggressive pricing", the mere assertion of benefits does not suffice. The Notifying Party's claims in the reply to the SO are so vague that any benefit to consumers is a theoretical proposition that can hardly be measured.

(444) In particular, the Notifying Party has not set out to what extent cost savings lead to a reduction of marginal costs and would thus likely be taken into account in pricing decisions. However, […]*[353]. Hence, even if those savings were merger-specific, the fact that H3G plans to have fewer customers than H3G and Orange in their stand-alone forecasts would suggest that the benefit to consumers from those efficiencies would not outweigh the negative effects from the concentration.

7.5. Conclusion

(445) The efficiencies claimed by the Notifying Party have not been shown to be verifiable, merger specific and to the benefit of consumers. Therefore, they cannot be taken into account in order to offset the competitive harm resulting from the Proposed Transaction.

8. COORDINATED EFFECTS

(446) According to case law[354] and the Horizontal Guidelines,[355] it must be established in order to assess coordinated effects that a Proposed Transaction will make coordination more likely, more effective or more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.

(447) In the Article 6(1)(c) decision dealing with the Proposed Transaction the Commission did not rule out the possibility that the Proposed Transaction may also lead to a weakening of competitive pressure as a result of coordinated effects. Those coordinated effects would result in prices on the market rising higher than if they were dictated only by the individual, non-coordinated, profit maximising behaviour of each individual competitor.

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353 See H3G Response to the SO, paragraph 312 and Annex 12 to the response.

354 Case T-342/99, *Airtours v Commission* [2002] ECR II-2585; T-464/04, *Impala v Commission* [2006] ECR II-2289.

355 Horizontal Guidelines, paragraphs 39–57.

(448) The Commission found that some characteristics of the Austrian mobile telecommunications market may be conducive to coordination and some past parallel behaviour of the Austrian MNOs could point to co-ordination.[356] However, the indications did not meet the requisite standard of proof the Commission has to meet according to the case law,[357] namely a significant impediment to effective competition leading to coordinated effects.

(449) In any event, even if coordinated effects in the market for mobile telecommunication services to end customers were assumed, the fact would remain that the commitments proposed by the Notifying Party aim to facilitate market entry and thus also address possible coordinated effects. Hence, it can be ruled out that the transaction as modified by the commitments would lead to a significant impediment to effective competition in the form of coordinated effects on the Austrian market for mobile telecommunications services to end customers.

9. OTHER MARKETS

(450) The Proposed Transaction does not give rise to competition concerns on the following markets discussed in Sections 9.1 to 9.3.

9.1. Wholesale access and call origination on public mobile telephone networks

(451) Wholesale network access is provided by MNOs to MVNOs. This includes the provision of a range of wholesale telecommunications services on a mobile telephone network for the purpose of providing retail mobile communications services to end users. The wholesale market for those services is therefore (i) on the supply-side, the MNOs which own their mobile networks and (ii) on the demand-side, the MVNOs who seek access to the MNO network in order to provide their retail services.

(452) Currently, only Vectone Mobile qualifies as an independent MVNO on the Austrian market. It is hosted by TA and has negligible market shares (about [0-5]*% in terms of subscribers, voice and data share). Other MVNOs like tele.ring, bob or Yesss! are not independent operators but only instruments that serve their parents multi-brand strategy. The MVNO Tele2 left the market in 2008; it had previously been hosted by Orange (former "One").

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356 Parallel pricing behaviour may be difficult to distinguish in practice from the expectation that rivals also have a unilateral incentive to follow price increases with price increases of their own, as discussed in Section 6.9.1 above.

357 See, to that effect, Case T-342/00 Petrolessence and SG2R v Commission [2003] ECR II-1161, paragraph 101, and the case-law cited; Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 38; and Case T-87/05 EDP v Commission [2005] ECR II-3745, paragraph 63.

(453) H3G does not offer wholesale access to any full MVNOs at the moment. Orange does not offer wholesale access to independent MVNOs.[358]

(454) The Austrian wholesale network access market therefore exhibits a significant lack of activity compared to the markets in other Member States. In its Decision in Case COMP/M.4748 – *T-Mobile/Orange Netherlands,* the Commission found that the Dutch mobile telephony market was characterised by the presence of approximately 50 MVNOs and Service Providers, with Tele 2 and Debitel being the largest ones.[359] Likewise the Commission established in 2010 that 25 MVNOs were active the UK mobile communication market.[360]

(455) In its Article 6(1)(c) decision, the Commission did not rule out the possibility that the Proposed Transaction might also lead to competition concerns on the wholesale market for call origination and network access given that MVNOs would have fewer options to enter the market due to the elimination of Orange. The merger could therefore increase the likelihood of a high cost of entry for MVNOs.

(456) During its market investigation, the Commission found some indications that the merger might possibly affect access opportunities for MVNOs. However, there is no need to come to a final decision in that respect, as the commitments proposed by the Notifying Party aim to facilitate market entry and thus equally address and rule out the possibility that the transaction would lead to negative effects on the Austrian wholesale market for network access and call origination.

9.2. Wholesale market for international roaming

(457) The notified concentration would lead to a horizontal overlap between the Parties' activities on the wholesale market for international roaming in Austria. However, the Parties' combined market share is less than 10% on that market. Therefore, the market for international roaming would not be horizontally affected.

(458) There is also a vertical relation between the wholesale roaming services in Austria and the provision of mobile telecommunication services to end customers in the Member States where the HWL Group telephony companies ("3 Group") are active, namely Denmark, Ireland, Italy, Sweden and the United Kingdom.

(459) This vertical link does not give rise to any affected markets because (at the upstream level) the market share of Orange (or even of the Parties combined) is below 10%. At the downstream level, the market share of each member of

[358] For completeness the Parties note that Orange provides access to its network to Eety, a small provider of mobile telecommunications services in Austria, which is jointly controlled by Orange through a 25.1% equity stake.

[359] See Case No COMP/M.4748 – *T-Mobile/Orange Netherlands,* paragraph 28.

[360] See Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 41.

the 3 Group in each Member State in which it offers retail mobile communications is also below 25% on the basis of market shares of existing customers.

(460) There is also a vertical link between the Austrian retail mobile communications market, on which both H3G and Orange operate and each of the foreign national markets for wholesale international roaming services, where the 3 Group companies are active, namely Denmark, Ireland, Italy, Sweden and the United Kingdom.

(461) The Notifying Party submits that this vertical link does not give rise to an affected market because (at the upstream level) the market share of each of the 3 Group companies for international roaming is below 25% in all countries in which it is active in the EEA. At the downstream level the market share of Orange (even when combined with H3G) on the retail mobile communications market in Austria is below 25%.

(462) For completeness it is noted that international roaming is (in any event) subject to sector-specific regulation at Union level[361] which includes caps on wholesale charges and imposes certain information obligations. Further, MNOs generally conclude many bilateral agreements in order to maximise the quality and coverage of their roaming services.

(463) Accordingly, this vertical link does not give rise to an affected market. The transaction is therefore unlikely to lead to a serious impediment to effective competition in relation to the wholesale market for international roaming.

9.3. Wholesale market for mobile call termination

(464) There is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the network to which the recipient is connected. Each individual network therefore constitutes a separate market for termination.[362] Therefore, there is no horizontal overlap between the Parties' activities on this market, that is to say, each party is active on a different market.

(465) Since MNOs need to ensure an end-to-end connection to their subscribers, the Parties' activities in the Austrian market are, however, vertically linked. The Austrian market for the provision of retail mobile telecommunications services, on which Orange is operating, is vertically linked to the markets for wholesale call termination services on the 3 Group companies' mobile networks in Denmark, Ireland, Italy, Sweden and the United Kingdom.

(466) In addition, the Austrian market for call termination services on Orange's mobile network is vertically linked to the different national markets for the provision of mobile telecommunications services to end customers in the Member States where the 3 Group companies operate outside Austria (Denmark, Ireland, Italy, Sweden and the United Kingdom).

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[361] Regulation (EC) No. 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks (OJ L 171, 29 June 2007, p. 32).

[362] Case No COMP/M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 13.

(467) According to the market definition used in previous Commission decisions,[363] each operator has a 100% share of the market for call termination services on their respective mobile network.

(468) H3G's call termination services in Austria and the 3 Group's termination services in Denmark, Ireland, Italy, Sweden and the United Kingdom give rise to affected markets. At the downstream level, the combined share of H3G and Orange is below 25%.

(469) Furthermore, Orange's call termination services in Austria give rise to a technically affected market. At the downstream level, H3G's and H3G's sister companies' shares are well below 25% on those vertically affected markets (in Denmark, Ireland, Italy, Sweden and the United Kingdom).

(470) However, the Proposed Transaction would not lead to any anticompetitive foreclosure effects on any of those markets.

(471) Firstly, the Austrian market for the provision of wholesale mobile call termination services is subject to regulatory analysis by the national regulators,[364] in order to ensure that access is granted on reasonable conditions preserving effective competition. Pursuant to a decision dated 15 June 2009,[365] the TKK subjected the Austrian MNOs to obligations to ensure non-discrimination and interconnection as well as obligations to publish a reference offer for mobile termination services and to ensure cost-based pricing in mobile termination fees. In order to implement the cost-based pricing obligation, specific fees were defined for the mobile termination services. The TKK also held that the termination fees should be reduced gradually from 4.50 euro cents to 2.01 euro cents at six-months intervals.[366] Therefore, given that termination tariffs are regulated, it is ensured that the mobile termination rates remain reasonable and non-discriminatory.

(472) Secondly, in principle, and in line with previous Commission decisions,[367] the Commission considers that discrimination against Austrian operators other than H3G/Orange would be technically impossible since operators receive most of their international traffic from international carriers (who act as intermediaries between the telecommunications operators) and, therefore, cannot identify in most cases the exact origin of the international traffic terminated on their mobile networks.

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363 For example Case No COMP/M.4748 – *T-Mobile/Orange Netherlands*, paragraph 62; Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 161.

364 Pursuant to Section 1 (9) of the Telecommunications Markets Ordinance 2008 (Telekommunikationsmärkteverordnung 2008, TKMVO 2008).

365 TKK decisions of 15 June 2009, mobilkom, TMA, Orange, H3G, M 1/08.

366 Form CO, Annex 6.(23) – RTR, Communications Report 2009, p. 72 and following.

367 Commission Decision of 24 October 2005 in Case No COMP/M.3920 – *France Télécom/Amena,* OJ C 289, 22.11.2005, p. 5, paragraphs 35 and following; Commission Decision of 10 January 2006 in Case No COMP/M.4035– *Téléfonica /O2,* OJ C 29, 4.2.2006, p. 14, paragraph 36; Case No COMP/M.5650 – *T-Mobile/Orange,* paragraph 177.

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(473) Thirdly, the Notifying Party submits that there is no risk that H3G or the 3 Group companies will (in respect of its network in any country) cease to need or make available wholesale call termination services, as this would only undermine the retail mobile offering of H3G and the 3 Group in each country in which it is active (because H3G and the 3 Group companies would, in effect, restrict their end customers from making/receiving calls to/from other networks)

(474) On the basis of the above, the Commission concludes that the Proposed Transaction is unlikely to lead to a serious impediment to effective competition in relation to the wholesale market for mobile call termination services.

10. THE VIEWS OF INTERESTED THIRD PARTIES

(475) The following section deals with the views of interested third parties. The observations by T-Mobile and Tele2 mainly address possible commitments that could eliminate the competitive concerns of the merger. They are therefore dealt with here and not earlier in the Decision.

10.1. T-Mobile Austria

(476) On 22 March 2012, the Commission received a complaint about the Proposed Transaction from T-Mobile, the second-largest MNO in Austria.[368] T-Mobile argues that while further consolidation in the Austrian mobile sector is inevitable and will not necessarily raise concerns, the proposed merger in its current form would be harmful to competition. The Commission would have to ensure that competition among the remaining players continues to be effective, in particular in relation to LTE.

(477) According to T-Mobile, in Austria, the merged entity would have significant spectrum holdings and it would be the only MNO with a contiguous 20 MHz block in the 1 800 MHz spectrum band. The merged entity would also have a time advantage of roughly 2 years in relation to the implementation of a nation-wide LTE network, together with A1 following the acquisition of 900 MHz block from Orange.

(478) In the absence of the merger, because of the current inefficient spectrum distribution, the 4 MNOs would have an incentive to reshuffle their spectrum holdings in order for each to have sufficient contiguous spectrum to build an LTE network. Post-merger, with the Orange spectrum being sold to H3G and TA (A1), there would no longer be an incentive to reshuffle.

(479) As a result, T-Mobile would not be able to form a contiguous block of spectrum and would be able to launch a nation-wide LTE service only significantly later than the merged entity and TA, its existing capacity disadvantages would be entrenched and its long-term ability to compete undermined.

(480) Therefore, in order to protect effective competition between the remaining players in particular in relation to LTE and following the practice in previous

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368 See Doc ID 58.

Commission decisions, T-Mobile called for structural remedies that would include the divestiture of spectrum and towers/sites in its favour. In addition, T-Mobile submits that access of MVNOs to the networks of the Austrian MNOs has never been a problem and therefore an MVNO remedy is not the right remedy in this case.

(481) The Commission agrees that a structural commitment is necessary to make up for the loss of competition, which would result from the Proposed Transaction. The Commission considers that the right commitment should allow a new MNO entrant to acquire the divestment spectrum[369] and be able to roll out LTE in competition with the remaining MNOs. In addition, the Commission considers that at least one strong and competitive MVNO is necessary to ensure fast entry into the Austrian retail mobile telecommunications market, also in relation to LTE.

(482) The Commission considers that a structural commitment by the Notifying Party to the advantage of one of the remaining MNOs would not remedy the competition concerns. On the contrary, it could lead to a further concentration of the existing spectrum holdings and further increase the barriers to entry for new players on the market.

(483) Moreover, as regards the question of the number of LTE networks after the Proposed Transaction, T-Mobile has not provided any proof that it would be less interested in investing in LTE in order to remain a competitive player on the Austrian market. In any event, a structural remedy allowing for the entry of a new MNO in combination with the entry of MVNOs, which would offer LTE ensures that there is a sufficient number of competing LTE networks, out of which Austrian retail mobile telecommunications customers could choose post-merger.

(484) As regards the lack of contiguity, the Commission reviewed a large number of internal strategy documents of the Parties and their competitors and did not identify spectrum reshuffling as the most likely alternative scenario in the absence the present transaction. Furthermore, spectrum reshuffling can be achieved by way of commercial agreements with the other Austrian MNOs, or by way of regulation to ensure an efficient distribution of spectrum. The Commission therefore questions the merger specificity of this concern.

10.2. Tele2

(485) Tele2 is active in Austria as a fixed-line operator offering voice, broadband internet and data network services to residential and business customers.

(486) Tele2 submits that the Proposed Transaction would have a negative impact on competition in the Austrian telecommunications market and would lead to an increase in consumer prices and a reduction of consumer choice. It would facilitate the oligopolistic market behaviour of the remaining three MNOs post-merger.

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369 See Recital (526).

(487) The Commission considers that the proposed remedy package addresses those concerns.

11. GENERAL CONCLUSION OF THE COMPETITIVE ASSESSMENT IN THE RELEVANT MARKETS

(488) The Commission considers that the Proposed Transaction would likely lead to a significant impediment to effective competition on the basis of non-coordinated effects on the market for mobile telecommunications service to end customers in Austria.

12. COMMITMENTS SUBMITTED BY THE NOTIFYING PARTY

12.1. Procedure

(489) Where a concentration raises competition concerns which could lead to a significant impediment to effective competition, the parties to a transaction may seek to modify the concentration so as to resolve those concerns identified by the Commission with a view to having the merger cleared.

(490) In order to address competition concerns identified following the first phase market investigation in the market for mobile telecommunication services to end customers the Notifying Party submitted commitments pursuant to Article 6(2) of the Merger Regulation on 20 August 2012. Those commitments (hereafter the "First Commitments") were subsequently market tested in the second half of August 2012 ("First Market Test"). Taking account of the results of the First Market Test in the SO sent out on the 20 September 2012 the First Commitments were assessed and their remaining deficiencies pointed out.

(491) On 9, 19, 24 and 29 October 2012 and further on 11 and 12 November 2012, in the light of the results of the First Market Test and the competition concerns communicated to the Notifying Party, a fundamentally revised commitments package was submitted pursuant to Article 8 (2) of the Merger Regulation. The ultimate consolidated document ("Final Commitments") is in Annex III to this Decision.

(492) Besides the commitment to conclude an upfront MVNO agreement the Final Commitments consist of improved provisions for wholesale access available to MVNO's as well as a divestiture of spectrum package opening the market to a potential MNO entrant.

(493) The Commission market tested ("Second Market Test") and assessed the Final Commitments in view of their ability to eliminate the competition concerns, in line with the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice").[370]

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[370] OJ C 267, 22.10.2008, p.1.

12.2. Description of the First Commitments

(494) On 20 August 2012 the Notifying Party submitted commitments with the intention to address the competition concerns identified following the first phase market investigation in the market for mobile telecommunication services to end customers and in the market for wholesale access and call origination.

(495) H3G committed to make available wholesale access to 30% of its network for up to 16 MVNOs in the coming 10 years, enabling them to offer mobile communication services to end customers in Austria. In addition H3G proposed upfront[371] to enter into an agreement with an MVNO, subject to approval by the Commission.

