EN

Case No COMP/M.3916
–T-Mobile Austria/Tele.ring

Only the German text is authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 8 (2)
Date: 26/04/2006.

EUROPEAN COMMISSION

Brussels, 26 April 2006

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PUBLIC VERSION

COMMISSION DECISION

of 26 April 2006

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case No COMP/M.3916 – T-MOBILE AUSTRIA/TELE.RING)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

Having regard to the Commission's decision of 14 November 2005 to initiate proceedings in this case,

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

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

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

WHEREAS:

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1 OJ L 24, 29.1.2004, p.1.

2 OJ C [...], [...].2006, p. [...]

3 OJ C [...], [...].2006, p. [...].

(1) On 21 September 2005 the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the Merger Regulation") whereby the undertaking T-Mobile Austria GmbH ("T-Mobile", Austria), part of the German group Deutsche Telekom AG ("Deutsche Telekom"), acquires, within the meaning of Article 3(1)(b) of the Council Regulation, control of the whole of the undertaking tele.ring Unternehmensgruppe ("tele.ring", Austria) by way of a purchase of shares.

(2) After examining the notification, the Commission found that the notified transaction fell within the scope of the Merger Regulation and on 14 November 2005 it decided, pursuant to Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement, to initiate proceedings.

(3) On 8 February 2006 the Commission served the notifying party with its Statement of Objections, to which the parties replied on 27 February and 1 March 2006 respectively. Pursuant to the second subparagraph of Article 10(3) of the Merger Regulation, the deadlines were extended by 20 working days by Commission decision and with the agreement of the notifying party.

I. THE PARTIES

(4) T-Mobile is a provider of mobile and fixed telephony services in Austria. It holds licences from the Austrian telecommunications regulator to operate a 2G/GSM network, a 3G/UMTS network and a fixed telephony network. T-Mobile has access to the GSM 900 MHz and 1800 MHz frequencies and to UMTS frequency bands. Its parent company, Deutsche Telekom, is a world player in the telecommunications industry.

(5) Tele.ring is a provider of mobile and fixed telephony services in Austria. It also holds licences from the Austrian telecommunications regulator to operate a 2G/GSM network, a 3G/UMTS network and a fixed telephony network. It has access to GSM frequencies only in the 1800 MHz band and to UMTS frequency bands.

II. THE PROPOSED TRANSACTION AND CONCENTRATION

(6) The proposed transaction involves T-Mobile acquiring all the shares in EHG Einkaufs- und Handels GmbH, the sole owner of the tele.ring group, which comprises tele.ring Telekom Service GmbH, TRA 3G Mobilfunk GmbH and EKOM 3G Mobilfunk GmbH.

(7) It therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(8) The parties have an aggregate worldwide turnover of more than EUR 5 000 million[4]. Deutsche Telekom and tele.ring each have an aggregate Community-wide turnover of more than EUR 250 million, but neither of them generates more than two thirds of

[4] The turnover calculation is made on the basis of Article 5(1) of the Merger Regulation and the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25).

their aggregate Community-wide turnover within one and the same Member State. The notified concentration therefore has a Community dimension.

IV. RELEVANT MARKETS

(9) T-Mobile and tele.ring operate mobile networks in Austria and are also active on related end-customer and wholesale markets. They also both provide fixed network services but the merger has no effect on these markets. The parties suggest that the product markets should be defined in accordance with previous decisions taken by the Commission[5] and, where appropriate, with Commission Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services ("the Recommendation")[6].

1. The provision of mobile telecommunications services to end customers

1.1 The relevant product market

(10) In its 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, subscribers or pre-paid customers) , for example, or by technology (2G/GSM or 3G/UMTS networks). It therefore assessed the previous cases on the basis of a single market for the provision of mobile telecommunications services to end customers[7].

(11) The market investigation confirmed that this was also appropriate in this case. As far as distinguishing by type of customer is concerned, such as between private and business customers or subscribers and pre-paid customers, there is supply substitutability by network operators and the network operators cannot even make a clear distinction between corporate and private customers. For example, tele.ring appears to have a large number of corporate customers on its ordinary private customer tariffs and introduced a special corporate tariff only in May 2005.

(12) Nor did the market investigation show that it was necessary to distinguish between markets for 2G/GSM and 3G/UMTS for the purpose of assessing this case.

(13) Voice telephony and data services, such as text messaging, access to e-mail services or general Internet access, can be provided on a 2G network although, in the case of general Internet access, at a slower speed of 9.4 kbit/s. Today, all these services are also already being provided over 3G networks. Other services require the faster transmission speed which only a 3G network can provide. This is currently 128 kbit/s, with transmission rates of up to 384 kbit/s planned for late 2006. Such transmission rates are required for services such as video telephony, mobile TV, mobile broadband Internet (HSDPA) and other multimedia services ("multimedia services").

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5 See in particular cases COMP/M.2803 - Telia/Sonera, COMP/M.3530 - TeliaSonera/Orange and COMP/M.3776 - Vodafone/Oskar Mobile.

6 OJ L 114, 8.5.2003, p. 45. However, the Recommendation is without prejudice to the definition of markets in competition cases (paragraph 18).

7 Cases COMP/M.3530 – TeliaSonera/Orange and COMP/M.3776 – Vodafone/Oskar Mobile.

(14) Mobilkom, T-Mobile, ONE and tele.ring currently each operate parallel 2G and 3G networks in Austria. The market investigation showed that the operators cannot distinguish between 2G and 3G customers, as they both use the same SIM card[8]. Even if a customer has a 3G telephone, it is highly likely that not all telecommunications services will be provided over the 3G network as 3G telephones can also operate in 2G networks. Since 3G networks are a long way from providing full geographical coverage in Austria, customers have to use 2G networks in any event in the areas not yet covered by a 3G network. Even in areas where 2G and 3G networks are operated in parallel, operators can direct traffic between the two according to network availability, capacity and efficiency considerations. The market investigation also showed that there is currently no price difference for the same services offered over a 2G or over a 3G network. For example, H3G, a 3G network operator, does not charge higher prices than the network operators which provide the same services over their 2G networks.

(15) In any event, the provision of multimedia services is closely connected to the provision of services that can also be provided over 2G networks. First, all these services are provided by the same operator to the same customer. From the customer's point of view, the services provided over 2G networks are the basic services. No customer will conclude a mobile telephone contract if the operator does not provide these basic services, and those will be the most relevant factors of competition in the foreseeable future even for 3G operators. The market investigation confirmed that competitive and aggressive voice-telephony offers are the key to attracting new customers, even if a 3G network operator also wants to sell multimedia services.

(16) The market investigation likewise showed that the services which can be provided over a 2G network will also be of overriding significance for operators in the future. In its business plan, T-Mobile expects […][*] of turnover in the 3G sector in 2007 to be generated by voice telephony, and the share of data traffic (including the sending of text messages, etc.) to stand at […][*]. This shows that voice telephony (and other services that can also be offered over a 2G network) will remain […][*] even for an operator which, alongside its 3G network, will provide voice telephony primarily over its 2G network. The market investigation showed that this was also true of purely 3G operators.

(17) The situation can differ for additional services, especially multimedia services, which cannot be offered over a 2G network on account of capacity bottlenecks and different technologies.

(18) For the purposes of this decision, we can therefore assume a single market for the provision of mobile telephony services to end customers, in so far as they can be provided on both a 2G and a 3G basis. As far as this case is concerned, the question can be left open whether there is a separate market for specific applications available only on the basis of 3G technology, especially multimedia services, as there are no competition concerns with respect to these services, which have only recently become available on the market.

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[8] SIM = Subscriber Identity Module

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

(19) In accordance with previous Commission decisions, the notifying party suggests that the geographic market should be defined in national terms, i.e. restricted to Austria. The market investigation confirmed this assessment.

2. Wholesale market for call termination

(20) 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 (together with interconnection, on which it is based) 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.

(21) As established in previous Commission decisions[9], 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. Recommendation 2003/311/EC accordingly regards call termination in different (fixed and mobile) networks as constituting separate markets. Each network operator therefore has a monopoly on call termination in its fixed or mobile network.

(22) Geographic markets for call termination in mobile and fixed networks tend to be national. 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. The coverage of fixed and mobile networks tends to correspond to national borders, with the result that the supply of call termination at wholesale level is also national in scope.

3. Wholesale market for international roaming

(23) International roaming is a service which allows mobile subscribers to use their mobile handsets and SIM cards to make and receive calls[10] even 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.

(24) 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.

(25) This market definition reflects the current situation as it has developed over time. Originally, the home network operator could not direct outbound traffic[11] onto a

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9 COMP/M.1493 – Telia/Telenor, COMP/M.2803 – Telia/Sonera and COMP/M.3806 – Telefónica/Cesky Telecom.

10 And to send and receive text messages (and other data services).

11 "Outbound traffic" means calls made by a network customer abroad. The home network operator must purchase outbound roaming services from the appropriate foreign network operator(s). "Inbound traffic" means calls made by customers of foreign mobile operators (visitors) on an operator's own network. An

specific foreign network. In the absence of effective traffic direction mechanisms, international roaming traditionally took place on any of the available mobile networks in the country in which the end customer was located. It was on this basis that the Commission previously reached the provisional conclusion that each network constituted a separate market for the provision of wholesale international roaming services[12].

(26) However, network operators can nowadays to a great extent choose the network in which their customers can make calls abroad. "Preference lists" are stored on the customer's SIM card and can be amended or adapted over the air (OTA), whereby even the registration of individual customers can be monitored in the foreign network[13].

(27) Any foreign network operator may be selected. In the past, operators frequently concluded several roaming agreements in the same country in order to ensure the best possible roaming coverage, even where the national coverage offered by the various operators was comparable. This strategy does not generate significant costs, given that standard roaming agreements do not contain minimum purchase volumes but allow multiple use and switching between various roaming suppliers. However, roaming agreements can also be concluded with a preferred 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 Eurocall partners. The former market definition to the effect that each individual network constitutes a separate market is consequently no longer appropriate. Instead, the networks largely compete with one another at national level.

(28) In previous decisions[14], the Commission regarded the market as national in scope (if the market was not anyway limited to the individual network). This analysis was 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. The same reasoning applies here.

V. COMPETITIVE ASSESSMENT

A. The provision of mobile telecommunications services to end customers

1. Competitors and market shares

(29) On the Austrian market for mobile telephony services to end customers, four companies currently operate mobile telephone networks based on GSM technology.

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operator which allows foreign customers to make calls on its network sells inbound roaming services to the relevant foreign operators.

12 See IP/05/161 "Commission challenges international roaming rates for mobile phones in Germany" and IP/04/994 "Commission challenges UK international roaming rates".

13 OTA is a standard for the transmission and reception of application-specific information in a wireless communications system.

14 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.

They are Mobilkom (a subsidiary of Telekom Austria), T-Mobile, ONE and tele.ring. They each also have a UMTS licence and operate parallel mobile telephone networks based on UMTS technology.

(30) In addition to these four, H3G (a subsidiary of Hutchison) entered the market in May 2003 and provides mobile telephony services purely on the basis of a UMTS network. However, this network to date covers only 50% of the Austrian population (in accordance with the requirement set by the Austrian regulator for the end of 2005) and a far smaller proportion of the country in geographical terms. In order nevertheless to be able to offer its customers mobile telephony services throughout Austria, H3G buys airtime access to Mobilkom's GSM network on the basis of a national roaming agreement. In the areas not covered by H3G's own network, H3G's customers therefore make their calls using Mobilkom's GSM network[15].

(31) The five network operators offer their customers a wide range of services such as voice telephony and data services, international roaming, etc. on both a subscription and a pre-paid basis. They market their services through all available distribution channels and are not restricted, for example, to Internet sales. All of the above four operators and H3G have met the requirement set to date in their UMTS licences for coverage of 50% of the Austrian population. All five UMTS network operators offer UMTS services, in particular advanced data services, on the basis of their coverage and plan to expand these services in the near future.

(32) The operators' shares of the Austrian mobile telecommunications market are as follows:

Operator	1st half of 2005		2004		2003		2002	
	Turnover	Customers	Turnover	Customers	Turnover	Customers	Turnover	Customers
Mobilkom	[35-45]*%	[35-45]*%	[35-45]*%	[35-45]*%	[40-50]*%	[40-50]*%	[40-50]*%	[40-50]*%
T-Mobile	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[25-35]*%
tele.ring	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[5-15]*%	[5-15]*%	[5-15]*%	[<5]*%
T-Mobile and tele.ring combined	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*	*[30-40]*%*
ONE	[15-25]*%	[15-25]*%	[15-25]*%	[15-25]*%	[15-25]*%	[15-25]*%	[15-25]*%	[15-25]*%
H3G	[<5]*%	[<5]*%	[<5]*%	[<5]*%	[<5]*%	[<5]*%	0%	0%

Source: Notifying party in the notification.

(33) The market shares expressed in terms of turnover shown in paragraph (32) relate to all revenue from mobile telephony and therefore include turnover from international

[15] In areas in which H3G's terminal equipment uses the national roaming arrangement with Mobilkom, end customers have no or only limited access to 3G services.

roaming and call termination. With respect to the end-customer market at issue here, the parties could only provide the Commission with data based on market research. The end-customer market shares established during the market investigation essentially correspond to the market shares by turnover given in paragraph (32). The same problem does not arise with respect to the market shares by customer number, as this is the figure that relates to the end-customer market.

