

***Case No COMP/M.5650 -
T-MOBILE/ ORANGE***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) in conjunction with Art 6(2)
Date: 01/03/2010

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EUROPEAN COMMISSION

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MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION IN
CONJUNCTION WITH
ARTICLE 6(2)

PUBLIC VERSION

To the notifying parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.5650 – T-MOBILE/ ORANGE
Notification of 11/01/2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 11 January 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("EC Merger Regulation") by which the undertakings France Télécom ("FT") and Deutsche Telekom ("DT") (together "the parties"), acquire within the meaning of Article 3(1)(b) of the EC Merger Regulation joint control of a newly created company constituting a joint venture ("JV"), by contributing to the JV their subsidiaries Orange UK ("Orange") and T-Mobile UK ("T-Mobile"), respectively.
2. At a state of play meeting with the parties on 29 January 2010, the Commission initially raised serious doubts as to the compatibility of the transaction with the common market.
3. On 8 February 2010, the parties submitted undertakings, which were subsequently amended on 10 February 2010. The Commission carried out a market test of the proposed remedies and communicated to the parties on 18 February 2010 the outcome of the test. On 24 February 2010, the parties submitted the final text of amended commitments. The commitments were designed to eliminate the serious doubts

¹ OJ L 24, 29.1.2004 p. 1.

identified by the Commission, in accordance with Article 6(2) of the EC Merger Regulation. After assessing the proposed transaction and in light of these undertakings, the Commission has concluded that the proposed transaction falls within the scope of the EC Merger Regulation and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

4. FT is the French incumbent telecommunications operator. It provides a large range of electronic communications services to all customer segments, including public fixed-line voice, leased lines and data transmission services, telecommunications equipment sales and rentals, television broadcasting and information services. Through its wholly-owned subsidiary Orange S.A., FT also provides a whole range of mobile telecommunications services (including 3G services) in several European countries under the brand "Orange".
5. Orange is a Mobile Network Operator ("MNO") wholly-owned by FT. It provides mobile communication services in the United Kingdom ("UK") and, to a lesser extent, broadband internet access services on a fixed network.
6. DT is the German incumbent telecommunications operator. It provides integrated telecommunications and information technology services and has activities worldwide in fifty countries. DT offers three customer brands under the global umbrella brand "T", including T-Mobile.
7. T-Mobile is a MNO wholly-owned by DT. It provides mobile communication services in the UK.

II. THE CONCENTRATION

8. The proposed transaction consists in the formation of a JV between T-Mobile and Orange. Upon completion of the proposed transaction, FT and DT will each hold 50% of the share capital of the JV. The JV will encompass the mobile businesses of T-Mobile and Orange as well as the fixed broadband business of Orange.
9. The board of the JV will be constituted by 6 members, 3 for FT and 3 for DT, while the Chairman will be alternatively from FT and DT with a rotation period of 2 years. Board decisions will normally be taken by simple majority. All strategic decisions, such as the approval of the business plan and the annual budget, will require the positive vote of all the present DT and FT directors. In case of deadlock, an escalation procedure is established, [...]. Accordingly, FT and DT will exercise joint control over the joint venture.
10. The JV will combine the activities of the already existing T-Mobile and Orange, which consist in providing mobile voice and data communication services in the UK, as well as the fixed broadband business currently held by Orange. Accordingly, the joint venture is a full-function JV venture performing on a lasting basis all the functions of an autonomous economic entity.
11. The transaction constitutes therefore a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation.

III. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate worldwide turnover for the year 2008 of more than EUR 5 000 million² (FT: EUR 53 480 million, DT: EUR 61 700 million). Each of FT and DT has a Community-wide turnover for the year 2008 in excess of EUR 250 million (FT: EUR [...] million, DT: EUR [...] million), without achieving more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
13. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the EC Merger Regulation.

IV. REFERRAL REQUEST

14. On 3 February 2010, the United Kingdom's Office of Fair Trading ("OFT") requested, on the basis of Article 9(2)(a) of the EC Merger Regulation, a partial referral of the proposed transaction from the Commission to the OFT in relation to the parts of the case concerning the UK mobile communications markets, with a view to assessing it under UK competition law (the "Referral Request").
15. In the Referral Request, the OFT asserted that the proposed transaction threatened to significantly affect competition in UK mobile communications markets, which present all the characteristics of distinct markets in accordance with Article 9(2)(a). According to OFT's preliminary assessment, the proposed transaction threatened to affect competition in two ways.
16. The OFT's first concern related to the ability of Hutchison 3G ("3UK") to continue to compete in the UK mobile communication market. 3UK has concluded an infrastructure sharing agreement (radio access network ("RAN")³ sharing agreement) with T-Mobile. This agreement is essential for the two companies (at least before the merger) to build a complete 3G network with national coverage and significant cost-savings. The OFT was concerned that the parties might have the incentive and ability to foreclose or marginalize 3UK. This would result in a risk that 3UK could be significantly weakened as a competitor or exit the UK mobile market. This would effectively reduce the vertically integrated competitors from five to three and could cause significant detriment to competition in mobile retail communication.
17. Secondly, the OFT was concerned about the concentration of spectrum on the 1800MHz band that the parties will jointly hold after the creation of the JV. This could affect the future offering of services over the new, fourth generation (4G) full

² Turnover calculated in accordance with Article 5(1) of the EC Merger Regulation and the Commission Consolidated Jurisdictional Notice of 10 July 2007, OJ C 95, 16.4.2008, p. 1–48.

³ The RAN is the part of the mobile network that enables mobile devices to operate. Mobile devices are two-way radios which convert voice and data signals into radio waves. Radio base stations enable these signals to be sent to and from mobile devices. The RAN includes mast/antenna sites, site support cabinets (SSC) and power supply, as well as antennas, combiners and transmission links, Nodes B, namely the base stations that receive and send data across frequencies and control a particular network cell, and the radio network controllers (RNCs) that each control a number of such Nodes B and that are linked to the core network.

speed national Long Term Evolution network ("LTE")⁴. As the amount and type of spectrum held by an MNO dictates its ability to launch an LTE net and the speed of that LTE network, the JV might result in just one mobile network operator offering this type of services in the UK, thereby resulting in a significant impediment to effective competition in mobile broadband and higher prices for consumers.

18. On 1 March 2010, in the light of the commitments of the parties, the OFT withdrew its Referral Request.

V. RELEVANT MARKETS

19. The activities of T-Mobile and Orange overlap in the markets for (i) mobile telecommunication services to end customers; (ii) wholesale access and call origination on public mobile telephone networks; (iii) wholesale market for international roaming and (iv) wholesale call termination on mobile networks.

Mobile Telecommunication Services to End Customers

Relevant Product Market

20. 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 networks). The Commission therefore assessed the previous cases on the basis of a single market for the provision of mobile telecommunications services to end customers.⁵ The parties concur with this assessment.
21. The market investigation confirmed that this approach is also appropriate in this case. As far as distinguishing by type of customer is concerned, the respondents to the market investigation indicated that normally customer classification might involve a distinction between private and business customers and that tariff plans are different for pre-paid and post-paid. However, although business customers are considered "heavy users" as opposed to private customers who use mobile communication more scarcely, the service offered is substantially the same as the one offered to private customers⁶. As for the distinction between pre-paid and post-paid, although the type

⁴ LTE is also referred to as the fourth generation of cellular wireless standards. It is a successor to [3G](#) and [2G](#) standards which will allow [ultra-broadband](#) internet access to mobile as well as stationary users. This technological development is relevant in view of the steep increase of data traffic demand expected in the coming years, which is closely related to the large success of "smartphones".

⁵ See Commission decision of 16 September 2003 in Case COMP/ M.3245 *Vodafone/Singlepoint*; Commission decision of 24 September 2004 in Case COMP/ M.3530 *TeliaSonera/Orange*; Commission decision of 26 April 2006 in Case COMP/ M.3916 *T-Mobile Austria / Tele.ring*; Commission decision of 7 November 2007 in Case COMP/ M. 4947 – *Vodafone/Tele2 Italy/ Tele2 Spain*.

⁶ For instance, one competitor of the parties submitted that "*Even though it may be possible to identify different market segments (such as corporate, small business, personal) these are not reliable because business people routinely place personal calls on their mobiles and individuals who subscribe personally for mobile services often use mobiles for business, and the purchase of the mobile services is often motivated by both purposes. Even the range of services offered to business customers and residential customers are similar.*"

of contracts have differentiated characteristics, the market investigation indicated that the distinction between the two segments is becoming blurred, because of the development of different types of offers.⁷

22. Voice communications and data services, such as text messaging, access to e-mail services or general Internet access, can be provided on 2G or 3G networks. However, in the case of general Internet access, 2G networks provide a much lower speed. Other services require the faster transmission speed which only a 3G network can provide (video communication, mobile TV or other multimedia services). A network operator can provide to its customer access to voice communication and text messaging services indifferently on a 2G or a 3G network. On the other hand, only 3G networks provide greater network capacity which allows operators to provide more advanced, data intensive services.
23. The market investigation aimed at verifying whether the services offered on the two types of networks belong to separate markets. The majority of the respondents indicated that, although some MVNOs (Mobile Virtual Network Operators)⁸ tend to offer only voice/text messages, the borders between the two types of service are blurred and the larger part of the offers in the market generally includes both data and voice. Furthermore, the mobile communications market is facing an increasing demand for data services⁹, which are normally coupled with effective voice communication and good coverage.
24. Therefore, for the purpose of this decision, the Commission considers that there is a single market for the provision of mobile communication services to end customers, in so far as they can be provided on both a 2G and a 3G basis.

Relevant Geographic Market

25. In accordance with previous Commission decisions¹⁰, the parties suggest that the geographic market should be defined in national terms, i.e. restricted to the UK.
26. The market investigation confirmed this assessment.

Wholesale Access and Call Origination on Public Mobile Telephone Networks

⁷ For instance, two MVNOs submitted that "*Originally [...] there was a clear distinction between pre paid and post paid offerings. However, this line is now blurred with offerings such as 30 day and SIM only packages*" and that "*over the last two years, the distinction between pre-pay and post-pay has become blurred, with the introduction of SIM-only 1-month rolling contracts on post-pay, and large inclusive bundles whenever you top-up on pre-pay*".

⁸ MVNOs are mobile communications operators that do not own an infrastructure network and purchase access and call origination at wholesale level from operators that own the infrastructure.

⁹ For instance, one respondent highlighted the relevance of the introduction of smartphones, which provides a wide variety of data-intensive applications.

¹⁰ See for example Commission decision of 26 April 2006 in Case COMP/ M.3916 *T-Mobile Austria / Tele.ring*; Commission decision of 20 August 2007 in Case COMP/ M. 4748 *T-Mobile/Orange Netherlands*.

Relevant Product Market

27. Network access and call origination have been considered in previous Commission decisions as part of the same market.¹¹
28. Network access and call origination are key elements required to provide retail mobile communication services. These elements are typically supplied together by a Mobile Network Operator (MNO), hence both services can be considered as part of the same market. MNOs own their mobile networks and constitute the supply side, whereas MVNOs and Service Providers which seek access to one or more of the MNO networks in order to provide their retail services, constitute the demand side of this market.
29. Service Providers either distribute SIM cards on behalf of the relevant MNO or issue their own SIM cards and provide services under their own brand. On the other hand, "full" MVNOs issue their own SIM cards and, in addition, own part of their network (e.g. switching or backbone) and therefore depend to a lesser extent on the network of the "host" operator.
30. In any event, the assessment in the present case would not change irrespective of the market definition for the wholesale access and call origination on public mobile phone networks

Relevant Geographic Market

31. The geographic scope of the product market for wholesale access and call origination on public mobile telephone networks is national¹². This is due to regulatory barriers as 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. 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, i.e. the UK in the present case.

Wholesale market for international roaming

Relevant Product Market

32. 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, mobile network operators conclude wholesale agreements with one another providing access and capacity on mobile networks in the foreign country.
33. 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.

¹¹ See for example COMP/M.4947 - Vodafone / Tele2 Italy / Tele2 Spain, para 13.

¹² See for example COMP/M.4947 - Vodafone / Tele2 Italy / Tele2 Spain.

34. 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.

Relevant Geographic Market

35. As in previous decisions¹³, the Commission regards the market as national in scope. This analysis is based 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 national territory.

Wholesale market for mobile and fixed call termination

Relevant Product Market

36. 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 communication services to end customers.
37. As established in previous Commission decisions¹⁴, 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 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.¹⁵

Relevant Geographic Market

38. Geographic markets for call termination in mobile (and fixed) networks tend to be national¹⁶ since they correspond to the geographic dimension of the network which in general is limited to national borders. This is essentially owing to regulatory barriers as the geographical scope of licences is in principle limited to areas which do not extend beyond the borders of a Member State.

¹³ See, for example cases COMP/ M.2726 – KPN/E-PLUS, COMP / M.2469 – Vodafone / Airtel, COMP / M.1863 – Vodafone / BT/ Airtel, COMP / M.2803 – Telia / Sonera and Comp / M.3806 – Telefónica / Cesky Telecom See also cases COMP/M.4748 *T-Mobile/Orange Netherlands*, COMP/M.4034 . *Telenor/Vodafone Sverige* and COMP/M.5148 – *Deutsche Telekom / OTE*.