(496) The details of the terms upon which access was to be made available were to be published on H3G's website in the form of a "Reference Offer".

(497) The addressees were MVNOs who wish to provide mobile telecommunication services to end customers under their own brand name, provided that they were not controlled by an MNO active in Austria. Different types of MVNOs, including those who have a limited amount of own spectrum, full MVNOs and those who would need – in part or entirely – additional core network infrastructure from third parties or possibly from H3G were included.

(498) H3G did not commit to carry out the technical implementation with more than two MVNOs at any one time. However, technical implementations which continue for more than 12 consecutive months were not counted in this limit.

(499) The wholesale prices were set and no minimum volumes or minimum revenues were foreseen in the Reference Offer. For voice and SMS transactions, per unit prices were applicable (for both the origination and termination legs). For data transactions, the MVNO had a choice of unit pricing: either a single unit price or a tiered unit price. On-net calls between MVNO's customers were to be charged as a single transaction.

(500) In addition, an MVNO could elect a tariff offered by H3G to which retail minus pricing was foreseen. Retail minus pricing was only available for data access SIM-only services (and not available for other products or market developments such as the so-called near field communication offerings, handset subsidies or content offerings). In that case H3G was supposed to charge the MVNO for packet switched data transactions at a 25% discount on the retail price H3G charges its own customers under the relevant tariff.

(501) Prices were subject to retail price indexation over time. H3G committed to negotiate in good faith to agree a reasonable price indexation mechanism taking account of the ability of the MVNO to offer competitive products and services to end users. Reasonable price indexation mechanisms could include

371 A commitment is "upfront" if the notifying party commits not to close the proposed transaction before it has implemented the commitment itself.

an index based on retail prices published by the RTR or an index based on the prices of H3G.

(502) In the Reference Offer a so called "Base Rate" per unit (voice, SMS, data) and a "Discount Rate" per unit were foreseen. The Discount Rate was supposed to be applicable to all units purchased after a specified annual "Discount Threshold" had been reached.

(503) The annual Discount Thresholds and corresponding ceilings were set for the first four years, after that H3G proposed to negotiate with MVNOs to agree on thresholds and ceilings for subsequent years of the MVNO Agreement. Alternatively “fall back” thresholds and ceilings were applicable.

(504) The Reference Offer included – in principle – access to LTE technology, however, the payable charges were subject to prospective separate negotiations with H3G.

(505) Furthermore MVNO's were asked to provide H3G with different forecasts on data, volumes, customers and other information. If the MVNO did not achieve or exceeded the forecasted volumes compensatory penalties were to be applied.

(506) A fast-track dispute resolution procedure had been put in place for disputes arising between MVNOs and H3G during their negotiations. If H3G and the MVNO had not agreed upon the terms of the MVNO Agreement within a period of five months and their CEOs had not resolved the matters in dispute within two additional weeks, a fast-track dispute resolution procedure was foreseen. The subsequent decisions of the expert panel, under supervision of the "Monitoring Trustee", were final and binding on the parties.

(507) Finally H3G committed not to complete the acquisition of Orange Austria before it had entered into an MVNO agreement based on the Reference Offer with one MVNO which would have to be approved up-front by the Commission ("upfront clause").

(508) The First Commitments had foreseen an independent Monitoring Trustee, appointed to monitor H3G’s compliance with the commitments and reporting to the Commission periodically.

12.3. Assessment of the First Commitments

(509) The First Commitments were not suitable to eliminate the competition concerns that the Proposed Transaction would lead to a significant impediment to effective competition on the market for mobile telecommunication services to end customers in Austria. On the basis of the results of the First Market Test the deficiencies of the commitments were pointed out in the SO on 20 September 2012.

(510) According to the Remedies Notice (paragraph 9), the Commission only accepts commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment to effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being

implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.

(511) The Commission considers that an effective way of resolving the competition concerns is to create the conditions for the emergence of new competitive entities (paragraph 22 of the Remedies Notice). This could take the form of structural remedies that could consist of divesting sufficient assets to create a new entrant with its own mobile network (that is to say, a new MNO) and could include spectrum, sites (masts and antennas), customers, brands etc.

(512) The Commission explained this to the Notifying Party in State of Play meetings held on 29 June, 23 July, 6 August and 9 September 2012.

(513) In order to determine if the First Commitments could possibly be accepted as a suitable, sufficient and effective remedy to completely eliminate all competition concerns, the Commission put the proposed remedy to a market test on 21 August 2012.

(514) As elaborated in detail in the SO,[372] although the results of the First Market Test showed that an MVNO access remedy triggered actual or potential interest of a number of MVNOs, market participants pointed to a number of important deficiencies where significant improvements would have to be implemented to ensure the effectiveness of such a remedy. MVNOs pointed out, inter alia, that the inclusion of penalty payments for not reaching short-term forecasts was inappropriate and could undermine any pro-competitive effect. In addition, many MVNOs criticized the extensive in-formation requirements to which the MVNOs would be subject under the Commitments. The majority of MVNOs also found that more concrete criteria for future LTE technology and prices needed to be fixed in advance.

(515) In particular the Austrian competition authorities (Federal Competition Authority, BWB, and the Federal Cartel Prosecutor) as well as the Telecoms Regulator (RTR, TKK) argued against accepting the offered remedy package. In their view divestiture remedies would be needed to make up for the loss of Orange.

(516) The Commission considered that the First Commitments would not be effective as a remedy for an important part of the market in the future, if there were no clear criteria for new technologies (LTE). Furthermore, the Commission took into account the disincentives for MVNOs resulting from penalty payments for not reaching the forecasts. Additionally, the Commission found the detailed exchange of information between MVNOs and H3G to be neither necessary nor appropriate in a market with so few participants and MVNOs being dependent on the network of H3G. Whereas the relationship between H3G and the MVNO is a relationship between wholesaler and customer, from the end-customers' perspective on the market for mobile tele-

372 See Section 8.2 of the SO.

communication services the products are offered by direct competitors, also active on the same horizontal market.

(517) Overall, in the light of the fact that the proposed MVNO access remedy would have to make up for the loss of competitive pressure exercised by an MNO having its own network, the Commission explained in the SO that the First Commitments did not entirely offset the significant impediment to effective competition brought about by the Proposed Transaction.

12.4. Description of the Final Commitments

(518) On 9, 19, 24 and 29 October 2012 and further on 11 and finally 12 November 2012 H3G formally submitted Final Commitments which include, as the First Commitments, a commitment to enter into an upfront agreement with one MVNO which would have to be approved by the Commission. The commitment to grant MVNOs access to H3G's network as already framed in the First Commitments had been improved and adjusted in response to the concerns in relation to the First Commitments. Finally and in addition, a commitment by H3G to make available spectrum to a new entrant and related commitments such as the sale or collocation of sites and national roaming for a period of up to 6 years on the H3G Network on the basis of the same charges and substantially the same terms as contained in the Reference Offer for the MVNO wholesale access were included in the Final Commitments. The divestment of spectrum to a new entrant is linked to the acquisition of additional spectrum which will be auctioned in Austria, as described in a resolution of the Austrian Telecom Regulator Telekom-Control-Kommission (TKK) of 22 October 2012.

(519) The Final Commitments are set out in Annex III. All details of the terms upon which access is made available to MVNOs and national roaming on H3G's network for an MNO will be published on the H3G website in the form of a Reference Offer, also attached to the Final Commitments in Annex III.

12.4.1. Commitment to enter into an Upfront MVNO Agreement

(520) H3G commits not to complete the acquisition of Orange Austria before entering into an MVNO agreement based on the Reference Offer with one MVNO, subject to prior approval by the Commission (the "Upfront MVNO"). In principle the provisions concerning the entry of this full MVNO in the Austrian market for mobile communication services to end customers as described in the First Commitments remain unchanged. As far as the conditions of wholesale access to MVNOs were modified in the Final Commitments, these provisions are applicable to the Upfront MVNO accordingly.

(521) UPC informed the Commission on 3 October 2012 that it had signed an MVNO access agreement with H3G.

12.4.2. Commitment to make wholesale access available

(522) The main concept described in the First Commitments dealing with the access rights given to MVNOs on H3G's network remained unchanged. The amendments introduced[373] in the Final Commitments can be summarized as follows.

(523) The wholesale access to up to 30% of H3Gs network for up to 16 MVNOs in the coming 10 years is maintained, but further provisions have been introduced, according to which this part of the commitment will also cease on the date on which (i) H3G has transferred the Divestment Spectrum to a Purchaser and (ii) the Auction Spectrum[374] has been transferred to the Purchaser[375] with a MNO to sell its 2 x 10 MHz of contiguous spectrum in the 2.6 GHz frequency band ("Divestment Spectrum"), or, if earlier, the date on which a new entrant MNO enters the market. In such circumstance H3G will only remain committed to pre-existing MVNO Agreements, including the right of those MVNOs to prolong their contracts.

(524) The framework of the general provisions in the Reference Offer remain unchanged but the so-called Base Rates for data now apply equally to services using UMTS, HSPA, HSDPA and LTE technologies, as well as GSM and GPRS technologies if available under H3G 2G and 2.5 G roaming arrangements.

(525) Furthermore, in reaction to the criticism revealed in the First Market Test according to which the inclusion of penalty payments for not reaching short-term forecasts were inappropriate and could undermine any pro-competitive effect, the information requirements for forecasting have been amended to limit information exchange between H3G and the competing MVNOs to a level that, according to H3G, is the minimum necessary to preserve the legitimate objective of H3G´s effective network planning. The incentive structure regarding forecasts is amended and payments due for not reaching thresholds are further restricted. Any further information exchanges between MVNOs and H3G are limited as set out in Part F of the Reference Offer.

12.4.3. Commitment to divest spectrum and additional rights

(526) H3G offers new structural commitments in the Final Commitments, making available the Divestment Spectrum, 2 x 10 MHz of spectrum in the 2 600 MHz frequency band to a new entrant on the Austrian market. That spectrum is to be divested alongside further spectrum in the 800 MHz frequency band (the "Auction Spectrum") which will be reserved by the ("TKK") for one new entrant in the context of the upcoming TKK Auction foreseen for 2013

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373 Deficits of the First Commitments as far as MVNO access to H3Gs networks is concerned had previously been addressed in a first amendment submitted by the Notifying Party on 9 October 2012. The future LTE technology and pricing were included, the penalty payments for not reaching thresholds were eliminated and the transparency between MVNOs and H3G restricted by reducing the MVNOs information obligations.

374 See Recital (526).

375 See paragraph 44 of the Commitments (Annex III).

(the "TKK Auction"). The Divestment Spectrum and Auction Spectrum will only be sold to the same new entrant MNO (the "Purchaser"). If no new entrant acquires the Auction Spectrum and the Divestment Spectrum, there will be no further obligation on H3G to divest spectrum and the Divestment Spectrum licence will remain with H3G. Existing MNOs of the Austrian market or undertakings affiliated with them are excluded from this offer.

(527) H3G's sale of the Divestment Spectrum will be subject to a condition precedent, according to which any acquirer of the Auction Spectrum will have the right to acquire the Divestment Spectrum. If H3G has entered into a sale and purchase agreement of the Divestment Spectrum before the TKK Auction and the acquirer is not successful in the following TKK Auction, the successful bidder for the Auction Spectrum will have the right to acquire the Divestment Spectrum at the same price as previously agreed between H3G and the first intended acquirer. If H3G does not enter into a sales agreement of the Divestment Spectrum prior to the TKK Auction, the Divestment Spectrum is to be sold by H3G to the acquirer of the Auction Spectrum at a price which should not be below zero. From the date at which the outcome of the TKK Auction is definitive H3G will offer the Divestment Spectrum for sale for a period of three months.

(528) H3G also commits to additional measures to enable the entry of the Purchaser in the market for mobile telecommunications services to end customers in Austria. Specific provisions deal with the new entrant's conditions for national roaming, preferred collocation rights and the possibility to purchase sites.

(529) The national roaming on the H3G Network is foreseen on the basis of the same charges and substantially the same terms as contained in the Reference Offer in Annex 1 to the Commitments *mutatis mutandis*. The term of the national roaming agreement will be in principle for a period of up to six years from the end of the Second Divestiture Period as defined in the Commitments. H3G will have a right to terminate the national roaming agreement if the Purchaser requests more than 30% of the capacity of the H3G Network. H3G will offer mobility scenarios (hand over and reselection) and potential radio network adoptions (for example, location area barring), based on the principle that the Purchaser will bear any network implementation costs which H3G may reasonably incur in order to accommodate such requests. The detailed terms will be subject to good faith negotiation and agreement between H3G and the Purchaser.

(530) Collocation on H3G´s existing sites, if technically feasible and subject to the underlying terms of the relevant site leases will be granted to the Purchaser on standard market terms. In addition, for a period of 6 years H3G will inform the Purchaser in a timely manner before new sites are installed in the H3G Network in order to allow the Purchaser to make use of its preferred rights to enter into a collocation agreement for such space where a third party also made a collocation request during a protected period of two weeks.

(531) Additionally H3G commits to offer to divest to the Purchaser on commercial terms any sites which, following the acquisition of Orange, are not required by H3G for the H3G Network and which have not been separately sold to

third parties. For a period of two years H3G will provide the Purchaser on a monthly basis with a list of sites for which H3G intends to terminate the site lease contracts provided that H3G will not be required to offer or divest any sites to the Purchaser after 31 August 2015; and upon the issue of each such list, the Purchaser will have a period of 1 month to make a binding selection of the sites on that monthly list which it will purchase. The maximum purchase price will be the book value in addition to operation cost and the cost that H3G would have had if the contract was terminated. Nevertheless H3G will be allowed to terminate site contracts before the date of the TKK Auction as part of its network consolidation project, provided that there are 2000 sites for potential divestment at the date of the TKK Auction as at 1 September 2013.

12.4.4. The Resolution of the Austrian Telecom Regulator Telekom-Control-Kommission (TKK) of 22 October 2012 ("Beschluss")

(532) On 22 October 2012 the TKK adopted a resolution which constitutes a necessary and integral part of H3G's commitment as far as the divestment of spectrum to a new MNO entrant is concerned. The Beschluss provides for a strengthening of the new MNO by adding available spectrum, reserved by the TKK, to the interested entrant.

(533) If the Commission clears the acquisition of Orange Austria by H3G subject to the divestiture of at least 2 x 10 MHz of the 2.6 GHz spectrum to a new entrant MNO, the TKK is prepared (subject to the approval by the relevant Federal Ministry for Transport, Innovation and Technology (BMVIT) to reserve spectrum in the 800 MHz spectrum band for a potential new entrant MNO in the framework of the upcoming Spectrum Auction of 2013 (the "Auction Spectrum").

(534) The reservation of the 800 MHz spectrum is conditional on the acquisition by a third party MNO of at least 2x10 MHz on the 2.6 GHz band Divestment Spectrum from H3G. The third party MNO needs to fulfil the Auction Spectrum participation criteria as defined by the TKK, it must actively participate in the auction but must not be currently active in Austria. The TKK further defines the conditions of the offer of the Auction Spectrum, stating that H3G must divest a number of sites, and must offer collocation rights and national roaming services to the new entrant MNO for a period of six years with the terms and conditions of H3G's MVNO commitment offer.

(535) The TKK will also impose on the new entrant MNO population coverage obligations for all acquired frequency bands, which will be comparable to the current coverage obligations in the long term.

(536) In case no new MNO enters the Austrian market, the TKK undertakes to ensure that the Divestment Spectrum of the 2.6 GHz range remains with H3G, as TKK will not require the spectrum licence for the Divestment Spectrum to be returned to the TKK.

(537) The details and conditions describing the resolution are explained in the Beschluss in Annex IV.

12.5. Assessment of the Final Commitments

(538) The First Commitments were revised and improved substantially by H3G and consolidated in the Final Commitments. The Commission's conclusion, based on the results of the Second Market Test and further assessments is that the Final Commitments are appropriate to eliminate the non-coordinated effects identified and, moreover, the possible coordinated effects.[376] Therefore the Proposed Transaction, in conjunction with the Final Commitments proposed by H3G, will not significantly impede effective competition in Austria, constituting a substantial part of the internal market.

(539) The competition concern results from the elimination of a viable competitor on the Austrian mobile telecommunication market for end customers, which is a market with high barriers to entry for competing MNOs and MVNOs. The Final Commitments address those concerns by lowering the barriers to entry for both groups of potential competitors, MNOs and MVNOs.

(540) The Final Commitments give the opportunity for a new MNO to emerge. A clear majority in the Second Market Test considered that the combined frequencies package of Divestment Spectrum and Auction Spectrum was sufficiently attractive for an MNO to enter the market. Two thirds of respondents believed that it enables the new MNO entrant to compete with the current MNOs on equal terms in future technologies (such as LTE). H3G's proposed national roaming offer also obtained strong support. Furthermore, a large majority of the respondents found the capacity threshold of 30% of H3G's network capacity, the collocation conditions and purchase rights for sites and masts appropriate.

(541) The Commission takes the view that a company ready to develop and invest in an own network structure represents a long-lasting and sustainable competitive force. In such a case it is acceptable that the MVNO access commitment will cease to be available for further MVNOs and will continue to be effective solely for those which had previously entered into agreements with H3G.