(34) The operators' market shares by airtime used on the network are as follows:

Operator	**Expected figure for 2005**	**Actual figure for 2004**
Mobilkom	[35-45]*%	[35-45]*%
T-Mobile	[20-30]*%	[20-30]*%
tele.ring	[10-20]*%	[10-20]*%
T-Mobile and tele.ring combined	**[30-40]*%**	**[30-40]*%**
ONE	[15-25]*%	[15-25]*%
H3G	[<5]*%	[<5]*%

Source: Economic report for the Telekom-Control-Kommission ("TKK"), November 2005; submitted by T-Mobile in its reply in Austrian proceedings before the TKK.

(35) The market-share calculations based on network airtime shown in paragraph (34) are taken from the November 2005 economic report for the TKK. They include airtime on both GSM and UMTS networks. Although these data do not exactly represent the end-customer market (for example, Mobilkom's share includes the airtime used by H3G customers on Mobilkom's GSM network), they correspond largely to the findings of the market investigation for shares of the end-customer market.

(36) In addition to the network operators, the Commission also assessed the strength of pure service providers on the market. Mobile Virtual Network Operators ("MVNOs")/service providers independent of the network operators are Tele2, eTel Austria and Schwarzfunk. Tele2 is an MVNO that entered the market back in the spring of 2003 and by December 2005 had a market share in customer terms of less than [<5]*%.

(37) The market investigation revealed that the other service providers referred to by the notifying party are resellers with very small customer bases. Schwarzfunk, for example, resells tele.ring SIM cards and has fewer than 1 000 customers. ETel Austria resells SIM cards for ONE and in the first half of 2005 had a few thousand customers; its services are directed only at traders and are supplementary to its fixed network/data services. As far as these companies are concerned, the parties' claim that they are "powerful firms" can be rejected[16].

(38) Given the past market positions of the service providers/resellers, it can be concluded that they have played only a very limited role on the market, in particular when compared with the network operators, and that this situation will not change in the foreseeable future, as explained in more detail below.

[16] See p. 69 of the report by CRA International that T-Mobile submitted in its reply to the Statement of Objections ("CRA reply to the Statement of Objections").

(39) Another service provider is YESSS!, which by December 2005 had a market share of around [<5]*% (in customer terms) after entering the market in April 2005[17]. However, it should be borne in mind that YESSS! is not an independent service provider, but a subsidiary of the network operator ONE and also offers its services over ONE's network. YESSS! offers only pre-paid packages and only through a discount food store and the Internet. Its services are restricted to voice telephony, text messaging and the provision of mailboxes; other services such as data services or international roaming are not offered by YESSS!. The market investigation showed that YESSS! cannot be regarded as an independent market player but is rather a secondary brand of ONE, specialised in the discount market.

2. Non-coordinated effects

(40) The Commission's market investigation leads it to conclude that the elimination of tele.ring as an independent network operator and the emergence of a market structure with two large network operators of similar size (Mobilkom and T-Mobile), a far smaller operator (ONE) and a very small operator (H3G) will give rise to non-coordinated effects, even though T-Mobile will not have the largest market share after the merger.

a. Analysis of market shares

(41) Tele.ring's active role on the market is reflected in the pattern of market shares. In the last three years, tele.ring has more than doubled its market share, from [5-10]*% in terms of turnover, or even almost tripled it, from [<5]*% to [5-15]*% in terms of customers. By contrast, of the three established network operators, Mobilkom and T-Mobile in particular have lost significant market shares in the same period. In percentage terms, T-Mobile has lost most market share: from [20-30]*% to [15-25]*% in turnover terms, i.e. a reduction of [10-20]*%. In terms of airtime, tele.ring's position on the market is even stronger than its share by turnover or customer numbers. On this basis, tele.ring's market share appears to be as high as [10-20]*%.

(42) The proposed merger would lead to close symmetry between the two largest suppliers, Mobilkom and T-Mobile. While Mobilkom's market share is around [35-45]*% (in terms of customer numbers and turnover), T-Mobile's post-merger market share would be around [30-40]*% (in terms of turnover and customer numbers). The other providers trail far behind. ONE has a share of around [15-25]*% (or some [<5]*% more if the customers of its subsidiary YESSS! are taken into account). H3G, even though it significantly boosted its market share in 2004 and the first half of 2005, still only has a share of around [<5]*% in customer or turnover terms[18].

(43) The analysis of market shares alone shows not only that tele.ring has played an active role on the market in the last three years but also that it has been the only company to play such an active role, in terms of increased market share. Although H3G has also significantly increased its market share in the last 18 months, it lacks the necessary complete network infrastructure and the frequencies, as outlined in paragraphs (103)

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[17] Independent sources available to Rundfunk und Telekom Regulierungs-GmbH ("RTR") put YESSS!'s customer base at around 250 000 to 260 000. In the first half of 2005, YESSS! had a market share of around [<5]*% (in customer terms).

[18] At the end of 2005, H3G's market share had increased to around [<5]*% (in customer terms).

et seq., to exert the same degree of competitive pressure as tele.ring on the other network operators, and on Mobilkom and T-Mobile in particular.

b. Calculation of the HHI[19]

(44) The HHI and the delta can be calculated on the basis of the market shares communicated by T-Mobile as shown in paragraph (32):

HHI						
	2004			1st half 2005		
	Pre-merger	Post-merger	Delta	Pre-merger	Post-merger	Delta
By turnover	[2500-3000]*	[3000-3500]*	[500-600]*	[2500-3000]*	[3000-3500]*	[500-600]*
By customers	[2500-3000]*	[3000-3500]*	[500-600]*	[2500-3000]*	[3000-3500]*	[500-600]*

Data source: Form CO, pages 51 and 52.

(45) The HHI and delta values are well above those defined as not giving rise to concern in the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Guidelines")[20]. They show that this is a highly concentrated market and that the proposed merger, in view of the high delta value, will bring about a significant change in market structures.

(46) T-Mobile argued in its notification that the HHI resulting from the proposed transaction in Austria was far lower than in many other European countries[21]. It also argued that the HHI should be assessed differently in mobile communications markets than for general industries, as mobile communications markets were network markets subject to state regulation and there were natural barriers to the number of providers, as establishing a network involved high investment costs. While it may be true that the number of network operators is limited in principle and that concentration (measured by the HHI) is higher in other European countries, the decision in this case is not a regulatory one as to how many networks should be established in Austria, but a decision under the merger control rules on the proposed consolidation of two existing networks. It is therefore irrelevant what natural barriers there are to the establishment of networks on the basis of the high investment costs or how many network operators there are outside Austria.

(47) In its notification and in its reply to the Statement of Objections, the notifying party argued that the proposed merger would generate efficiencies. It cites the TKK's official report to the effect that network integration leads to better capacity utilisation

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19 Herfindahl-Hirschmann Index.

20 OJ C 31, 5.2.2004, p. 5, paragraph 19.

21 According to T-Mobile's own calculations, the HHI post-merger would be lower in the United Kingdom, Greece, Germany, Italy and Poland, but higher in the Netherlands, Sweden, Spain, Hungary, Portugal, Belgium, the Czech Republic, France, Ireland and Switzerland; see page 53 of the notification.

and would therefore allow the company to achieve increased fixed-cost degression as compared with the pre-merger situation[22]. Specifically, T-Mobile states that the better frequency spectrum allocation post-merger will mean that building up its own network will generate lower costs for T-Mobile than with a smaller frequency allocation, that the merger will reduce the costs of the necessary renewal and improvement of the infrastructure, that the number of cells can be reduced and the quality of service improved and that the merger will reduce costs per customer for customer service and administration. However, the Horizontal Guidelines stipulate that efficiencies put forward by the parties must benefit consumers, which is more likely in the case of variable or marginal costs than in the case of fixed costs. The reduction in costs referred to by T-Mobile relates to fixed costs, in particular for building up and maintaining the network. It cannot be assumed that this kind of cost saving will be passed on to consumers by the notifying party. Moreover, the increase in customer numbers, on which T-Mobile bases the reduction in fixed costs per customer, goes hand in hand precisely with a reduction in the incentives for T-Mobile to attract new customers by way of an aggressive pricing strategy. This is because, at least in the medium term, low prices would have to be offered to the entire customer base, which would reduce the profitability to T-Mobile of the customer base as a whole, as set out in more detail in paragraphs (76) *et seq.* It therefore appears unlikely that the proposed merger will generate efficiencies within the meaning of the Merger Regulation[23].

(48) Nor is it relevant that T-Mobile communications networks are in part subject to state regulation as the Austrian market for mobile telephony services to end customers at issue here is not specifically regulated by the Austrian regulator.

c. Switching provider

(49) The market-share data in themselves suggest that a large proportion of customers who have left T-Mobile and Mobilkom have become customers of tele.ring.

(50) The data collected by the Austrian regulator on the basis of number portability further support this interpretation. However, the possibility for customers of taking a number with them when they switch provider has existed in Austria only since October 2004. In 2005 more than half of all customers who switched provider and made use of number portability went to tele.ring and between 57% and 61% of those who left T-Mobile and Mobilkom with their telephone numbers switched to tele.ring[24]. In second place behind tele.ring in 2005 was H3G, which picked up some 20% of all customers switching provider and using number portability.

(51) Even though the customers who made use of number portability do not account for all customers who switched provider, this analysis provides a further indication that tele.ring exerts the strongest competitive pressure on Mobilkom and T-Mobile in particular[25]. The economic study submitted by T-Mobile with its notification also assumes that the number portability data are the most relevant for an analysis of

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22 TKK report in the related proceedings Nos 2, 7, 8, 9, 11/05, p. 21.

23 On the efficiencies taken into consideration under the Merger Regulation, see the Horizontal Guidelines, paragraphs 79 *et seq*.

24 A comparison of the number of customers who switched to tele.ring with the number who left tele.ring shows a clear net gain in tele.ring's customer numbers.

25 The conclusion drawn in the CRA study submitted by the notifying party takes a similar line: "[…]*", pp. 9 and 47.

switching behaviour[26]. However, in its reply to the Statement of Objections, the notifying party described this approach as "questionable" on the grounds that the data revealed only some of the customers who had switched provider within a given period of time and gave a distorted picture of customers' switching behaviour, as only tele.ring and H3G provided compensation for the number portability costs of EUR 19. Moreover, the data would not take account of the fact that many customers switched away from tele.ring again and that Mobilkom and T-Mobile numbers were regarded as "better" and their customers were more likely to want to keep their numbers than tele.ring and H3G customers were[27].

(52) The Commission rejects these arguments. The number portability data naturally include customers who switched from tele.ring and took their numbers with them. The total number of customers who switched provider given above includes customers who switched from tele.ring. Nor is it clear why tele.ring customers should value their old number less than Mobilkom and T-Mobile customers, especially since they make significant use of their mobiles and therefore attach particular importance to remaining reachable, as set out in paragraphs (82) *et seq*.

(53) Likewise, it cannot be assumed that compensation for the switching fee, or even merely advertising it, distorts the picture. On the contrary, according to the arguments of the notifying party, customers who switch to Mobilkom, T-Mobile or even ONE on quality grounds are likely to tolerate paying even a small fee in exchange for remaining reachable. Nor can compensation for the switching fee be regarded in isolation but must be considered in the context of the full offer to customers wishing to switch. For example, T-Mobile does not directly provide compensation for the EUR 19, but it does offer new customers a tariff discount of EUR 50 on a variety of tariffs if the customer does not need terminal equipment, which will frequently be the case for customers switching provider who have already been using their telephone numbers.

(54) It can therefore be assumed that the data collected by the Austrian regulator on switching behaviour based on number portability relate to a representative section of the market as a whole and constitute a more reliable sample than customer surveys by commercial market research institutes, which necessarily include a smaller number of customers. The notifying party again acknowledges in its reply to the Statement of Objections that the data are relevant for switching behaviour, and this in itself very much qualifies its claim of systematic distortion[28].

d. Price development on the market

Technical minutes[29]

(55) The Commission also analysed average per-minute prices on the basis of all the tariffs applied by the various network operators, using data from the Austrian telecoms

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26 See CRA study in the notification, p. 43.

27 See paragraphs 35 *et seq*. of the parties' reply to the Statement of Objections and pp. 64 *et seq*. of the CRA reply to the Statement of Objections.

28 See p. 67 of the CRA reply to the Statement of Objections.

29 The regulator defines technical minutes as airtime actually used and invoiced. They correspond largely to originated minutes.

regulator for 2001-05[30]. For reasons of confidentiality, Annex I reproduces only the graphs for T-Mobile and tele.ring. They show that overall, prices constantly fell in the reference period and that tele.ring has offered its services since the third quarter of 2002 at significantly lower prices per minute than the other three network operators and since the first quarter of 2002 at lower prices per minute than the market average.

(56) The data provided to the Commission on the other competitors show that the per-minute prices charged by Mobilkom and ONE are in the same range as T-Mobile and therefore that tele.ring's prices are well below the per-minute prices charged by the three leading operators. This can also be seen in the graphs reproduced for the average per-minute prices of all mobile telephony providers on the end-customer market. H3G's average per-minute prices are quite close to those charged by tele.ring, without undercutting them.

Tariff comparison based on standard user profiles

(57) A comparison with the results obtained from the tariff calculator offered by the public body, the Austrian Chamber of Labour ("AK Wien")[31], confirms the price analysis made in paragraph (55). The simulation used profiles of typical mobile communications users in the tariff calculator in combination with staggered monthly call volumes of between 30 and 480 minutes, based on the tariff situation as at October 2005. The simulation also used the call volumes of the average private/ corporate and pre-paid user indicated by T-Mobile and tele.ring respectively in Annexes 39 and 40 to the notification.