¹⁴ See Commission decision COMP / M.1493 – *Telia / Telenor*, COMP / M.2803 *Telia / Sonera* and COMP / M.3806 – *Téléfonica / Cesky*. See also Revised Commission Recommendation of 17 December 2007 referring to wholesale voice call termination on individual mobile networks.

¹⁵ See Commission decision of 10 January 2006 in Case COMP / M.4035 – *Téléfonica / O2*, par. 9 et seq; COMP / M. 4947 – *Vodafone / Tele2 Italy / Tele2 Spain*, par. 13; Revised Recommendation, p.24.

¹⁶ See case COMP/M.4748 - *T-Mobile/Orange Netherlands*, COMP/M.4947 *Vodafone/Tele2 Italy/Tele2 Spain* and COMP/M.5148 – *Deutsche Telekom / OTE*.

VI. ASSESSMENT

39. The Commission analysed the markets for retail and wholesale mobile communication in the UK, the wholesale market for international roaming in the UK, the call termination market on mobile networks in the UK and a number of retail and wholesale mobile markets outside the UK which are vertically connected to the UK wholesale international roaming market.
40. In relation to the markets for retail and wholesale mobile communication in the UK, the Commission considered *prima facie* that the proposed transaction raised serious doubts as to its compatibility with the common market in relation to two aspects: the uncertain future of the network sharing agreement currently in place between T-Mobile and 3UK and the concentration of spectrum at 1800MHz in relation to the future development of LTE networks in the UK. Since these aspects affect both the retail and wholesale levels only indirectly, they are discussed below separately.

(1) Retail market for the provision of mobile telecommunications services to end-consumers

Market structure and characteristics

41. There are five MNOs on the UK retail mobile communication market, namely O2, Vodafone, Orange, T-Mobile and 3UK. 3UK has a pure 3G network; the other four networks are 2G and 3G capable. Since 3UK does not operate a 2G/GSM network, 3UK provides 2G services through its national roaming arrangements with Orange. Although it is possible to provide voice services over a 3G network, coverage of 2G networks is more extensive than 3G networks.¹⁷ The UK mobile communication market is further characterised by the presence of more than 25 MVNOs. The penetration rate¹⁸ of the UK mobile communication market is more than 125%.¹⁹
42. The parties submitted the following information about the market structure:

¹⁷ In the UK the 2G network cover 99 % of the population, while 3G network have a 92% population coverage. Certain areas in the UK are more affected by the lack of 3G coverage (e.g. Scotland, Wales, Northern Ireland, south west of England).

¹⁸ Mobile phone penetration rate describes the number of active mobile phone subscriptions (expressed as a percentage) within a specific population.

¹⁹ Source: OFCOM: Mostly mobile, OFCOM's mobile sector assessment. Penetration in 2008 based on 8+ population. In many EU countries the mobile penetration rate is above 100%. This reflects a trend that many users to buy second or third subscriptions.

Mobile communication market shares (based on the number of subscribers)

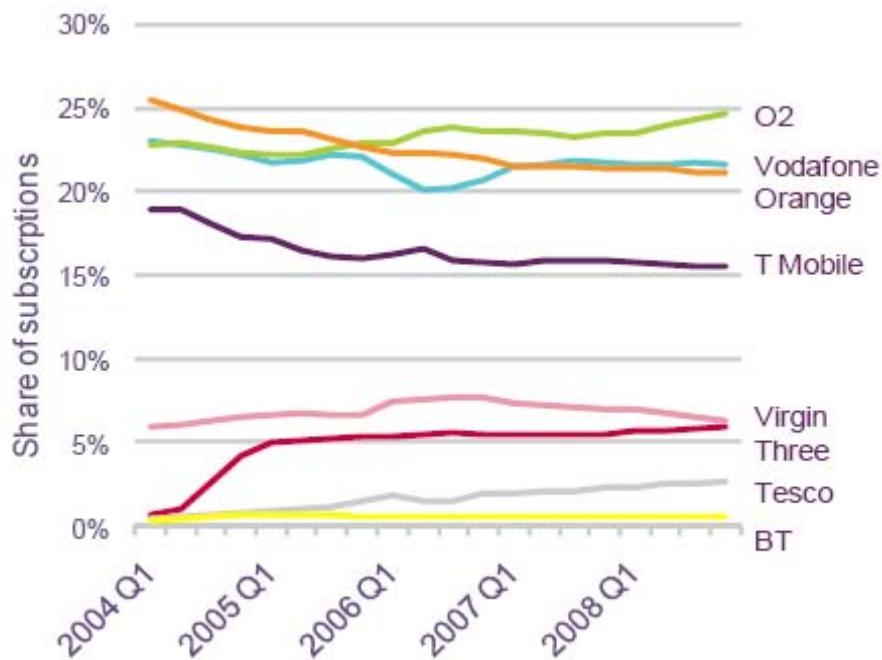
Operator / Service Provider	2009 1 st half		2008		2007	
	Number of Customers (in mn)	Market Share	Number of Customers	Market Share	Number of Customers	Market Share
O2	[....]	[20-30]%	[....]	[20-30]%	[....]	[20-30]%
Vodafone	[....]	[20-30]%	[....]	[20-30]%	[....]	[20-30]%
Orange	[....]	[10-20]%	[....]	[20-30]%	[....]	[20-30]%
T-Mobile	[....]	[10-20]%	[....]	[10-20]%	[....]	[10-20]%
3UK	[....]	[5-10]%	[....]	[5-10]%	[....]	[5-10]%
Virgin	[....]	[0-5]%	[....]	[0-5]%	[....]	[5-10]%
Tesco Mobile	[....]	[0-5]%	[....]	[0-5]%	[....]	[0-5]%
BT Mobile	[....]	[0-5]%	[....]	[0-5]%	[....]	[0-5]%
Lycamobile	[....]	[0-5]%	[....]	[0-5]%	[....]	[0-5]%
Lebara Mobile	[....]	[0-5]%	[....]	[0-5]%	[....]	[0-5]%
Others	[....]	[0-5]%	[....]	[0-5]%	[....]	[0-5]%
TOTAL	[....]	100%	[....]	100%	[....]	100%

Source: Exhibit 44 of Notification. Overall market shares, including private and business, post-paid and pre-paid customers.

43. Following the proposed transaction, the parties' combined market share at the retail level in terms of number of subscriptions would be approximately [20-30]%. The JV would thus have the largest share, followed by O2 having a market share of around [20-30]%, Vodafone of [20-30]% and 3UK of [5-10]%. The market share of the MVNOs on the basis of subscriptions is around [10-20]%, with Virgin being the largest with [0-5]%, followed by Tesco, Lebara and a number of other smaller MVNOs.
44. On the basis of revenues, the parties submitted that O2 had a [20-30]% market share in the first half of 2009, ahead of Vodafone ([10-20]%), Orange ([10-20]%), T-Mobile ([10-20]%) and 3UK ([0-5]%). Therefore the parties' combined market share in terms of revenues post-transaction would be approximately [20-30]%. The market share of MVNOs, also based on revenues, accounts for [10-20]²⁰.
45. According to OFCOM (the UK communications regulator), the retail market share trends (by subscriptions) were as follows:

²⁰ Source: Exhibit 45 to the Form CO.

Mobile providers' retail market shares 2004-2008²¹



46. In the UK mobile retail market, MVNOs play a significant role. Launched in 1999, Virgin is the largest MVNO with about [...] customers. Tesco Mobile (using the O2 network), is the UK's second largest MVNO and it achieved nearly [...] mobile connections by the end of 2008. A significant proportion of MVNOs offer low-cost international calls to customers from ethnic and immigrant groups. Lebara Mobile, operating since 2007 as an MVNO in the UK, achieved over [...] million total acquired subscribers by May 2009. MVNOs not only compete on price and consumer service with their host networks but they also stimulate competition by introducing innovative business models.
47. Available data shows that prices have been falling on a year-on-year basis for a basket of mobile services.

Real cost of a basket of mobile services

Source: OFCOM



²¹ In this graph 3UK is referred to as "Three".

48. Service and price innovations continue to take place in the UK mobile sector. Following the introduction of pay-as-you go (pre-paid) tariffs, in 2007 there has been further pricing innovation with the introduction of SIM-only tariffs with shorter duration contracts (typically 30 days).
49. Pricing and service innovations have often been led by smaller players. A good example is 3UK which was the first to introduce a low cost, flat-rate mobile broadband package. 3UK continues to maintain its price leadership position in mobile broadband services: it offers the cheapest mobile broadband data package in the market (measured in terms of pricing by MB²²). 3UK has promoted new services such as Skype (including integrating Skype's mobile VoIP services²³ into a dedicated handset). It was also the first UK operator to introduce new products such as mobile broadband dongles²⁴ aimed at a mass-market audience.
50. The profitability of the four big MNOs has decreased since 2003. Latest figures show that total revenue fell by 5.1% across the UK's four largest operators between Q3 2008 and Q3 2009.²⁵ UK mobile operators' profit margins are consistently lower than the margins of mobile operators in comparable international markets²⁶.
51. The UK retail mobile market is further characterized by a high level of switching by customers (with or without porting the existing phone number to the new network)²⁷ between different mobile service providers. In 2007/08, 12% of consumers had switched mobile service provider, and a further 14% were considering switching. The above data indicates that the rate of switching is relatively high and attitudes towards switching are positive.
52. In the UK retail mobile market there is large number and variety of distribution channels. Besides the retail stores owned by the MNOs/MVNOs, there are indirect distribution channels, for example independent specialists such as Carphone Warehouse and Phones 4U. In addition, end-customers could turn to generalist stores, such as Comet, Tesco and Argos, as well as internet-only retailers.
53. In the course of the market investigation the Commission verified that the UK retail mobile market is characterized by the strong presence of MVNOs and by a large number of efficient distributions channels. Compared to other European mobile

²² MB is a measurement of data equal to 1,024 kilobytes

²³ Voice over Internet Protocol ("VoIP") is a technology for transmitting voice conversations via the Internet. This service allows the customer to make phone calls via the Internet, using their broadband connection.

²⁴ A mobile broadband dongle is a portable device which allows users to connect to the internet over a 3G connection.

²⁵ Source: OFCOM Telecommunications market data update Q3 2009

²⁶ Source: OFCOM: Mostly mobile, OFCOM's mobile sector assessment, second consultation, published 8 July 2009.

²⁷ Statistics on mobile number portability are not collected by the UK regulator.

markets, in the UK there is a significant level of switching between different mobile service providers, and there is pricing and service innovation. These factors point to the fact that the UK retail mobile market is very competitive.

54. In the course of the market investigation, the Commission received replies from several consumers' associations such as Which?, Consumer Focus, and Communications Consumer Panel. The main concern expressed was the reduction of the number of market players from five to four, although the Commission notes that this assessment does not take into account the numerous MVNOs present in the market. According to the consumers' associations, there is a risk of significant lessening of competition. The Commission therefore examined the extent of current competition between the parties and also, whether the parties could be considered as particularly close competitors.

The extent of current competition between the parties

55. The parties state that they are not particularly close competitors. In support of this argument the parties submitted switching data analysis.
56. The Commission analysed the switching data in order to verify whether the parties can be considered as particularly close competitors. An analysis of the switching flows amongst operators by customers making use of the number portability shows that in 2008 Orange had a [...] net balance of [...]. In 2008 on the prepay segment, [40-50]% of Orange churners (customers who switch from one operator to another) chose O2, [20-30]% switched to 3UK and [10-20]% to T-Mobile. Vodafone, Virgin and Tesco retain [5-10]%, [5-10]% and [0-5]% of the Orange churners respectively. On the post pay segment, [40-50] of the customers who leave Orange switch to O2, while [20-30] go to 3UK. [10-20] of the post-paid customers go to T-Mobile, [10-20] switch to Vodafone and [0-5] go to Virgin. The above data shows that O2 and 3UK take the lion's share of Orange churners.
57. Concerning switching rates away from T-Mobile, data shows that in 2008, [30-40] of prepay customers leaving T-Mobile switch to O2, [20-30] switch to Orange, [20-30] to 3UK, [10-20] to Vodafone and [10-20] to Virgin. On the post pay market, [30-40] of customers switch to O2 and [20-30] switch to Orange. Vodafone, 3UK and Virgin retain [10-20]%, [10-20] and [0-5] of the T-Mobile churners respectively.
58. The Commission notes that a considerable number of customers switch from T-Mobile to Orange. That said, switching from T-Mobile to Orange is largely in line with Orange's market share. Switching from Orange to T-Mobile is substantially below the levels that may be suggested by T-Mobile's market share²⁸. This analysis of

²⁸ In order to allow for conclusions with regard to the closeness of competition, "switching shares" of customers switching away from a particular operator are compared to the market shares of the other operators (excluding that particular operator). For instance, when looking at switching rates from Orange (customers switching away from Orange), we excluded Orange's market share. (Since the user will pick another operator, not Orange). T-Mobile's market share when excluding Orange would be about [10-20] (instead of [10-15] which would be normally the case). This is why the switching percentage is below the level that the market share as such would suggest.

switching patterns tends to indicate that the parties are not particularly close competitors.