(542) In such a scenario one new MVNO (the Upfront MVNO) and potentially additional MVNOs or an MNO will have entered the relevant Austrian market and would be likely to exert sufficient competitive constraints on the three remaining incumbent players.

(543) Even though the entry of an MNO would have a very strong and desirable competitive effect, addressing the competitive concerns, the Commission is aware that there is no guarantee that a MNO will effectively enter the market. Even though the package of Divestment- and Auction Spectrum is attractive to start the MNO business on the Austrian mobile telecommunications market, such a decision would involve further serious investments and a long term commitment in Austria. In any event, the Commitments enable an MNO

[376] See Section 8.

entrant to come to the Austrian market, a considerable lowering of barriers to entry which is further supplemented by the MVNO access agreement.

(544) The Final Commitments guarantee that the barriers to entry are also lowered for MVNOs. Up to 16 alternative players will be able to enter the Austrian market for the next 10 years on attractive terms as confirmed by the Second Market Test. One new Upfront MVNO will enter the market before the Proposed Transaction is implemented. On the basis of the First Market Test and the Second Market Test and information provided by the Notifying Party, the Commission considers it likely that more MVNOs will enter the Austrian market for mobile telecommunication services for end customers. The MVNOs will have the possibility to transfer into an MNO over time as long as the MVNO does not hold spectrum which exceeds outdoor coverage of 10% of the population.

(545) On the basis of all the information available, including that received from potential MVNO entrants, the Commission considers it likely that MVNOs will offer at least to a certain extent post-paid tariffs. Furthermore, the MVNO access agreement is sufficiently advantageous to allow for offering tariffs which target the data segments.

(546) As far as the proposed improvements to the commitment relating to wholesale access are concerned, the results of Second Market Test overall demonstrate that the Final Commitments are effectively and sufficiently improved The revised forecasting mechanism of the MVNO access commitment was approved by a large majority of respondents, who also considered that the MVNO's rights were sufficiently protected. Likewise it was said that the new LTE pricing mechanism was sufficient to enable MVNOs to compete in the future.

(547) Overall a majority of more than two thirds thought that the MVNO access remedy was appropriate to attract the interest of MVNOs and the foreseen fast track dispute resolution mechanism was sufficiently effective and timely.

(548) Generally MNOs and MVNOs were in favour of the commitments package proposed by the Notifying Party with the exception of Tele2 and Deutsche Telekom (T-Mobile's parent company) which took critical stances. Deutsche Telekom argued that the Austrian market would be better served if the remedies attributed spectrum to existing MNOs, such as T-Mobile, which does not have enough spectrum to compete on a level playing field with the other Austrian MNOs.

(549) In the Commission's view the criticism of Tele 2 is sufficiently covered by the fact that MVNOs are eligible for the wholesale access remedy proposed by H3G, even when holding spectrum frequency licences with outdoor coverage not exceeding 5%. If, during the contractual relationship between the MVNO and H3G, the population coverage exceeds 10%, H3G will have a right to terminate the MVNO agreement. These thresholds take into consideration possible developments of MVNOs.

(550) As far as Deutsche Telekom's submission is concerned, the Commission believes that the competition concerns are sufficiently and adequately resolved by attracting new entrants to the highly concentrated market of three remain-

ing MNOs on the Austrian mobile telecommunication market, rather than by strengthening one of the incumbents, the number two on the relevant market. It should be emphasized that the competition concerns identified by the Commission are based on the elimination of a competitive force on the market and not an excessive spectrum in the hands of H3G after the merger.

(551) The Austrian competition authorities (BWB and Federal Cartel Prosecutor) remained critical of the remedies in the Second Market Test and considered that market entry by a new MNO was rather unlikely and it was not clear to what extent possible co-ordinated effects were eliminated. The Final Commitments lower barriers to entry for both MNOs and MVNOs and post-merger at least one new MVNO (the Upfront MVNO), and probably more, will be active on the Austrian mobile telecommunication market for end customers. The Commission therefore takes the view that the entry of MVNOs and possibly an MNO will guard against any possible coordinated effects.

(552) The Austrian Telecoms regulator (RTR and TKK) supported the Final Commitments package with the exception of certain provisions. The regulator admits that the Final Commitments substantially decrease barriers to entry for possible entrants that could compensate for the elimination of Orange. The regulator also explicitly welcomed the commitment to provide wholesale access for MVNOs because it would create an even lower entry barrier. MVNO entry should, in principle, be suitable to increase competition further – or if no new MNO should enter – to invigorate competition. RTR and TKK generally considered that the package of structural and other commitments suffice to compensate for the exit of Orange from the Austrian market.

(553) In the light of all the preceding considerations the Commission concludes that, subject to full compliance with the commitments given by H3G, the Proposed Transaction will not significantly impede effective competition in the internal market or a substantial part thereof. The merger should therefore be declared compatible with the internal market and the EEA Agreement pursuant to Article 2 (2) and Article 8 (2) of the Merger Regulation and Article 57 of the EEA Agreement, subject to full compliance with the commitments contained in Annex III.

13. CONDITIONS AND OBLIGATIONS

(554) The fulfilment of the measures that give rise to the entry of MVNOs and enable the entry of an MNO in the Austrian market is a condition, whereas the implementing steps which are necessary to achieve that result are generally obligations on the Notifying Party, H3G. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Article 14(2) and Article 15(1) of the Merger Regulation.

(555) In accordance with the basic distinction described in recital (554) as regards conditions and obligations, this Decision should be made conditional on full

compliance by the Notifying Party with Sections B, C and D (excluding "Annex 1" and "Appendix A" to the Commitments) of the Final Commitments submitted by the Notifying Party on 12 November 2012. All other Sections of the Commitments (including "Annex 1" and "Appendix A" to the Commitments) should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as Annex III to this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Hutchison 3G Austria Holdings GmbH acquires sole control of Styrol Holding 1 GmbH and its indirect wholly owned subsidiary Orange Austria Telecommunications GmbH (excluding Yesss! Telekommunikation GmbH) within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in Sections B, C and D of Annex III.

Article 3

Hutchison 3G Austria Holdings GmbH shall comply with the obligations set out in sections A, E, F and G of Annex III (including "Annex 1" and "Appendix A" to the Commitments).

Article 4

This Decision is addressed to:

Hutchison 3G Austria Holdings GmbH
Gasometer C
Guglgasse 12/10/3
1110 Vienna
Austria

Done at Strasbourg, 12.12.2012

For the Commission
(signed)

Joaquin ALMUNIA
Vice-President

ANNEX I – COMPARISON OF ESTIMATED DIVERSION RATIOS BETWEEN THE PARTIES IN PRIVATE POSTPAID VOICE & DATA BUNDLES

1. MOBILE NUMBER PORTABILITY ESTIMATES

(1) Although the Notifying Party argues that little weight should be given to the Mobile Number Portability ("MNP") database (as provided with the notification), there seems to be no reason to expect it to be a poor or biased estimator of switching in the post-paid segment. MNP data is used by the MNOs in their business decisions, along with internal surveys (further discussed below).[377] Moreover, since it is a large sample (about 10% of total switchers according to H3G), it should reliably estimate the population statistics. By contrast, the Notifying Party may be correct in surmising that it is of less value in the pre-paid segment and of very little value in the data-only segment, where the subscriber number is unimportant[378]. For these reasons, the Commission makes use of the data only in relation to the post-paid retail segment.

(2) The Commission further notes that the MNP data roughly corresponds to the position accepted by the merging parties, namely that each mobile operator gains new business from the others in a ratio of approximately one-third each

(3) The following table shows the implied diversion ratios between each of the operators using the MNP data.

Table 1: Diversion ratios computed from total port-outs (2009 - 2011), MNP data

Date	*Company*	*Loss to H3G*	*Loss to TA*	*Loss to Orange*	*Loss to T-Mobile*	*Loss to Yesss!*	*Total*
2009	H3G		[20-30]*%	[40-50]*%	[30-40]*%	[0-5]*%	100.00%
2010	H3G		[30-40]*%	[30-40]*%	[30-40]*%	[0-5]*%	100.00%
2011	H3G		[30-40]*%	[20-30]*%	[30-40]*%	[0-5]*%	100.00%
2012q1	H3G		[20-30]*%	[30-40]*%	[30-40]*%	[0-5]*%	100.00%
2009	TA	[20-30]*%		[30-40]*%	[40-50]*%	[0-5]*%	100.00%

377 H3G's response to Commission RFI of 15 May 2002, File 29.M6497_RFI 15.05.12_Annex 2.3.2 (1011_Insights) (Confidential).ppt.

378 Form CO, paragraph 207

2010	TA	[20-30]*%		[20-30]*%	[40-50]*%	[0-5]*%	100.00%
2011	TA	[30-40]*%		[20-30]*%	[40-50]*%	[0-5]*%	100.00%
2012q1	TA	[30-40]*%		[30-40]*%	[20-30]*%	[0-5]*%	100.00%
2009	Orange	[20-30]*%	[30-40]*%		[40-50]*%	[0-5]*%	100.00%
2010	Orange	[20-30]*%	[30-40]*%		[30-40]*%	[0-5]*%	100.00%
2011	Orange	[30-40]*%	[30-40]*%		[30-40]*%	[0-5]*%	100.00%
2012q1	Orange	[30-40]*%	[30-40]*%		[20-30]*%	[0-5]*%	100.00%
2009	T-Mobile	[20-30]*%	[30-40]*%	[30-40]*%		[0-5]*%	100.00%
2010	T-Mobile	[30-40]*%	[30-40]*%	[30-40]*%		[0-5]*%	100.00%
2011	T-Mobile	[30-40]*%	[40-50]*%	[20-30]*%		[0-5]*%	100.00%
2012q1	T-Mobile	[20-30]*%	[40-50]*%	[20-30]*%		[0-5]*%	100.00%

Source: Form CO, Annex 6.8, MNP database

2. EVIDENCE PROVIDED BY SURVEYS

In principle, diversion ratios could also be estimated from the survey data collected by the Parties and included with the Form CO[379]. However, such sources offer a number of drawbacks which make them clearly inferior to use of the MNP data, even if the estimates they provide are broadly comparable. The use which can be made of this data is therefore only qualitative.

(4) In the Form CO, the Notifying Party argues that "*on the whole, the Survey diversion ratios [DRs] suggest less competitive interaction between H3G and Orange than the MNP DRs. While the Survey DRs generated on the basis of these studies fall within a considerable range, a clear majority of them are materially smaller than the corresponding MNP DR. In only a small propor-*

[379] Annex 6.10 to the Form CO "Review of internal studies on churn and switching".

tion of cases the Survey DR is materially larger. This confirms that MNP DRs [0-5]% overstate the interaction between Orange and H3G.*"[380]

(5) The Notifying Party has offered no explanation of why, in its view, the MNP diversion ratios should overstate the interaction between the merging parties or why the survey results, notwithstanding their much smaller sample size and methodological limitations, should be considered more accurate. In the Commission's view, the relevant survey results are limited in number and are, indeed, within their margin of error, compatible with the figures derived from the MNP. Given that the latter is a much larger, unbiased sample for the post-paid segment and that it also correctly accounts for the time of switching, it is clearly the preferable estimate of the applicable diversion ratios.

(6) Firstly it should be noted that the correct measure of the diversion ratio from A to B is the proportion of customers of A which would switch to B in the event of a price increase (or equivalent hedonic change). The proportion of new customers of B which come from A, which is the number most often estimated in the surveys, is a different figure and not directly relevant for this purpose.

(7) Secondly, diversion ratios are measured at a moment in time. The MNP data does this, but a number of surveys take as a basis the last switching event of a consumer, irrespective of when it took place. This generates a downward bias in the estimate of switching away from H3G and/or a wider confidence margin on this estimate due to the fact that the MNP database shows that in absolute terms switching from H3G was lower in the earlier periods because it had a lower market share. In other words, if all customers of a given operator are considered, it is more difficult to find those whose previous operator was H3G than if one considered only new customers of the same operator. Even if one restricts attention to the subsample of customers who switched from H3G, this subsample is very small and since it contains customers who switched over a long period it will also fail to pick up any switching trends[381].

(8) Although there is a trade-off between accuracy and recentness, the diversion ratio to be considered for the UPP analysis should be the most recent one available as, on the assumption that it is unbiased by seasonality, it will be the figure which best estimates incentives and behaviour post-merger.

(9) It also needs to be emphasized that the available surveys provide far less observations than the MNP database. The total MNP database considered contains 634756 observations, compared to only 2000 in the most recent study commissioned by A1[382]. This study includes only 200 observations on

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380 Form CO, paragraph 250.

381 This latter consideration may be less relevant for switching from H3G to Orange as the MNP data shows no overall trend in this direction over the 13 quarters considered, though the most recent quarterly data in the MNP database might indicate that the more recent trend is for this value to increase.

382 Annex 6.9.1 to the Form CO "Neukundenanalyse Februar 2012".

switching from each of H3G and Orange[383]. It also includes information on internal switching and the choice of operator of persons opting for an operator for a second handset. There are accordingly only very few observations on switching between Orange and H3G, as a result of which the confidence interval on the estimates is large. Of surveys carried out between 2010 and 2012, this survey also gives results which appear to be outliers.

(10) In these more recent surveys, there are in fact only five estimates of the rate of switching from Orange to H3G, and only one of the rate of switching from H3G to Orange. Three surveys carried out by Orange at the end of 2010 estimate the proportion of their customers who have switched or intend to switch to H3G. The first of these estimates a switching ratio of between [30-40]*% and [30-40]*%, the second [20-30]*%, and the third [30-40]*%, all similar to the estimate from the MNP data. A survey from January 2010 provides an outlying estimate of [10-20]*%.

(11) These surveys do not indicate whether the respondents were recent leavers or include also persons having left since some time. It is also not certain whether or not they include Yesss!. According to the MNP data, switching from Orange to H3G has been increasing on average by [0-5]*% per quarter (in the opposite direction there is no discernible trend), as a result of which incorporation of older switchers in the survey would result in a measure which is biased downwards because there are fewer old switchers than current switchers. In any case, extrapolating these figures to 2011 would require an increase of +1.2% using the MNP trend and extrapolating them to 1Q2012 would require increasing them by five quarters i.e. +3%.

(12) In conclusion, these numbers are therefore comparable to the figures of [30-40]*% for 2011 and [30-40]*% for 1Q2012 observed in the MNP data.

(13) The only survey which estimates switching from H3G to Orange is the aforementioned study from early 2012 by A1, which gives a figure of [20-30]*%. This is based on about 100 observations and has a 95% confidence margin of +/- 8%. It also does not estimate recent switching but all switching. It is therefore compatible with the 2011 MNP estimate of [20-30]*%, and if it falls short of the 1Q12 estimate of [30-40]*% this is unsurprising as it would not have picked up any recent trend. There therefore seems no reason to prefer this estimate to the estimate provided by the MNP data.

(14) The remaining surveys estimate arrival rates. Arrival rates can be used to estimate diversion ratios, but require a correction factor to be applied which cannot be directly estimated from the surveys themselves.

(15) In order to do this, let n_{ij} be the number of switchers from i to j at time t, and define N_i as the number of switchers away from i. Then N_i is the sum of n_{ij} for all values of j, i.e. $\sum_j n_{ij}$. Further define N'_j as the number of switchers to j. Then $N'_j = \sum_i n_{ij}$

[383] The study includes disproportionate observations on switching to A1's brands, which is logical given the purpose for which it was commissioned: these represent 55% of the dataset (60% including Yesss!).

(16) Define s_{ij} as the proportion of all switchers from i which go to j and s'_{ij} as the proportion of all switchers to j which come from i. Then $s_{ij} = n_{ij} / N_i$ and $s'_{ij} = n_{ij} / N'_j$

(17) It follows that $s_{ij} / s'_{ij} = N'_j/N_i$, i.e. $s_{ij} = (N'_j/N_i)\, s'_{ij}$. Accordingly the diversion ratio from A to B is equal to the arrival ratio to B from A multiplied by the ratio between the total number of subscribers arriving at B and the total number leaving A. This reflects the intuition that if many users in the market are switching to B, whereas few are switching from A, the proportion of users of A in the total who switch to B will be low, notwithstanding that, of those few users who switch from A, many might switch to B.

(18) In general, we know that many more users in the market switch to Hutchison than to Orange, and many more switch from Orange than from Hutchison. On the complete MNP data, switching from H3G is [0-5] times switching to Orange, whereas switching from Orange is 0.8 times switching to H3G.

(19) It follows that, using the MNP data, the proportion of switchers to H3G which come from Orange would be likely to underestimate the diversion ratio from Orange to H3G by a factor of 3.3, whilst the proportion of switchers to Orange which come from H3G would also be likely to underestimate the diversion ratio from H3G to Orange, but by a lesser amount, i.e. 1.25. Both values underestimate the respective diversion ratios because both H3G and Orange receive proportionately many more switchers than the market average. Unlike H3G, however, Orange also loses proportionately many more customers.

(20) In the following table, based on the one provided by the Notifying Party at Annex 6.10 to the Form CO, the values which directly estimate the diversion ratio (subject to the other methodological weaknesses discussed above) are those in the first and fourth columns. The value in the second column has been multiplied by 1.25 and in the third column by 3.3. It can be seen that applying this correction immediately results in values much closer to the MNP values and indeed frequently exceeding them (the colour coding is the one originally used by the Notifying Party).