Terminal equipment subsidies not taken into account

(58) A study submitted by T-Mobile in the course of the proceedings criticises AK Wien's tariff calculator for not taking account of subsidies for terminal equipment, short-term promotions and differences in billing increments. The study finds that there are currently no publicly available comparisons in Austria which include these elements. It accordingly acknowledges that AK Wien's price calculator is "helpful" and itself uses a number of the price comparisons generated by it.

(59) The study "corrects" the results of AK Wien's price calculator by factoring in subsidies for terminal equipment and attempts to show that taking account of such subsidies means that the results of the price calculator have to be assessed differently and that in any event tele.ring is no longer the cheapest provider[32]. In response to the criticism made in the Statement of Objections that the "correction" was based solely on estimates by T-Mobile and that neither the valuation of the subsidies nor the

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30 The data are collected from the mobile network operators by the Austrian regulator on a quarterly basis pursuant to a regulation implementing Article 90(2) of the Austrian Telecommunications Act, as well as in pending proceedings.

31 AK Wien offers Austrian consumers help and advice on consumer issues. With respect to telephone services, consumers can identify the cheapest fixed and mobile providers using an online calculator (which takes account only of current tariffs). In addition, AK Wien regularly publishes tariff rankings in its tariff guide, showing all tariff structures broken down by tariff type and costs for consumers.

32 The study does not propose any alternative calculation methods for the two other factors criticised as absent, promotions and differences in billing increments. The importance of the correction for terminal equipment prices is further stressed in T-Mobile's comments of 17 November 2005 in response to the Commission's decision to initiate proceedings.

calculation method was apparent from the study[33], T-Mobile included in its reply to the Statement of Objections examples of how the subsidy estimates were calculated[34]. However, these calculations are based solely on examples using H3G, whose 3G equipment in 2005 was considerably more expensive than the 2G equipment offered by other operators[35]. This in itself reveals the limits of an approach which includes subsidies for terminal equipment. As set out in paragraphs (65) *et seq.*, most H3G customers use this equipment not for multimedia services, but for voice telephony and other services (such as text messaging) that are also available on 2G equipment. The data for H3G show merely that it has to subsidise its equipment more in order to keep up with the 2G operators and not that customers have switched to H3G because of the specific handsets. By contrast, the study again gives only general data and estimates for T-Mobile and tele.ring, without substantiating them.

(60) Nor can the differences be explained by reference to information provided in the course of the proceedings by T-Mobile and tele.ring regarding actual expenditure on terminal equipment subsidies. In 2004 T-Mobile's subsidies stood at EUR […]* million in absolute figures, while the corresponding figure for tele.ring was EUR […]* million (for new and existing customers). This gives a figure per customer of EUR […]* for T-Mobile and EUR […]* for tele.ring. Even if pre-paid customers are removed (as they obtain at most a far lower subsidy), this would give a figure per customer of EUR […]* for T-Mobile and EUR […]* for tele.ring[36]. Although the reply to the Statement of Objections argues that this approach is wrong since only new customers and contract extensions benefit from subsidised terminal equipment, the same criticism applies to the methodological approach in T-Mobile's own study: its estimates relate only to new customers but do not include terminal equipment subsidies for contract extensions. Moreover, in this case it would seem to make sense, contrary to the criticism in the study, to extend the subsidies across the entire subscriber base, as suggested, since they relate to an existing customer base within which subsidised terminal equipment is offered in turn to new customers or for contract extensions when current contracts expire.

(61) Moreover, the estimates proposed by the study in no way correspond to the actual figures submitted by T-Mobile and tele.ring. T-Mobile's estimates assume subsidies for new subscribers in 2004 of EUR […]* for tele.ring and EUR […]* for T-Mobile[37]. According to the actual figures[38], tele.ring spent more than this on each existing subscriber, while T-Mobile spent only […]* of the estimated amount. It can accordingly be noted that tele.ring's subsidies as actually applied were […]* than T-Mobile's and therefore that […]*.

(62) Given the problems in taking account of other factors, AK Wien's tariff calculator seems at present to provide the most accurate information on the price situation on the Austrian mobile communications market and also focuses on comparing prices for the actual services provided by mobile telephony providers, i.e. mobile telephony

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33 For example, the study refers as its source for the values of the subsidies merely to a "subsidies comparison", without specifying what is meant.

34 See pp. 53 *et seq.* of the CRA report (Statement of Objections).

35 See CRA report (Statement of Objections), pp. 53 *et seq.* T-Mobile also concedes that the H3G's equipment subsidies are higher because of the 3G capability; see footnote 123.

36 Using the customer figures given in Annexes 39 and 40 to form CO.

37 See p. 58, footnote 123 of the CRA reply to the Statement of Objections.

38 Figures submitted by T-Mobile and tele.ring on 10 January 2006.

services. This approach is also equivalent to that used for the analysis, referred to in paragraph (55), of the average price per technical minute on the basis of data from the telecoms regulator. There too, the average price per minute is compared without taking into account the subsidies for the handsets.

Results of the analysis of standard user profiles

(63) In the survey of standard user profiles for October 2005 with call volumes of between 30 and 480 minutes (in steps of 30 or 60 minutes[39]), tele.ring was the cheapest supplier in six cases, and H3G in four. The second cheapest supplier after tele.ring was H3G in four cases and T-Mobile and Mobilkom in one case each, and tele.ring was the second cheapest supplier after H3G in all four cases.

(64) The same picture emerges for the average user profiles for T-Mobile and tele.ring. Out of a total of six user profiles, tele.ring was the cheapest in five cases and H3G in the remaining case. The second cheapest supplier was H3G in five cases and tele.ring in the remaining case[40].

Tariff comparisons by AK Wien 2003-2005

(65) Besides the simulations using AK Wien's tariff calculator, an analysis was also carried out of the monthly tariff comparisons published between 2003 and the first half of 2005. The survey covers all the common tariff structures used by mobile telephone operators in Austria. AK Wien distinguishes between three different types of user — "new users", "families" and "young people" — each with a monthly volume of 90 or 180 minutes and subdivided into contract subscribers and pre-paid customers.

(66) Analysis of the monthly tariff comparisons over the whole reference period (i.e. from 2003 to the first half of 2005), irrespective of user type, shows that tele.ring offered the cheapest tariff most often – in around 33% of all cases – followed by H3G in around 29% of cases[41]. T-Mobile, ONE and Mobilkom offered the cheapest prices less often (around 15% of cases for T-Mobile and around 2% for both Mobilkom and ONE).

(67) A further analysis was made for the period January to August 2005. Here too tele.ring was the cheapest supplier in 46.5% of cases, disregarding all the distinctions mentioned in paragraph (65). YESSS! was cheapest in 29.1% of cases and H3G in 24.6%.

(68) Of particular significance is the analysis concerning contract subscribers, who account for the overwhelming majority of tele.ring's customers (over 77%). Among this customer group, tele.ring was the cheapest supplier in 58.1% of cases and H3G in 41.9% of cases ([60-70]*% of H3G's customers are subscribers).

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[39] As call volumes increase, the steps are of 60 minutes as the tariff calculator's ranking did not differ whether the length of the call was given in steps of 30 or 60 minutes.

[40] In some of the cases mentioned, YESSS! was the cheapest provider. However, YESSS! cannot be regarded as fully comparable with tele.ring because, as will be shown below, it offers only a very limited range of services and in terms of competition is fully dependent on its parent company, ONE.

[41] In this analysis YESSS! came out as the cheapest supplier in approximately 6% of cases. In the remaining cases one of the other suppliers was the cheapest, in particular Tele2.

(69) For pre-paid customers, however, YESSS! was the cheapest supplier in 58.1% of cases (although account needs to be taken here of the limited services it offers, as described in paragraph (39)), tele.ring in 34.9% of cases and H3G in 7% of cases. No other suppliers cropped up as the cheapest in AK Wien's tariff comparisons.

(70) In some cases the discount brand YESSS!, which did not enter the market until April 2005, is slightly cheaper than tele.ring, depending on the user profile applied. However, it must be borne in mind here that, as explained in paragraph (39), YESSS! offers only very limited services in mobile telephony and cannot therefore be fully compared to tele.ring and other mobile network operators. In particular, YESSS! offers only one pre-paid tariff (at a fixed price per minute) and no post-paid contracts[42]. In this respect it is especially difficult to draw a comparison with tele.ring, which, in mid-2005, had post-paid contracts with over […]* of its customers[43]. There are also other limitations on the services offered by YESSS!: for example, its customers cannot roam and its SIM cards can be loaded up only via the Internet or using coupons issued in a few outlets. The competitive behaviour of YESSS! is also restricted by its status as a subsidiary of ONE, as explained in more detail in paragraph (110).

(71) In its reply to the Statement of Objections, the notifying party argued that the situation had changed meanwhile and that tele.ring no longer occupied first place according to AK Wien's calculations. The Commission therefore conducted another analysis using AK Wien's tariff comparison in March 2006. It looked at 3 call volumes for "new users" (30-90 minutes), "families" (60-180 minutes) and "young people" (60-180 minutes) respectively. For post-paid tariffs, of particular importance to tele.ring customers, tele.ring was first in 55% of cases, followed by H3G in 33% of cases. Taking all tariff categories together, tele.ring was first in 22% of cases, a new YESSS! tariff in 55% and the standard YESSS! tariff in 22% of cases[44]. However, the very limited relevance of this most recent analysis must be stressed. First, it was only a one-off examination of the situation in March 2006, whereas the previous analyses had covered a longer period of time and were therefore far more representative of tele.ring's strategy. Second, the agreement on the sale of tele.ring had already been concluded in July 2005. It cannot be assumed that tele.ring pursued an equally aggressive strategy after conclusion of the sale agreement and while the merger proceedings were under way as a company with an independent future would.

Summary

(72) The conclusion to be drawn from these considerations is that, during the period under investigation (from 2002 to 2005), tele.ring was the most active player in the market, and that it exerts considerable competitive pressure on T-Mobile and Mobilkom in particular and plays a crucial role in restricting their freedom on pricing. The price

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42 Heavy users who want to make long and frequent telephone calls must constantly load large sums on their YESSS! prepaid card. This is much less convenient than having a post-paid contract.

43 See notification, Annex 15.

44 In addition to the standard restrictions already described for YESSS!, the new YESSS! tariff has 90/60 incremental billing such that customers pay 1.5 minutes in any event and thereafter must always pay for complete minutes. This far less favourable tariff compared with others (usually with 60/30 incremental billing) leads to significantly higher charges in practice, which, however, are not reflected in AK Wien's tariff calculator.

analysis therefore suggests that tele.ring's role in the market has been that of a maverick.

(73) A similar conclusion is reached by T-Mobile in the CRA study submitted in these proceedings. Because of the high degree of interaction between tele.ring and T-Mobile reflected in the switch rates discussed in paragraphs (50) *et seq*., the study concludes that "*tele.ring's high interactivity index means that its market share understates its significance in terms of competition*"[45]. In the reply to the Statement of Objections, a further study by CRA stresses that Mobilkom is the nearest competitor of T-Mobile on price; the reply goes on to state that "*in view of tele.ring's target groups, customers who switched to tele.ring probably have very little incentive to return to the established providers purely on price grounds, since they probably charge higher prices*"[46].

e. Incentive structures

(74) The incentives for an operator to attract new customers to an existing network by offering aggressive prices are determined by the size of the customer base.

(75) The mobile telephone industry is characterised by high investment costs in building up a network to cover 98% of the population (a regulatory requirement for 2G services), network operating costs that are largely independent of the actual amount of airtime used, and relatively low variable costs.

(76) The initial incentive for network operators is therefore to exploit their capacity to the full by having as large a customer base as possible. This is particularly true of network operators that first have to build up their customer base in order to be able to recoup the network investment costs and cover the network operating costs. It is therefore vitally important for such network operators to attract new customers by adopting an aggressive pricing policy, as they do not have a secure and adequate customer base. This explains the actions of tele.ring and H3G, which first had to build up their customer base and must continue to do so. In the period from 2002 to 2005, tele.ring not only considerably increased its customer numbers but, despite tariff reductions, also significantly boosted its turnover and improved its profitability.

(77) The incentives vary depending on the size of the customer base. Attracting new customers by bringing out new offers and adopting an aggressive pricing policy will reduce the profitability of the existing customer base as these tariffs and conditions will also have to be extended to existing customers. This effect is not necessarily felt immediately: for a certain period it is possible to differentiate between tariffs for new customers and tariffs for existing customers (particularly where offers are confined to temporary benefits, such as a discount on the standing charge or an increase in airtime for the first few months). In time, however, lower tariffs for new customers always have medium-term implications for the customer base, as existing customers will not tolerate discrimination over a longer period and might therefore go elsewhere. So, the bigger the customer base, the less likelihood of low price offers aimed at attracting new customers, as the threat of lost income from existing customers would no longer be offset by the additional income to be expected from new customers. Moreover,

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45 CRA study (notification), p. 46.

46 CRA reply to the Statement of Objections, p. 11; reply to the Statement of Objections, paragraph 40.

once a network operator has a certain number of customers, the flow of revenue from the existing customer base allows it to recover its investment in building up the network and its network operating costs.