The parties as particularly important competitive forces

59. The parties claim that neither of them has been a particularly important force for competition in the UK retail mobile market. The Commission examined whether either of the parties could be considered as particularly important competitors in the market, exerting particularly important competitive constraints on the other players in the UK retail mobile communications market.
60. Development of market shares shows that both parties lost market shares over time. Orange's overall market share (based on the number of subscriptions) decreased from [20-30]% in 2004 to [20-30]% in 2008. T-Mobile had a [10-20]% market share in 2004 and in 2008 its market share decreased to [10-20]%. These decreases in market shares suggest that neither of the parties could be considered to be a maverick.
61. The Commission also examined pricing in the relevant market. The pricing analysis shows that neither of the parties was amongst the cheapest providers. In the business segment, 3UK offered the lowest prices. In the prepay segment, O2 offers the lowest rates while 3UK offers the lowest rates for long term post pay contracts²⁹.
62. As regards the switching data, the Commission notes that 3UK could be considered more as a 'maverick' in the market since it captures more customers from Orange and T-Mobile than its market share would suggest. In addition, as described above, 3UK is a leader in pricing and service innovations (e.g. mobile broadband, integrating Skype's mobile VoIP services).
63. As described above, the Commission does not consider that either of the parties could be regarded as a maverick in the UK mobile market. On the other hand, 3UK is an important driving force for competition on the UK mobile market. The question whether 3UK remains a viable competitor after the proposed transaction will be dealt with separately below (paragraph 81 and following).

Conclusion

64. The Commission has verified that the UK market for retail mobile services is competitive and is likely to remain competitive following the proposed transaction, taking into consideration the market structure and characteristics. While the parties would have a combined [30-40]% market share, there would be two comparably strong competitors and a large number of MVNOs. Furthermore, the market is characterized by significant switching rates and by efficient distribution channels. The parties are not particularly close competitors and neither of them is a particularly important competitor. However, this assessment of the UK market for retail mobile services cannot be disconnected from the analysis of 3UK's RAN sharing agreement with T-Mobile and the spectrum concentration at the 1800 MHz spectrum band. Therefore, while the Commission's assessment is that this market will remain competitive post-transaction, this is subject to the analysis of 3UK's RAN sharing

²⁹ Source: UK Mobile Pricing Annual Review 2008, Pure Pricing Ltd., 2009

agreement with T-Mobile and the spectrum concentration (see paragraphs 81 and 111 below respectively).

(2) Wholesale market for access and call origination on public mobile telephone networks

65. The Commission investigated whether the proposed merger would alter the access opportunities for MVNOs, notably in relation to the reduction in the number of MNOs and the risk of capacity reduction that merging the networks could entail.

Reduction in the number of MNOs

66. At the wholesale level the transaction leads to a reduction of players from 5 to 4. The merger will create the number one player both by subscribers ([40-50]%) and by revenues ([40-50]%), ahead of O2 ([20-30]% by subscribers, [20-30]% by revenues) and Vodafone ([20-30]% by subscribers, [20-30]% by revenues), while 3UK has only a negligible market share. The combined market share of the parties is consequently higher than at retail level. If network sharing and co-operation agreements are taken into account, it might even be argued that post-merger there will be only two remaining networks operating alliances namely on the one hand the parties together with 3UK (in the case where Orange merges its network with the existing shared network between T-Mobile and 3UK) and on the other Vodafone and O2 (which have also entered a network sharing agreement).
67. During the investigation, the Commission has however not received substantiated complaints on excessive concentration at the wholesale level.

Reduction in capacity available to MVNOs

68. The possible effect on capacity at wholesale level was raised as an issue by the Commission at an early stage of the investigation. Already in the form CO and in reply to questions from the Commission the parties submitted detailed information on capacity and internal documents.
69. Sufficient unused network capacity is a key prerequisite for supplying wholesale communications to MVNOs and an incentive to attract new wholesale customers. Network capacity is determined on the basis both of the frequency spectrum available, the number of sites / cells and of the number of carriers within a cell (which have a direct incidence on the number of calls that can be handled through a single cell) that transmit the radio signal between the mobile terminal equipment and the antenna.
70. MNOs usually have spare capacity on their network to address increases in demand within a medium term, and consequently, in particular in a situation like in the UK where there are already a significant number of MVNOs present in the market, do not have the incentive to foreclose MVNOs, as the losses that they would incur in doing so (by losing revenue from the wholesale agreements with MVNOs) exceed any retail revenues they would pick up should these MVNOs exit the market.
71. Although the main synergies expected from the merger would stem from the combination of the party's respective networks which should entail the closure of [...] RAN sites (out of [...] sites combined), the parties claim that they have no incentive to reduce capacity and that, on the contrary, the combined entity's network

rationalisation efforts would eventually lead to a more efficient network with more capacity.

72. The parties notably explain that there is no direct relation between the number of sites and the capacity of a network since a single site can host several carriers which operate on different spectrum bands. It would therefore be easily feasible to decommission a site from one of the parties and transfer the carriers attached to this site to the closest adjacent one of the other party with a neutral effect on capacity.
73. The Commission however received some complaints from MVNOs indicating that the merger would reduce capacity or bargaining power.
74. Three MVNOs suggested that the merger would alter the parties' incentives to supply capacity at the wholesale level. They raised concerns in relation to the parties' plan to achieve synergies through a reduction of redundant sites and "network rationalisation", which could ultimately lead to a reduction of the parties' network capacity. Notably, the Commission's discussions with two of these operators revealed that the network optimization planning, which is one of the declared purpose of the operation, could limit the networks' unused existing spare capacity (as opposed to the spare capacity which is currently used by MVNOs), which could increase the parties' bargaining power and lead them to impose higher prices to MVNOs.
75. However, none of these complainants suggested that the operation could increase the parties' incentives to foreclose MVNOs. The market investigation revealed on the contrary that all MNOs will continue to own unutilised spectrum capacity (yet possibly reduced compared to the current situation) and that they would continue to have an incentive to host the existing and additional MVNOs³⁰.
76. In addition, two respondents to the investigation submitted that the merger should maintain, if not increase, the parties' interest in concluding MVNO contracts, notably because merging their networks could also possibly lead them to have more capacity and consequently increased incentives to compete aggressively to acquire MVNO customers.
77. The investigation also confirmed that any possible increase in the parties' bargaining power as regards MVNO deals would only concern a limited number of them (i.e. the "generalist" MVNOs such as Tesco or Virgin which compete directly with the parties), since only few of the UK MVNOs compete directly with the MNOs. Indeed, many MVNOs target specific segments of user groups (for example ethnic groups) with partially different needs (notably in terms of hours). Therefore, for MNOs, MVNO deals often represent an opportunity for traffic optimization. The operation would not alter the parties' incentives in that regard.
78. Moreover, the discussion with the parties as well as respondents to the investigation revealed that MNOs, when planning investments and traffic allocation, usually make limited or no distinction between their own traffic and those of the MVNOs which

³⁰ Notably, the investigation revealed that (1) the MNO usually plan capacity investment in order to ensure a safety margin against sudden increases in demand and (2) plan updates on each site in a way that ensure a sufficient capacity to address the foreseen rise in demand within a medium term. This implies that MNOs usually have a minimum amount of spare capacity they can offer to MVNO customers.

roam on their network. This is notably because any such distinction would require an excessively detailed and costly analysis, which would have to be performed on a granular basis. It would therefore be practically difficult for the parties to limit the future investments in order to limit the unused capacity available to MVNOs.

79. Finally, the foreseeable rising needs in capacity necessary to address the exponentially growing bandwidth demand for data transmission and mobile internet access limits the parties' incentives to reduce their network capacity either within the course of the network rationalization or in view of future investments.

Conclusion

80. The Commission does not have concerns with respect to the impact of the proposed merger with respect to capacity constraints in the market for wholesale access and call origination on public mobile telephone networks. However, this assessment of UK market for wholesale access and call origination on public mobile telephone networks cannot be disconnected from the analysis of the spectrum concentration at the 1800 MHz spectrum band and from the evaluation of the possibility that 3UK might exit the wholesale market as a result of the creation of the JV. Therefore, while the Commission's assessment is that this market will remain competitive post-transaction, this is subject to the analysis of the spectrum concentration and of the effects of the transaction on T-Mobile's network sharing agreement with 3UK (see paragraphs 82 and 111 below).

(3) T-Mobile's RAN sharing agreement with 3UK

The existing agreements

81. 3UK is the UK subsidiary of the Hong-Kong based multinational group Hutchinson Whampoa Limited. That group is active globally in several sectors, including telecommunications. 3UK is the only UK MNO holding exclusively a 3G network, based on its 2x15MHz of the 2100MHz spectrum.
82. In order to limit the costs linked to the deployment of a proprietary network and to enhance the coverage it offers to its customers, 3UK entered into two network agreements in 2007: it concluded a 3G RAN sharing agreement with T-Mobile and a 2G national roaming agreement with Orange because 3UK does not own its own 2G network.
83. Under the RAN share, the companies agreed to merge their existing RANs to create a single 13,000 site network and set up a joint venture to manage the integration (hereinafter "the RAN sharing JV"). Once completed, the network is supposed to increase 3UK's sites footprint (number of sites) by [...]% and from [...]% population coverage to at least [...]% population coverage. Therefore, this agreement would guarantee to 3UK an extensive coverage of service, for both voice/messaging and data transmission.
84. 3UK explained that the 2G roaming agreement is currently necessary to ensure the extensive coverage required by customers of mainly voice and text messaging services. Once the integration of T-Mobile's and 3UK's 3G networks is completed, the relevance of the 2G agreement with Orange will significantly decrease. The roaming contract with Orange currently expires on [...], and 3UK is concerned that at that

point, as a result of the transaction, Orange will refuse to renew, raise the roaming charges to 3UK or otherwise worsen the terms and conditions faced by 3UK.

85. 3UK expressed concerns to the Commission with regard to the future of these agreements, and more specifically of the RAN sharing agreement, and the negative consequences a termination of the latter would entail both for 3UK and the UK mobile market in general. 3UK explained that after the transaction the parties would have the ability to terminate the RAN sharing agreement early and the incentive to eliminate or severely compromise 3UK as a competitor.
86. The Commission found that 3UK's main concern is related to the RAN sharing agreement. It appears that 3UK's business focus is on the development of the 3G integrated networks, and that the possible anti-competitive effects are derived essentially from the parties' abilities and incentives related to this agreement, rather than the 2G agreement. As a consequence, the Commission's assessment focused on the future of the RAN sharing agreement.

Description of the RAN sharing agreement

87. The RAN sharing agreement expires on [...], with either party able to terminate on notice, without cause, from [...] onwards.
88. If T-Mobile were to breach the terms of the agreement, the agreement would provide for a number of liabilities: T-Mobile would be liable for [...], T-Mobile would still be required to pay [...]. T-Mobile's financial exposure under these provisions is up to [...].
89. Furthermore, the agreement is also designed to ensure that neither party can frustrate the RAN sharing JV by allowing the quality or competitiveness of the shared 3G RAN to deteriorate: (i) the parties agreed a [...] business plan [...]; and (ii) the parties are obliged to [...] "Best 3G Network Standards", [...].
90. Moreover, the agreement provides for termination on 2 years notice in the event of persistent deadlock (i.e. where any issue remains unresolved for 3 years). Ultimately, repeated deadlock provisions in the RAN share agreements could lead to dissolution of the RAN share and a consequential split of network assets and network sites.

Ability of the parties to terminate or severely compromise the RAN sharing agreement

91. The parties claim that they would have no real ability to terminate the RAN sharing agreement in the short term since it has been agreed on a long term basis [...] and a unilateral early termination would not be possible until [...], except against payment of significant penalties. Any breach of the agreement [...] by one of the parties would be sanctioned by significant deterrence payments.
92. While 3UK recognizes that the parties would indeed not have *de jure* the ability to terminate the agreement in the short term, it claims that they would have *de facto* the ability to damage the agreement in the short term without incurring any significant penalty cost. For instance, while migrating their customers to Orange's network, the parties could limit their investments in the shared network, which would eventually deteriorate its quality. Although this would normally be prohibited by the agreement,

such non-cooperative behaviour would be difficult to prove and would in any event result in complex and uncertain litigation.

93. 3UK also raised the concern that T-Mobile might intentionally create "deadlock" situations - for instance, in relation to important investments necessary to reach the "best 3G network standards", capacity enhancements and key partnerships - in order to be able to accelerate the termination of the agreement.
94. The Commission found that, although the agreement has a number of safety clauses that can to some extent guarantee 3UK's position, the creation of the JV with Orange might have an effect on T-Mobile's commitment to the agreement. As a consequence, if, as discussed below, T-Mobile would prefer to privilege the investment on the integration with the Orange network, it might be able to use the "deadlock" provision as a tool to slow down and hinder the 3G RAN's development to the detriment of 3UK.
95. Furthermore, the creation of the JV entails the progressive integration of T-Mobile's and Orange's networks, which include their respective 2G and 3G networks. Orange's 3G network also includes a RAN. In this respect, the Commission notes that the way in which the completion of the integration of T-Mobile's and 3UK's RAN on the one hand and T-Mobile's and Orange's networks on the other hand will be carried out is unclear. The 2007 RAN sharing agreement did not provide for the possibility of integration with a third network, so the creation of the JV now creates an evident uncertainty as to how T-Mobile will proceed.
96. Therefore the Commission concluded that the parties, post-merger, might have the ability to early terminate or, at least, compromise the functioning of the existing 3G RAN sharing agreement to the detriment of 3UK.