Table 2: Diversion Ratio

		Switching from Orange (MNP 2011: 31%)		Switching from H3G (MNP 2011: 27%)	
Document	**Period covered**	**leaving**	**Adj. arriving**	**Adj. arr.**	**leaving**
TA Neukundenanalyse 2012_VORABERGEBNISSE.ppt	January/February 2012	[10-20]*%	[10-20]*%	[30-40]*%	[20-30]*%
H3G Hauptstudie Voice_2011_Bericht.ppt	2011	-	[20-30]*%	-	-
H3G Kundenbewegungen_VOICE und DATA.ppt (voice)	November 2011	-	[40-50]*%	[30-40]*%	-
H3G Hauptstudie Voice_2011_Bericht.ppt	2010	-	[20-30]*%	-	-
TA Neukundenanalyse 2011_April2011_bm_final .pdf (external churners)	Christmas 2010	-	[20-30]*%	[40-50]*%	-
OA Churn Study 2010_Used Network Provider.ppt	November/December 2010	[30-40]*%	-	-	-
OA Orange New Customers Study, Wave 2 - 25 November 2010 till 6 December 2010.ppt	November/December 2010	-	-	[50-60]*%	-
OA Orange Churn Study, Wave 2 - 25 November 2010 till 6 December 2010.ppt	November/December 2010	[20-30]*%	-	-	-
OA Orange New Customers Study, Wave 1 - 28 October 2010 till 5 November 2010.ppt	October/November 2010	-	-	[30-40]*%	-
OA Orange Churn Study, Wave 1 - 28 October 2010 till 5 November 2010.ppt	October/November 2010	[30-40]*%	-	-	-
OA Orange Blitz – Befragung ehemaliger Orange Kunden, January 2010 (survey of former Orange customers).ppt	January 2010	[10-20]*%	-	-	-

(21) It follows that both the surveys and the MNP data show levels of switching which are consistent with estimates of the parties' shares of new business, but not of their existing share of subscribers. For reasons of simplicity, because it would appear to provide a less biased and more accurate estimate, and because the surveys do not paint a consistent or significantly different picture and do not provide a reliable alternative estimate of the diversion ratios, the UPP analysis has been carried out using the MNP data only.

ANNEX II – ROBUSTNESS CHECKS ON THE PREDICTED PRICE INCREASES AS A RESULT OF THE MERGER

1. THE PREDICTED PRICE INCREASES ARE ROBUST TO ALTERNATIVE ASSUMPTIONS AS TO THE RELEVANT MARGINS TO CONSIDER

(1) As set out in the main body of the text, the Commission has used for its calculations on predicted price increases the same contribution margins which, according to internal documents, the Parties use for their own pricing decisions.[384]

(2) In the reply to the SO, H3G argues that the marginal costs used by the Commission in its calculations are only those which are "*both (i) directly attributable to individual tariffs and (ii) variable in the very short term, namely interconnection fees and customer acquisition costs*", which "*do not include an important cost associated with winning additional subscribers, [namely] the cost of expanding capacity to supply them with calls and data*".[385]

(3) As a preliminary comment, if this claim were correct, one would expect such costs to figure in pricing decisions and in internal management accounting. This, however, does not appear to be the case.

1.1. Incorporation of the claimed variable components of capital expenditure does not have a material effect on the result

(4) Although it is not referenced in the reply to the SO, the argument concerning margins was developed further in the submission of the Parties' economic advisors in response to the 6(1)(c) decision.[386]

(5) In that submission it was claimed, although without supplying evidence, that certain costs which are accounted for as capital expenditure (CAPEX) and not reflected in the contribution margin used for the UPP calculation by the Commission are in fact variable and are "*an important proportion of the costs that drive pricing incentives*". The Notifying Party further claims that such costs are "*a large proportion of CAPEX*", although this proportion is not quantified, but merely qualified by the statement that "*in our <u>understanding</u>*

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[384] See for instance H3G's reply to the Commission's RFI of 11 May 2012, Annexes 2.5 (pp. 12 & 13) and 2.12 (pp. 12 & 18).

[385] Reply to the SO, para. 242.

[386] Submission of 10 September 2012 on unilateral effects, para. 4.18-4.34.

[i.e. that of the economic advisors], *a substantial proportion of an operator's CAPEX is variable in the short-to-medium term*".[387]

(6) Notwithstanding this claim, in response to the SO the Parties make no attempt themselves to recalculate the expected price increases using what they would consider to be the correct costs.

(7) The claim that a part of capital expenditure should be considered variable has not been sufficiently substantiated by the Notifying Party, nor has the part in question been adequately identified. Nonetheless, even taking the Notifying Party's claims at face value, they would not significantly affect the conclusions, since even if one were to look at *all* network-related CAPEX in the accounts of H3G, of which presumably the parties accept that a part is *not* variable in the short to medium term, it amounted for 2011 only to EUR 44.9 million compared to OPEX (which are treated below) of EUR [300-400]* million.[388]

(8) In addition to this, it should be borne in mind that, as mentioned at paragraph 155 of the Decision, the vast majority of traffic on H3G's network is data traffic (around [90-100]*%)[389] of which the vast majority (about [80-90]*% of the total) is in turn data traffic over data-only devices.[390] On the Orange network, approximately [70-80]*% of data traffic originates from mobile broadband plans,[391] and total data traffic represents just under [90-100]*% of the total.[392] Hence, even if the Parties were right in arguing that a part of CAPEX should be considered variable, this part is of limited relevance to the post-paid segment.

(9) In the interests of robustness, the Commission has nonetheless recalculated the expected price increases attributing the maximum plausible amount of the claimed variable CAPEX, in reduction of post-paid margins across private and business clients.

(10) Given that in terms of network utilization it basically does not matter whether (data) traffic is generated by data-only or by voice enabled devices, it fol-

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387 Para 4.25 of the paper on unilateral effects (emphasis added).

388 Depreciation and amortization of CAPEX amounted to [0-100 million]*

389 See Table 38 of Form CO. This presumably includes all data traffic, while only downloaded data should be considered as reasoned in footnote

390 On the basis of Annex 3.1 to the RFI of 4 April 2012, H3G in December 2011 realized [2,000-3,000]* million MB of data load on data-only tariffs as compared to only [0-1,000]* million MB on voice-enabled tariffs.

391 On the basis of Orange's reply to the RFI of 4 April 2012, in 2011 it realized [3,000-4,000]* million MB on mobile broadband tariffs; according to Annex 5a of its reply to the RFI of 8 May 2012, it realized a total of [4,000-5,000]* million MB in the same year.

392 In 2011, Orange realized [1,000-2,000]* million incoming minutes of voice calls, which according to para. 510 of the Form CO translate to network load at a ratio of [0-100]* mins/MB. Outgoing traffic is assumed not to lead to a binding constraint given that it is carried over a separate frequency channel and much more data is downloaded than uploaded. The proportion of the incoming network load constituted by voice calls may be slightly higher given that some of the data traffic represents upload traffic. Even if download and upload data traffic is considered, Orange's proportion of data traffic is roughly [70-80]*% according to Table 38 of Form CO.

lows that the imputed marginal costs from CAPEX for each MB must be the same for data-only or other post-paid contracts. Since the traffic generated by an average post-paid customer is much less than that of a data-only subscriber, the marginal costs from expenditures needed to relieve congestion at specific sites per post-paid subscriber is relatively low.[393]

(11) The Notifying Party argues that the costs per subscriber are decreasing in the size of the MNOs, which would imply that the marginal costs of an additional subscriber are below the average variable costs.[394] For its robustness tests, the Commission has nevertheless assumed that variable costs per customers are constant.

(12) Therefore for H3G at most [20-30]*% of such allegedly variable CAPEX could be considered relevant to the GUPPI calculation for the postpaid voice-enabled segment, whereas for Orange it is at most [40-50]*%.[395]

(13) This calculation scarcely differs from the one set out in the main text. Using this approach, the margin of H3G for the twelve months April 2010-March 2011 would be reduced from EUR [5-10]* to EUR [5-10]* per month per postpaid customer.[396] For Orange it passes from EUR [10-20]* to EUR [10-20]*.[397] As a result, the predicted price increase for H3G would be reduced from [10-20]*% to [10-20]% and for Orange from [10-20]*% to [10-20]*%.

1.2. Claimed variable operational expenditure not included in contribution margins

(14) At paragraph 245 of the response to the SO, H3G also argues that some operational expenditure (OPEX) which is not incorporated into the quoted contribution margins should similarly be viewed as variable. Although this argument was not elaborated upon in the reply to the 6(1)(c) decision, in Annex 10.1 of the reply to the Commission's RFI of 8/5/12, various categories of fixed costs were presented which H3G argued were partly variable. In this submission, a certain percentage of costs was proposed to be considered as variable based on an internal exercise in which the Notifying Party had attempted to estimate the irreducible part of these costs.

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393 It is also to be noted that the claim at para. 4.27 of the submission on unilateral effects and at para. 243 of the response to the SO, according to which the Parties can and do upgrade the network constantly based on dynamic monitoring (and therefore that part of the CAPEX could be considered as variable) seems, as already discussed in the main body of the decision, to contradict the simultaneous claim made elsewhere of an imminent binding capacity constraint on H3G. The onsale of Yesss will also leave Orange with additional implemented capacity in the short term.

394 See H3G Reply to the SO, para. 311 et seq.

395 The relevant traffic proportion for post-paid is at most the voice/SMS traffic plus the data traffic not generated by data only plans. For H3G, this is roughly […] = [10-20]*% and for Orange this amounts to […] = [30-40]*% on the basis of downlink traffic and […] = [40-50]*% on the basis of total traffic.

396 Source: Calculations based on annex 10.2 to the reply of H3G to the Commission's RFI of 8 May 2012. Note that H3G provides a blended margin for private and business postpaid customers.

397 Source: Calculations based on annex 10a to the reply of Orange to the Commission's RFI of 8 May 2012. Quoted margins exclude business customers.

(15) In response to this claim, it should first be noted that if these costs are only partly variable as H3G argues, it is methodologically incorrect simply to identify a proportion of costs which may be considered variable, since this proportion is a function of the period over which it has been calculated.[398] As it is not clear how the Parties have proceeded, it is not possible on the basis of their estimates to separate the components which are agreed to be fixed from those that are claimed to be variable. The Commission can therefore not be confident that application of this percentage to the costs observed over the period for which it conducts its analysis leads in fact to a correct result. Moreover, insofar as the estimate compounds information from earlier periods in which the customer base was smaller and therefore fixed costs greater as a proportion of the total, carrying out the calculations using this same percentage must necessarily result in an underestimate of the predicted price increase.

(16) The Commission has nevertheless proceeded in this way purely as a robustness check.

(17) In order to assign the claimed variable proportion of OPEX correctly to the postpaid private voice-enabled segment rather than the other segments, the Commission has grouped them into three categories, with the cost driver assumed to be either (a) network traffic (b) subscriber numbers or (c) zero for a category of costs presumptively only applying to data (such as content costs).[399] Based on the same reasoning as set out above for CAPEX, the costs categorized in this way were charged respectively for 20%, 65% and 0% in reduction of H3G's postpaid voice-enabled margin. These allocation keys are justified by the fact that slightly less than [20-30]*% of the total data traffic is generated by voice subscribers (almost all post-paid), but voice subscribers amount to [60-70]*% of H3G's total subscribers.[400] On a conservative basis the entire latter proportion is assigned to the post-paid margin in view of the fact that billing and marketing costs are likely to be lower for pre-paid.

(18) For Orange, a proposal relating to the attribution of OPEX costs not considered in contribution margins was absent. The Commission therefore tried to map the fixed cost categories of Orange to those of H3G and assumed they were variable in the same degree. In doing so, it endeavoured once again to proceed on a conservative basis. As regards the attribution key, costs driven by network use were assigned at 40% and those driven by subscriber numbers were assigned at 90% to the post-paid segment.[401]

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398 As the fixed costs are by definition invariate over time, they contribute a varying and not fixed percentage of the total in any given period.

399 Certain costs such as network transmission charges are taken to be driven by network load whereas others such as marketing and IT are taken rather to be driven by subscriber numbers.

400 On the basis of Annex 3.1 to the RFI of 4 April 2012, H3G in December 2011 had [500,000-600,000] data-only subscribers and [800,000-900,000] voice subscribers; these figures are similar to those furnished in Annex 6.3 to the Form CO.

401 For the number of data-only subscribers we have taken the more conservative figure based on the reply to the RFI of 4 April 2012, i.e. in Dec 2011 approximately [100,000-200,000] data-

(19) The additional OPEX adjustment makes a much more substantial impact than the CAPEX one. Nonetheless the predicted price increases remain significant.

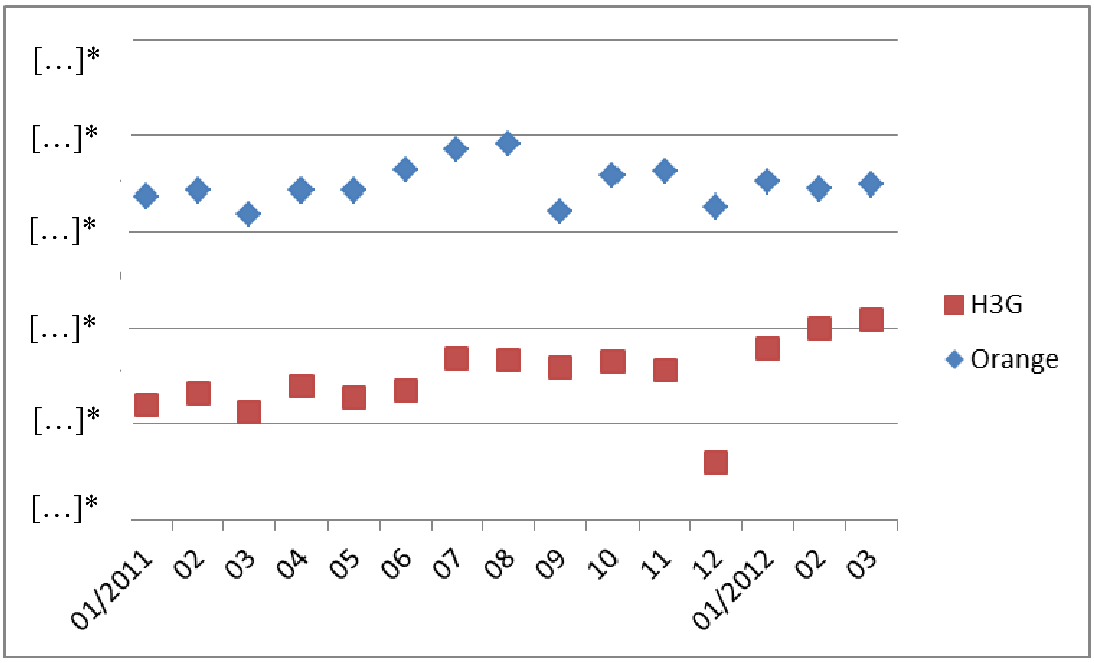
(20) The result of the additional OPEX adjustment is that the contribution margin of H3G for the period April 2011-March 2012 would be further reduced (over and above the allocation of the claimed variable CAPEX) by EUR [0-5] for 2011 to EUR [0-5], whereas for Orange it would be reduced by EUR [0-5] to EUR [10-20].

(21) The impact of this on the predicted price increase would be to reduce it further to [5-10]*% for H3G customers and [5-10]*% for Orange customers.

2. THE PREDICTED PRICE INCREASES ARE ROBUST TO ANTICIPATED TRENDS IN REVENUES AND MARGINS

(22) It is also interesting to note that Orange's average contribution margins, which are high, have, as shown in the graph below, remained rather constant over the 15 months Jan 11-Mar 12 (a linear regression on the data points shows an average increase of EUR [0-5] per month), whereas those of H3G have been increasing steadily (except for Dec 11 due to Christmas promotions) at an average of EUR [0-5] per month. This trend would suggest that if anything the pricing effect will be greater going forward since increased margins give an increased incentive to price higher.[402]

Figure 1: Average contribution margins per post-paid private voice-enabled customer

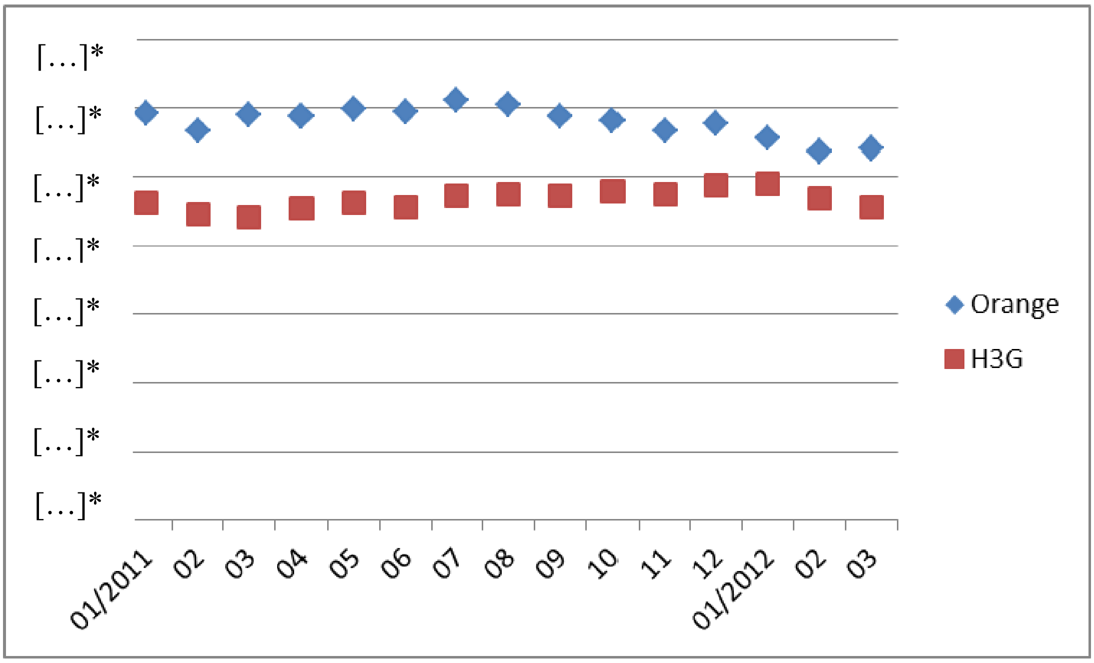


only subscribers out of a total of [1,400,000-1,500,000], i.e. data-only subscribers as [10-20]% of the total.