(78) In the past, tele.ring and H3G were therefore able to adopt an aggressive pricing policy as the new customers attracted by their offers always more than offset any price cuts offered to existing customers. By contrast, neither Mobilkom nor T-Mobile has caused any shift in market prices in the past by making particularly aggressive offers, which can be explained by their large base of existing customers, as reflected in their market share. The proposed merger will not only eliminate tele.ring from the market as an independent supplier but also substantially increase T-Mobile's customer base. Consequently, T-Mobile will be far more susceptible than in the past to the effect whereby lower prices erode the profitability of the existing customer base, yet at the same time the loss of income cannot be offset by new customers because of the significant number of existing customers.

(79) It can therefore be concluded that tele.ring's incentive to charge very competitive prices is a consequence of the number of its existing customers. T-Mobile has not pursued such a strategy to date and the planned combination of T-Mobile and tele.ring will have even less incentive to do so in future.

(80) The market investigation also suggests that, by its aggressive pricing strategy, tele.ring has attracted customer segments that are particularly price-sensitive. These customers have reacted to lower prices by making longer calls. As a result, the average turnover generated by tele.ring's customers actually increased between the end of 2002 and the beginning of 2004 despite several price reductions. So, over and above the effect described in paragraph (77), the aggressive pricing strategy pursued by tele.ring has been even more profitable because of the high price sensitivity of its own customer base.

(81) Other factors may also have played a role in tele.ring's strategy of attracting new customers through aggressive pricing. As a consumer study shows, this also ties in with tele.ring's standing in the market since it is regarded by customers as particularly inexpensive, but it is not highly rated on other counts such as quality, innovation or service.

f. Importance of a national network/incentives for network operators

(82) Another factor affecting pricing by mobile telephone operators is network structure and coverage.

(83) The importance of a national network with maximum possible network coverage stems in the first instance from customer demands. According to the market investigation, network coverage covering as much of Austria as possible is a crucial factor in attracting customers, who want to be able to use their mobile phones all over Austria and to have as few problems as possible with the quality of the signal.

(84) An operator also has different incentives for setting prices if it does not have its own national network but secures nationwide coverage by purchasing airtime from other network operators. Having one's own network entails high investment costs during the start-up phase and, thereafter, operating costs that depend largely on the network structure rather than the actual number of minutes transmitted. By contrast, the cost of

purchasing mobile telephone capacity wholesale under a national roaming agreement is calculated largely according to the number of minutes taken up. It is therefore a (variable) marginal cost and is presumably regarded by the mobile operator as constituting, together with the other variable costs, the minimum price per minute to be charged to customers. In using national roaming, the mobile operator cannot achieve economies of scale comparable with those that can be achieved in a dedicated network, as the more airtime it sells to its customers, the higher the cost of purchasing that airtime under its supply contract.

(85) By contrast, investments and network operating costs do not constitute variable costs for a network operator and therefore have no direct bearing on the price of airtime sold to customers. With regard to these costs, the network operator has in particular an incentive to achieve economies of scale (within the network capacity available), as the costs incurred in building up and operating the network are largely independent of the airtime used.

(86) In this context there appear to be no major differences in the incentives of Mobilkom, T-Mobile, ONE and tele.ring as all these network operators have GSM networks with nationwide coverage of at least 98% (a regulatory requirement) and, at least in the normal course of events, do not have to resort to other networks in order to serve their customers in Austria.

(87) However, differences do emerge here in relation to H3G, whose network covers around 50% of the Austrian population (in line with the requirement set by the Austrian telecoms regulator for the end of 2005) and around [2-8%]* of the geographical area of Austria. To cover the rest of the population, H3G purchases airtime under a national roaming agreement with Mobilkom. As a result, H3G has variable costs for each minute used by its customers outside its own network, and this has implications for its pricing. H3G's incentives are also fundamentally different here as it cannot achieve economies of scale for that airtime comparable with those of a network operator. Also, H3G's incentive to attract more customers should be far greater in areas where it has its own network than in areas where its customers would mainly be making calls under the national roaming agreement. It follows that H3G can be regarded as a fully fledged network operator only in part as it also bears the hallmarks of an MVNO.

g. Network capacity

(88) Sufficient network capacity is a *sine qua non* for supplying services to existing customers and, in theory, an incentive to attract new customers. On the other hand, if a mobile operator seeking to maximise profits has sufficient network capacity, this does not necessarily mean that, when it has spare capacity, it will lower its prices to attract new customers and use that capacity to the full, since this may reduce the profitability of its existing customer base, as explained in paragraph (55). This factor must be taken into account when considering capacity.

Current network capacities

(89) Network capacity[47] is determined on the basis both of the frequency spectrum available and of the number of carriers within a cell that transmit the radio signal between the mobile terminal equipment and the antenna[48]. The geographical range of the cell's signal depends on the topography of the particular location and the expected signal volume and level of traffic. In rural areas with low levels of traffic, a cell can cover a distance of some 10-20 km around the site. Nevertheless, even in rural areas it may be necessary to set up several cells if higher traffic is to be expected for limited periods, e.g. calls by tourists. More cells are generally required in urban areas, where the volume of traffic is usually higher. An even greater concentration of cells is necessary in centres with high volumes of traffic.

(90) In general, the frequency spectrum available also determines the capacity of a mobile network. Building up a network is more costly where the available frequency spectrum is smaller as more carriers and cells have to be installed. The frequency allocations of the Austrian network operators are as follows:

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[47] In its notification (Chapter 9.2.C) T-Mobile regards network capacity as a function of frequency allocation in relation to users, i.e. users per MHz. In the CRA study submitted in the proceedings, network capacity is presented as a function of frequency allocation in relation to airtime, i.e. airtime per MHz. However, neither of these calculation methods is a proper way of expressing the use of network capacity. According to RTR and competitors, the full range of frequencies is usable on each carrier. Only in 2G communications is it impossible to use the same frequency in directly adjacent cells because of interference. This statement is confirmed by T-Mobile's reply to the request for information dated 29 September 2005 to the effect that the dimensions of a mobile communications network depend on the cells. So there seems little point in making a link between the frequency band and the numbers of users or airtime for the purposes of evaluating capacity. Neither the number of users nor the amount of airtime is determined in relation to cells but constitutes an absolute figure for a network.

[48] The operator transmits the call from the antenna to a directly connected fibre optic network or — via microwave radio relay — to a fibre optic network interface. In both cases the operator carries the call on in the cable network. If the recipient of the call is connected to the fixed network, the call signal remains in the fixed network. If a mobile user is involved, the call is directed to the cell where the mobile terminal is registered and then transmitted to the terminal equipment wirelessly.

Operator	Simple GSM bandwidth			Paired UMTS[49]
	900MHz	1800 MHz	Total	
Mobilkom	17	15	32	2x14.8
T-Mobile	12.8	8.0	20.8	2x14.8
tele.ring	-	16.8	16.8	2x9.8
T-Mobile/ tele.ring combined	12.8	24.8	37.6	2x24.6
ONE	3.2	29.0	32.2	2x10
H3G	-	-	-	2x9.8

Source: RTR website (www.rtr.at), Telecommunications/Frequency allocation.

(91) The capacity of a mobile network can be determined only roughly using a series of indicators, but it is not possible to give a single, absolute indicator on account of the wide variety of different technical parameters. In the present case it would therefore seem appropriate to assess existing network capacity by comparing all networks - on the basis of those indicators - against Mobilkom's network, which is the most extensive network and the one on which most airtime is used.

(92) One important indicator is the number of carriers installed as this determines the maximum possible number of calls that can be conducted simultaneously[50]. A comparison with Mobilkom shows that tele.ring has far fewer carriers, T-Mobile has around […]* as many and ONE comes somewhere between tele.ring and T-Mobile. A similar picture emerges when the comparison is drawn for individual Austrian regions.

(93) The relationship between installed carriers and airtime actually used on a particular network compared with the reference network is another factor that can be used to determine the extent to which network capacity is taken up and how much traffic a network can still absorb. Mobilkom's network is suitable as a reference here as it has the highest use of airtime[51].

(94) In comparison with Mobilkom's network, the current volume of traffic on tele.ring's network is such that it can still absorb a limited amount of additional traffic, while T-Mobile's network is used to a much lesser extent and could still absorb a great deal

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[49] Some operators, such as Mobilkom and T-Mobile, also have an unpaired UMTS frequency spectrum. However, the market investigation found that this is not currently usable for technological reasons; nor is it possible to say when it will be usable (either as a result of technological innovation or changes in the frequency spectrum). This spectrum is therefore irrelevant for the purposes of the present analysis.

[50] In the TMA network configuration […]* time slots per carrier are used as traffic channels. One carrier has […]* slots, of which […]* are used for voice traffic and […]* reserved for signalling traffic […]. This means that each carrier can carry […]* calls at the same time.

[51] It is not necessary to examine here whether the reference network itself still has free capacity as the point is to compare the spare capacity of a given network with the reference network.

more traffic. ONE has spare network capacity somewhere between that of tele.ring and T-Mobile and could therefore take up more new users than Mobilkom.

(95) From a structural point of view, tele.ring's network is also suited to absorbing extra customers over and above its current capacity. Tele.ring has the smallest number of mobile communications sites, although it has met the requirement for rolling out a 2G network covering 98% of the population. A slight and selective concentration of its activities in urban areas would also put tele.ring in a position to expand its network - for an affordable investment - in order to absorb extra customers.

(96) However, H3G cannot be included here as it does not yet have a complete network. Its network coverage is less than [2-8%]* in terms of geographical area and 50% in terms of population.

Consequences of the proposed merger on network capacity

(97) Internal documents and statements by T-Mobile show that, once the planned merger has been completed, T-Mobile plans […]*. To this end, T-Mobile plans to take over […]* sites and to increase the number of carriers at […]* of its existing sites. These measures should ensure that T-Mobile can carry the increased traffic from tele.ring's customers on its network. In view of the limited number of sites at which carriers will be increased, it can be assumed that T-Mobile will not extend its network much further than coverage of the increased traffic resulting from the larger combined customer base will require.

(98) After completion of the proposed merger, not only will the Tele.ring network be eliminated, but, presumably, the T-Mobile network will be used to full capacity to a far greater extent than currently. The proposed merger would therefore lead to a situation where, instead of there being three operators with spare capacity, only ONE will have significant spare capacity for new customers, taking Mobilkom's network as a point of reference, even if in some areas the market investigation showed that an improvement in network coverage is possible. In general, it can be concluded that the considerable reduction in spare capacity will also reduce the incentives for network operators to attract new customers by offering low prices in order to use up significant spare capacity.

(99) In these circumstances one must also reject the argument advanced by the notifying party, on the basis of a CRA study, that if, after the proposed merger, the remaining competitors were to have in their networks an absorption capacity totalling 10% of T-Mobile and Tele.ring customers, this would be enough to make any price increase unprofitable for T-Mobile[52]. As pointed out in paragraphs (55) *et seq.*, the setting of prices and acquisition of new customers do not necessarily depend on the (spare) capacity available but are determined primarily by the incentives in the light of the existing customer base. So the existence of spare capacity among competitors amounting to 10% of T-Mobile and Tele.ring customers does not point to the conclusion that the competitors will inevitably plan to attract those customers at the expense of the profitability of their own customer base.

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[52] See pages 18 *et seq*. of T-Mobile's reply to the competitors' comments in the proceedings before the Austrian telecoms regulator, submitted to the Commission's proceedings by letter from T-Mobile dated 25 October 2005.

(100) Furthermore, the considerations outlined in paragraphs (97) *et seq*. show that the merger will lead to a significant overall reduction in capacity in the market. Even assuming, as the study does, that the spare capacity in the market would play a crucial role in pricing, this reduction in available capacity would suggest that the merger would have a considerable impact on competition.

(101) Although, as the notifying party states, it can be assumed that the development of 3G networks will extend capacity, the 3G networks of all operators are still far from covering all of Austria (at least in population terms) and will therefore not give rise to an overall capacity increase, at least for the time being and in the foreseeable future. Moreover, the voice telephony traffic of all operators (except H3G) is currently carried almost exclusively on 2G networks. This is necessarily the case in view of the fact that few customers possess 3G-enabled terminal equipment to date. Potential capacity increases on 3G networks therefore play no role as yet. Moreover, it can also be assumed that the increased capacity is not yet sufficient to keep prices under control.

h. Role of other competitors after the proposed merger

(102) As emerged from the price analysis in paragraphs (55) *et seq.*, H3G and YESSS!, the discount brand of the network operator ONE, have also offered low prices in the market. The question is whether this means that these two providers (or the main ONE brand) might in future play a role in the market similar to that of tele.ring.

H3G

(103) H3G has hitherto played only a limited role in the market. Only since the end of 2004 has its market share increased significantly; it now lies at around [<5]*% of customers and [<5]*% of turnover.

(104) Furthermore, H3G could not be fully regarded as a network operator up to now as its network covers only 50% of the Austrian population (coinciding with the regulatory coverage requirement at the end of 2005) and around [2-8]*% of Austrian territory. To cover the remaining areas, H3G depends on a national roaming agreement with Mobilkom, so that its customers in other parts of Austria can use mobile communications services (but not UMTS-based services) via Mobilkom's 2G network.