Incentives of the parties to terminate the RAN sharing agreement

97. 3UK argues that it would be also profitable for T-Mobile to terminate the RAN sharing agreement early, as there would be significant commercial incentives for T-Mobile to harm 3UK's position as a competitor on the UK market.
98. The merged entity would be unlikely to want to maintain and develop the parties' two separate 3G RAN networks (i.e. the T-Mobile network with 3UK and Orange's separate network), since any synergies and cost savings which resulted from the RAN sharing agreement could be replicated with Orange, as a specific result of the operation, without including 3UK.
99. Terminating the RAN Agreement would have the effect of foreclosing 3UK from the market, and this would ultimately result in the merged entity acquiring a proportion of 3UK's existing customer base.
100. The parties replied that, contrary to 3UK's assumptions, the costs of terminating or damaging the agreement would largely exceed the benefits, notably because of the penalties incurred. Should T-Mobile terminate the agreement earlier outside the "pre-

determined" termination rights, it would incur a liability of up to GBP [...]³¹. In any case, T-Mobile would still be required to pay [...].

101. Moreover, the parties also submit that the termination would also lead to an increase of the operating costs of the parties' 3G network because they would lose 3UK's yearly contribution of GBP [...] million. In addition, the JV would have to face the renegotiation of thousands of agreements (almost [...]) through which T-Mobile and 3UK have managed to consolidate their rights vis-à-vis the site owners and site providers, in order to guarantee the possibility to exercise separate access rights to the sites.
102. The parties submitted that the calculation of the synergies expected from the transaction takes into account a network shared between the parties and 3UK and that the cost of carrying out a 3G network sharing only with Orange would entail a cost of GBP [...] million more than by including also the 3UK network.
103. The Commission observes that the calculation of the incentives as presented by the parties and 3UK in this case is particularly complex, as it involves a comparison between cost savings (from maintaining the RAN agreement running) and possible profit gains from acquisition of the competitors' customers (in case of marginalization of 3UK) and would probably deserve an in-depth investigation. This concern was shared by the OFT.
104. However, the Commission also notes that the competitive concern does not only rest on the possibility of eliminating 3UK as a competitive force, but also on the risk that its position in the market might be severely compromised. In this sense, it cannot be excluded that T-Mobile, instead of trying to terminate the agreement, would rather try to deteriorate the quality of the RAN with 3UK (for instance, as mentioned above, by using the deadlock provisions) in order to weaken the quality of its services to customers. Ultimately, T-Mobile, without incurring the high liabilities mentioned above, might prefer to accelerate the integration of its network with Orange's network, in order to enhance 3G services to its customers, while slowing down the integration with or deteriorating the RAN with 3UK. As a consequence of a lower quality service, 3UK's competitive pressure on the JV might be significantly reduced and the JV might gain a large number of 3UK customers.
105. Therefore, the Commission concluded that the parties, post-merger, might have the incentive to early terminate or, more likely, to compromise the functioning of the existing 3G RAN sharing agreement to the detriment of 3UK.

Consequences on 3UK 's ability to remain as a competitive force on the market

106. 3UK claims that, absent the agreement it could hardly remain profitable since it would be extremely difficult, if not impossible, to reconstitute a separate nationwide network

³¹ [...]. In concrete terms, the effect of any wrongful termination depends on 3UK. As a matter of law, 3UK would have two options: it could accept the termination and sue T-Mobile for damages or decide not to accept the termination and require T-Mobile to continue the RAN sharing agreement. The RAN sharing agreement was agreed in a form which would permit the consolidated network to continue to exist and be upgraded even if one party was no longer committed to it. Should 3UK decide to continue the agreement, DT would still have to contribute to the network consolidation.

in a timely and cost effective manner. As a consequence, in the short or medium term the operation could actually lead to a "five to three"³² concentration given that it could indirectly force 3UK to exit the market. The OFT and OFCOM both also expressed concerns on this issue.

107. Moreover, 3UK is considered by several market players as an important competitive force in the UK market and to be the most innovative MNO in the market. It has played a key role in driving innovation, particularly in the data segment, and lower prices for consumers³³. (see paragraph 49 above in the retail market assessment) The important role of 3UK on the UK market has also been acknowledged and confirmed by OFCOM.
108. The possible disappearance of 3UK or the degradation of its competitive position could consequently have a serious impact on the UK retail mobile communication market and would mean that the merger could in a worst case scenario lead to a concentration from 5 to 3 players.

Conclusion

109. In view of the above, the Commission informed the parties on 29 January 2010 that it had identified *prima facie* serious doubts as to the merger's compatibility with the common market in relation to the ability and incentives of the parties to eliminate 3UK as a competitive force in the UK mobile market.
110. In order to resolve the competition concerns raised by this element of the transaction, the parties submitted unilateral commitments on 8 February 2010. This remedy package was subsequently improved on 24 February 2010 (see paragraph 187 below for more detail).

(4) Concentration of spectrum

111. Following the operation, T-Mobile and Orange would hold a combined amount of contiguous spectrum at the 1800 MHz frequency level significantly larger than their competitors:

Spectrum holdings of UK MNOs

112. The current amount of spectrum³⁴ held by the five MNOs is as follow:

³² This assessment does not take into account the MVNOs active at retail level.

³³ 3UK claims that its presence on the market has led to a substantial cross-industry reduction in data prices for consumers. Further, 3UK has encouraged consumers to use Skype, Windows Live Messenger, Facebook and e-mail on their handsets, which various other operators do not allow, at present.

³⁴ The spectrum is usually paired (i.e. 2x30 MHz for instance) to allocate the same amount of spectrum to emission – from the handset to the antenna – and reception. The 900 MHz, 1800 MHz and 2100 MHz bands correspond to the frequencies around which the spectrum holdings of the different MNOs are located. For instance, the 2x30 MHz that Orange owns at the 1800 MHz level corresponds to the frequency bands 1751.5 - 1781.5 MHz and 1846.5 - 1876.5 MHz.

	900MHz	1800 MHz	2100 MHz	Total
Orange	-	2x30MHz	2x10MHz	2x40MHz
T-Mobile	-	2x30MHz	2x10MHz	2x40MHz
Combined		2X60MHz	2x20MHz	2x80MHz
Vodafone	2x17.4MHz	2x5.8MHz	2x15MHz	2x38.2MHz
O2	2x17.4MHz	2x5.8MHz	2x10MHz	2x33.2MHz
3UK	-	-	2x15MHz	2x15MHz
Total	2x35MHz	2x72MHz	2x60MHz	2x167MHz

113. Spectrum in the 900MHz and 1800MHz frequency bands are currently used for 2G mobile services; the 2100MHz frequency band is used for 3G services.

114. In the context of mobile broadband communication, three dimensions of the spectrum holdings of an operator are particularly relevant:

- the aggregate amount of spectrum available is the main determinant for capacity (which has a direct incidence on the number of call that can be served simultaneously, and, in the case of data transmission, on the bandwidth that the user can access for download / upload). On this amount depends above which level of demand the network operator has to start taking additional, generally more costly, steps to increase capacity;
- the frequency band used, since different frequency bands present different propagation characteristics: lower frequency spectrum (e.g. 900 MHz) is generally preferable to higher frequency spectrum (e.g. 1800 MHz or 2600 MHz) as lower frequency signals generally travel further and penetrate more deeply into buildings than do higher frequency signals;
- the amount of contiguous spectrum available, with contiguous spectrum generally preferable as this can allow both the provision of higher speed end-user services and the provision of moderate speed end-user services more consistently over a larger area. Contiguous spectrum also allows easier and cheaper spectrum coordination and equipment.

Forthcoming auction

115. In addition to the spectrum shown in the above table, two further bands of spectrum are due to be made available within the next few years:

- 2x30MHz of spectrum in the 800MHz band and
- 2x70MHz of spectrum in the 2600 MHz band.

116. The UK Government is currently consulting on proposals that would entail the auctioning of these two bands of spectrum together in the first half of 2011. The 800MHz band would become available for use only by the end of 2013, since it is currently allocated to analogue television transmission and will need to be cleared for mobile use following the switchover of terrestrial TV to digital TV. The 2600 MHz

band would be available for use immediately. However, the 2600 MHz band will be subject to certain restrictions on its use in certain geographic areas until sometime in 2013 or 2014.

Next generation – Long Term Evolution

117. Long Term Evolution ("LTE") technology, also referred to as fourth generation ("4G") should be developed in UK within the coming years. Compared to previous generations (3G or HSPA³⁵), it is expected to provide higher bandwidths, especially suitable for faster data transmission.
118. The Commission investigation has revealed that the distribution of spectrum amongst competitors for the provision of next generation mobile broadband services is likely to have a significant impact on the shape of future competition for the provision of mobile services.
119. Notably, in order to deploy the most efficient and fastest download speed LTE technology, contiguous spectrum of 2x20 MHz is preferable, and necessary to achieve the maximum bandwidth possible (a speed of 100 Megabit per second – "Mbps"). While LTE can be launched also on 2x10 MHz or even smaller bands, the full speed will not be reached if this smaller amount of spectrum is used.
120. The concern raised by the other MNOs is that the JV, as a result of the combination of the 1800 MHz spectrum bands currently held by T-Mobile and Orange, could be the only MNO with a clear path to full coverage maximum-speed LTE technology in the UK. It seems indeed plausible that the 1800MHz spectrum could be used by the JV to launch a national 2x20MHz LTE network in the near future due to the fact that it can:
 - offer good coverage (if sufficient sites are built, which is the case since the parties will already have a 1800MHz grid in place for their 2G networks);
 - use its significant amount of spectrum at the 1800 MHz level (2x60 MHz combined: 1721.5 - 1781.5 MHz and 1816.5 - 1876.5 MHz) to clear (i.e. to make available for a different use, in the present case from 2G to 4G) within a short time frame 2x20MHz while migrating the customers from one of the merging parties' network to the other one, without incurring disruptions or lower quality of service in the meantime;
 - offer up to 100Mbps speed (a competitor with less than 2x20MHz exclusively dedicated to LTE would not be able to offer this speed);
 - significantly lower the operational cost of the network.
121. This could result in a bifurcation of the market in the years to come, with the JV being the only MNO in the UK able to offer LTE technology at the best possible speeds with full coverage and with the remaining MNOs offering a much inferior product.

Adverse impact on competition

³⁵ High Speed Packet Access, also referred to as 3.5G.

122. The merger could possibly lead the parties to have the only full-speed national LTE network in the short to medium term, since the amount and type of spectrum held by an MNO dictates its ability to launch a LTE network as well as the speed of that LTE network.
123. The parties submit that this cannot be the case for a number of reasons. However, these reasons were called into doubt by the market investigation such that the Commission has *prima facie* serious doubts as to the merger's compatibility with the common market.
124. First, the parties claim that having a 2x20MHz LTE network at the 1800MHz band would on balance be less efficient than having a lower frequency (e.g. 900 MHz) LTE network as their MNO competitors could develop. This is because of both the lower costs entailed (i.e. better coverage with fewer sites) and benefits to users (i.e. in-building reception) of the lower frequency network.
125. However, competing MNOs commented that, as the merged entity already has a network in place which gives it coverage to the same extent as its competitors³⁶, any advantage the 900MHz spectrum has, due to its superior propagation characteristics, is nullified. While this has implied significantly higher capital expenditure for the parties in the past, the Commission indeed considers that, as regards LTE development, the difference in costs linked to the lower coverage of 1800 MHz spectrum will be limited.
126. Second, the parties submit that LTE is not a major step change as described by other MNOs. Notably, the available technologies that can be launched within the next year on 3G networks (e.g. HSPA+) could offer speeds of up to 40Mbps (compared to 100 Mbps for LTE).
127. In addition, the parties dispute the fact that a 2x20MHz LTE network is required for effective 4G national coverage. They notably consider that 2x10MHz is sufficient for a rural LTE network where the demand is lower, and where 50 Mbps would be a sufficient download speed for practically all applications, and that a 2x20MHz LTE network could be launched in urban areas through a number of different options (given that 2.6MHz spectrum will become available and auctioned soon).
128. The Commission considers that it is indeed possible that other LTE networks could be launched by coupling sub 1000MHz spectrum (i.e. at the 800 or 900 MHz level) and 2600 MHz spectrum which will be auctioned in the coming years. However, there are strong grounds to conclude that the parties would still have a significant technological and marketing advantage over competitors. In particular, the parties will be able to offer superior network quality in terms of maximum download speed, and potentially also in terms of consistency of provision of lower download speeds. The parties will also have a significant time advantage due to the uncertain timing of the auction and the time needed to clear the sub 1 GHz spectrum. In addition, the 2600 MHz spectrum presents lower coverage performance compared to the 1800 MHz spectrum, which makes it hardly suitable for areas other than urban.