402 This can be seen by differentiating equation 11 in the Hausman et al. paper.

(23) The improvements in margins are, however, driven entirely by reductions in costs rather than increases in revenues. As shown in the graph below, the average per-user revenue of H3G has remained relatively constant over the fifteen months Jan 2011-Mar 2012, whilst that of Orange has declined somewhat.

Figure 2: Average revenue per post-paid private voice-enabled customer



(24) The movement in average revenues is driven by customers leaving or arriving in a given period, including those customers who change within the same firm from one tariff plan to another. Together with changes in average costs these translate to the movement in average margins.

(25) Based on the documents submitted to the Commission, it is not possible to isolate these effects in the data and so to determine what the actual revenues and margins associated with new customers are and will be going forward. However, the effect of both trends, namely decreasing ARPU and increasing margins, is likely to be higher predicted price increases, provided that the downward trend in ARPU is at least in part due to a similar downward trend in the average revenue per new user (and not entirely explained by higher-than-average revenues of lost users).

(26) If, for instance, the base-case scenario using the quoted contribution margins were recalculated using an average revenue per new user for Orange equal to that of H3G's current ARPU (EUR [20-30[)[403] and a contribution margin per

[403] Assuming that the stable ARPU of H3G might represent a value towards which Orange in terms of new business could be converging

new user of EUR [10-20] for H3G,[404] the result is a small increase in the expected price increase for H3G clients to [10-20]%, but a rather larger increase in the expected price increase for Orange clients to [10-20]%.

(27) This is because Orange's revenues enter into the equation only for Orange and they do so in the denominator. The intuition for this is that, for the same absolute price increase as a result of the merger, a lower initial level of revenues implies a higher price (and thus revenue) increase relative to the pre-merger ARPU.[405]

(28) Similarly, H3G's higher margin is realized on all new customers and thus, at constant revenues, also increases the incentive for both it and Orange to raise prices. This is because those customers who remain with H3G despite the price increase will deliver higher margins[406] whilst those who, if they switch, decide to switch to Orange will deliver higher margins still.[407]

3. THE PREDICTED PRICE INCREASES ARE ROBUST TO THE INCLUSION OF PREPAID WITHIN THE ANALYSIS

(29) As indicated in the main body of the Decision, the MNP switching data contains very little information on switching between prepaid and postpaid. However, the available information suggests that there is very little such switching.[408]

(30) In the interests of robustness, however, the Commission has also made the calculations on the assumption that the correct revenues and margins to be used should be the market-wide revenues and margins (excepting data-only), therefore including pre-paid and business. On such a basis, the blended ARPU for H3G for the twelve month period considered is reduced to EUR [10-20] and that of Orange reduced to EUR [20-30], whilst the blended

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404 The upward trend in average margins realized by H3G is despite no similar trend in revenues, and therefore attributable to average costs. The greater part of costs serves to acquire new users, which suggests that the cost of acquisition is also falling. As a result, new users are more profitable than in the past. Using the most recent contribution margin is therefore a conservative assumption.

405 Algebraically, differentiating equation (11) of Hausman et al with respect to p_1 gives $-(d_{12}m_2+d_{12}d_{21}m_1)/2(1-d_{12}d_{21})p_1^2$, which is necessarily negative given that $0<=d_{ij}<=1$. In the case of equation (2) the formula is more complex and there are ranges of values for which this result does not hold, but they require a very high degree of asymmetry between the merging parties which in any case does not characterize the present case and may also violate technical constraints.

406 Differentiating equation (11) of Hausman et al with respect to m_1 gives $d_{12}d_{21}/2(1-d_{12}d_{21})p_1$, which is necessarily positive. In the case of equation (2) the formula is more complex and there are ranges of values for which this result does not hold, but they require a very high degree of asymmetry between the merging parties.

407 Differentiating equation (11) of Hausman et al for Orange (i.e. $\Delta p_2/p_2$) with respect to m_1 gives $d_{21}/2(1-d_{12}d_{21})p_2$, which is also necessarily positive. The relative price rises of Orange and H3G per unit increase in the margins of H3G, calculated by dividing this equation by the one in the previous footnote, is given by $(p_1/p_2)*(1/d_{12})$. Given that H3G's prices are lower than those of Orange and d_{12} is always less than one, both factors contribute to making the price effect due to an increase in the margins of H3G larger on the side of Orange.

408 See section 6.5.1.2.1. of the Decision.

contribution margins are reduced to EUR [5-10] and EUR [10-20] respectively.

(31) As indicated above, the effect of a reduction in the ARPU is to increase the anticipated price effect (relative to the pre-merger ARPU) due to the merger, whereas the effect of a reduction in the margins is to reduce it. Calculating using equation 2 of the Hausman et al paper as above gives anticipated price rises of [10-20]*% for a H3G customer and [10-20]*% for an Orange customer. This is somewhat of a decrease as concerns Orange, where the margin effect predominates, but it is an increase as regards H3G, where the effect which predominates is that due to the reduction of the revenue figure. This result is of course counter-intuitive and results from the artificial extension of the diversion ratios to the prepaid segment and the artificial assumption implied by using an average over both segments that switching between the two segments would occur.

(32) The Commission also carried out the calculation using a blended diversion ratio weighted by existing customers in which the postpaid component comes from the MNP and the prepaid component is the one implied on assumptions of homogeneity by the observed gross adds in the prepaid segment for the months January to May 2012 as reported in the main body of the decision above. This blended diversion ratio is [0-5] for H3G to Orange and [0-5] for Orange to H3G. On such a basis, the predicted price increases would be [10-20]% for H3G customers and [5-10]% for Orange customers. Although these are lower than the price increases predicted on the postpaid segment alone, notwithstanding their artificiality they remain significant.

ANNEX III

European Commission
DG Competition
Rue Joseph II 70
B-1000 Brussels

CASE M.6497
HUTCHISON 3G AUSTRIA HOLDINGS GMBH /
ORANGE AUSTRIA TELECOMMUNICATIONS GMBH

COMMITMENTS TO THE EUROPEAN COMMISSION

11 NOVEMBER 2012

Pursuant to Article 8(2) of Council Regulation (EC) No 139/2004 (the ***Merger Regulation***), Hutchison 3G Austria Holdings GmbH (***H3G Austria Holdings***) hereby provides the following commitments (the ***Commitments***) in order to enable the European Commission (the ***Commission***) to declare the acquisition of Orange Austria Telecommunications GmbH (***Orange***) (H3G Austria Holdings and Orange are together the ***Parties***) compatible with the common market by a decision pursuant to Article 8(2) of the Merger Regulation (the ***Decision***).
The Commitments shall take effect upon the date of adoption of the Decision.
This text shall be interpreted in the light of the Decision, to the extent that the Commitments are attached as conditions and obligations, in the general framework of Union law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

A. DEFINITIONS

1. For the purposes of the Commitments, the following terms shall have the following meanings:

   Auction Spectrum: means the spectrum that the TKK reserves for a new entrant in the TKK Auction.
   Closing: means the completion of the acquisition of Orange by H3G Austria Holdings (inter alia) through the transfer of the share capital of Styrol Holding 1 GmbH to H3G Austria Holdings.
   Divestment Spectrum: means the spectrum as defined in paragraph 9.
   Effective Date: means the date of the adoption of the Decision.

First Divestiture Period: means the period from the Effective Date and ending on the date that the TKK publishes the tender documents for the TKK Auction.

H3G Austria Holdings: means Hutchison 3G Austria Holdings GmbH, a company incorporated under the laws of Austria with its registered office at Guglgasse 12/10/3, Gasometer C, 1110 Vienna.

H3G: Hutchison 3G Austria GmbH, a company incorporated under the laws of Austria with its registered office at Guglgasse 12/10/3, Gasometer C, 1110 Vienna.

H3G Network: means the mobile telecommunications network operated or used by H3G in Austria from time to time (including for the avoidance of doubt as it evolves through the integration of the Orange network, as well as components owned by H3G and third parties) subject to any limitations contained in national roaming or infrastructure (including site) sharing agreements with third parties.

Licence: means a licence issued under the Austrian Telecommunications Act.

Mobile Virtual Network Enabler: means an entity that provides infrastructure and services (including core infrastructure services) to enable a mobile virtual network operator to offer services to end customers.

Monitoring Trustee: means one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by H3G Austria Holdings, who has the duty to monitor H3G Austria Holdings' compliance with the conditions and obligations attached to the Decision.

MVNO: means a person that:

(a) does not directly or indirectly control, is not controlled by or is not under common control with or is not otherwise affiliated to a mobile network operator active in Austria; and

(b) provides (or wishes to provide) mobile services to end customers under its own brand name using the network of a mobile network operator; and

(c) provides for its own core network infrastructure, either through owning some or all of its own core network or through obtaining some or all of it from a third party such as a Mobile Virtual Network Enabler or under separate negotiation and agreement with H3G on the terms and conditions (and cost-oriented charges, taking into account the investment and operational expenditures made by H3G and allowing for a reasonable rate of return on the investment and these expenditures); and

(d) does not hold spectrum frequency licence(s) in Austria (i) with respect to which it has achieved at the date of the signing of the MVNO Agreement outdoor coverage exceeding 5% of the Austrian population or (ii) which at the date of the signing of the MVNO Agreement contain outdoor coverage obligations exceeding 5% of the Austrian population. For this purpose, population coverage is defined in the same manner as used in the coverage obligations contained in the existing spectrum licences for the respective spectrum in Austria or if there is no defined method, then in the same manner as set out in the Telekom-Control Commission's decision of 20 November 2000, K 15e/00 (schedule IV, § 9).

MVNO Agreement: means an agreement for wholesale access to the H3G Network entered into between H3G and the Upfront MVNO (as defined in paragraph 6) or a Requesting Party, as the context requires.

Purchaser: means the Qualifying New MNO that has been approved by the Commission as the acquirer of the Divestment Spectrum and the Auction Spectrum.

Qualifying New MNO: means any undertaking that wishes to become a new entrant mobile network operator in Austria through the acquisition of the Divestment Spectrum and the Auction Spectrum and does not directly or indirectly control, is not controlled by or is not under common control with or is not otherwise affiliated to, a mobile network operator active in Austria.

Requesting Party: means an MVNO seeking wholesale access to the H3G Network for the purposes of offering retail mobile communications services to end customers as an MVNO in Austria, and which does not directly or indirectly control, is not controlled by or is not under common control with or is not otherwise affiliated to a mobile network operator active in Austria.

Requesting Party Limit: means the number of Requesting Parties with respect to which their aggregated forecasted traffic at any point in time during the term of the Commitments is no more than 30% of the capacity of the H3G Network. For this purpose, the limit of 30% of the capacity of the H3G Network shall be deemed to have been reached if the traffic volume on the H3G Network exceeds any of the following thresholds in any given month: 180 million voice minutes or 900 million MB or 120 million SMS. To take account of future capacity expansions of the H3G Network, these thresholds shall be indexed according to the volumes published in the latest available RTR Telekom Monitor for the whole mobile communications market whereby the base value for indexation shall be the latest volumes published in the RTR Telekom Monitor as per 1 January 2013. For this purpose, the thresholds shall be indexed on the day following the publication of the most recent RTR Telekom Monitor.

Reference Offer: means the document attached as **Annex 1** which is to be published on H3G's website in accordance with paragraph 4(a) below.

Second Divestiture Period: means the period of 3 months commencing from the later of: (a) the end of the period in which an appeal of the TKK Auction may be lodged and no appeal has been made; or (b) if an appeal has been lodged with the administrative court and/or the constitutional court within the applicable time-limit, the date on which the final judgment of such appeal is handed down.

TKK: means the Telekom-Control Commission, a panel authority established under section 116ff of the Austrian Telecommunications Act.

TKK Auction: means the forthcoming auction to be held by the TKK which is currently scheduled to take place in 2013 and which comprises spectrum in the 800 MHz frequency range reserved for a new entrant to the Austrian market.

B. COMMITMENT TO MAKE WHOLESALE ACCESS AVAILABLE TO REQUESTING PARTIES

2. H3G Austria Holdings commits to procure that upon Closing, H3G will make available wholesale access to the H3G Network to Requesting Parties up to the Requesting Party Limit subject to a maximum of 16 Requesting Parties.

3. H3G shall not be obliged to carry out the technical implementation of wholesale access for more than 2 MVNOs on the H3G Network at any one time. Provided that if the technical implementation of an MVNO continues for more than 12 consecutive months, the relevant MVNO shall not be included in the number of MVNOs for the purposes of calculating the preceding limit.

4. With a view to the access referred to in paragraph 2 being available on fair and non-discriminatory terms, H3G Austria Holdings commits to procure that:

   (a) the details of the terms upon which access is available are published on the H3G website in the form of the Reference Offer subject to minor amendments which may be required from time to time; and

   (b) where a Requesting Party requests in writing to become an MVNO on the H3G Network, H3G shall enter into good faith negotiations with a view to agreeing an MVNO Agreement on the basis of the principles set out in the Reference Offer. If the parties have not agreed upon the terms of the MVNO Agreement within a period of 5 months of H3G's receipt of the written request, and provided that the CEOs of H3G and the Requesting Party have not resolved the matters in dispute within 2 weeks of the matter being escalated to them in writing by either party, a fast track dispute resolution procedure shall apply in accordance with Section F below.

5. If H3G wishes to enter into MVNO agreements with additional MVNOs above the Requesting Party Limit, it may do so in its sole discretion and these Commitments (including for the avoidance of doubt the terms contained in the Reference Offer) do not apply.

C. UPFRONT COMMITMENT TO ENTER INTO AN MVNO AGREEMENT

6. H3G Austria Holdings commits to procure that H3G will enter into an MVNO Agreement based on the Reference Offer with an MVNO to be approved by the Commission (***Upfront MVNO***). H3G will not close the acquisition of Orange before the signing of the MVNO Agreement with the Upfront MVNO and the prior approval of the Commission for the Upfront MVNO.

7. For this purpose, an Upfront MVNO, in order to be approved by the Commission, must:

   (a) be independent of and unconnected to H3G or any mobile network operator active in Austria;

   (b) possess the financial resources, proven expertise and incentive to be a viable and active competitive force in competition with H3G and other competitors on the Austrian market for mobile communications to end customers. Companies which fulfil the aforementioned criteria may (*inter alia*) include existing MVNOs, companies with telecoms activities, specialised electronic retailers in Austria or mass market retailers in Austria; and

(c) be expected to obtain, in light of the information available to the Commission, all necessary approvals from the relevant regulatory authorities to operate as an MVNO in Austria.

8. When H3G has or is about to reach an agreement with the Upfront MVNO, H3G shall provide the Commission with a copy of the MVNO Agreement and a fully documented and reasoned statement in writing, enabling the Commission to verify that the above criteria have been fulfilled and that the MVNO Agreement is being entered into in a manner consistent with these Commitments. H3G Austria Holdings will be deemed to have complied with the Commitment in Section C upon approval by the Commission of the Upfront MVNO and H3G having entered into an agreement with the Upfront MVNO.

D. COMMITMENT TO OFFER FOR SALE THE DIVESTMENT SPECTRUM

9. The Divestment Spectrum consists of 2 x 10 MHz of contiguous spectrum in the 2.6 GHz frequency band.

10. H3G Austria Holdings commits to procure that H3G shall offer to divest to a single Qualifying New MNO the Divestment Spectrum in the First Divestiture Period. Provided that the agreement to sell the Divestment Spectrum in the First Divestiture Period shall be subject to a condition precedent that the Qualifying New MNO also acquires the Auction Spectrum.