(105) Dependence on the domestic roaming agreement with Mobilkom considerably restricts H3G's room for manoeuvre. As explained in paragraphs (55) *et seq*., it entails substantial variable costs for H3G per minute[53], which has a direct impact on the cost of making airtime available to final consumers and the price it charges them. The agreement also means that, compared with other network operators, H3G has very different incentives when it comes to adopting an aggressive pricing strategy and attracting customers even in areas where it does not have its own network. Moreover, the regulatory requirement under Austrian law to conclude a domestic roaming

[53] In the economic report by RTR in proceedings Z2, 7, 8, 9, 11/2005, the Austrian telecoms regulator assumed that H3G's average payment under the roaming agreement with Mobilkom was 4.99 euro cents per minute for 2004 and 5.42 euro cents for 2005-2007 (see page 16). However, the rules of the agreement concerning pricing are such that it is not possible to calculate an exact amount of compensation per minute for the future.

agreement in H3G's favour extends only up to 2007. After that date H3G therefore faces considerable uncertainty as to how far and at what cost it can conclude with its rival network operators a suitable roaming agreement covering the whole of Austria.

(106) It can be assumed that H3G will expand its own network coverage in future. For the time being, however, it is under no regulatory obligation to do so: its network coverage of 50% of the population meets all the requirements of the Austrian regulator as regards UMTS up to the end of 2005. Moreover, such a development will take considerable time and is subject to major uncertainties. According to data supplied by T-Mobile, H3G had around […]* sites in 2005, guaranteeing coverage of around 50% of the population, whereas T-Mobile and tele.ring needed […]* and […]* sites respectively to cover [98% or more]* of the population (via the 2G network)[54]. As UMTS frequencies correspond to shorter wave lengths than the 900 and 1800 MHz frequencies used in the GSM network, even more sites would be required to build up a UMTS network on the same scale. This shows that, even in comparison with its expansion since 2002, H3G would have to make strenuous efforts to expand its network and this would take considerable time. This analysis is borne out by the market investigation.

(107) This kind of network expansion is also subject to major uncertainties. First, there is the question of finding suitable locations when four mobile telephone networks already exist; sharing is no longer an option at many sites, which are already fully occupied by existing users. Second, it has become much more difficult to obtain the necessary permits to construct new mobile communications sites on account of growing environmental concerns, particularly as regards "electrosmog". The market investigation showed that, as a result, some local authorities have taken decisions preventing or severely restricting further network expansion. The construction of new mobile communications sites is therefore also subject to serious legal obstacles, requiring not only a building permit but also an environmental permit or a local-character preservation permit. In these circumstances it cannot be assumed that H3G will be able to increase its competitive standing substantially in the foreseeable future by expanding its network.

(108) H3G's room for manoeuvre is also restricted by the limited UMTS frequency spectrum available to it. H3G currently has only one UMTS frequency spectrum of 10 MHz, whereas, after the proposed merger, T-Mobile will have a frequency spectrum of 25 MHz for UMTS and 37.6 MHz for GSM. Given current developments in 3G services, H3G's limited frequency spectrum would appear to be insufficient to exert price pressure on competitors that enjoy a much broader spectrum. First, it means that H3G's capacity is severely restricted. With a growing number of customers, H3G would have to use a significant portion of its frequency spectrum for voice telephony and hence would no longer have enough capacity to keep pace with other competitors in multimedia services given the qualitative demands of 3G. This would reduce much further H3G's incentive to attract new customers by engaging in aggressive price competition. By contrast, as pointed out in paragraph (88), its competitors can continue to use GSM frequencies for voice telephony and other services delivered by 2G technology. Second, expanding a network with a limited frequency spectrum requires considerably more investment than with a broad frequency spectrum, as many more mobile communications sites are needed to create

[54] See Form CO, page 40.

the same capacity. This means that H3G will take longer to expand its network, as discussed in paragraph (107), and face greater uncertainties, while at the same time incurring considerable extra expense.

(109) Although H3G has hitherto already adopted an aggressive, low-price strategy in the market, its dependence on the national roaming agreement means it cannot play a role similar to tele.ring in exerting competitive pressure. Moreover, H3G's role in the market depends on further network expansion, which implies a great deal of time and uncertainty and is made even harder by its small frequency allocation; at the same time it will incur much more expenditure than its competitors. So, in view of its existing capacity limitations, it is doubtful whether H3G will have the incentive to continue to act as an inexpensive provider in the market and attract a large number of new customers.

ONE/YESSS!

(110) As already explained in paragraphs (35) *et seq*., ONE is active in the market both under its own brand and, since April 2005, under the discount brand YESSS!. The findings of the price analysis serve to confirm that, operating under its own brand, ONE has not been exerting aggressive price competition in the market in recent years but that its price-per-minute has been around the same level as that of Mobilkom and T-Mobile, although ONE has lost less market share than T-Mobile.

(111) The reason behind this competitive behaviour seems to be that ONE also had an incentive not to jeopardise profitability from its existing customers, although ONE already has spare capacity. Classing ONE as a network operator that does not especially target price-sensitive customers is also borne out by the findings of the market investigation. This showed that ONE has established itself as a network operator that sets particular store by the quality of the mobile network (for instance as regards network coverage, resilience and transmission quality)[55] and by service quality although, according to the market investigation, an improvement in network coverage seems possible in some areas where tele.ring is particularly strong, and therefore charges higher prices than tele.ring. In contrast, tele.ring is seen as a network operator occupying a lower price and quality segment of the market[56]. Given ONE's brand positioning, it seems highly unlikely that an aggressive price strategy like tele.ring's would be profitable for ONE. The market investigation showed no evidence that ONE's strategy will change after the transaction, especially since the proposed merger will remove tele.ring, the most active firm in price terms and an aggressive competitor to ONE, from the market.

(112) YESSS!, ONE's discount brand, offers only pre-paid cards and a narrow range of services, and its distribution avenues are limited. YESSS!, then, is clearly different from the ONE brand in terms of what it offers, and the extent to which it is comparable with the services offered by tele.ring and other mobile network operators is therefore limited. Tele.ring in particular has a very high proportion of post-paid customers – around […]*. These customers generate a very large amount of call time, whereas the call time in the case of pre-paid customers is normally much lower and the limited range of services offered by YESSS! suggests that it is aimed primarily at

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55 See only CRA study, page 25.

56 See CRA study page 26.

low-level users. It cannot be assumed that the services offered by YESSS! represent a direct market alternative for tele.ring customers and YESSS! cannot therefore be regarded as a disciplining force for the other mobile communications operators to the same extent as tele.ring.

(113) YESSS! is still dependent on its parent company ONE when setting prices. It therefore appears doubtful whether ONE will continue this strategy once tele.ring, the most active force for price competition, disappears and ONE no longer needs to compensate for the loss of customers from its quality brand ONE. At all events, the market investigation has revealed no evidence that YESSS!, as assumed in the study submitted by the notifying party, will offer a post-paid service[57].

Other service providers

(114) As shown in paragraphs (35) *et seq*., service providers and resellers play only a very limited role in the market. Schwarzfunk and eTel, which resell SIM cards, have a few thousand customers at most, while Tele2 has a bigger customer base but has not significantly boosted competition since it entered the market in 2003. At the end of 2005 it had a market share of under [<5]*%. It can therefore be concluded that service providers/resellers play only a very limited role in the market and do not exert strong competitive pressure, particularly compared with the network operators.

(115) In its reply to the statement of objections, the notifying party claimed that service providers could be expected to provide additional competition in future, pointing in particular to developments in other mobile telephone markets such as Germany and Britain.

(116) However, in the present case it is the Austrian market that the Commission must assess. In its market investigation it found no tangible evidence that the role of service providers in the Austrian market will change in the foreseeable future. Nor can the notifying party rely here on the assessment of the TKK's official expert[58]. For the purpose of assessing the merger, the expert found no evidence in ONE's incentive structure that the latter might depart from its strategy of cooperation with resellers or MVNOs such as Tele2 and eTel[59]. Thus, the TKK expert merely expects that the merger will not adversely affect the role of MVNOs and resellers; one cannot deduce that the result will be to exert significant additional competitive pressure on network operators. Unlike in other countries, the limited role of service providers is not explained by the fact that their market activities are restricted by lack of available capacity, as the notifying party has claimed. So there is no apparent reason why competition from service providers should be stronger at this particular juncture.

New entry of other network operators or service providers

(117) In its market investigation the Commission found no signs that a new network operator might be intending to enter the Austrian market. Since no frequencies are available at present and the market investigation revealed no evidence that a network operator would be willing to sell frequencies, and given the high costs of building up another mobile communications network, a new entry in the market would be highly

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57 See CRA study, page 13.

58 See page 68 of the CRA reply to the Statement of Objections.

59 TKK report of June 2005, Z 2, 7, 8, 9, 11/05.

unlikely in any event. Nor did the market investigation uncover any signs that a service provider other than those discussed above would enter the market. Unless the new market entrant were the secondary brand of an established operator (along the lines of ONE/YESSS!), it would also require some preparation time, in particular to conclude the necessary agreements with a network operator.

Conclusion

(118) For these reasons it seems unlikely that H3G or ONE/YESSS! will occupy a place in the market comparable with tele.ring once the proposed transaction is completed or that they will be able to discipline the competitive behaviour of T-Mobile and Mobilkom in particular. Similarly, it cannot be assumed that service providers would be able to assume such a role.

i. Future development of tele.ring

(119) In their reply to the statement of objections, T-Mobile and tele.ring both stated that, in the medium and long term, tele.ring would no longer be able to pursue the aggressive price strategy it had adopted in the past. The first reason cited for this was the growth of tele.ring's customer base, which had reduced tele.ring's incentive to pursue an aggressive pricing policy. The parties also explained that tele.ring was able to fund its aggressive pricing policy only because in recent years its termination fees were higher than those allowed other operators by the telecoms regulator and that tele.ring would have to invest substantially in 3G infrastructure in the immediate future.

(120) These arguments can be rejected in the light of tele.ring's internal plans, which expect its growth to level out considerably in the next few years and customer numbers to increase by […]* in 2006-2009. However, since tele.ring now has a relatively large customer base, this means that in absolute terms it is still aiming for a significant increase in customer base. The wider market conditions also need to be taken into account here. Tele.ring's plans assume that market growth will slow down considerably compared with 2004 (when customer numbers grew by […]*) and 2005 ([…]*), as the market would be saturated to a level of 100.4% by the end of 2005 and growth in customer numbers would fall to under 1% for 2007-2009. By contrast, T-Mobile's customer base had already stopped growing in 2004 and 2005, when it shrank by […]* and […]* respectively, despite a strongly growing market. Since the growth rates expected by tele.ring are well above the rate of market growth, it can be assumed that, despite the levelling-out of growth, tele.ring must continue its aggressive price strategy in order to expand its customer base further in a stagnating market at the expense of other operators.

(121) It is true that, in accordance with the trend mapped out by the Austrian telecoms regulator, termination fees will be reduced to 6.79 cents per minute for all operators on 1 January 2009. So, from then on tele.ring will no longer benefit from higher fees than other operators. However, it cannot be concluded from this that tele.ring will no longer pursue its aggressive price strategy with regard to originating minutes. For one thing, the regulator's plans still provide for the various network operators to be treated differently between 2006 and the end of 2008. For example, between 1 January and 30 June 2006, the termination fee for tele.ring is 13.26 cents, whereas for T-Mobile it is 12.64 cents.

(122) Moreover, reductions in termination fees in the past have not deflected tele.ring from its aggressive pricing policy. The most recent significant reduction in fees was on 1 April 2005, when the fee for tele.ring was cut by over 2 cents per minute from 15.99 cents to 13.80 cents. Internal tele.ring documents show that, after analysing the market situation, tele.ring concluded at that time that it could achieve no further growth in the post-paid field using existing instruments. As an alternative future strategy tele.ring considered either accepting the situation and keeping its market share stable or choosing new instruments to pursue growth[60]. Tele.ring decided to pursue growth by introducing on to the market a new tariff – 'tele.ring Starter Flat', later known as 'Formel 10' – in order to "win back its leading position on prices"[61]. This shows that a reduction in termination fees can in fact act as an incentive to introduce new, aggressive tariffs on the market, so that falling revenue can be offset by growth elsewhere. This view is also confirmed by T-Mobile's reply to the statement of objections: T-Mobile observed that the decision by the Austrian telecoms regulator to reduce termination fees forced H3G "to fit more call time into its own network"[62].

(123) Tele.ring's strategy for expanding its UMTS network is […]*. On the one hand, this is to be achieved by expanding as late as possible, so that the infrastructure is ready when there is demand for UMTS services and the price of 3G mobile telephony services has fallen. On the other, a "hybrid" network has been chosen whereby 2G and 3G transmission installations are interconnected, so that the 3G infrastructure can be placed together with the 2G infrastructure. Also, network expansion was initially confined to urban areas, with planned coverage of […]* of the population in 2009[63]. On this basis, tele.ring's planned investment on expanding the UMTS network is […]* for 2006 and […]* for 2007-2009[64]. It cannot therefore be assumed that investment in the UMTS network will prevent tele.ring from exerting aggressive price competition on other mobile telephone operators in Austria.

(124) It can therefore be concluded that tele.ring would continue to operate in future as a price-aggressive service provider on the Austrian mobile telephone market.

j. Consequences of non-coordinated effects

(125) In the light of the preceding analysis, and especially with the elimination of the maverick in the market and the simultaneous creation of a market structure with two leading, symmetrical network operators, it is likely that the planned transaction will produce non-coordinated effects and significantly impede effective competition in a substantial part of the common market. It is therefore probable that the proposed merger will have a tangible effect on prices in the Austrian end-customer market for mobile telephony services. Even if prices do not rise in the short term, the weakening

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60 See "tele.ring, tariff measure – April 05 Starter tariff", 8 March 2005.