³⁶ They already have a sufficient number of sites in place to provide national coverage on their current spectrum-holding, subject to limited technical changes on exiting sites to make them suitable for LTE.

- 129. Third, the parties suggest that the merged entity would [...]³⁷ [...].
- 130. However, establishing such an LTE network would impose significant constraints on other MNOs, since in addition to the spectrum acquired they would need to pool their spectrum at the 1800 MHz level to launch an equivalent 2x20 MHz LTE network, which make such an operation uncertain. [...].
- 131. Fourth, the parties argue that given that 3G will be the dominant technology over the coming years and that Vodafone and O2 will have the ability to deploy such a network at 900MHz spectrum (with all the resulting benefits of better coverage and in-door penetration), it is Vodafone and O2 that will be in the stronger position in the mobile telecommunications market going forward.
- 132. However, it is difficult to assess to which extent the advantage that the parties' competitors will derive in the short term from 3G would offset a faster development of a 4G network by the parties in the medium term . Moreover, even if the development of voice over 4G might indeed take some time, the deployment of LTE dongles will likely occur much faster and in any event before the deployment of LTE handsets. The impact of LTE would therefore appear to be more immediate than the parties suggest.
- 133. Finally, the parties also submit that the rationale for the proposed transaction has nothing to do with launching an LTE network, citing as evidence the absence of any mention of LTE in the internal documents provided to the Commission.

134. [...].

The situation in the absence of the merger

- 135. Absent the merger, several scenarios could be envisaged. In this respect, it is important to take into account the future availability of additional spectrum in the course of the auction. A key point is that this additional spectrum could enable the different MNOs, including the parties on a stand alone basis, to launch a mixed frequency LTE network, by combining (a) rural LTE networks using either 800MHz or 900MHz spectrum and; (b) an urban LTE network using 1800MHz or 2600 MHz spectrum. There will be sufficient spectrum available for up to five networks to be built in this way in the longer term.
- 136. Another option available to MNOs which would allow the earlier launch of full coverage 2x20MHz LTE networks, would be to pool spectrum in the 1800MHz band. There are a number of different options that would have been available to MNOs prior to the merger, namely for either Orange or T-Mobile to pool their spectrum with either (or both of) Vodafone and O2.
- 137. Therefore, the above analysis shows that, absent the merger, it seems likely that more than one LTE network could emerge in the UK market.

³⁷ The UK Department for Business, Innovation & Skills ("BIS"). The BIS proposals include spectrum caps which will limit, for each operator, both the total amount of spectrum held and the amount of spectrum below 1 GHz. The caps would vary according to the number of players in place: respectively 2x65 MHz (total) / 2x17,5 (sub 1 GHz) in the absence of consolidation between the five MNOs, and 2x90 MHz / 2x20 MHz in case of consolidation.

Conclusion on spectrum

138. In view of the above, the Commission informed the parties on 29 January that it had identified *prima facie* serious doubts as to the merger's compatibility with the common market in relation to the wholesale and retail telecommunications markets over the next few years as a result of the 1800MHz band spectrum concentration deriving from the merger.
139. In order to resolve the competition concerns raised by this element of the transaction, the parties submitted unilateral commitments on 8 February 2010. This remedy package was subsequently improved on 24 February 2010 (see paragraphs 205 below for more detail).

(5) Wholesale market for international roaming and related markets

140. The proposed transaction will lead to a horizontal overlap on the market for wholesale international roaming services in the UK.
141. In addition, there is a vertical relation between wholesale roaming services in the UK and the provision of retail mobile communications services abroad, therefore the UK market as well as each of the national markets for wholesale international roaming services where Orange or T-Mobile operate are concerned by the proposed transaction.

1. Wholesale market for international roaming services in the UK

Horizontal assessment

142. The market investigation revealed that post-merger the combined market share of the parties by revenues for 2009 would be [30 - 40 %] ([10 - 20 %] for T-Mobile UK and [20 - 30 %] for Orange). Vodafone has a market share by revenues of [30 – 40 %], O2 [20 – 30%] and 3UK – about [0 – 5 %]. The combined market share in volume (minutes billed) would be [20 – 30 %] (around [10 – 20 %] for T-Mobile and [10 – 20 %] for Orange). Vodafone holds a share of [50 – 60 %] and O2 of [20 – 30 %]. 3UK would have a share of around [0 – 5 %].³⁸
143. The parties submit that MNOs can nowadays to a large extent choose the host network through which their customers can make calls abroad, because home networks are increasingly adopting traffic steering techniques that enable them to direct their end-users onto preferred visited networks. "Preference lists" are stored on the customer's SIM card and can be amended or adapted over the air ("OTA"). Operators cannot, though, because of technical reasons, steer all of its subscribers' roaming traffic on a partner's network.

³⁸ There are no publicly available figures for the revenues of MNOs on the UK market for wholesale international roaming. The parties' competitors provided the relevant data to the Commission during the market investigation, but required the data on which the Commission bases its assessment to remain confidential. Therefore, the Commission provides ranges in order to respect the competitors' legitimate request.

144. The Commission investigation confirmed that subscribers of service providers belonging to one alliance also roam on other network operators' networks, for example in case of a failure or gap in the partner's network.
145. Currently all five MNOs in the UK are active in the market for wholesale international roaming services. The transaction brings together two members of the same alliance, as both T-Mobile and Orange are members of the Freemove Alliance, which provides to all the subscribers of the member MNOs a seamless mobile service throughout seventeen countries in the EEA. Vodafone has a preferential relationship with its sister companies in many European and non-European countries and with the Vodafone partner networks (such as Proximus from Belgium and Mobilkom from Austria). O2 belongs to the Telefónica group which allows it to negotiate preferential roaming tariffs in the countries where it holds affiliates (in the EU: Germany, Slovakia, the Czech Republic, Spain and Ireland). Finally, 3UK belongs to the Hutchison Whampoa Ltd. group which similarly allows it to negotiation preferential roaming tariffs in countries where it holds affiliates (in the EU: Ireland, Austria, Italy, Sweden and Denmark).
146. Post-merger there will be four 3G networks and three 2G networks available in the UK for foreign operators. Therefore, any foreign operator will continue to be able to choose between several alternative networks with nationwide coverage for its roaming traffic in the UK. In addition, foreign operators will also be able to choose an "independent" operator in the UK (Telefonica/O2 and 3UK), if they do not belong to any alliance.
147. Furthermore, the new Regulation (EC) 717/2007 (amended by Regulation n°544/2009 of 18 June 2009) of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21³⁹ introduced a "price cap" on wholesale tariffs. This regulation is likely to have a significant impact on the market for international roaming as well as on the activities of the alliances.
148. In addition, the Commission considers it relevant that, according to the parties, any discounts below the regulated wholesale caps are negotiated bilaterally and remain strictly confidential. Even amongst the members of the Freemove Alliance, discounts are negotiated bilaterally and remain confidential *vis-à-vis* the other members.
149. In the light of these elements it can be concluded that the proposed merger does not raise serious doubts as to its compatibility with the common market in relation to the UK wholesale market for international roaming.

Vertical assessment

³⁹ Regulation n° 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L 171 of 29 June 2007, as amended by regulation (EC) n°544/2009 of the European Parliament and of the Council of 18 June 2009, OJ L 167 of 29 June 2009.

Markets vertically linked with the UK market for wholesale international roaming services: the national markets for the provision of retail mobile communications services in the countries where Orange or T-Mobile operate outside the UK

150. The UK market for wholesale international roaming services is vertically linked to the different national markets for the provision of retail mobile communications services in the countries where Orange or T-Mobile operate (Austria, Belgium, France, Poland, Slovakia, Spain, Romania, Luxemburg for Orange, as well as Austria, the Netherlands, the Czech Republic, Poland, Hungary, Greece, Bulgaria, Romania and Slovakia for T-Mobile).
151. As already mentioned, the market share held by the JV on the UK market for international roaming services will be around [30-40]%.
152. The parties submit that based on revenues, Orange holds market shares exceeding 25% on the markets for the provision of retail mobile communications services in Belgium ([30-40]%), France ([40-50]%), Poland ([30-40]%), Romania ([30-40]%) and Slovakia ([50-60]%). For its part, T-Mobile holds a market share above 25% based on revenues in Austria ([30-40]%), Czech Republic ([30-40]%), Germany ([20-30]%), Greece ([40-50]%), Hungary ([40-50]%), Poland ([30-40]%), Slovakia ([40-50]%). As for Bulgaria and The Netherlands, T-Mobile's market share by customers was [30-40]% and [20-30]% respectively.
153. However, the proposed transaction will not lead to any anticompetitive effects on any of these wholesale roaming markets.
154. First, the transaction will not have customer foreclosure effects on the UK wholesale market for international roaming, because, since the parties belonged to the same roaming alliance, the emergence of the new entity will not significantly alter the existing market dynamics and its two main competitors, namely Vodafone and O2, will continue to be active on that market , as indicated above.
155. Second, the proposed transaction should not result in a decrease of roaming traffic for competitors in the UK wholesale market for international roaming services. Indeed, both T-Mobile and Orange are already sending almost all of their roaming out traffic⁴⁰ in the UK to their subsidiaries in the UK.
156. The proposed transaction will also not have input foreclosure effects on any of the national retail mobile communication markets outside the UK on which FT/Orange and DT/T-Mobile are respectively present. The parties submit that Orange holds market shares exceeding 25% in Belgium ([30-40]%), France ([40-50]%), Poland ([30-40]%), Romania ([30-40]%) and Slovakia ([50-60]%). For its part, T-Mobile holds a market share above 25% in Austria ([30-40]%), Czech Republic ([40-50]%), Germany ([20-30]%), Hungary ([40-50]%), Poland ([30-40]%), Slovakia ([40-50]%) and the Netherlands ([20-30]%).

⁴⁰ In 2008, [...] % of the minutes sent by Orange affiliates to the UK were charged by Orange and [...]% of the minutes sent by T-Mobile affiliates to the UK were charged by T-Mobile UK.

- 157. First, Orange's and T-Mobile's competitors in these countries only direct a limited part of their outbound roaming traffic in these countries to Orange and/or T-Mobile. In fact, the roaming traffic incoming from these countries comes to Orange or T-Mobile to a very large extent from their respective affiliates. The proposed transaction is not likely to modify this situation.
- 158. Second, the new entity will not have the ability to foreclose its competitors, in particular in the short term, because of the fact that retail and wholesale international roaming services are currently regulated⁴¹. This would prevent any adverse effects as regards prices for access to these services in the UK.
- 159. Third, the combination of non-exclusive roaming agreements and the ability to direct traffic enables home network operators to switch between UK visited networks with nominal switching costs and within a short time frame.
- 160. Foreign operators will continue to have the choice between four viable alternative networks with a nationwide coverage for their roaming traffic in the UK. In addition, foreign operators will also be able to choose an "independent" operator in the UK (Telefonica/O2 or 3UK), if they do not belong to any alliance.

2. Markets outside the UK vertically linked with the UK market for the provision of retail mobile communications services : the national wholesale markets for international roaming services in the countries where Orange and/or T-Mobile operates outside the UK

- 161. The roaming offer (and its price) is part of the retail offers of MNOs. Consequently, the UK market for the provision of retail mobile communications services is vertically linked to the different national wholesale markets for international roaming services where Orange (Austria, Belgium, UK, France, Poland, Spain, Romania, Luxemburg and Slovakia) and T-Mobile (Austria, Bulgaria, the Czech Republic, Slovakia, Germany, Greece, Hungary, the Netherlands, Poland and Romania) operate.
- 162. Orange operates in Belgium, France, Luxemburg and Spain, whereas T-Mobile is not active in these countries. T-Mobile operates in Greece, the Netherlands, Hungary, Germany, Bulgaria and the Czech Republic, whereas Orange is not active in these countries. Both Orange and T-Mobile operate in Austria, Slovakia, Romania and Poland.
- 163. The parties submit that according to the exclusivity agreement between DT and FT, where one of them, but not both, have an affiliate in the respective foreign country, the JV shall maximize the traffic to the respective affiliate. On this basis, it can be expected that Orange and T-Mobile will receive a substantial part of the traffic of the new entity.
- 164. However, since Orange and T-Mobile are already both members of the Freemove Alliance, they already steer a large part of the respective roaming traffic to one

⁴¹ Regulation n° 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L 171 of 29 June 2007, as amended by regulation (EC) n°544/2009 of the European Parliament and of the Council of 18 June 2009, OJ L 167 of 29 June 2009.

another. As a result, both Orange and T-mobile already receive a substantial part of the outbound roaming traffic of the other party in these countries.

