



**Final Report of the Hearing Officer<sup>1</sup>**  
**Telefónica Deutschland / E-Plus**  
**(M.7018)**

**I. WRITTEN PROCEDURE**

**A. Introduction**

1. On 31 October 2013, the European Commission (the "Commission") received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation<sup>2</sup> by which Telefónica Deutschland Holding AG ("Telefónica" or the "Notifying Party") acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over E-Plus Mobilfunk GmbH & Co. KG ("E-Plus") (the "Transaction"). Telefónica and E-Plus are collectively referred to as the "Parties".
2. The Commission's first phase investigation raised serious doubts as to the compatibility of the Transaction with the internal market. On 20 December 2013, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation. The Notifying Party submitted written comments on 15 January 2014.

**B. Statement of Objections**

3. On 26 February 2014, the Commission adopted a Statement of Objections ("SO"), in which it took the preliminary view that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2 of the Merger Regulation.
4. The Commission set a time limit of 12 March 2014 for replying to the SO. The Parties as well as Koninklijke KPN NV ("KPN"), the ultimate parent of E-Plus, replied on that date. In its reply, the Notifying Party requested a formal oral hearing.

**C. Access to the file**

5. The Notifying Party initially received access to the file via CD-ROM on 27 February 2014. On 3 March 2014, the Notifying Party submitted a request to DG Competition for further access to the file. DG Competition dealt with this request.

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<sup>1</sup> Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

6. Additional access to the file was granted on 10 March, 4 April, 25 April, 8 May and 16 June 2014.

#### **D. Interested third persons and competent authorities of the Member States**

##### *1) Admission of interested third persons*

7. Upon their reasoned requests, I allowed Deutsche Telekom AG ("Deutsche Telekom"), Vodafone Group plc ("Vodafone"), freenet AG ("freenet"), l&l Telekom GmbH ("l&l Telekom"), Drillisch AG ("Drillisch") and Airdata AG ("Airdata") to be heard as interested third persons. I also acceded to requests from each of these to participate in the formal oral hearing.

##### *2) Rejection of application to be heard as an interested third person*

8. A private consultancy applied to be heard as an interested third person for the purposes of Article 18(4) of the Merger Regulation. By a letter of 25 February followed by a decision of 7 March 2014, I rejected that application in accordance with Article 5(3) of Decision 2011/695/EU.

9. In essence, that consultancy had not shown a "sufficient interest" to be heard as an interested third person.<sup>3</sup> In that regard, I considered that expertise in the sector concerned and the mere expression of interest in the Commission's investigation are not enough to show the existence of a "sufficient interest" for the purposes of Article 18(4) of the Merger Regulation. In addition: (i) the mere fact that an applicant to be heard as an interested third person purchases retail services of the type concerned by the present case did not, taken on its own, suffice for the purposes of Article 18(4) of the Merger Regulation; (ii) the consultancy did not purport to act as a "consumer association"; and (iii) its claimed superior expertise for the purposes of appraising the proposed concentration had no bearing on whether it had a "sufficient interest" for the purposes of Article 18(4) of the Merger Regulation.

##### *3) Competent authorities of the Member States*

10. The national competition authorities of each Member State were invited to the oral hearing. Upon request, on the basis of Article 15(3) of the Merger Implementing Regulation, I also invited the Austrian Regulatory Authority for Broadcasting and Telecommunications and the German Bundesnetzagentur to the formal oral hearing.

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<sup>3</sup> In accordance with Article 18(4) of the Merger Regulation, Article 11 of Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1 (the "Merger Implementing Regulation") and Article 5(2) of Decision 2011/695/EU, if natural or legal persons other than notifying parties or other involved parties are to be heard pursuant to Article 18 of the Merger Regulation and Article 16(1) of the Merger Implementing Regulation, they must demonstrate a "sufficient interest" within the meaning of Article 18(4), second sentence, of the Merger Regulation. It follows from Articles 1(2) and 5(2) of Decision 2011/695/EU that, in merger cases, when assessing whether an applicant has shown a sufficient interest, the hearing officer takes into account whether and to what extent that applicant is affected by the proposed concentration.

## **II. ORAL PROCEDURE**

### **A. Participants at the formal oral hearing**

11. The formal oral hearing was held on 17 March 2014 and was attended by:
- the Parties and KPN, as well as their external legal and economic advisers;
  - the interested third persons Deutsche Telekom, Vodafone, freenet, 1&1 Telekom, Drillisch and Airdata, some of whom were assisted by external advisers;
  - relevant Commission services;
  - the competition authorities of 10 Member States (Belgium, Germany, Spain, France, Italy, Netherlands, Latvia, Hungary, Finland and the United Kingdom); and
  - other competent authorities of the Member States, namely the Bundesnetzagentur (Germany) and the Regulatory Authority for Broadcasting and Telecommunications (Austria).

### **B. Closed sessions**

12. The Parties requested and were granted closed sessions for parts of their presentations.

## **III. PROCEDURE AFTER THE FORMAL ORAL HEARING**

### **A. Letter of facts**

13. On 4 April 2014, the Commission issued a letter of facts to the Notifying Party. The Parties and KPN submitted their comments on the letter of facts on 10 April 2014.

### **B. Remedies**

14. The Notifying Party submitted a first set of commitments on 10 April 2014 and the Commission undertook a market test of these commitments on 11 April 2014. On 28 April 2014, the Notifying Party submitted a second set of commitments which were market tested starting 30 April 2014. The Notifying Party submitted a final set of commitments on 29 May 2014.

### **C. Additional interested third person**

15. Upon its request, I admitted Mass Response Services GmbH to the proceedings as an interested third person.

### **D. The draft decision**

16. I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which

the Parties and KPN have been afforded the opportunity of making known their views.

**IV. CONCLUSION**

17. Overall, I consider that the effective exercise of the procedural rights has been respected in this case.

Brussels, 25 June 2014

*(Signed)*

Joos STRAGIER