61 See "Request for board approval 'Launch of tele.ring Starter tariff'", 3 March 2005.

62 See T-Mobile's reply to the statement of objections, paragraph 83.

63 Tele.ring management presentation, 27 May 2005, pp. 85 and 89.

64 Tele.ring management presentation, 27 May 2005, p. 90; Annex 1 to T-Mobile's answer to the request for information of 9 January 2006.

of competitive pressure as a result of tele.ring's elimination from the market makes it unlikely that prices will continue to fall significantly as in the past[65].

(126) This conclusion is consistent with the Horizontal Guidelines. These state that some firms have more of an influence on the competitive process than their market shares would suggest. A merger involving such a firm could change the competitive dynamics in a significant anti-competitive way, in particular when the market is already concentrated[66]. This is precisely the case here. As noted in paragraphs (44) *et seq*. regarding the HHI resulting from the proposed merger, the Austrian market for mobile telecommunications for end customers is highly concentrated. As has also been indicated, tele.ring, as a maverick, has a much greater influence on the competitive process in this market than its market share would suggest.

3. Coordinated effects

(127) Furthermore, the Commission does not rule out the possibility that the proposed merger, besides producing the non-coordinated effects as described above, may also lead to a weakening of competitive pressure as a result of coordinated effects. These coordinated effects would result in prices on the market rising higher than if they were dictated only by the individual, non-coordinated, profit-maximising behaviour of each individual competitor.

(128) One particular pointer here is that, following the proposed merger, two network operators of roughly equal size, Mobilkom and T-Mobile, would together account for a market share of [60-80]*% (in terms of both customers and turnover) on the Austrian mobile communications market. At the same time, the effect of the notified merger would be to remove the price-aggressive maverick, tele.ring, from the market, leaving no other service provider able to take over its role in the short to medium term.

(129) However, there is no need to come to a final decision on whether the merger will lead to coordinated effects in addition to non-coordinated effects, as the commitments proposed by the notifying party rule out the possibility that the transaction will lead to coordinated effects on the Austrian end-customer market for mobile telephony services.

4. Commitments

a. Description of the commitments

(130) On 3 March 2006, i.e. after notification of the Statement of Objections, T-Mobile submitted the commitments attached in Annex II to this decision ("the commitments"), which it then slightly amended by letter of 12 April 2006. They are based on the package of commitments made by T-Mobile during the first stage of proceedings and submitted on 1 December 2005, but they also incorporate

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65 Under the Guidelines on the assessment of horizontal mergers, the term "increased prices" also covers situations where prices would fall significantly further if the merger did not take place. See paragraph 8, footnote 7.

66 Guidelines on the assessment of horizontal mergers, paragraph 37.

considerable improvements as regards both content and the time-frame for implementation. The commitments cover the transfer of both tele.ring's UMTS frequencies and its mobile communications sites. In order to meet a large part of these commitments "up front", T-Mobile signed a binding framework agreement ("term sheet") with H3G on 28 February 2006 concerning the sale of sites and UMTS frequencies. The framework agreement is an integral part of the commitments and should culminate in a full contract no later than […]* after control of tele.ring has been acquired.

UMTS frequencies

(131) After the notified merger, T-Mobile would have the right – subject to approval by the Austrian telecoms regulator – to use 25 MHz of UMTS frequency band (in the paired range). These 25 MHz comprise five frequency packages of 5 MHz each[67], three blocks of which were allocated to T-Mobile and two to tele.ring before the merger. The Austrian Telecommunications Act (TKG) allows frequency usage rights to be transferred, but subject to approval by the telecoms regulator. Mobilkom currently has a licence to use 15 MHz of UMTS frequencies (divided into three 5 MHz packages), while ONE und H3G each have 10 MHz of UMTS frequencies (divided into two 5 MHz packages).

(132) The commitments provide for T-Mobile to sell off the two 5 MHz UMTS frequency blocks allocated to tele.ring. T-Mobile, on the basis of the framework agreement, undertakes to sell one block to H3G and to offer the other for sale to a competitor with a smaller market share, i.e. ONE, H3G or a new entrant to the market. The sell-offs will be subject to approval by the Commission and the telecoms regulator. If no contract of sale is concluded for one or both of the frequency packages before the end of the sell-off period, T-Mobile undertakes to hand the unsold frequency packages back to the Republic of Austria.

Mobile communications sites

(133) Tele.ring currently operates around […]* mobile communications sites in Austria. These sites consist of masts and carriers installed by tele.ring on property owned by third parties. Tele.ring has concluded rental contracts with the owners, allowing the properties to be used for erecting and operating a mobile communications site. The mobile communications sites are linked via microwave radio relay or cable infrastructure to tele.ring's backbone network. According to T-Mobile, subletting of the sites by tele.ring is permissible in principle.

(134) T-Mobile has undertaken to produce a final list, within six weeks of acquiring control of tele.ring and under supervision by a trustee, identifying the […]* tele.ring mobile communications sites ([…]* in urban areas and […]* in rural areas) that are and can be shown to be permanently required for network integration and operation of the combined T-Mobile/tele.ring network.

(135) T-Mobile has undertaken to sell to H3G, on the basis of the framework contract, at least […]* tele.ring mobile communications sites chosen by H3G, including the radio

[67] In the paired UMTS frequency range, this corresponds to 2x5 MHz.

relays and cable infrastructure, at a negotiated price. The sites are to be sold off by way of universal succession, which means that the rental contracts can be transferred without the need for the landowners' approval. […]* system equipment, in particular GSM antennas, which T-Mobile happens to leave at the sites.

(136) In addition, H3G may, if it so chooses, acquire other tele.ring mobile communications sites on the basis of a number of options staggered over time and at the price already agreed, provided that this does not affect the […]* sites required by T-Mobile for migration. With regard to those […]* sites, T-Mobile undertakes to offer H3G a preferential right of collocation over and above the legal entitlement. Where collocation at those sites is not possible, T-Mobile undertakes further to offer a preferential right of collocation for those sites that are located outside urban areas. Under the framework contract, T-Mobile also undertakes to grant H3G the right to use tele.ring's fibre optic backbone network, comprising […]* throughout Austria, and the access cable infrastructure at normal market conditions.

(137) T-Mobile undertakes further to offer to sell to ONE those of tele.ring's mobile communications sites that are not required for network integration or chosen by H3G, with the price per site being comparable to the price agreed with H3G. As regards the […]* tele.ring sites required for network integration, ONE will receive a preferential right of collocation over and above the legal entitlement, but subordinate to that of H3G. Also, if these […]* sites are subsequently sold or relinquished, T-Mobile undertakes to offer H3G, and thereafter ONE, the right of first refusal.

(138) The sites to be sold to H3G and ONE comprise the transmission masts together with the necessary technical equipment for operating the masts (antenna system including wiring, air-conditioning, 48V DC power supply transformer, 2G and/or 3G transmission/reception technology (Base Transceiver Station (BTS) and/or Node B), containers), including the radio relay and cable infrastructure, and transfer of the rental rights vis-à-vis the property owners. In the case of H3G, the infrastructure package also includes the transfer of the microwave relay frequencies used by tele.ring.

Implementation of the commitments

(139) As regards implementation of the commitments on offer, T-Mobile has undertaken to complete the sale of tele.ring's two UMTS frequency packages within […]* of acquiring control of tele.ring and to hand back to Austria any unsold UMTS frequency packages. There is a binding timetable for the transfer to H3G of tele.ring's ([…]* or more) mobile communications sites: […]* sites must be definitively transferred by […]*, followed by […]* by […]*, another […]* and the remainder by […]*. Even before these deadlines, H3G will be given access to the sites in order to plan and install transmission stations. For the transfer of tele.ring's sites to ONE, T-Mobile undertakes to offer to sell to ONE the sites not chosen by H3G […]* after it acquires control (during that time H3G has first refusal) and to complete the transfer no later than […]* after acquiring control.

(140) T-Mobile has also undertaken to appoint a trustee, whose task will be to supervise the selection of mobile communications sites, the sell-off process, and the transfer of the sites. The commitments given also provide that, in the event of disagreements between T-Mobile, on the one hand, and H3G and ONE, on the other, the Austrian regulatory authority, RTR, will act as arbiter.

b. Technical effects of the commitments

(141) The two aspects of the commitments (UMTS frequencies and mobile communications sites) are intended to improve the network resources of the smaller network operators in the Austrian mobile communications market, in particular the recent market entrant H3G, in structural terms so that they can play a full part in competition.

(a) Impact on the H3G network

(142) At present, H3G cannot yet be regarded as a fully fledged network operator as its own network covers only around [2-8]*% of the country and reaches no more than about 50% of the population. For the parts of Austria that are not covered, H3G is dependent on the national roaming agreement with the market leader Mobilkom for the use of its GSM network. In that respect H3G very much fits the description of a mobile "virtual" network operator (MVNO). But, as national roaming still covers only the GSM network, in the regions in question H3G can offer only voice telephony and simple data services, but not 3G multimedia services.

(143) The commitments are designed to allow H3G to extend its network throughout Austria very rapidly and so to become independent of the national roaming agreement with Mobilkom. It is therefore to be expected that, even after the notified merger and fulfilment of the commitments, four fully fledged mobile communications network operators will be active in Austria, compared with the current "4.5" network operators.

Mobile communications sites

(144) H3G has indicated both to the Commission and direct to T-Mobile Austria its interest in extending its network using the tele.ring mobile communications sites; on 28 February 2006 it concluded a binding framework contract with T-Mobile.

(145) The commitments include an offer to acquire at least […]* tele.ring mobile communications sites – chosen by H3G itself – together with options and preferential collocation rights. This would allow H3G to build up a complete network within a very short time and, as a network operator, to offer all mobile communications services (voice telephony, data and multimedia services) throughout Austria via its own network. Besides the mobile communications sites, the commitment also covers the entire technical infrastructure, in particular cables and microwave relay frequencies to link the sites to the backbone network and, if H3G wants it, the backbone network itself. These elements are also of major importance for the rapid extension of the network.

(146) According to H3G's revised business plan, which takes account of the possible purchase of the tele.ring sites, the H3G network will, in the foreseeable future, achieve complete coverage of the population – comparable with the other network operators. Comparison with H3G's original business plan shows that the commitments should enable H3G to increase the overall coverage of its network beyond what was originally envisaged and to speed up extension of its network by about two to three

years[68]. H3G has told the Commission that, once the sites have actually been transferred, it can integrate them into its own network within a few months. Furthermore, the possibility of acquiring the existing tele.ring sites by way of universal succession makes the extension of the H3G network more predictable since putting up new masts entails the often lengthy process of concluding rental contracts with property owners and obtaining administrative approval. As noted in paragraph (107), heightened sensitivity on the part of both the public and the authorities to health and environmental protection aspects now makes it difficult to extend the network and slows down approval for new masts.

UMTS frequency package

(147) The offer to sell one (or possibly two) UMTS 5 MHz frequency package(s) would, in particular, improve H3G's capacity to provide voice telephony services via its own network. In contrast to the other network operators in Austria, H3G cannot handle voice telephony traffic via the GSM network. To have enough capacity available to provide voice telephony services, H3G must therefore soon reserve an entire 5 MHz UMTS frequency block for voice telephony. Acquiring at least one additional frequency block would enable it to reserve the capacity without allocation conflicts between voice telephony and multimedia services. It is therefore to be expected that the additional frequency package would increase H3G's overall capacity, allowing it to serve a greater number of customers on its own network and giving it a greater incentive to win over a large number of new customers.

(148) The additional frequency package also has a direct positive influence on the extension of H3G's network. As indicated in paragraph (108), extending a network when you have a limited frequency spectrum requires considerably more investment than if you own a wider frequency band. Because of the typically large data volume of multimedia services, capacity usage in a UMTS network has a stronger impact on the range and thus on the geographical size of a cell than in a GSM network. The size of the cell diminishes significantly if it is heavily used, because the available channels in the BTS/transponder or antenna are saturated. In order to guarantee full coverage in the event of heavy traffic despite the reduced cell radius[69], the network operator has two options. Either he can invest a considerable amount of money and time in erecting additional transmission masts and antennas to increase the network density or he can extend the frequency spectrum so that more frequency channels are available in order to maintain the range or geographical size of the cells when traffic is heavy. The additional frequency package offered would thus enable H3G to achieve full coverage and sufficient capacity for its network without having to set up a large number of additional transmission sites.

(b) Impact on ONE's network

(149) The commitments could help ONE, if it acquires the tele.ring sites, to improve its network quality in regions where tele.ring has better served its customers than ONE. ONE has expressed an interest in around […]* tele.ring sites in order to complete its

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[68] H3G itself estimates that, taking into account the commitments on offer, it will reach well over [almost complete coverage] of the Austrian population via its own network by the end of 2007.

[69] The term "radius" is misleading since cells are typically honeycomb-shaped.

own network. However, ONE can have access to these […]* sites only in so far as H3G does not need them to build up its nationwide network and T-Mobile cannot demonstrate that it requires them for its network integration. If ONE then obtains the sites it wants, its ability to compete will be strengthened, particularly in areas where its network coverage has hitherto been inferior to that of tele.ring.