11. If: (a) H3G has not entered into an agreement in the First Divestiture Period to divest the Divestment Spectrum; or (b) the acquirer of the Divestment Spectrum in the First Divestiture Period does not also acquire the Auction Spectrum, H3G Austria Holdings commits to procure that H3G shall offer the Divestment Spectrum for sale to the acquirer of the Auction Spectrum in the Second Divestiture Period. In the case of (a), H3G shall offer the Divestment Spectrum at no minimum price, but shall not be obliged to sell the Divestment Spectrum for a price below zero. In the case of (b), the price payable for the Divestment Spectrum shall be the same price agreed with the acquirer who has been approved by the Commission during the First Divestiture Period, provided that such price does not appear unreasonably high, having regard to the prices paid for similar amounts of spectrum in previous spectrum auctions in Austria.

12. The Commitment to divest the Divestment Spectrum is subject to the Divestment Spectrum carrying an obligation on the Purchaser to roll-out its network within a reasonable time period, to be determined by the TKK, to a coverage area that is equivalent to the minimum coverage area currently required within the 2.6 GHz frequency band.

13. H3G Austria Holdings will be deemed to have complied with the divestment Commitment in paragraphs 10 and 11 of Section D if H3G has entered into a

binding sale and purchase agreement to sell the Divestment Spectrum to the acquirer of the Auction Spectrum by the expiration of the Second Divestiture Period and that acquirer has been approved by the Commission in accordance with the provisions at paragraphs 16-17 below. Provided that if the Auction Spectrum is not acquired or if the acquirer of the Auction Spectrum chooses not to acquire the Divestment Spectrum there shall be no further obligation on H3G Austria Holdings to procure the divestment of the Divestment Spectrum and H3G shall be entitled to continue to use the Divestment Spectrum in accordance with the terms and conditions of the relevant Licence.

14. If the Divestment Spectrum is divested, the Divestment Spectrum will be cleared and all related Licences, to the extent they relate to the Divestment Spectrum, will be transferred by H3G to the Purchaser by no later than 1 month after the Second Divestiture Period.

15. If at any point following the divestment of the Divestment Spectrum, the Purchaser no longer qualifies as a Qualifying New MNO, H3G shall have the right, subject to applicable approvals under Austrian and/or EU law including from the TKK, to re-acquire the Divestment Spectrum from the Purchaser at the same price as the Purchaser has paid to H3G and, in such circumstances, the Purchaser shall be required to clear and return the Divestment Spectrum to H3G within a period of 6 months.

<u>The Purchaser</u>

16. The Divestment Spectrum shall be divested only to a Qualifying New MNO that has been approved by the Commission. In order to be approved by the Commission, the Qualifying New MNO must:

(a) have acquired or intend to acquire the Auction Spectrum;

(b) be independent of and unconnected to H3G or any mobile network operator active in Austria;

(c) have the serious and *bona fide* intention to enter the Austrian market for mobile communications to end customers;

(d) have the financial resources, proven expertise and incentive to use the Divestment Spectrum as a viable and active competitive force in competition with H3G and other competitors on the Austrian market for mobile communications to end customers; and

(e) neither be likely to create, in light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Spectrum, (the ***Purchaser Requirements***).

17. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When H3G has reached or is about to reach an agreement with a Qualifying New MNO, H3G Austria Holdings shall submit a fully documented and reasoned proposal including a copy of the final agreement to the Commission and the Monitoring Trustee. H3G Austria Holdings must be able to demonstrate to the Commission that the Qualifying New MNO meets the Purchaser Requirements and that the Divestment Spectrum is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the Qualifying New MNO fulfils the Purchaser Requirements and that the Divestment Spectrum is being sold in a manner consistent with the Commitments.

Related commitments

18. If the Divestment Spectrum is divested, H3G Austria Holdings shall procure that:

(a) H3G shall offer the Purchaser national roaming on the H3G Network on the basis of the same charges and substantially the same terms as contained in the Reference Offer attached as Annex 1 mutatis mutandis except that paragraphs 9, 10, 46, 48 and 49 of the Reference Offer will not apply. The term of the national roaming agreement will be for a period of up to 6 years from the end of the Second Divestiture Period provided that this term shall not extend beyond 10 years after the Effective Date. H3G shall have a right to terminate the national roaming agreement if the Purchaser requests more than 30% of the capacity of the H3G Network (as defined in accordance with the Requesting Party Limit in Section A above). H3G shall offer mobility scenarios (hand over and reselection) and potential radio network adoptions (e.g. location area barring), based on the principle that the Purchaser shall bear any network implementation costs which H3G may reasonably incur in order to accommodate such requests. The detailed terms shall be subject to good faith negotiation and agreement between H3G and the Purchaser;

(b) H3G shall offer the Purchaser co-location (within the meaning of section 8 (2) of the Austrian Telecommunications Act) on its existing sites, if technically feasible and subject to the underlying terms of the relevant site leases. Co-location rights shall be granted to the Purchaser on standard market terms. In addition, for the period of up to 6 years from the end of the Second Divestiture Period provided that this term shall not extend beyond 10 years from the Effective Date:

    (i) H3G shall inform the Purchaser in a timely manner before new sites are being installed in the H3G Network;

    (ii) in the event of simultaneous requests for co-location on the same site by the Purchaser and a third party, the Purchaser shall have a preferred right to enter into a co-location agreement for such space on standard market terms for a period of two weeks from the day on which H3G has informed the Purchaser of the third party co-location request. This right of the Purchaser is subject to any contractual rights of third parties which may have already been granted by H3G prior to the Effective Date; and

(iii) H3G shall inform the Purchaser of any co-location requests by third parties to the extent that granting a co-location right in response to such a request would eliminate the last available co-location possibility on the relevant site. In the event of such a request, the Purchaser shall have a preferred right to enter into a co-location agreement on standard market terms for a period of two weeks from the day on which H3G has informed the Purchaser of the third party co-location request. This right of the Purchaser is subject to any contractual rights of third parties which may have already been granted by H3G prior to the Effective Date; and

(c) H3G shall offer to divest to the Purchaser on commercial terms any sites which, following the acquisition of Orange, are not required by H3G for the H3G Network and which have not been separately sold to third parties. This Commitment shall be implemented as follows:

(i) for a period of 2 years from the end of the Second Divestiture Period H3G shall provide the Purchaser on a monthly basis with a list of sites for which H3G intends to terminate the site lease contracts provided that H3G shall not be required to offer or divest any sites to the Purchaser under this paragraph 18(c) after 31 August 2015; and

(ii) upon the issue of each such list, the Purchaser shall have a period of 1 month to make a binding selection of the sites on that monthly list which it will purchase. This binding selection shall include a commitment by the Purchaser to purchase the sites at a maximum price of book value and the legal title to such sites shall be transferred to the Purchaser as soon as practically possible for H3G and thereafter all operational and other costs related to the relevant sites shall be the responsibility of the Purchaser.

The above shall not prevent H3G from terminating site contracts as part of its network consolidation project, provided that there shall be 2000 sites for potential divestment as at 1 September 2013.

E. MONITORING TRUSTEE

<u>Appointment of the Monitoring Trustee</u>

19. H3G Austria Holdings shall appoint a Monitoring Trustee to carry out the functions specified in paragraph 26 below. The Monitoring Trustee shall be

independent of the Parties, possess the necessary qualifications to carry out its mandate, and shall neither have nor become exposed to a conflict of interest.

20. The Monitoring Trustee shall be remunerated by H3G Austria Holdings in a way that does not impede the independent and effective fulfilment of the Monitoring Trustee's mandate.

Proposal by H3G Austria Holdings

21. No later than 1 week after the Effective Date, H3G Austria Holdings shall submit a list of two or more persons whom H3G Austria Holdings proposes to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out in paragraph 19 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under the Commitments; and

(b) the outline of a work plan, which describes how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

22. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, H3G Austria Holdings shall appoint or cause to be appointed, the individual or institution concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, H3G Austria Holdings shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within 1 week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by H3G Austria Holdings

23. If all the proposed Monitoring Trustees are rejected, H3G Austria Holdings shall submit the names of at least 2 more individuals or institutions within 1 week of being informed of the rejection, in accordance with the requirements and procedure set out in paragraphs 19 and 22.

Monitoring Trustee nominated by the Commission

24. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom H3G Austria Holdings shall appoint, or cause to be appointed, in accordance with a trustee

mandate approved by the Commission. This Monitoring Trustee shall also fulfil the requirements set out in paragraph 19.

Functions of the Monitoring Trustee

25. The Monitoring Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or H3G Austria Holdings, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

26. The Monitoring Trustee shall:

(a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;

(b) monitor compliance by H3G Austria Holdings with the obligations and conditions provided in Sections B and D of the Commitments;

(c) upon notification from H3G Austria Holdings, verify (and confirm to the Commission) whether 30% of the H3G Network has been reached for the purpose of the obligations in paragraphs 2 and 18;

(d) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(e) in case of a divestment of the Divestment Spectrum by way of private sale, review and assess potential purchasers as well as the progress of the divestiture process in Section D;

(f) report to the Commission on the design and progress of the TKK Auction;

(g) in case a Purchaser requests co-location, monitor H3G's compliance with the obligations in paragraph 18(b);

(h) in case of a divestment of sites, monitor H3G's compliance with the obligations in paragraph 18(c);

(i) propose to H3G Austria Holdings such measures as the Monitoring Trustee considers necessary to ensure H3G Austria Holdings' compliance with the conditions and obligations attached to the Decision;

(j) provide to the Commission, sending H3G Austria Holdings a non-confidential copy at the same time, a written report within 15 calendar days after the end of every calendar month for the first 3 months and from then on within 15 calendar days after the end of each 6 month period for the duration of the Commitments. The report shall cover developments in relation to the negotiation of MVNO Agreements with Requesting Parties and the progress of the divestiture process, the co-location process and the divestiture process, so that the Commission can assess whether H3G Austria Holdings is complying with its obligations under the Commitments;

(k) within one week after receipt of the documented proposal referred to in paragraph 17, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and whether the Divestment Spectrum is sold in a manner consistent with the Commitments

(l) in addition to these periodic reports, promptly report in writing to the Commission, sending H3G Austria Holdings a non-confidential copy at the same time, if it concludes on reasonable grounds that H3G Austria Holdings is failing to comply with any of the Commitments; and

(m) monitor the fast-track dispute resolution process in Section F and, in this context, provide to the Commission:

(i) a report (on a fortnightly basis) on the progress of any ongoing dispute resolution process; and

(ii) a final report detailing the outcome of any dispute resolution procedure within 7 days of a determination by the Expert.

27. The documents provided for above shall be prepared in English.

Duties and obligations of H3G Austria Holdings

28. H3G Austria Holdings shall, and commits to procure that H3G shall, provide and shall cause its advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of H3G's business books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments. H3G Austria Holdings shall, and commits to procure that H3G shall, provide the Monitoring Trustee upon request with copies of any document. H3G Austria Holdings shall procure that H3G makes available to the Monitoring Trustee one or more office(s) on its premises, and that H3G shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

29. H3G Austria Holdings shall indemnify the Monitoring Trustee and its employees and agents (each an ***Indemnified Party***) and hold each Indemnified Party harmless against, and herby agrees that an Indemnified Party shall have no liability to H3G Austria Holdings for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness,

gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.

30. At the expense of H3G Austria Holdings, the Monitoring Trustee may appoint advisors which are independent of the Parties (in particular for legal advice), subject to H3G Austria Holdings' prior approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee reasonably considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under its mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should H3G Austria Holdings refuse to approve the appointment of advisors proposed by the Monitoring Trustee, the Commission may approve the appointment of such advisors, after having heard representations from H3G Austria Holdings. Only the Monitoring Trustee shall be entitled to issue instructions to any appointed advisors. Paragraph 29 shall apply *mutatis mutandis*.

Replacement, discharge and re-appointment of the Monitoring Trustee

31. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including exposure to a conflict of interest:

(a) the Commission may, after hearing the Monitoring Trustee, require H3G Austria Holdings to replace the Monitoring Trustee; or

(b) H3G Austria Holdings, with the prior approval of the Commission, may replace the Monitoring Trustee.

32. If the Monitoring Trustee is removed according to paragraph 31, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the outgoing Monitoring Trustee has effected a full hand-over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 19 to 24.

33. Besides the removal according to paragraph 31, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments might not have been fully and properly implemented.

F. FAST-TRACK DISPUTE RESOLUTION

34. A fast-track dispute resolution procedure shall apply in respect of any dispute arising between H3G and a Requesting Party concerning the negotiation of terms of an MVNO Agreement prior to the signing of an MVNO Agreement.

35. If H3G and a Requesting Party have not agreed upon the terms of an MVNO Agreement within a period of 5 months from H3G's receipt of a written re-

quest, and provided that the CEOs of H3G and the Requesting Party have not resolved the matters in dispute within 2 weeks of the matter being escalated to them in writing by either party, the fast track dispute resolution procedure below shall apply upon written notice by one party to the other.

36. H3G and the Requesting Party shall appoint a panel of experts (the ***Expert***) to determine any such dispute.

37. This panel shall comprise:

(a) one expert appointed by H3G;

(b) one expert appointed by the Requesting Party; and

(c) one expert appointed by the two experts so appointed provided that if they fail to appoint the third expert within 15 calendar days from their appointment, either party may request the Chairman of the Rundfunk und Telekom Regulierungs-GmbH to appoint the third expert,

provided that each person so appointed shall be an independent, suitably qualified and experienced expert.

38. The process shall be conducted in private and shall be confidential but under supervision of the Monitoring Trustee. The language of the process shall be in English or German, and shall be so determined by the unanimous agreement of the Expert and the Monitoring Trustee.

39. The Expert shall act on the following basis:

(a) the Expert shall act fairly and impartially;

(b) each party shall submit to the Expert its brief and its submission in relation to the matter in dispute within 5 calendar days of the Expert's appointment;

(c) the Expert shall decide the procedure to be followed within 5 calendar days of their appointment, which may be the rules of arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules);

(d) the parties shall assist and provide such documentation as the Expert reasonably requires for the purposes of the determination;

(e) the Expert shall make its determination taking into account the following principles:

(i) the Requesting Party’s ability to obtain wholesale access to the H3G Network on the terms set out in Section B;

(ii) the provisioning of the H3G Network for access by a Requesting Party not compromising or threatening to compromise the integrity, quality, capacity and operational performance of the H3G Network to the detriment of either H3G or other MVNOs providing services over the H3G Network; and

(iii) the provision of wholesale access being effected in the most cost effective manner for both H3G and the MVNO, and not increasing the cost of the operation of the H3G Network beyond what would be reasonably expected in order to implement an MVNO Agreement on the basis of the terms and conditions (including charges) in the Reference Offer.

(f) decisions of the Expert shall be based on majority votes of the panel;

(g) the Expert’s determination shall be given within a maximum period of 3 months of the Expert’s appointment;

(h) the Expert's determination shall (save for manifest error or fraud) be final and binding on the parties;

(i) each party shall carry out the actions required to comply with the obligations set out in the Expert’s determination within any time-limits specified by the Expert. If the Requesting Party fails to comply with applicable obligations set out in the Expert’s determination, H3G Austria Holdings, acting reasonably, may choose not to continue negotiations, or enter into an MVNO Agreement, with that Requesting Party; and

(j) the Expert shall determine how and by whom the costs of the determination including the fees and expenses of the Expert are to be paid.

40. The Commission shall be allowed and enabled to participate in all stages of the fast-track dispute resolution procedure by:

(a) receiving all written submissions (including documents and reports, etc.) made by the parties to the procedure;

(b) receiving all documents exchanged by the Expert with the parties to the procedure;

(c) filing any Commission amicus curiae briefs; and

(d) being present at the hearing(s) in Vienna and being allowed to ask questions to parties.

41. The Expert shall forward, or shall order the parties to the procedure to forward, the documents mentioned to the Commission without delay.

42. The Monitoring Trustee shall receive copies of:

(a) all submissions made by the parties in relation to the matters they wish to have resolved by the Expert, on the day when these have been submitted to the Expert;

(b) all other documentation provided by the parties, on the day when these have been submitted to the Expert; and

(c) the determination made by the Expert, on the day when the determination has been provided to the parties.

43. Following the signing of an MVNO Agreement, the dispute procedure set out above shall no longer apply. This is without prejudice to any other rights and remedies that may be available to a Requesting Party or H3G as the case may be in respect of any breach of an MVNO Agreement as a matter of contract law or otherwise, including without limitation a party's right to seek, obtain and implement injunctive, interlocutory or other immediate relief.

G. FINAL PROVISIONS

I. DURATION

44. The Commitment in Section B shall expire on the date which is the earlier of:

(a) the date on which (i) H3G has transferred the Divestment Spectrum to a Purchaser and (ii) the Auction Spectrum has been transferred to the Purchaser;

(b) the date on which a new entrant MNO enters the market; or

(c) 10 years from the Effective Date.

Provided that:

(i) in the case of sub-paragraphs (a) and (b), H3G shall continue to fulfil its obligations under all existing MVNO Agreements it has entered as at that date in accordance with the terms and conditions of such agreements (including, for the avoidance of doubt, the rights of extension contemplated in paragraph 46 of the Reference Offer and the relevant MVNO Agreement); and

(ii) in the case of sub-paragraph (c), in 2022 (being the tenth year of the Commitments), H3G shall not be obliged to enter into an MVNO Agreement for a period longer than 2 years.