165. Consequently, even if for example Orange should receive most of the roaming traffic coming from the new entity, the proposed transaction will in fact not lead to a significant increase of roaming traffic for Orange on these national markets.
166. The market investigation confirmed that roaming traffic from T-Mobile's and Orange's customers in these countries is limited in comparison to the overall volume of traffic generated from total visiting customers. Thus, even assuming that either Orange or T-Mobile should receive more traffic from the new entity than before the proposed transaction, this traffic increase is likely to be very limited and would not have any significant impact on the markets for international roaming services in these countries.
167. Therefore, it must be concluded that the proposed transaction will not lead to any customer foreclosure effects on Orange's competitors in Belgium, France, Luxemburg and Spain or on T-Mobile's competitors in Greece, the Netherlands, Hungary, Germany, Bulgaria and the Czech Republic.
168. In Austria, Slovakia, Romania and Poland, where both Orange and T-Mobile are active, the transaction is similarly not going to change substantially the pre-existing situation. In practice, resulting from their membership in the FreeMove alliance, Orange and T-Mobile already send almost the entirety of their traffic to Orange and T-Mobile in Austria, Slovakia, Romania and Poland.
169. Furthermore, it is unlikely that the transaction could give rise to input foreclosure effects. Firstly, as mentioned above, the market is regulated preventing adverse effects on prices. Secondly, the new entity will face strong competitors such as Vodafone and O2. Lastly, MNOs have the practice to conclude as many bilateral agreements as possible in order to maximise the quality and coverage of their roaming services.
170. Therefore, the new entity will not have the ability or incentive to foreclose its competitors on the retail market for mobile communications who purchase wholesale international roaming services in the countries where Orange and/or T-Mobile are present.
171. On the basis of the above, the Commission concluded that the transaction does not raise serious doubts as to its compatibility with the common market in relation to the wholesale market for international roaming and related markets

(6) Wholesale market for mobile and fixed call termination services

(i) The national wholesale markets for mobile and fixed call termination services in the countries where Orange or T-Mobile operate outside the UK

172. Since MNOs need to ensure an end-to-end connection to their subscribers, the UK market for the provision of retail mobile communications services is also vertically linked to the markets for wholesale call termination services on Orange's mobile networks in Austria, Belgium, Poland, France, Romania, Spain, Luxembourg and Slovakia as well as on T-Mobile's mobile networks in Austria, the Netherlands, the Czech Republic, Poland, Hungary, Greece, Bulgaria, Romania and Slovakia.

173. Similarly, the UK market for the provision of retail mobile communications services is vertically linked to the markets for fixed call termination services on FT's fixed networks in Belgium, France, Poland and Spain and on DT's fixed network in Germany, Slovakia, Romania, Hungary and Greece.
174. According to the market definition adopted in previous Commission decisions, each Orange operator and T-Mobile operator, as well as FT and DT, have a 100% share of the market for call termination services on their respective mobile or fixed network.
175. However, the proposed transaction will not lead to any anticompetitive foreclosure effects on any of these markets.
176. Firstly, the market for the provision of wholesale mobile and fixed call termination services is subject to regulatory analysis by national regulators, in order to ensure that access is granted on reasonable conditions preserving effective competition. Therefore, given that termination tariffs are regulated, it is ensured that the mobile and fixed termination rates remain reasonable and non-discriminatory.
177. Secondly, in principle, and in line with previous Commission decisions⁴², the Commission considers that discrimination against UK operators other than the JV would be technically impossible since FT/Orange and DT/T-Mobile operators receive most of their international traffic from international carriers (who act as intermediaries between the telecommunication operators) and, therefore, cannot identify in most cases the exact origin of the international traffic terminated on their mobile networks. It is only possible to identify the exact origin of the international traffic terminated on a network where there is a direct interconnection with the foreign operator, which is currently possible only for FT/Orange and DT/T-Mobile intra-group traffic.
178. Thirdly, the market investigation confirmed that any attempt by FT/Orange or DT/T-Mobile operators to foreclose the JV's competitors by means of the wholesale call termination services (mobile or fixed) would not influence the cost structure or customers of the JV's competitors in any significant manner given that only a small proportion of outgoing mobile calls from the UK are terminated in these countries⁴³.

(ii) Market vertically linked with the UK market for call termination services on the JV's mobile network: the national retail markets for the provision of retail mobile and international fixed communications services in the countries where FT/Orange or DT/T-Mobile operate outside the UK

179. The UK market for call termination services on the JV's mobile network is vertically linked to the different national retail markets for the provision of retail mobile communications services where Orange or T-Mobile are active (Austria, Belgium, France, Poland, Slovakia, Luxemburg, Spain, Romania for Orange as well as Austria,

⁴² See Case No. COMP/M. 3920 - *France Télécom/Amena* §35 and §36, and Case No. COMP/M.4035 - *Telefonica/O2*, §36.

⁴³ According to the "Telegeography Report 2009, Country traffic statistics for 2007", international fixed and mobile calls from UK to Germany represent 5.3% of total outgoing traffic and around 9% of international call in Germany, respectively 4.8% and around 8% in France, 3.6% and 15% in Spain, 1.5% and 5% in Poland.

the Netherlands, the Czech Republic, Poland, Hungary, Greece, Bulgaria, Romania and Slovakia for T-Mobile). The UK market for call termination services on the JV's mobile network is also vertically linked with the different national retail markets for international call services from a fixed network where FT (France, Spain and Poland) or DT (Germany, Slovakia, Romania, Hungary and Greece) are present.

180. According to the definitions developed in previous Commission decisions, the combined entity will have a 100% share of the UK market for call termination services on its mobile network.
181. However, the proposed transaction will not lead to any anticompetitive foreclosure effects on any of these markets for reasons similar to those presented at paragraphs 177 to 179 above.
182. First, possible anti-competitive discrimination operated by the JV on the mobile call termination markets would be prohibited under the applicable regulatory framework.
183. Secondly, discrimination by the new entity against competitors of FT/Orange or DT/T-Mobile would be technically impossible since the JV mostly receives its traffic from international carriers and cannot identify the exact origin of the international traffic terminated on its networks.
184. In addition, there would be no obstacle to FT/Orange or DT/T-Mobile's competitors switching international carriers in order to acquire termination services in case of discrimination.
185. Thirdly, and in any event, only a very limited proportion of the calls from countries where the parties are present are terminated in the UK.
186. On the basis of the above, the Commission concludes that the transaction does not raise serious doubts as to its compatibility with the common market in relation to the wholesale market for mobile and fixed call termination services.

V. PROPOSED REMEDIES

A. *First set of commitments*

187. On 8 February 2010, the parties submitted formal commitments in order to address the competition concerns identified in relation to (i) 3UK's position on the market and (ii) the concentration of spectrum in the 1800MHz band. On 11 February 2010, the parties submitted a revised set of commitments with some modifications following comments received after their contacts with the OFT and OFCOM.

Description of commitments

T-Mobile's RAN sharing agreement with 3UK

188. The parties offered a unilateral commitment to modify and amend the 3G RAN sharing agreement and the 2G national roaming agreement according to the terms set out in a draft 3UK agreement attached to the commitments and on the basis of the principles described extensively in another exhibit attached to the commitments.

189. In particular, the parties committed to amend the agreements, within a certain deadline after the adoption of the decision, in relation to (i) the termination provisions in the 3G RAN Sharing Agreement; (ii) the interaction between the consolidation of the 3G RANs of T-Mobile and 3UK and the implementation of the consolidation of the Orange network with safeguards for 3UK; (iii) a modification of the terms of the 2G roaming agreement with Orange and (iv) the ownership of the joint network after completion of the proposed transaction, which would remain unchanged.
190. The parties would periodically submit written reports to the Monitoring Trustee on the developments of the negotiations with 3UK and any agreed changes to the 3G and 2G agreements.

Spectrum

191. In order to remove the possible concern as regards the spectrum holding of the JV following the proposed transaction in the UK market, France Télécom and Deutsche Telekom committed to divest, either by way of a private sale or in the OFCOM auction (see paragraph 115 above), 2x15 MHz of the JV's 1800 MHz spectrum band (the "Divestment Spectrum").
192. The Divestment Spectrum consists of:
 - (i) 2x10 MHz of the JV's 1800 MHz spectrum ("Divestment Spectrum I"); and
 - (ii) further 2x5 MHz of the JV's 1800 MHz spectrum ("Divestment Spectrum II").
193. The parties committed to divest or procure the divestment of the Divestment Spectrum I and II by [...]. In addition, the parties undertook that the Divestment Spectrum I will be cleared and all related licences shall be surrendered to OFCOM by no later than 30 months after the OFCOM auction ends and no later than 30 September 2013, whichever is the earliest.
194. The parties undertook that the Divestment Spectrum II will be cleared and all related licences will be surrendered to OFCOM by no later than 30 September 2015.
195. According to the first set of commitments, the purchaser should fulfil certain requirements, namely: (i) it should be independent of and unaffiliated to the parties; (ii) it should have the financial resources, proven expertise and incentive to use the Divestment Spectrum as a viable and active competitive force in competition with the parties and other competitors; and (iii) it should neither be likely to create *prima facie* competition concerns nor give rise to a risk that the implementation of the commitments will be delayed and should, in particular, reasonably be expected to obtain all necessary regulatory approvals for the acquisition of the Divestment Spectrum.
196. The parties should be deemed to have complied with this commitment if:
 - (i) by [...]:
 - a. the parties have entered into a binding sale and purchase agreement ("SPA") to sell the Divestment Spectrum I and II to a purchaser and on

terms approved by the Commission and OFCOM in accordance with the procedure described in the commitments⁴⁴ or

- b. have unconditionally offered for sale the Divestment Spectrum I and II in the OFCOM auction in accordance with the auction rules established by OFCOM; and
 - (ii) have cleared the Divestment Spectrum I by no later than 30 months after the OFCOM auction ends or 30 September 2013, whichever is the earliest; and
 - (iii) have cleared the Divestment Spectrum II by no later than 30 September 2015.
197. If the parties have not divested the Divestment Spectrum I at the end of the Divestiture Period (from the date of the adoption of the Commission decision until [...]), the parties committed to surrender to OFCOM any licence related to the Divestment Spectrum I by no later than 30 months after the OFCOM auction ends and no later than 30 September 2013, whichever is the earliest.
198. If the parties have not divested the Divestment Spectrum II at the end of the Divestiture Period, the parties committed to surrender to OFCOM any licence related to the Divestment Spectrum II by no later than 30 September 2015.

Assessment of the first set of commitments

199. The Commission market-tested the first set of commitments submitted by the parties by sending questionnaires to the MNOs, MVNOs, distributors and consumer associations that participated in the Commission's market investigation.

T-Mobile's RAN sharing agreement with 3UK

200. The Commission's main concern related to the binding unconditional offer proposed by the parties is that such offer did not meet the criteria established by the Commission in relation to remedies offered in first phase⁴⁵. A unilateral commitment which depends on the agreement of a third party not bound by the commitments themselves does not resolve in a clear-cut manner the identified problem, that is the risk that the merger might increase the parties' ability or incentive to erode the 3G RAN sharing agreement, thus potentially removing 3UK as an effective competitor in the UK.

⁴⁴ Once they reach an agreement with a purchaser that meets the purchaser requirements, the Parties must submit a fully documented and reasoned proposal to the Commission, OFCOM and the Trustee. The latter three must verify that the purchaser meets the purchaser requirements and that the Divestiture Spectrum is being sold in a manner consistent with the commitments.

⁴⁵ “The remedies [should be] so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out ‘serious doubts’ within the meaning of Article 6(1)(c) of the Merger Regulation”, Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paragraph 81, OJ 2008/C 267/01.

201. In general, most respondents to the market test had no view or a generally positive view on the 3UK commitment. The most critical reply came from 3UK, which highlighted that the offered unilateral commitments did not provide sufficient certainty on significant issues such as the integration planning, that they amended 3UK's existing contractual rights to 3UK's detriment and required it to agree to the interpretation of provisions which are in dispute. 3UK also contested the dispute resolution mechanism (by arbitration) established by the commitments.

Spectrum

202. The Spectrum Divestment as such seemed *prima facie* likely to help to meet the spectrum related concern, since it could enable an acquirer to develop a 2x15 MHz LTE network on the 1800 MHz band or even a 2x20 MHz shared network, if the acquirer would pool their spectrum with either Vodafone or O2, which each already hold a 5.8 MHz 1800 band. As a consequence, the acquirer would be able to develop and deploy a network which could compete on almost equal footing with the JV's future LTE network.

203. The market test revealed that some respondents did not consider the offered remedy as appropriate to solve the competition concern. In particular, the respondents indicated that:

- (i) the divestiture process seems too lengthy, especially for the Divestment Spectrum II (competitors consider that it would be feasible for the parties to clear the total divested amount much faster);
- (ii) the amount of spectrum to be divested is insufficient (2x20 MHz would be more appropriate);
- (iii) there is no sufficient clarity as regards the contiguous characteristics of the spectrum divested (in particular one competitor indicated that the 2x15MHz spectrum would not allow a purchaser to act as a viable competitive constraint on the JV unless it is contiguous with the purchaser's existing 1800MHz holdings);
- (iv) there are some difficulties connected to the fact that currently a private sale of the spectrum would be prohibited under UK law and that there is considerable uncertainty as regards how the divestment could interact with the upcoming OFCOM spectrum auction;
- (v) there is no clarity as to whether the purchaser of Divestment Spectrum I and II should be one single entity or should be two, with some respondents indicating that the purchasers should be more than one, and 3UK indicating that the buyer should be single.