(150) If ONE acquires the second tele.ring frequency package, this will have positive effects on the density of the UMTS network and the number of additional transmission sites necessary.

c. Assessment of the commitments

(a) Market test

(151) The Commission has subjected the commitments to a market test. The Austrian telecoms regulator has expressed its views on matters relating to frequencies and sites. In this respect, it considers that the commitments are adequate to help strengthen the role of smaller competitors and that they are a mandatory condition to keep a "corresponding level" of competition.

(152) The feedback from the competitors canvassed was mixed, even when individual interests are taken into account. One competitor saw the commitments as a suitable solution for the competition problems raised by the merger, whereas another rejected them as inadequate and demanded instead that tele.ring's assets be divided among the competitors in proportion to their market position. The same competitor also suggested a number of measures which either relate to regulatory matters that are for the Austrian regulatory authority to decide or are incapable of resolving the competition problems raised or concern markets where the Commission found no competition problems.

(153) The Bundesarbeitskammer, which is responsible for consumer protection in Austria, also gave its opinion on the merger, assessing the commitments on offer from the particular viewpoint of consumers. In its final assessment of the commitment proposal, it specifically welcomed the concept of an "upfront buyer", which has since been realised with the conclusion of the framework contract between T-Mobile and H3G. The Bundesarbeitskammer considers that the improved commitments serve to "establish important preconditions for ensuring further dynamic competition on the mobile communications market even after the merger, thereby allowing Austrian consumers to benefit from inexpensive and attractive offers."

(b) Commission's assessment

(154) The Commission considers that the commitments given are capable of eliminating the risk that the merger in its original form would significantly impede effective competition in the Austrian mobile communications market. In particular, sufficient guarantees have been given that the commitments will be effectively implemented and these commitments create the necessary conditions for H3G to exert, through a nationwide mobile communications network, competitive pressure in the end-customer market for mobile telephony comparable to that previously exerted by tele.ring.

(155) First of all, the commitments guarantee that H3G will have a complete mobile communications network in Austria once it has taken over the infrastructure. H3G will take over at least […]* tele.ring sites and receive options and preferential collocation rights over other sites. H3G itself considers that, on the basis of the tele.ring sites and frequencies to be acquired from T-Mobile, it will already reach over […]*%[70] of the Austrian population by the end of 2007 (compared with around 50% at the end of 2005). As described in the section on network capacity in paragraph (47), H3G will then have sufficient capacity at its disposal, a *sine qua non* for serving its present and future customers.

(156) Building up its own network will make H3G independent of the national roaming agreement with Mobilkom and allow it to reduce its variable costs substantially. As noted in paragraph (105), the national roaming agreement with Mobilkom currently entails variable costs because the charges are based on volume. Firstly, this has a direct impact on H3G's pricing and, secondly, H3G cannot achieve any significant economies of scale in respect of this airtime, unlike the pure network operators. This agreement structure also has an impact on H3G's incentive to win over new customers. H3G's incentives to attract new customers ought to be significantly higher in areas where it has its own network than where its customers make calls via the national roaming agreement. The competitive pressure exerted by H3G can therefore be regarded as far lower in such areas. As a result of the commitments, H3G will be able to reduce steadily and significantly the number of minutes transmitted via the national roaming agreement up to […]* and will have to resort to that agreement only for areas not then covered by its own network[71].

(157) After a careful analysis of all the information available, the Commission considers it likely that H3G will pass on these lower costs to customers in the form of even cheaper tariffs, thereby ensuring intense price pressure in the Austrian mobile communications market. This expectation is based firstly on H3G's past pricing behaviour: as shown in paragraph (55), H3G has, after tele.ring, offered the lowest tariffs in the last one or two years[72]. H3G's role as an inexpensive provider of voice telephony services in particular is also backed up by internal tele.ring documents produced before the notified merger. In these documents, tele.ring expressly states that the market positioning of the H3G brand is designed to associate it with aggressive price offers for voice telephony and with innovative services. H3G's revised business plan, which includes expanding and speeding up the construction of its network, also considers further price reductions for the benefit of end customers in voice telephony.

(158) After the commitments have been implemented, H3G will have an even greater incentive to pursue an aggressive pricing policy as it will soon have almost complete network coverage. The wider geographical coverage also makes H3G's network more attractive and increases its ability to win new customers throughout the country. It must therefore try to recoup its investment costs as soon as possible and fill up its newly acquired capacity by obtaining as many users as possible. It is also essential

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[70] This figure is a business secret of H3G.

[71] H3G estimates that the proportion of its total traffic carried via the national roaming agreement will fall to less than […]*% by the end of 2007 [business secret of H3G]*.

[72] The price per minute charged by H3G in the first quarter of 2005 was only minimally higher than tele.ring's average price of […]*.

that it rapidly and significantly expand its customer base from the present level of [3-5]*% of users. It is generally accepted that cheap prices are by far the best way of winning over new customers, particularly in voice telephony, as tele.ring's example has shown. Nor are H3G's incentives to pursue an aggressive pricing policy reduced by the "cannibalisation" of profits from lower prices, as is the case with Mobilkom and T-Mobile, described in paragraph (78). H3G currently has a market share of only [3-5]*% so, if it lowers its prices, the prospect of additional profits from extra customers far outweighs the danger of lower earnings from existing customers who cannot be denied tariff cuts in the longer term.

(159) Nor are H3G's incentives to offer aggressive prices for voice telephony services fundamentally altered by the fact that it operates a 3G network, whereas tele.ring has hitherto been purely a 2G operator. 3G networks offer services other than voice telephony, in particular multimedia services. Nevertheless, the basic services - even for multimedia users - always consist of voice telephony and other services that can be delivered via 2G networks (such as text messaging). Accordingly, the market investigation showed that, when end customers choose a mobile operator, the tariffs for voice telephony services play a leading role, even in the case of a 3G network operator such as H3G. The market investigation showed that, for network operators, voice telephony is by the far the most important T-Mobile communications service in terms of volume, turnover and profits, and it will remain so for the foreseeable future (certainly until 2009). This applies not only to traditional 2G network operators, but also to pure 3G operators such as H3G and even to the 3G networks of operators that run both 2G and 3G networks. The very fact that H3G is speeding up its network expansion means that it must seek more voice telephony customers.

(160) H3G therefore has a strong incentive to acquire new customers primarily by offering cheap voice telephony tariffs. This is backed up by figures submitted to the Commission by H3G concerning the use of multimedia services, according to which even the multimedia services incorporated in packages sold by H3G are used by far fewer than half of customers, while even fewer pay extra charges to have access to multimedia services. This shows that well over half of present customers use H3G's mobile communication network solely for voice telephony (and other services that can be delivered by 2G). This is also reflected in H3G's tariff structure. The current Talk&More tariffs include a voice package (comprising 100-600 voice minutes per month) combined with the possibility of using some multimedia services (such as 10 MMS per month), which is designed to interest customers who mainly use voice telephony in multimedia services as well. The fact that H3G's prices, as analysed in paragraph (55), are at the same level as tele.ring's even though the price analysis did not comprise multimedia services shows that the multimedia services included in the package are a "means of temptation". H3G's price structure indicates that H3G tries to attract new customers through cheap voice telephony while offering multimedia services as an additional bonus.

(161) H3G has a further incentive to pursue a price strategy similar to that of tele.ring, in that its customers have a similar profile to tele.ring's customers. H3G therefore has a strong incentive to appeal to tele.ring's customers by offering prices as cheap as tele.ring's and hence to further its own objective of expanding its customer base. The market investigation showed that both network operators have very price-sensitive customers, the vast majority of which they have "lured away" from other service providers. Internal tele.ring documents produced before the notified merger also show that tele.ring and H3G customers in particular regard cheap prices as the most

important asset of their respective providers. Other similarities between the two customer groups are the proportion of post-paid customers, which is well above average compared with all other providers, and the large proportion of frequent callers. Finally, the similarities of tele.ring's and H3G's customer base are illustrated by statistics on mobile customers who switch and take their number with them. They reveal that almost half of customers who left tele.ring in 2005 switched to H3G[73].

(162) Moreover, tele.ring will not remain a pure 2G operator in future but will migrate its customers to a 3G network. According to the business plan drawn up before the merger was notified, tele.ring expects […]* to opt for 3G in 2006. These figures are set to […]* in 2009, when just under half of all tele.ring customers will already be UMTS users. The figures clearly show that tele.ring would also develop rapidly into a 3G provider and its incentive and cost structures would converge further with those of H3G. On the question of cost structures, it is worth mentioning that 3G-enabled mobile telephones have been more expensive up to now but, according to the market investigation, the price will, in any event, fall more rapidly.

(163) Given the similar incentives and very similar communications profile of H3G and tele.ring customers, there is strong evidence that H3G will in future pursue an aggressive price strategy similar to that pursued by tele.ring in the past.

(164) The framework agreement signed by T-Mobile and H3G on 28 February 2006 creates sufficient guarantees that H3G will actually acquire the frequencies and sites. Indeed, it is even legally binding and reflects the express wishes of T-Mobile and H3G to conclude a comprehensive agreement and to transfer the frequencies and sites within […]*. This also ensures that H3G will have a nationwide network sooner than it would have had by its own efforts, thereby boosting its competitiveness and allowing it to assume the role, described in paragraphs (103) *et seq.*, of a price-disciplining provider. Furthermore, if any disagreements should arise concerning fulfilment of the commitments, the involvement of the Austrian telecoms regulator as arbiter will ensure effective implementation of those commitments.

(165) The Commission therefore takes the view that the commitments as set out in the version of 3 March 2006 eliminate the risk of a significant impediment to effective competition in the Austrian mobile communications market as regards both coordinated and non-coordinated effects.

5. Conclusion following analysis of the end-customer market for mobile telephony services

(166) For the reasons given above, the Commission has concluded that the commitments given will probably eliminate both the non-coordinated effects identified and the coordinated effects not ruled out by the Commission and that therefore the notified merger, as amended by the commitments proposed by T-Mobile Austria, will not significantly impede effective competition in a substantial part of the common market.

B. International roaming

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[73] Compared with the figures quoted in paragraph (50) in the competition assessment, it has to be borne in mind that the number of customers who have switched to tele.ring is much higher than the number who have left tele.ring. The same applies to H3G.

(167) All network operators in Austria are active in the market for inbound international roaming. Their market shares are shown in the table below:

Operator	**1st half of 2005**	**2004**	**2003**	**2002**
Mobilkom	[40-50]*%	[40-50]*%	[40-50]*%	[40-50]*%
T-Mobile	[25-35]*%	[25-35]*%	[25-35]*%	[25-35]*%
tele.ring	[5-15]*%	[5-15]*%	[5-15]*%	[5-15]*%
T-Mobile and tele.ring combined	*[35-45]*%*	*[35-45]*%*	*[35-45]*%*	*[35-45]*%*
ONE	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%
H3G	[<5]*%	[<5]*%	0%	0%

Source: Estimates by T-Mobile.

(168) As in the end-customer market for mobile telephony, the market shares for inbound international roaming show that the planned transaction would bring T-Mobile closer to Mobilkom. However, tele.ring does not appear to have played the same role in this market as in the market for mobile telephony services to end customers, since tele.ring's market share also fell over this period.

(169) In any case international roaming market shares are of limited relevance. This is a wholesale market where the customers are mobile telephony providers from other countries. Their main requirement is for a partner with a nationwide mobile telephony network in Austria available for international roaming, so that their customers can telephone anywhere in Austria. Even after the proposed merger there will be two other network operators, Mobilkom and ONE, besides T-Mobile/tele.ring so that T-Mobile operators from abroad will still have a sufficient choice of partners for international roaming. H3G also offers international roaming. At present, H3G's role in this market is not very important because it offers international roaming only for 3G and only in so far as its still incomplete network allows. But H3G will probably come to play a bigger role in this market, offering an alternative to the other network operators once 3G-capable mobile telephones become more widespread and once it has built up a nationwide network, something which the commitments given makes possible.

(170) The analysis also has to take account of the fact that all mobile telephony operators, if they offer their customers the option of international roaming[74], conclude roaming contracts with all the mobile network operators in a given country. This is done on the basis of the GSM Association's Standard International Roaming Agreement (STIRA) and a standard Inter-Operator Tariff (IOT). But price competition in international roaming can exist since operators give discounts on the IOT. Foreign mobile telephony operators can, to a considerable degree, direct the traffic their customers generate in another country as regards which network is used. In particular, they can direct the traffic to the provider that offers them the best roaming conditions. Even

[74] As explained in paragraph (39), YESSS!, for example, is an exception.

after the proposed merger they will, as demonstrated in paragraph (169), still have sufficient alternatives.

(171) The remaining traffic, i.e. the undirected part of the roaming traffic, is of less importance as the notifying party has shown for its roaming traffic in Austria. The way in which this traffic is distributed depends more on technical aspects; according to the notifying party's contract, parameters are, in particular, network coverage and network availability, certain mobile device algorithms and the manual choice made by the customer. The market investigation identified another factor in the distribution of roaming traffic, namely the Mobile Network Code (MNC). If traffic is not directed, the network used by the roaming customer's mobile phone is normally selected at random while a network is more likely to be chosen if it has two MNCs, as will be the case for T-Mobile after the proposed merger. But random distribution occurs only if the traffic is not directed and therefore applies to only a rather small proportion of roaming traffic. The MNC plays a part in the random selection only alongside the other parameters referred to. Therefore, the possible increase in roaming traffic for T-Mobile through the acquisition of a second MNC concerns only a small part of all the roaming traffic. Nor will having two MNCs boost T-Mobile's market strength beyond the market shares indicated in paragraph (167). For the purposes of this analysis, therefore, the fact that T-Mobile would have two MNCs after the proposed merger (and only as long as the regulator does not withdraw one of T-Mobile's MNCs) is largely irrelevant.