45. The Commitment in Section C shall expire upon fulfilment in accordance with paragraph 8.

46. The Commitments in paragraphs 10 and 11 of Section D shall expire upon fulfilment in accordance with paragraph 13. The Commitments in paragraph 18 of Section D shall expire at the end of the respective periods specified in paragraphs 18 (a), (b) and (c).

II. REVIEW

47. The Commission may, where appropriate, in response to a request from H3G Austria Holdings showing good cause and accompanied by a report from the Monitoring Trustee:

    (a) grant an extension of the time periods foreseen in the Commitments; or

    (b) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in the Commitments.

48. In determining whether exceptional circumstances may justify a waiver, modification or substitution of the Commitments at the request of H3G Austria Holdings, the Commission will take into account *inter alia* significant changes in market circumstances, applicable laws and/or the regulatory environment.

…………………………………………

Name: Thomas Wessely / Angeline Woods

Date: 29 October 2012

Duly authorised on behalf of Hutchison 3G Austria Holdings

ANNEX 1: REFERENCE OFFER

This Reference Offer is published pursuant to Commission Decision M. 6497 Hutchison 3G Austria Holdings GmbH / Orange Telecommunication GmbH.

This Reference Offer sets out the key commercial principles and charges for the provision of MVNO wholesale access to the H3G Network for the purpose of providing electronic communications services to end users in Austria.

A. WHOLESALE ACCESS OFFER

1. Where a Requesting Party reasonably requests in writing to become an MVNO on the H3G Network, H3G shall offer the following services:

   (a) wholesale access to the H3G Network for the origination and termination of circuit switched, SMS, packet switched data (including MMS) services to MVNO customers;

   (b) wholesale access to the H3G Network for the provision of value added services to MVNO customers;

   (c) location data for emergency call delivery services with respect to MVNO customers; and

   (d) location data and real time CDRs for legal interception services with respect to MVNO customers.

   The technical specification for the services and the network access requirements will be made available on request and without undue delay.

2. The above wholesale access services are available using the mobile network technologies which H3G uses to deliver services to its customers from time to time (UMTS, HSPA, HSDPA and LTE, as well as GSM and GPRS to the extent available under its 2G and 2.5G roaming arrangements).

3. H3G shall grant the MVNO access to future evolutions in mobile technologies and/or new products based on existing technologies which were not offered by H3G in Austria as at [***insert Effective Date***] (for example differentiated quality of service offers) within a reasonable period of the commercial launch of the new technology and/or new products by H3G unless such access is not technically feasible, and subject to negotiation and agreement between H3G and the MVNO of the terms and conditions (and, if applicable, charges). Such period is not to exceed 8 weeks if H3G is the first operator in the market to launch the new technology and/or new product or 4 weeks if the new technology and/or new product has already been commercially launched by a competitor of H3G. If the terms and conditions (and, if applicable, charges) for access to such future evolutions in mobile technologies and/or new products are agreed between H3G and the MVNO, such "service" will become a service under the MVNO Agreement.

4. At the request of the MVNO, H3G shall, at no extra cost, make available a copy of its mobile number portability database as at the date of the MVNO Agreement.

5. Subject to Section A 6, the MVNO shall be responsible for making its own arrangements to meet its obligations as a public communications network operator under Austrian law.

6. H3G will consider all reasonable requests to provide assistance with respect to emergency call delivery services, legal intercept services, numbering and mobile number portability. The provision of any such assistance by H3G shall be subject to separate negotiation and agreement between H3G and the MVNO of the terms and conditions (and charges).

7. This Reference Offer covers only the services set out in Section A 1 above, and not, for instance, the following services (a) the provision of all or part of the core network infrastructure such as the interconnection between the H3G and Requesting Party, or between the Requesting Party and other mobile or fixed network operators (b) the provision of a mobile number portability platform (c) transit or routing services or (d) international roaming services. H3G shall consider reasonable requests for additional services. The provision of any such services by H3G shall be subject to separate negotiation and agreement between H3G and the MVNO of the terms and conditions (and cost-oriented charges, taking into account the investment and operational expenditures made by H3G and allowing for a reasonable rate of return on the investment and these expenditures), and shall not form part of the MVNO Agreement.

8. This Reference Offer is subject to the Requesting Party and H3G entering into an MVNO agreement on reasonable terms and conditions which shall include the commercial terms set out in this Reference Offer.

9. This Reference Offer is available to up to (a) 16 Requesting Parties enabling them to offer retail mobile communications services to end customers in Austria or (b) such lower number of MVNOs for which the aggregate forecasted traffic at any point in time during the term of the MVNO Agreements is no more than 30% of the capacity of the H3G Network.

10. H3G Austria Holdings shall not be obliged to carry out the technical implementation of wholesale access for more than 2 MVNOs on the H3G Network at any one time. Provided that if the technical implementation of an MVNO continues for more than 12 consecutive months, the relevant MVNO shall not be included in the number of MVNOs for the purposes of calculating the preceding limits.

B. CHARGES

11. The charges payable by the MVNO for the services in Section A 1(a) above (circuit switched, SMS, packet switched data (including MMS) services) shall be calculated in accordance with the rates and conditions set out in Appendix A of this Reference Offer. Provided that H3G may pass on to the MVNO any additional fees or charges that have been levied on H3G under Austrian law and/or at the direction of a competent authority (or which H3G is required to charge to the MVNO) to the extent that they relate to the network access services being provided to the MVNO. The rates in Appendix A are subject to price indexation in accordance with Section C below.

12. Charges payable for the services in Section A 1(b) (value added services) or any other service (including differentiated quality of service offers or any administrative and other handling services with respect to emergency call delivery and legal intercept)

shall be subject to negotiation and agreement between H3G and the MVNO of the terms and conditions (including charges).

13. All interconnection fees for the termination and origination of circuit switched services and SMS by or to MVNO customers shall be for the account of the MVNO, and shall be paid and settled directly between the MVNO and the interconnecting mobile and/or fixed network operator (including H3G) as the case may be.

14. The MVNO shall provide an on demand financial security (in the form of a bank guarantee) ("Security") to H3G in an amount equal to the Security Amount. For this purpose the "Security Amount" shall be an amount equal to the average monthly charge payable based on the 12 month rolling forecast provided by the MVNO from time to time multiplied by 3. The Security Amount shall be recalculated each time the MVNO provides its 12 month rolling forecast as described in Section F below. H3G may drawdown on the Security in accordance with its terms at any time during or after termination of the MVNO Agreement to satisfy any amounts due and payable to H3G (including any charges) that remain unpaid by the relevant due date. The MVNO shall maintain the level of the applicable Security Amount and shall replenish the Security within 30 working days of (a) receipt of notice from H3G that it has drawn down on the Security or (b) the provision of its 12 month rolling forecast if there is a shortfall between the Security Amount calculated on the basis of that forecast compared to the Security Amount calculated in relation to the immediately preceding 12 month forecast.

15. All charges will be payable in Euros and are exclusive of VAT.

16. H3G will issue invoices monthly, which shall be payable within 30 days.

C. PRICE INDEXATION

17. The charges set out in Appendix A are subject to retail price indexation. H3G and the MVNO shall negotiate in a good faith a reasonable price indexation mechanism, taking into consideration the ability of the MVNO to offer competitive products and services to end-users. Reasonable price indexation mechanisms may include an index based on retail prices published by the Rundfunk & Telekom Regulierungs-GmbH or an index based on the prices of H3G.

D. IMPLEMENTATION AND IMPLEMENTATION FEE

18. The MVNO Agreement shall specify the technical implementation work required in order to provide wholesale access to the H3G Network, including the responsibilities of H3G and the MVNO and the agreed project plan.

19. H3G may charge the MVNO a set-up fee of up to €200,000, payable in two equal instalments. The first instalment shall be payable on signature of the MVNO Agreement and the second instalment shall be payable on the earlier of the commercial launch by the MVNO of its retail services and 9 months from the signature of the MVNO Agreement. The implementation fee is subject to the Austrian consumer price index ("Verbraucherpreisindex").

E. NON-DISCRIMINATION OBLIGATION

20. H3G shall supply the same quality of service and coverage to the MVNO in respect of the MVNO customers as it does to its own customers and to those of other MVNOs on the H3G Network, including with respect to suspension of services for maintenance (including repairs, upgrades and modifications to the H3G network) and emergencies.

21. H3G has the right to manage the traffic flow on its network (including that of the MVNO customers) in order to maintain network integrity or to improve the service for a larger range of customers in a cell. The reduction of the portfolio of services offered by H3G to its customers could also result in comparable limitations on the services offered by the MVNO to its customers, subject to H3G providing the MVNO a lead time of 1 month.

22. For the avoidance of doubt, the retail offer by H3G to its customers of any new technologies or products which H3G has offered to the MVNO in accordance with Section A 3, and which the MVNO has chosen not to offer to its customers, shall not be considered a breach of the non-discrimination obligations contained in this Section E.

23. H3G shall be permitted to monitor and conduct internal analyses of the MVNO customers for network quality assurance purposes as it does so with respect to its own customers and those of other MVNOs on the H3G Network.

F. FORECASTS

24. The MVNO Agreement shall include forecast requirements which shall be limited to the minimum extent necessary for capacity management purposes.

25. Following the commercial launch by the MVNO, the MVNO shall on an annual basis provide H3G, no later than on the 15^{th} of September of each year (the "**Forecasting Date**"), a forecast for each month of the ensuing 12 month period from the September to the August inclusive and an annual forecast for a further 4 years (the "**Forecast**"). In the absence of any Forecast for the applicable 12 month period, the actual traffic volumes of the immediately preceding 12 month period (September to August inclusive) shall be deemed to be submitted as the Forecast.

26. Each Forecast shall show the volume of voice (minutes), data (megabytes) and SMS traffic (SMS messages) expected to be generated by the MVNO's customers per calendar month within the 12 month Forecast and on an annual basis for the remaining 4 years of the forecasting period.

27. Each 12 month Forecast for each type of traffic (voice, data and SMS) shall be non-binding on the MVNO as long as the individual monthly forecasts (for each type of traffic) in any Forecast do not exceed the respective non-binding thresholds of 30 million voice minutes, 150 million MB or 20 million SMS respectively (the "**Maximum Non-Binding Forecast**"). The components of the Maximum Non-Binding Forecast shall at the beginning of each forecasting period be indexed according to the volumes published in the latest available RTR Telekom Monitor for the whole mobile communications market whereby the base value for indexation shall be the latest volumes published in the RTR Telekom Monitor as per 1 January 2013, reflecting market development on voice, data and SMS traffic. The reference date for the indexation of the Maximum Non-Binding Forecast shall be the most recent RTR Telekom Monitor preceding the Forecasting Date. Any forecast for a particular traffic type (voice, data or

SMS) in excess of the relevant Maximum Non-Binding Forecast shall be binding ("**Binding Forecast**"). For the avoidance of doubt, the Binding Forecast shall only refer to the first 12 month period of the Forecast.

28. In addition to the Forecast, the MVNO shall provide H3G with non-binding quarterly update forecasts which shall be taken into account for interim capacity planning purposes.

29. If on the basis of the Binding Forecast H3G envisages the need for investment in capacity upgrades to the H3G Network, H3G shall within 20 business days from receipt of the Forecast notify the MVNO in writing: (a) with its best estimate of the cost of such investment attributable to the MVNO on the basis of the proportion of traffic increase forecast by the MVNO relative to the total forecast increase in capacity required by H3G (for all retail and wholesale customers); and (b) the maximum possible volumes to be handled without the need for such investment. If the MVNO adjusts its Binding Forecast in writing within 10 business days from such notification, the updated Forecast shall be deemed to be the Forecast for the applicable Forecasting Date.

H3G shall provide for the required capacity to handle the forecasted traffic (including Binding Forecasts) on the condition that:

(a) the MVNO acknowledges and accepts that H3G is permitted to manage the traffic in relation to, and selectively for, the MVNO's customers if and to the extent that the actual usage is in excess of 125% of the Forecast and if such excess usage would cause degradation of the quality of the H3G Network; and

(b) if actual usage falls short of 75% of the Binding Forecast and H3G has invested in the capacity upgrade of the H3G Network earlier than necessary for its own forecasted traffic in order to meet volumes in the Binding Forecast, and H3G has duly notified the MVNO, H3G is entitled to charge the MVNO reasonable financing costs for such investment. Provided that the financing costs shall only be payable by the MVNO if: (i) the period is more than 6 months between the actual investment made by H3G to the time the MVNO's actual usage meets 75% of the highest monthly volume in the Binding Forecast or (ii) the period is more than 6 months between the actual investment made by H3G to the time when such investment becomes necessary for H3G's own traffic requirements plus the actual usage of the MVNO. If neither event occurs, and will not foreseeable occur within 5 years from the Forecasting Date, the MVNO shall be responsible for both the financing costs and the investment costs. The amount of the investment costs for this purpose shall be capped at the charges which would have become due and payable for the shortfall between the actual usage and 75% of the Binding Forecast.

G. ACCESS TO AND USE OF MVNO CUSTOMER INFORMATION

30. To the extent that H3G personnel have access to the forecast information provided under Section F above or to data relating to the MVNO's customers, H3G shall ensure that access is limited to persons who require access solely for the purposes described in Section F above (in relation to the forecast information) and paragraph 31 below (in relation to any customer data).

31. H3G and the MVNO shall agree that customer data provided by the MVNO to H3G shall be limited to the minimum necessary for the purposes described below. The

MVNO shall permit H3G to use traffic and location data related to the MVNO customers, and to supply such data to third parties, solely to the extent necessary for the purposes of legal interception, billing, capacity management, traffic management, fraud detection, routing and cell identification and other technical purposes required for the provision of wholesale access to the MVNO or otherwise in order to comply with applicable laws or the directions of a competent authority.

H. NUMBERING

32. The MVNO shall be solely responsible for meeting its numbering requirements under Austria law and H3G shall be under no obligation to manage any part of its numbering requirements.

33. In order to allow proper system configuration and unique user identification by H3G, the MVNO shall provide H3G with (a) the IMSI range to be used by the MVNO's customers on the H3G Network (including any sub-ranges being used by the MVNO's customers) and (b) the MSISDN range to be used by the MVNO's SIMs on the H3G Network.

I. PRIVACY AND DATA PROTECTION

34. H3G and the MVNO shall each comply with relevant data protection and privacy laws with respect to the processing of the MVNO customer data (including traffic and location data).

J. USE OF THE H3G NETWORK

35. The MVNO shall take all reasonable steps to maintain the quality of the H3G Network.

36. The MVNO shall:

    (a) not use the wholesale access services or allow any customer or other third party to use the services for any immoral, obscene, harmful, offensive or unlawful purpose;

    (b) not connect or allow any customer or other third party to connect to the H3G Network any mobile device (whether a handset, USIM or other device) unless the device is compliant with international technical standards;

    (c) provide H3G with information on all planned UE (user equipment) / CPE (customer premises equipment) at least 10 days before the MVNO makes such equipment commercially available;

    (d) not connect or allow any customer or other third party to duplicate MVNO SIM cards (with one and the same IMSI) or manipulate MVNO SIM cards for roaming fraud, premium rate service abuse, SMS spamming/faking, interconnect fraud, subscription fraud or similar fraud and abuse;

    (e) not connect or allow any customer or other third party to connect or continue the connection of any equipment that allows the bypass of interconnect costs through terminating fixed to mobile calls as mobile to mobile calls ("**Gateway**") to the H3G Network without H3G's prior written consent;

(f) monitor activities involving fraud, artificially inflated traffic and any other breaches of security connected with the use of the H3G Network including the unauthorised use of any Gateway, and notify H3G immediately of such activities;

(g) comply with any security requirements in relation to access to the H3G Network and systems, and comply with all reasonable instructions issued by H3G in relation to the use of the wholesale access services;

(h) not make any disparaging remarks about the H3G Network, nor mislead or make any false statements or representations in respect of the H3G Network;

(i) comply with all directions issued by H3G reasonably necessary to assist it in complying with any regulatory requirement;

(j) not use the wholesale access purchased from H3G in conjunction with with services it has acquired from another mobile network operator in Austria (excluding, for the avoidance of doubt, interconnection);

(k) not use the H3G Network to allow a third party to provide mobile communications services in Austria to end customers;

(l) not seek to sell MVNO services to any customer whose residence or place of business is outside Austria; and

(m) not act in a manner which would lead to a lower quality of service and coverage for H3G's customers compared to the customers of the MVNO.

37. H3G may suspend or terminate an MVNO's customer if the customer is using devices or other equipment which is defective or illegal or non-compliant with international technical standards, the customer is causing technical problems on the H3G Network, the customer is suspected of fraudulent or unauthorised use or authentication of the subscription is not possible. Prior to any suspension or termination, H3G will inform the MVNO unless it is not expedient to do so in which case it will inform the MVNO immediately thereafter.

38. H3G may request the MVNO to block a SIM card used contrary to the prohibited uses above and the MVNO shall investigate such request and block the relevant SIM to the extent the MVNO deems it so required, acting reasonably.

39. If either H3G or the MVNO suspects any kind of fraud or abuse which involves the services offered by the MVNO under the wholesale access offer they shall inform each other immediately and co-operate in good faith and use all appropriate means to identify, eliminate and the prevent the fraud or abuse as soon as feasible.

K. INTELLECTUAL PROPERTY AND BRANDING

40. All intellectual property rights which are owned by, or proprietary to, a party shall remain the exclusive property of that party.