204. On the basis of the above, the Commission concluded that the first set of commitments submitted by the parties was not sufficiently clear-cut to address the identified competition concerns. In particular, the unilateral nature of the 3UK commitment raised concerns as to its effectiveness. As regards the spectrum commitment, the Commission found that the proposal implied a number of uncertainties connected to the sequence of the private sale and of the auction options for divestiture. This concern was related to the fact that, in making spectrum purchasing decisions, operators need to have a clear idea of the various spectrum

holdings of the various competitors. In addition, the Commission noted that the spectrum should be divested to a single purchaser in order to allow the independent deployment of an LTE network and that the Commission should retain control over the possible successful bidder in the auction.

B. Second set of commitments

205. Following the communication to the parties on 18 February of the outcome of the market test on the first set of commitments, and as a result of the technical observations put forward by OFCOM and OFT, the parties submitted a second set of commitments on 25 February. In the meantime, the parties informed the Commission on 19 February that they had reached and signed an agreement with 3UK. As a consequence, the Commission has assessed whether the content of this agreement is sufficient to remove the concerns identified above.

Description of commitments and the Commission's assessment

T-Mobile's RAN sharing agreement with 3UK

206. The text of the commitments refers to the agreement reached with 3UK on 19 February 2010. The object of that agreement is :
- (i) the timing of the integration plan, [...];
 - (ii) the cancellation of certain early termination rights under the 3G RAN sharing agreement;
 - (iii) the extension for [...] years of the 2G agreement and the reduction by [...]% of charges in relation to the 2G agreement;
 - (iv) a mutual commitment to negotiate and conclude an network integration plan between the parties and 3UK by [...]; and
 - (v) a fast track dispute resolution mechanism is established to guarantee the resolution of any dispute relating to terms of the network integration plan by [...]. This commitment is repeated in full in the text of the "Commitments".
207. The fast track dispute resolution mechanism provides that, if the CEOs of T-Mobile and 3UK do not resolve the dispute by [...], the parties should in agreement appoint a panel of experts.
208. The expert panel shall make its determination in writing by [...]. The process should be conducted in private and under the supervision of the Trustee. The expert should make its determination fairly and impartially, basing its decision on the factors indicated in the agreement and, in particular, on the principles guaranteeing a number of safeguards for 3UK.
209. Even if such dispute resolution mechanism departs from the mechanism set out in the Commission model text for commitments, the Commission considers that since the Monitoring Trustee will have a relevant role in the process and the Commission would receive regular reports on the development of the process, the fast track dispute resolution mechanism proposed by the parties can be accepted.

210. The Commission considers that the agreement reached with 3UK on 19 February 2010 is an important development that clearly meets the competition concerns raised during the market investigation. In particular, the parties and 3UK reached certainty on the terms for the integration plan of the respective networks which was one of the most serious concerns in the Commission's *prima facie* assessment. Given that a clear sequence of events has been established and that a fast track dispute resolution mechanism has been introduced, the possibility for the parties to deteriorate the shared RAN with 3UK is severely limited.
211. Furthermore, the Commission concludes that the elimination of the early termination rights constitutes a relevant safeguard for 3UK that highlights the parties' commitment to the agreement.
212. Finally, the agreement on the extension of the 2G agreement is a positive factor that reinforces 3UK's position on the market, allowing it to rely on a wide network. In turn, this helps 3UK to put competitive pressure on the parties.

Conclusion

213. In view of the modifications introduced to the text of the commitments, which are mainly due to the parties' agreement with 3UK, the Commission concludes that the commitments clearly solve the *prima facie* serious doubts expressed with respect to T-Mobile's radio access network sharing agreement with 3UK.

Spectrum

214. The second set of commitments carries over much of the substance of the first set of commitments (most notably the amount of Divestment Spectrum remains the same) but makes certain modifications in order to address the concerns expressed with respect to the first set of commitments.
215. In particular, in the second set the parties (i) propose to divest the same spectrum amount (2x10MHz plus 2x5MHz); (ii) maintain the possibility to divest the spectrum via private sale, auction or, as a fallback option, by surrendering of the license to OFCOM; (iii) repeat the provision related to the Commission's and OFCOM's approval of the purchaser in case of private sale.
216. The changes in the second set of remedies relate to the following aspects: timing of the auction and of the private sale; requirement for a single purchaser; monitoring of the auction and assessment of the successful bidder and specifications on the characteristic of the spectrum to be divested.

Timing of the auction / private sale

217. First of all, it should be noted that, with respect to the submissions as to the absence of a possibility to make a private sale of the Divestment Spectrum under national law, OFCOM has confirmed to the Commission that spectrum trading is not currently permitted in respect of spectrum licenses for frequencies in the 1800MHz band. Such sales will only be permissible if existing trading regulations in the UK are amended. By letter of 26 February 2010, OFCOM confirmed to the Commission that it intends to legislate in order to enable lawful trading of these licenses.

218. That said, the Commission cannot be certain that this type of private trading will be permitted sufficiently soon to enable the parties to sell spectrum to private parties within the time periods foreseen in the commitments. However, assuming that licenses have not been made tradable within that time frame, the commitments will nevertheless remain effective. This is because, in the absence of a private sale, the commitments foresee that the Divestment Spectrum will be sold through the OFCOM auction or, if the auction does not take place by [...], the parties will be obliged to surrender the relevant licences by the dates set out below. Therefore, even in the absence of a private sale, it is certain that the Divestment will take place.

219. Next, in order to address the concerns related to the uncertainties connected to the sequence of the private sale and of the auction options for divestiture, the parties introduced a new condition related to the requirements for the private sale. Otherwise, the clauses with respect to timing and private sale remain the same. For the reasons presented below, the Commission is satisfied that the modification in question provides sufficient certainty with respect to the sequence of private sale and of the auction.

220. [...]⁴⁶.

221. In practice, this means that:

- a. [...];
- b. [...];
- c. [...];
- d. [...].

222. The amendments to the text of the commitments thus ensure a greater clarity as to the time-line for the different alternative divestment processes for the Divestment Spectrum.

Single purchaser

223. The text now expressly indicates that the purchaser of the 2x10MHz should be the same as the purchaser of the 2x5MHz. This will ensure that the purchaser will hold a sufficient amount of spectrum to allow an independent deployment of a competitive LTE network. This thus solves one of the Commission's concerns with respect to the first set of commitments.

Control over the "auction purchaser"

224. The divestiture mechanism of the commitments provides that if the spectrum is to be offered unconditionally in an OFCOM auction, the Commission would have to approve the successful bidder on the basis of the same criteria established for the potential purchaser. Furthermore, the Monitoring Trustee will review and assess the

⁴⁶ [...].

auction process and report to the Commission. It follows from this that the Commission will retain control over the possible successful bidder in the auction.

Amount of spectrum

225. The amount of spectrum to be divested has not been modified by the parties. The parties indicated that clearing 2x20 MHz would take a longer time to clear than 2x15 MHz; that it would impair their plans to develop their own LTE network and that, as a result of the diminished spectrum, they would face severe capacity limitations for the offer of access agreements to MVNOs at wholesale level.
226. In any case, the Commission considers that a divestiture of 2x20 MHz of spectrum would go beyond what is necessary to address the competition concerns which emerged during the investigation. In the absence of the merger, the emergence of two competing single LTE players on the 1800 MHz network was not the most likely scenario (see paragraph 135).
227. It is therefore reasonable to conclude that the divestment of 2x15 MHz of 1800 MHz spectrum would be a better solution and still sufficiently clear-cut to address the competition concerns: by acquiring such amount of spectrum, O2 or Vodafone could develop independently a 2x15 MHz or even a 2x20 MHz network that could effectively compete with the JV's network on equal grounds. Alternatively, 3UK or a new entrant would also have sufficient spectrum of 1800 MHz to build a strong competing LTE network.
228. The Commission notes that the second set of commitments specifies exactly which parts of the parties' spectrum is going to be divested, which is contiguous to Vodafone's spectrum. This does not change the key finding that the Divestment Spectrum will be sufficient for any potential purchaser to deploy an LTE network, irrespective of whether it would be contiguous to its own existing 1800 MHz band or not. Indeed, the Divestment Spectrum would be sufficient even for potential purchases who do not hold any 1800 MHz spectrum.

Timing of the clearance

229. The parties did not modify the clearance timing for the two blocks of spectrum, namely 30 September 2013 and 30 September 2015. The Commission's investigation concluded that the timing suggested by the parties seems reasonable and consistent with OFCOM's technical estimation. In planning the clearance of the 2G 1800 MHz spectrum, the parties have to take into account (a) the amount of spectrum they will hold post-divestment; (b) the amount of 2G traffic loading on the two networks; (c) the migration rate of traffic away from 2G to other technologies, considering that most of their customers are pre-paid and therefore less willing to move to a 3G-subscription and (d) the spare capacity on 3G and LTE (yet to be implemented) networks to accommodate migrating 2G traffic.
230. An additional complicating element is the 3G RAN sharing with 3UK, and the fact that, following the agreement with 3UK of 18 February 2010, [...].
231. In conclusion, given the technical characteristics of the parties' integration plans, and the migration and customer base characteristics that the parties have provided to the Commission, to OFCOM and to the OFT, the Commission considers that the

timing for clearance of the divestment spectrum proposed by the parties is reasonable and can be accepted.

Conclusion

232. In view of the above, the Commission considers that, given the modifications of the text, the commitments clearly solve the Commission's *prima facie* serious doubts related to the excessive concentration of spectrum in the 1800MHz band as a result of the creation of the JV.

C. Conclusion on commitments

233. In view of the fact that the changes included in the second set of commitments and the technical explanations submitted by the parties address the concerns raised by the respondents to the market test of the remedies, the Commission concludes that the second set of commitments is sufficient to clearly rule out 'serious doubts' as regards the competition concerns related to the agreement with 3UK and to the spectrum holding of the JV in the 1800MHz band. Thus the Commission can conclude that the proposed transaction does not raise serious doubts as to its compatibility with the common market in relation to the UK market for retail mobile services and the UK wholesale market for access and call origination on public mobile telephone networks.

D. Conditions and obligations

234. Under the first sentence of the second subparagraph of Article 6(2) of the EC Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
235. The decision in this case is conditioned on the full compliance with Sections B, C, D and G of the commitments and exhibit 1 to the Commitments submitted by the parties on 24 February 2010.
236. The remaining requirements set out in the other Sections of the Commitments submitted by the parties on 24 February 2010 constitute obligations.
237. The Commission has concluded that the remedies submitted by the parties are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the parties, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) and Article 6(2) of Council Regulation (EC) No 139/2004.
238. The detailed text of the commitments is annexed to this decision. The full text of the annexed commitments forms an integral part to this decision.

VII. CONCLUSION

239. For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the

common market and with the functioning of the EEA Agreement, subject to full compliance with the conditions and obligations contained in the commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President of the Commission

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EEC) No. 139/2004 (the “**Merger Regulation**”), France Télécom and Deutsche Telekom (the “**Parties**”) hereby provide the following commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the formation of a 50/50 Joint Venture between T-Mobile UK and Orange UK (the “**JV**”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) 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 Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties, including the JV, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89.

Application Date: the date specified by OFCOM for the receipt of applications for the grant of a licence following the OFCOM Auction.

Combined Auction: the forthcoming auction to be held by OFCOM of 800 MHz spectrum, 2.6 MHz spectrum and any spectrum that is released by mobile operators as a result of the spectrum caps in accordance with OFCOM Auction Rules.

Decision: decision of the Commission.

Divestiture Period: the period from the Effective Date until [...].

Divestment Spectrum: the spectrum as defined in Section B that the Parties commit to divest.

Divestment Spectrum I: 2x10 MHz of the JV's 1800 MHz spectrum, at 1721.7 – 1731.7 MHz paired with 1816.7 – 1826.7 MHz.

Divestment Spectrum II: further 2x5 MHz of the JV's 1800 MHz spectrum to be divested, at 1731.7 – 1736.7 MHz paired with 1826.7 – 1831.7 MHz.

Effective Date: the date of adoption of the Decision by the European Commission.

H3G Agreement: the Godiva Variation and National Roaming Variation Agreement between the Parties and H3G the effect of which is to modify and amend the 3G RAN Sharing Agreement and the 2G National Roaming Agreement.

Licences: licences issued under the Wireless Telegraphy Act 2006.

MBNL: the joint venture between T-Mobile UK and H3G which manages the shared 3G radio access network.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

OFCOM Auction: the Combined Auction or a separate or other form of spectrum auction run by OFCOM.

OFCOM Auction Rules: the regulations adopted by OFCOM governing the OFCOM Auction and any related rules or procedures.

Parties: France Télécom and Deutsche Telekom as well as their respective affiliates, in particular Orange UK and T-Mobile UK and the JV.

Parties to the Arbitration: the Parties and H3G.

Purchaser: the entity approved by the Commission and OFCOM as acquirer of the Divestment Spectrum in accordance with the criteria set out in Section D.

Trustee: the Monitoring Trustee.

3G RAN Sharing Agreement: the agreements between T-Mobile UK and H3G entered into on 18 December 2007, the effect of which is to create a joint 3G radio access network which provides 3G network capacity to T-Mobile UK and H3G.