(172) Furthermore, the proposed transaction will not result in any substantial impediment in terms of the existing alliances. Tele.ring has not so far been a member of any alliance, while T-Mobile belongs to the "Freemove" alliance and ONE to the Starmap alliance and Mobilkom is a partner of the Vodafone Eurocall network. H3G is not a member of any alliance but is linked to the other mobile telephony operators that belong to Hutchison.

(173) In its decision in the Telefónica/O2 case[75], the Commission found that the Freemove and Starmap alliances differ in that the Freemove alliance provides for a substantial percentage of the traffic to be directed to the network of the alliance member. In the present case, the proposed transaction will result in the disappearance from the market of a network operator that is independent of any alliance. But, in contrast with the findings in the case of Telefónica/O2 for the United Kingdom, the fact that ONE is a member of the Starmap alliance means that one roaming partner will remain that belongs to a less tightly knit alliance than Freemove or Vodafone Eurotel. And, unlike in the Telefónica/O2 case, the transaction would not lead to the disappearance of an independent roaming partner in a number of countries that are very important for international roaming in view of their relevance for business customers, such as the United Kingdom and Germany.

(174) The fact that there still remains one network operator (ONE) that is not a member of the Freemove alliance or the Vodafone Eurocall network is particularly important for those foreign mobile telephony operators that themselves belong either to no alliance or to the Starmap alliance. Foreign operators that belong to Freemove or Vodafone Eurocall can route their traffic via their Austrian alliance partners. Foreign mobile

[75] Case COMP/M.4035 – Telefónica/O2, 10 January 2006.

telephony operators that are not members of any alliance or that belong to the Starmap alliance can route their traffic via ONE.

(175) Also relevant is the fact that international roaming contracts are normally reciprocal, i.e. a mobile telephony operator in country A negotiates at the same time both to provide international roaming services for a mobile telephony provider from country B on his network (*inbound roaming*) and to purchase international roaming services on the latter's network in country B (*outbound roaming*). Prices and volumes are normally negotiated reciprocally, i.e. prices and volumes for both outbound and inbound roaming are considered together. At all events, the agreed prices are more in the nature of "transfer prices", as long as the balance of inbound and outbound roaming between two network operators is balanced and the payments are netted out. The expected volume of inbound roaming traffic on one's own network is therefore a significant factor in the negotiations on outbound roaming and the corresponding prices.

(176) In this respect too the present case differs from the case of Telefónica/O2. Mobile telephony providers that are not members of any alliance or that belong to the Starmap alliance can expect to be able to continue to negotiate with ONE as a roaming partner whose outbound roaming traffic has not yet been assigned to partner networks in other countries under the Freemove alliance or Vodafone Eurocall. Moreover, tele.ring's outbound volumes are not very significant and have not helped make tele.ring particularly attractive as an international roaming partner. Although tele.ring had more than […]*% of T-Mobile's market share in terms of turnover in 2004, as shown in paragraph (32), its number of outbound roaming minutes in that year amounted to less than […]*% of T-Mobile's. This is another reason why tele.ring was not very important for mobile network operators from other countries in the Austrian market for international roaming.

(177) In view of the foregoing, the proposed transaction will not significantly impede effective competition in the Austrian market for international roaming.

C. Wholesale market for termination services

(178) The notified merger will not result in market share addition in the termination markets since each network amounts to a separate market as regards call termination (see paragraphs (20) *et seq*. for the market definition).

(179) Possible vertical effects can also be ruled out: tele.ring has a market share of 100% in the two wholesale call termination markets in its fixed and its mobile network in Austria. These markets are upstream of the mobile markets and the fixed network markets for connections abroad in which T-Mobile (or its parent Deutsche Telekom) is active in Austria and other countries, since call termination in tele.ring's networks is an intermediate product for T-Mobile's end-customer services (or those of Deutsche Telekom) in those markets.

(180) T-Mobile (or Deutsche Telekom) also has a market share of 100% on the wholesale market for termination in its own mobile and/or fixed networks in Austria, Germany, the United Kingdom, the Netherlands, Hungary, Poland, the Czech Republic and Slovakia. These markets are in turn upstream of the Austrian (end-customer) mobile

telephony market, where tele.ring is active and has a market share of [10-20]*%, and of the Austrian (end-customer) fixed network market for calls abroad, where tele.ring is active and has a market share of [<5]*%.

(181) In view of the size of tele.ring's market share in the market for mobile telecommunication services for end customers, market partitioning as a result of the notified merger can largely be ruled out. Moreover, discrimination against foreign telecommunications providers is technically very difficult since most international calls are handled via international carriers, which act as intermediaries vis-à-vis the providers. In most cases the parties are therefore unable to identify who is requesting termination services. The precise origin of international traffic for termination can be determined only in the event of direct interconnection with the foreign provider that is sending the call. Even then, discrimination is unlikely since the foreign provider can quite easily divert to an international "carrier" in order to avoid discrimination.

(182) Furthermore, the termination charges are fixed by the Austrian regulator for each network operator in accordance with a cost-oriented "glide path". In doing so, the Austrian telecoms regulator has already made provision for the proposed merger. The regulator's decision provides that, as soon as the takeover is completed, the termination charges for tele.ring will be lowered to the level that will then apply for T-Mobile. In addition, the Austrian regulator has assumed that further cost reductions due to the merger will not arise immediately after the merger is legally completed. Consequently, the changes brought about by the merger can be examined during the next round of proceedings since the regulator is assuming that its current decision will expire before the end of 2006. It can therefore be assumed that, as regards the size of the termination charge, the Austrian regulator has taken account of the merger in its proceedings[76].

VI. CONDITIONS AND OBLIGATIONS

(183) In accordance with the first sentence of Article 8(2)(2) of the 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.

(184) Measures that give rise to a structural change in the market must be made subject to conditions, while the implementing steps necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision declaring the merger compatible with the common market is null and void. If the parties fail to meet an obligation, the Commission can revoke its clearance decision under Article 8(6)(b) of the Merger Regulation; in addition, fines and periodic penalty payments can be imposed on the parties under Articles 14(2)(d) and 15(1)(c) of the Merger Regulation.

(185) In line with the basic distinction described above, the Commission's decision is subject to the condition that there is full compliance with the commitment to transfer

[76] See TKK decisions in procedures Z 2, 7, 8, 9, 10, 11, 13, 14/05 of 19 December 2005.

to H3G by […]* at the latest the mobile transmission sites that H3G selects and to transfer to ONE the mobile transmission sites that it selects no later than […]* after control of tele.ring is acquired. The Commission furthermore make its decision subject to the sale of one UMTS frequency package to H3G within the period of sale ([…]* after T-Mobile takes control of tele.ring) and to hand it over within the period allowed for compliance ([…]* after T-Mobile took control of tele.ring) and either to sell the second UMTS frequency package to a smaller competitor approved by the Commission within the extended sell-off period ([…]* after acquisition of control over tele.ring) and transfer it within the period allowed for compliance or to hand it back within the period allowed for compliance to the Austrian regulator and, within […]* of acquiring control of tele.ring, to abstain from the acquisition of direct or indirect control of the disposed assets without the Commission's prior approval.

(186) The remainder of the commitments contained in Annex II, in particular the commitment to maintain for the time being the business to be sold off and to manage it separately and the details regarding the trustee to be appointed by the parties, will constitute obligations since they are merely intended to accompany implementation of the above-mentioned conditions.

VII. CONCLUSION

(187) Subject to full compliance with the commitments given by T-Mobile Austria, it can be assumed that the planned merger will not significantly impede effective competition in the common market or in a substantial part thereof. The merger can therefore be declared compatible with the common market and the functioning of the EEA Agreement pursuant to Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement, subject to full compliance with the commitments contained in the Annex,

HAS ADOPTED THE FOLLOWING DECISION:

Article 1

The notified concentration by which T-Mobile Austria GmbH is to acquire control of tele.ring Unternehmensgruppe within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the common market and with the EEA Agreement.

Article 2

Article 1 shall apply on condition that the commitments given by T-Mobile in paragraphs III.2, 3 and 6 and VII.1(a) and (b) of Annex II as regards the UMTS frequencies and in paragraphs IV.3 and 4 and VII.1(a) and (b) of Annex II as regards the sites are complied with in full.

Article 3

This decision is issued subject to the obligation on T-Mobile to comply in full with the other commitments given, as set out in Annex II.

Article 4

This decision is addressed to:

[…]*

For the Commission
signed
Neelie Kroes
Member of the Commission

ANNEX 1

The full original text of the conditions and obligations referred to in Articles 2 and 3 may be consulted on the following Commission website:

http://ec.europa.eu/comm/competition/index_en.html

EUROPEAN COMMISSION
Competition DG

Policy and Strategic Support
Enforcement Priorities and Decision Scrutiny

OPINION

of the ADVISORY COMMITTEE on CONCENTRATIONS
given at its 139th meeting on 7 April 2006
concerning a draft decision relating to
Case COMP/M.3916 – T-Mobile Austria/Tele.ring

Rapporteur : LUXEMBOURG

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1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of Regulation 139/2004 and that it has a Community dimension.

2. The majority of the Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, the relevant product markets are the following:
   a) The market for provision of mobile telecommunication services to end consumers;
   b) The market for wholesale of termination services;
   c) The market for wholesale international roaming services.

   A minority disagrees with respect to a) and a minority abstains for c).

3. The Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, the relevant geographic markets are national.

4. The majority of the Advisory Committee agrees with the Commission that the operation as notified would give rise to non-coordinated effects in the Austrian market for the provision of mobile telecommunication services to end consumers and therefore result in a significant impediment of effective competition in that market. A minority abstains.

5. The Advisory Committee agrees with the Commission that the efficiency claims raised by T-Mobile are very unlikely to take place after the concentration.

6. The majority of the Advisory Committee agrees with the Commission that the commitments submitted by the parties are sufficient to remove the competition concerns raised and that, as a result, the concentration should be declared compatible with the Common Market. A minority disagrees.

7. The Advisory Committee asks the Commission to take into account all the other points raised during the discussion.

BELGIË/BELGIQUE	**ČESKÁ REPUBLIKA**	**DANMARK**	**DEUTSCHLAND**	**EESTI**
J. MUTAMBA	---	---	F. SCHUSTER	---
ELLADA	**ESPAÑA**	**FRANCE**	**IRELAND**	**ITALIA**
---	---	B. ALOMAR	---	G. PAZZI
KYPROS/KIBRIS	**LATVIJA**	**LIETUVA**	**LUXEMBOURG**	**MAGYARORSZÁG**
---	---	I. KUDZINSKIENE	G. BLESER	G. SZILÁGYI
MALTA	**NEDERLAND**	**ÖSTERREICH**	**POLSKA**	**PORTUGAL**
---	R. van HUTTEN	S. FISCHER	E. SYKUT	R. MAXIMIANO
SLOVENIJA	**SLOVENSKO**	**SUOMI-FINLAND**	**SVERIGE**	**UNITED KINGDOM**
---	---	H. VÄISÄNEN	C. SZATEK	F. PÉNA

EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER IN CASE COMP/ M.3916 – T-Mobile AUSTRIA / TELE.RING

(pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21)

On 21 September 2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking T-Mobile Austria GmbH ("T-Mobile", Austria) belonging to the German group Deutsche Telekom AG ("DTAG") acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Tele.ring Unternehmensgruppe ("TeleRing", Austria) by way of purchase of shares.

At the end of the first phase of the investigation, the Commission concluded that the concentration raised serious doubts as to its compatibility with the common market and with the EEA Agreement. In particular, concerns resulted from the fact that TeleRing was considered to be the most active competitor in the market driving prices down due to, *inter alia*, its very strong incentive to build up a sufficiently large customer base in order to generate considerable economies of scale for its fully expanded mobile 2G network.

Accordingly, and in spite of the commitments proposed by T-Mobile on 19 October 2005, the Commission initiated proceedings in accordance with Article 6(1c) of the Merger Regulation on 14 November 2005.

T-Mobile did not request access to the "key documents" in the Commission file in accordance with chapter 7.2. of the "Best Practices on the conduct of EC merger control proceedings".

On 1 December 2005, T-Mobile submitted a further commitment proposal.

On 8 February 2006, a Statement of Objections was sent to T-Mobile, which replied on 27 February 2006. The same day, access to file was provided. On 1 March 2006, TeleRing submitted its comments to the SO.

The parties did not request to develop their arguments in a formal oral hearing.

In agreement with T-Mobile, the Commission issued a decision on 21 February 2006 pursuant to Article 10(3) second paragraph of the Merger Regulation in order to extend the procedure by 20 working days.

On 3 March 2006, T-Mobile submitted an improved set of commitments which were subsequently market-tested. The market test of these improved undertakings was mainly positive.

I have not been asked to verify the objectivity of the enquiry.

In the light of the commitments eventually proposed and having analysed the results of the market test, the draft Decision concludes that the proposed concentration, subject to full respect of the commitments, is compatible with the common market and with the EEA Agreement.

In the light of the above, I consider that the parties' rights to be heard have been respected.

Brussels, 18 April 2006

(signed)

Serge DURANDE