41. All intellectual property rights in the H3G marks and the H3G Network shall remain the property of H3G. The MVNO shall not brand or promote its services under the H3G brand.

42. All intellectual property rights in the MVNO marks shall remain the property of the MVNO.

L. COMPLIANCE WITH ALL APPLICABLE LAWS

43. Each party to the MVNO Agreement shall comply with all applicable laws, regulations and rules applicable to its obligations under the MVNO Agreement, including for the avoidance of doubt Austrian telecommunications laws.

M. LIMITATIONS OF LIABILITY AND WARRANTIES

44. Subject to the limitations set out in the MVNO Agreement, the liability of the parties shall be governed by Austrian law. The parties shall only be liable for damages caused by intentional misconduct ("Vorsatz") or gross negligence ("grobe Fahrlässigkeit"). Liability for negligence shall to the extent legally permitted be excluded. Neither party will be liable to the other, whether for negligence, breach of contract, misrepresentation or otherwise for loss of profit or revenue, or indirect loss/damage or consequential loss/damage suffered by the other party whether or not foreseeable.

45. The MVNO Agreement shall contain standard representations and warranties regarding the capacity and authority to enter into the Agreement, the holding of all necessary permits, registrations, filings and licences and the compliance with applicable laws.

N. TERM AND TERMINATION

46. The term of the MVNO Agreement will be for an initial term of 3 years, with a right for the MVNO to extend the term up to a date no later than the date 10 years from [***insert the Effective Date***]. Provided that the term of any MVNO Agreement entered into in 2022 shall not exceed a period of 2 years unless otherwise agreed between the parties.

47. Each party will have the right to terminate the MVNO Agreement for material breach, insolvency events and force majeure. It will be deemed to be a material breach if the MVNO is 2 months or more late in paying any invoice.

48. H3G shall have a right to terminate the MVNO Agreement if (a) the MVNO is acquired (directly or indirectly) by another MNO in Austria or (b) the MVNO holds spectrum frequency licence(s) with respect to which it has achieved outdoor coverage exceeding 10% of the Austria population or (c) the MVNO holds spectrum frequency licence(s) which contain outdoor coverage obligations exceeding 10% of the Austrian population. For this purpose, population coverage is defined in the same manner as used in the coverage obligations contained in the existing spectrum licences for the respective spectrum in Austria or if there is no defined method, then in the same manner as set out in the Telekom-Control Commission's decision of 20 November 2000, K 15e/00 (schedule IV, § 9).

49. On termination of the MVNO Agreement, H3G will use reasonable endeavours to assist the MVNO to port or migrate its customers to the network of another mobile network operator, provided that any costs related to such migration shall be borne by the MVNO. If H3G exercises its right to terminate as contemplated in Sections N 48(b) and (c) above, H3G will continue to provide the MVNO with the wholesale access services that it is providing as at the date of termination, and until such time as the MVNO's customers are ported or migrated to the network of another mobile net-

work operator or its own network, up to a maximum period of twelve (12) months from the date of termination. The terms and conditions of the MVNO Agreement will continue to apply to the provision of such services during this post-termination period. For the avoidance of doubt H3G's obligations in Section A 3 would not apply during the such period.

O. GOVERNING LAW AND JURISDICTION

50. The MVNO agreement shall be governed by the laws of Austria.

51. The competent court in Vienna, Austria, shall have sole and exclusive jurisdiction over any disputes between the parties arising in connection with the execution of the MVNO Agreement.

APPENDIX A: CHARGES

1. H3G shall charge the MVNO for each Transaction Type submitted over the H3G Network by, or to, an MVNO Customer, calculated in accordance with the terms and conditions set out in this Appendix.

2. With respect to each Year of the MVNO Agreement (and subject to paragraph 8 below):

   (a) the Base Rates shall apply to all Transactions paid for in that Year up to (and including) the Discount Threshold for that Year;

   (b) the Discount Rates shall apply to all Transactions paid for in that Year in excess of the Discount Threshold up to (and including) the Discount Ceiling for that Year; and

   (c) thereafter, the Base Rates shall apply to all Transactions paid for in that Year in excess of the Discount Ceiling.

3. There are two pricing options available to the MVNO with respect to packet switched data Transactions: (i) fixed unit pricing (as set out in Tables 3 and 7 below, as applicable) or (ii) tiered pricing (as set out in Tables 4 and 8 below, as applicable). The MVNO must elect the charging option it wishes to be applied at the time it first enters into an MVNO Agreement. The additional retail minus pricing option set out in paragraph 19 below may be elected by the MVNO from time to time during the term of the MVNO Agreement, subject to the terms and conditions set out therein.

4. For the purposes of this Appendix, the following capitalised words have the following meanings:

   (a) **Base Rates:** mean the rates set out in Tables 1 to 4 in paragraph 5 below;

   (b) **Discount Ceilings**: mean the figures set out in column 3 of Table 9 in paragraph 7 below;

   (c) **Discount Rates**: mean the rates set out in Tables 5 to 8 in paragraph 6 below;

   (d) **Discount Thresholds**: means the figures set out in column 2 of Table 9 in paragraph 7 below;

   (e) **Transaction**: means (i) mobile originated or terminated circuit switched traffic (i.e. voice, fax, video and circuit switched data) (ii) mobile originated or terminated SMS (iii) or packet switched data (each being a "**Transaction Type**"); and

   (f) **Year**: means the applicable 12 month period, with Year 1 being the 12 month period starting from the date of the commercial launch by the MVNO of retail services in Austria over the H3G Network and Years 2 onwards being construed accordingly.

5. The Base Rates are:

Table 1: Circuit Switched

Transaction Type	Billing Unit	Charge Rate per Minute (€)	Charge Rate per Second (€)
Mobile originated or terminated circuit switched (i.e. voice, video, fax and circuit switched data) incl. calls made to emergency numbers (112 etc.)	1 Second	0.01	0.000167

Table 2: SMS

Transaction Type	Billing Unit	Charge Rate (€)
Mobile originated or terminated SMS	1 SMS	0.004

Table 3: Packet Switched Data - Fixed Unit Pricing

Transaction Type	Billing Unit	Charge Rate per MB (€)**
Data (inclu. MMS) up to 30 Mbit/sec*	1 kilobyte (rounded to the nearest kilobyte)	0.002

**For services using UMTS, HSPA, HSDPA and LTE technologies, as well as GSM and GPRS technologies to the extent available under the H3G 2G & 2.5G roaming arrangements.*

***The wholesale charge rate for higher speed data services will be calculated in accordance with paragraph 18 below.*

Table 4: Packet Switched Data - Tiered Pricing

Transaction Type	Billing Unit	Volume Tier (MB)		Per MB Charge Rate (€)**
		From	To	
Data (inclu. MMS) up to 30 Mbit/sec*	1 kilobyte (rounded to the nearest KB)	0	< 30	0.015
		30	< 200	0.004
		200	< 1000	0.003
		1000	< 5000	0.0016
		5000	Upward	0.0011

**For services using UMTS, HSPA, HSDPA and LTE technologies, as well as GSM and GPRS technologies to the extent available under the H3G 2G & 2.5G roaming arrangements.*

***The wholesale charge rates for higher speed data services will be calculated in accordance with paragraph 18 below.*

6. The Discount Rates are:

Table 5: Circuit Switched

Transaction Type	Billing Unit	Charge Rate per Minute (€)	Charge Rate per Second (€)
Mobile originated or terminated circuit switched (i.e. voice, video, fax and circuit switched data) incl. calls made to emergency numbers (112 etc.)	1 Second	0.0085	0.0001416

Table 6: SMS

Transaction Type	Billing Unit	Charge Rate (€)
Mobile originated or terminated SMS	1 SMS	0.0034

Table 7: Packet Switched Data - Fixed Unit Pricing

Transaction Type	Billing Unit	Charge Rate per MB (€)**
Data (inclu. MMS) up to 30 Mbit/sec*	1 kilobyte (rounded to the nearest kilobyte)	0.0017

**For services using UMTS, HSPA, HSDPA and LTE technologies, as well as GSM and GPRS technologies to the extent available under the H3G 2G & 2.5G roaming arrangements.*

***The wholesale charge rate for higher speed data services will be calculated in accordance with paragraph 18 below.*

Table 8: Packet Switched Data - Tiered Pricing

Transaction Type	Billing Unit	Volume Tier (MB)		Per MB Charge Rate (€)**
		From	To	
Data (inclu. MMS) up to 30 Mbit/sec*	1 kilobyte (rounded to the nearest KB)	0	< 30	0.01275
		30	< 200	0.0034
		200	< 1000	0.00255
		1000	< 5000	0.00136
		5000	Upward	0.000935

**For services using UMTS, HSPA, HSDPA and LTE technologies, as well as GSM and GPRS technologies to the extent available under the H3G 2G & 2.5G roaming arrangements.*

***The wholesale charge rates for higher speed data services will be calculated in accordance with paragraph 18 below.*

7. The Discount Thresholds and Discount Ceilings are:

Table 9: Discount Thresholds and Discount Ceilings

Year	Discount Threshold (€)	Discount Ceiling (€)
Year 1	1,700,000	2,720,000
Year 2	5,000,000	8,000,000
Year 3	7,000,000	11,200,000
Year 4	9,000,000	14,400,000

8. The Discount Thresholds and Discount Ceilings are based on the total amounts (in Euros) paid by the MVNO to H3G for the wholesale access services specified in section A1(a) of the Reference Offer in the relevant Year (excluding units purchased in accordance with the retail minus pricing in paragraph 18 below).

9. If an MVNO Agreement continues or is extended for more than 4 years, H3G will negotiate in good faith with the MVNO to agree (before the end of Year 4) the Discount Thresholds and Discount Ceilings for the Years in the remainder of the term of the MVNO Agreement which shall not exceed a period of more than 10 years from [*insert Effective Date*]. If the parties cannot agree on new thresholds, the following Discount Thresholds and Discount Ceilings shall apply:

Table 10: Discount Thresholds and Discount Ceilings

Year	Discount Threshold (€)	Discount Ceiling (€)
Year 5	11,000,000	17,600,000
Year 6	12,500,000	20,000,000
Year 7	14,000,000	22,400,000
Year 8	15,000,000	24,000,000
Year 9	16,000,000	25,600,000
Year 10	16,500,000	26,400,000
Year 11	17,000,000	27,200,000
Year 12	17,500,000	28,000,000

Charging Principles Applicable to Circuit Switched Transactions

10. H3G shall charge the MVNO for each circuit switched transaction (originating and terminating) submitted over the H3G Network by, or to, an MVNO customer.

11. The charge for each circuit switched transaction shall be calculated by multiplying the applicable rate per second by the call duration. The call duration for each transaction is the number of seconds from the time the call is answered until it is terminated. If the duration of the call is a fraction of a second, it shall be rounded up or down as the case may be (>=0.5 rounded to 1.0 and <0.5 rounded to 0.0).

12. A circuit switched transaction sent by one MVNO customer to another customer of the same MVNO shall be charged as a single transaction.

Charging Principles Applicable to SMS Transactions

13. H3G shall charge the MVNO for each SMS message (originating and terminating) submitted over the H3G Network by, or to, an MVNO customer, even if the SMS is not successfully received by the recipient.

14. An SMS sent by one MVNO customer to another customer of the same MVNO is charged as a single SMS.

15. There is no charge for an SMS delivery report.

Charging Principles Applicable to Packet Switched Data Transactions

16. If an MVNO has elected the tiered pricing option for packet switched data Transactions, H3G shall charge the MVNO on a per SIM basis, calculated by multiplying the volume of data used by that SIM in the relevant calendar month (rounded to the nearest KB) by the applicable charge rate. The applicable charge rate is the rate which corresponds to the volume tier (MB) in which that SIM's monthly data volume falls.

17. H3G shall charge the MVNO for each MMS message (originating and terminating) submitted over the H3G Network by, or to, an MVNO customer, even if the MMS is not successfully received by the recipient as a packet switched data transaction.

18. With respect to the wholesale charge rates for higher speed data services (not less than 30 Mbit/s), the rates in tables 3, 4, 7 and 8 will apply to the data service offered by H3G from time to time to its retail customers which has the second highest data throughput speed ("Standard Data Service"). If H3G charges a premium to its retail customers for directly comparable data-only services at a higher speed ("Premium Data Service"), then the wholesale charge rate for the comparable wholesale Premium Data Service provided by H3G to the MVNO will be charged at a premium which will be equivalent to the ratio of H3G's retail price for the Premium Data Service and the Standard Data Service. For example, if the 'up to 100 Mbps' flat rate service is offered by H3G to its retail customers at €49 per month and the second fastest comparable product ('up to 30 Mbps') is charged at €24 per month then a premium of 204% will be applied to the wholesale charge rates in tables 3, 4, 7 and 8 (both the fixed unit pricing and tiered pricing) for the wholesale data service using 'up to 100 Mbps.'

Additional Retail Minus Pricing Option for Packet Switched Data Transactions

19. The MVNO may elect a retail tariff which is offered by H3G to which retail minus pricing will be applied, whatever the mobile network technology being used by H3G to deliver the service to its customers from time to time (UMTS, HSPA, HSDPA and LTE, as well as GSM and GPRS to the extent available under the H3G 2G and 2.5G roaming arrangements). Retail minus pricing shall only be available for data access SIM-only services (and shall not be available for other products or market developments such as NFC offerings, handset subsidies or content offerings). In this case, H3G shall charge the MVNO for packet switched data Transactions at a 25% discount on the retail price H3G charges its own customers under the relevant tariff. To ensure accurate wholesale billing, the flat rated IMSIs of the MVNO will be separately identified. The election of retail minus pricing does not prevent the MVNO offering retail tariffs to its customers based on the Base Rates or Discount Rates, as applicable. However, in relation to the same customer, the MVNO may only apply either retail minus pricing or per unit pricing (whether the Base Rates or the Discount Rates). Units purchased in accordance with the retail pricing are not counted towards the Discount Thresholds and Discount Ceilings above.

ANNEX IV

F 1/12

Beschluss der Telekom-Control-Kommission (TKK) vom 22.10.2012 betreffend Förderung eines Neueinsteigers in Zusammenhang mit der Übernahme von Orange durch H3G

Wird die Übernahme von Orange durch H3G genehmigt, würden aus Sicht der TKK folgende Maßnahmen zur Stärkung des Wettbewerbs ergriffen werden:

- Die TKK ist – vorbehaltlich der notwendigen Zustimmungen des BMVIT - unter den nachfolgend angeführten Selbstverpflichtungen der H3G bereit, Spektrum im Bereich 800 MHz für einen etwaigen Neueinsteiger im Rahmen der Vergabe des Jahres 2013 (große Auktion) bereitzuhalten bzw. zu reservieren. Ziel der TKK ist es dabei, einem Neueinsteiger durch die Kombination von zur Auktion gelangendem Flächenspektrum in Verbindung mit Kapazitätsspektrum der H3G und nach Maßgabe der unten genannten weiteren Bedingungen, den Markteintritt zu ermöglichen. Folgende Voraussetzungen sind aus Sicht der TKK erforderlich:

  - Seitens der TKK wird 800 MHz Spektrum für einen erfolgreichen Neueinsteiger nur dann reserviert, wenn die Kopplung mit abzugebenden 2,6 GHz Spektrum sichergestellt ist.
  - Die Selbstverpflichtung zur Abgabe von Frequenzen (mind. 2 x 10 MHz im 2,6 GHz Bereich), in einer ersten Phase ggf. durch direkten Verkauf der H3G an ein drittes, wettbewerblich von bestehenden österreichischen MNOs unabhängiges Unternehmen, das die Voraussetzungen für die Teilnahme an der Auktion erfüllt und sich verpflichtet aktiv an der Frequenzauktion teilzunehmen.
  - Eine Selbstverpflichtung zur Abgabe von für eigene Zwecke nicht benötigten Standorten bzw. die bevorzugte Ermöglichung von Kollokation an/für den Neueinsteiger (einschließlich der Anbindung der abgegebenen Standorte) nach dessen Wahl.
  - Eine Selbstverpflichtung zum Angebot von National Roaming Diensten für den Neueinsteiger, für die Dauer von 6 Jahren, zu Konditionen wie sie dem vorliegenden MVNO-Angebot entsprechen, allerdings ohne die gegebene Einschränkung hinsichtlich Pop-Coverage eines MNOs.

- Die TKK stellt sicher, dass, wenn kein Neueinsteiger aus dem Verkauf und der damit verbundenen Vergabe von Spektrum hervorgeht, die oben

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genannten Frequenzen im 2,6 GHz Bereich bei der H3G bleiben da die Nutzungsrechte auch formal nicht an die TKK zurückfallen.

- Die TKK würde für einen Neueinsteiger langfristig vergleichbare Versorgungsauflagen für alle Frequenzbänder vorsehen, die zur Vergabe gelangen. Längerfristig sollen für alle Betreiber analoge Versorgungsverpflichtungen gelten. Mit dieser Regelung beabsichtigt die TKK einerseits dem Umstand Rechnung zu tragen, dass der Neueinsteiger einen entsprechenden roll-out vornimmt und andererseits auch dem Wachstumspfad eines Neueinsteigers entsprochen wird.

Wien, am 22.10.2012

Die Vorsitzende

Dr. Elfriede Solé