2G National Roaming Agreement: the agreement between Orange UK and H3G entered into on 10 May 2006, the effect of which is to allow H3G customers to roam onto the Orange UK 2G network when not in coverage of the footprint of H3G's own 3G network.

Section B. The Commitments

B.1. Commitment towards H3G

1. The Parties commit to ensure that [...] T-Mobile UK will materially complete the current consolidation plan of the 3G RANs of T-Mobile UK and H3G (excluding the RAN in Northern Ireland) by [...], and that certain termination rights included in the 3G RAN Sharing Agreement [...] are cancelled. The Parties also commit to ensure that the 2G national roaming agreement is extended for a period of [...] years and that a [...]% reduction on the "[...]" Charges" to be paid by H3G shall apply.
2. In order to achieve such a result the Parties have entered into the H3G Agreement with H3G on 19 February 2010, which is attached as **Exhibit 1**.
3. Pursuant to the H3G Agreement, the current consolidation plan of the 3G RANs of T-Mobile UK and H3G (excluding the RAN's in Northern Ireland) will be completed by [...]). Similarly, the termination rights included in the 3G RAN Sharing Agreement [...] are cancelled [...]). Similarly, the 2G national roaming agreement is extended for a period of [...] years and a [...] reduction on the "[...]" Charges" to be paid by H3G shall apply [...]).
4. According to the H3G Agreement, the Parties also commit to negotiate and agree upon the terms of a network integration agreement relating to the terms of the Parties' network integration on the basis of the principles referenced in Clause 3.5 of the H3G Agreement and the 3G RAN Sharing Agreement and other agreements related to that.
5. The Parties shall be deemed to have complied with the commitment set out under paragraph 4 if such agreement is finalised by [...], or – should this not be the case – the CEOs of Deutsche Telekom and Hutchinson have resolved the matters in dispute by [...].
6. If the Parties and H3G have not agreed upon the network integration agreement as set out under paragraph 4 by [...], and provided the CEOs of Deutsche Telekom and H3G did not resolve the matters in dispute by [...], a fast track dispute resolution procedure shall apply in accordance with Section G below. Any such disagreement between the Parties and H3G shall be finally and exclusively resolved by such fast track dispute resolution procedure.

B.2. Commitments to offer for sale the Divestment Spectrum

7. The Divestment Spectrum consists of
 - (i) 2x10 MHz of the JV's 1800 MHz spectrum, at 1721.7 – 1731.7 MHz paired with 1816.7 – 1826.7 MHz (the "*Divestment Spectrum I*'); and
 - (ii) further 2x5 MHz of the JV's 1800 MHz spectrum, at 1731.7 – 1736.7 MHz paired with 1826.7 – 1831.7 MHz to be divested (the "*Divestment Spectrum II*').
8. The Parties commit to divest or procure the divestment of the Divestment Spectrum I and the Divestment Spectrum II by the end of the Divestiture Period.
9. In addition, the Parties undertake that the Divestment Spectrum I will be cleared and all related Licences (or parts of Licences) so far as they relate to the Divestment Spectrum I shall be surrendered to OFCOM by no later than 30 months after the OFCOM Auction ends and no later than 30 September 2013, whichever is the earliest. The Divestment Spectrum II will be cleared and all related Licences (or parts of Licences) so far as they relate to the Divestment Spectrum II shall be surrendered to OFCOM by no later than 30 September 2015.
10. The Divestment Spectrum will be divested either by way of a private sale or in the OFCOM Auction.
11. The Parties shall be deemed to have complied with this commitment if:
 - (i) by the expiration of the Divestiture Period:
 - a. the Parties have entered into a binding sale and purchase agreement to sell the Divestment Spectrum I and the Divestment Spectrum II to a single Purchaser and:
 - (1) the Purchaser and the terms have been approved by the Commission and OFCOM in accordance with the procedure described in paragraphs 18 and 19; and
 - (2) the Parties have submitted a copy of the final agreement to the Commission and OFCOM for such approval at least [...] or

- b. the Parties have unconditionally offered for sale the Divestment Spectrum I and the Divestment Spectrum II in the OFCOM Auction in accordance with the OFCOM Auction Rules; and the Purchaser has been approved by the Commission in accordance with paragraphs 18 and 20, and
 - (ii) the Parties have cleared the Divestment Spectrum I by no later than 30 months after the OFCOM Auction ends or 30 September 2013, whichever is the earliest; and
 - (iii) the Parties have cleared the Divestment Spectrum II by no later than 30 September 2015.
- 12. If the Parties have not divested the Divestment Spectrum I at the end of the Divestiture Period, the Parties will surrender to OFCOM such part of any Licence in so far as it relates to the Divestment Spectrum I by no later than 30 months after the OFCOM Auction ends and no later than 30 September 2013, whichever is the earliest.
- 13. If the Parties have not divested the Divestment Spectrum II at the end of the Divestiture Period, the Parties will surrender to OFCOM such part of any Licence in so far as it relates to the Divestment Spectrum II by no later than 30 September 2015.
- 14. If the Parties have not cleared the Divestment Spectrum in accordance with paragraphs 8 or 9, the Parties will surrender to OFCOM such part of any Licence in so far as it relates to the Divestment Spectrum.
- 15. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Spectrum, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Spectrum is no longer necessary to render the proposed concentration compatible with the common market.

Section C. Related commitments

- 16. The Parties shall submit written reports in English on the development of the negotiations with H3G and any agreed changes to the existing 3G RAN Sharing

Agreement and 2G National Roaming Agreement to the Commission, OFCOM and the Monitoring Trustee (the "***Trustee***") no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

17. In case of a divestment of the Divestment Spectrum by way of a private sale, the Parties shall submit written reports in English on potential purchasers and developments in the negotiations with such potential purchasers to the Commission, OFCOM and the Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

Section D. The Purchaser

18. In case of a divestment of the Divestment Spectrum by way of a private sale or an Ofcom Auction, the Purchaser, in order to be approved by the Commission and OFCOM, must:
 - (a) be independent of and unaffiliated to the Parties;
 - (b) have the financial resources, proven expertise and incentive to use the Divestment Spectrum as a viable and active competitive force in competition with the Parties and other competitors; and
 - (c) neither be likely to create, in the 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 before-mentioned criteria for the purchaser hereafter the "***Purchaser Requirements***").
19. The final binding sale and purchase agreement shall be conditional on the Commission's and OFCOM's approvals. When the Parties have reached an agreement with a Purchaser, they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission, OFCOM and the Trustee. The Parties must be able to demonstrate to the Commission and OFCOM that the Purchaser meets the Purchaser Requirements and that the Divestment Spectrum is being sold in a manner consistent with the Commitments. For the approval, the Commission and OFCOM shall verify that the Purchaser fulfils the Purchaser Requirements and that the Divestment Spectrum is being sold in a manner consistent with the Commitments.

20. Also in case of an OFCOM Auction, the Purchaser must fulfil the requirements set out in paragraph 18 and be approved by the Commission as set out in paragraph 19 for a private sale.

Section E. Trustee

E.1. Appointment Procedure

21. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee.
22. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as a regulatory body, an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Parties

23. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom the Parties propose 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 Trustee fulfils the requirements set out in paragraph 22 and shall include:
 - (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments; and
 - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

24. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the

Commission. If more than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

25. If all the proposed Trustees are rejected, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 21 and 22.

Trustee nominated by the Commission

26. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

E.2. *Functions of the Trustee*

27. The 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 Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.
28. The Trustee shall:
 - (i) 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 of the Commission;
 - (ii) monitor compliance by the Parties with the conditions and obligations provided in Sections B and C;
 - (iii) assume any other functions assigned to the Trustee under the conditions and obligations attached to the Decision;

- (iv) in case of a divestment by way of a private sale of the Divestment Spectrum, review and assess potential purchasers as well as the progress of the divestiture process;
- (v) in case of an OFCOM Auction of the Divestment Spectrum, consult with Ofcom about the intended design of the auction and the envisaged auction rules and report on that to the Commission as well as on the progress of the Ofcom Auction;
- (vi) review and assess qualified bidders in the Ofcom Auction;
- (vii) propose to the Parties such measures as the Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision;
- (viii) provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report in English within 15 calendar days after the end of every month for the first 3 months and from then on within 15 calendar days after the end of every quarter until the Commission has confirmed that the obligations attached to the Decision have been fully complied with. The report shall cover the developments in relation to the negotiation of the terms of the network integration agreement as contemplated in the H3G agreement attached as Exhibit 1 and to the divestiture of the Divestment Spectrum so that the Commission can assess whether the Parties comply with their obligations under these Commitments; and
- (ix) provide, in addition to these periodic reports, prompt reports in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with any of the conditions or obligations under these Commitments.
- (x) supervise the fast-track dispute resolution process and provide on a fortnightly basis reports on the progress of the process to the Commission as set out in paragraph 43.

E.3. Duties and obligations of the Parties

29. The Parties shall provide and cause its advisors to provide the Trustee with all such cooperation, assistance and information, including copies of all relevant

documentation, as the Trustee may reasonably require to perform its task. The Trustee shall have full and complete access to any of the business books, records, documents, personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments. The Parties shall make available to the Trustee one or more office(s) on its premises, and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

30. The Parties shall indemnify the Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agree that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the 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 Trustee, its employees, agents or advisors.
31. At the expense of the Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 29 shall apply *mutatis mutandis*.

E.4. Replacement, discharge and reappointment of the Trustee

32. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
 - (i) the Commission may, after hearing the Trustee, require the Parties to replace the Trustee; or
 - (ii) the Parties, with the prior approval of the Commission, may replace the Trustee.

33. If the Trustee is removed according to paragraph 32, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 21 at seqq.
34. Besides the removal according to paragraph 32, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

35. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Trustee:
 - (i) grant an extension of the time periods foreseen in the Commitments, or
 - (ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.
36. As far as the undertakings relating to the Divestment spectrum II under paragraphs 8 and 9 are particularly concerned, the following factors will be taken into account in determining whether exceptional circumstances may justify a waiver, modification or substitution of the Commitments at the request of the Parties:
 - (i) significant changes in the market circumstances, in particular, in relation to availability of additional spectrum;
 - (ii) significant changes in the regulatory environment including, in particular new allocations of spectrum, refarming of existing spectrum being permitted or new Combined Auction design;
 - (iii) a new regulatory assessment of the effect of spectrum allocation.
37. Where the Parties seek an extension of a time period, they shall submit a request to the Commission no later than one month before the expiry of that period, showing

good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

Section G. Fast Track Dispute Resolution

38. A fast track dispute resolution procedure shall apply if the Parties and H3G cannot finally agree upon the terms of a network integration agreement relating to the terms of the Parties' network integration on the basis of the principles referenced in clause 3.5 of the H3G Agreement (**Exhibit 1**) by [...] and provided the CEOs of Deutsche Telekom and H3G did not resolve the matters in dispute by [...]. Such disagreements shall be finally and exclusively resolved by the fast track dispute resolution procedure as described below.
39. The parties shall appoint a panel of experts (the "Expert") to determine any dispute. This panel shall comprise:
 - (i) One expert appointed by TMUK;
 - (ii) One expert appointed by H3G; and
 - (iii) One expert appointed by the Chairman of OFCOM,each of whom shall be an independent, suitably qualified and experienced UK based expert.
40. The Expert shall make his determination in writing by [...].
41. The process shall be conducted in private and shall be confidential but under supervision of the Trustee.
42. The Expert shall act on the following basis:
 - (i) The Expert shall act as an expert and not as an arbitrator and shall act fairly and impartially, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Expert or his determination or the procedure by which he reaches his determination;
 - (ii) Each party shall submit to the Expert its brief and its submission in relation to the matter it wants to see resolved by the Expert within 2 working days of his appointment;

- (iii) The Expert shall decide the procedure to be followed within 5 days of his appointment and the parties shall assist and provide such documentation as the Expert reasonably requires for the purposes of the determination;
- (iv) The Expert shall base his determination on the factors referred to in the H3G Agreement, and in particular the delivery of the factors referred to in Clause 3.5 of the H3G Agreement;
- (v) The Expert's determination shall (save for manifest error or fraud) be final and binding on the parties;
- (vi) Each party shall carry out the actions required to apply and comply with the obligations set out in the Expert's determination; and
- (vii) 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.

43. In order to enable the Trustee to carry out its supervision function, the Trustee shall
- (i) receive copies of all submissions made by the Parties in relation to the matters they want to see resolved by the Expert, on the day when these have been submitted to the Expert;
 - (ii) receive copies of all other documentation provided by the Parties, on the day when these have been submitted to the Expert;
 - (iii) receive a copy of the determination made by the Expert, on the day when the determination has been provided to the Parties;
 - (iv) provide on a fortnightly basis reports on the progress of the process to the Commission;
 - (v) provide a written report to the Commission on this determination made by the Expert within 7 days.
44. The dispute procedure set out above shall be without prejudice to any other rights and remedies that may be available to a party in respect of any breach of the H3G Agreement, including, without limitation a party's right to seek, obtain and implement injunctive, interlocutory or other immediate relief.

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