



EUROPEAN COMMISSION  
DG Competition

***Case M.8808 - T-MOBILE  
AUSTRIA / UPC  
AUSTRIA***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 09/07/2018

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## EUROPEAN COMMISSION

Brussels, 9.7.2018  
C(2018) 4535 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

To the notifying party

**Subject: Case M.8808 – T-Mobile Austria / UPC Austria  
Commission decision pursuant to Article 6(1)(b) of Council  
Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the  
European Economic Area<sup>2</sup>**

Dear Sir or Madam,

- (1) On 18.05.2018, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which T-Mobile Austria Holding GmbH ("TMA-H", Austria), controlled by Deutsche Telekom AG ("DTAG", Germany), intends to acquire sole control of the whole of UPC Austria GmbH ("UPC", Austria), controlled by Liberty Global Group ("LG", United Kingdom) within the meaning of Article 3(1)(b) of the Merger Regulation, by way of purchase of shares (the "Transaction").<sup>3</sup> TMA-H is a holding company which conducts its business operations mainly through its subsidiary T-Mobile Austria GmbH ("TMA", Austria). DTAG, TMA-H and TMA are designated hereinafter as the 'Notifying Party' and, together with UPC, as the 'Parties'.
- (2) On 18 June 2018, after the Commission informed the Parties that it could not be excluded that the Transaction would raise serious doubts on a potential

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

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

<sup>3</sup> Publication in the Official Journal of the European Union No C 179, 25.05.2018, p. 7.

market for home internet services, the Notifying Party submitted commitments pursuant to Article 6(2) with a view to removing these possible serious doubts. The commitments were subsequently amended on 20 June 2018.

- (3) Upon further investigation, the Commission then found that the Transaction would not raise serious doubts on this potential market as further explained in this Decision, and informed the Notifying Party accordingly. The Notifying Party withdrew the commitments on 6 July 2018. For this reason, neither are the commitments proposed by the Notifying Party assessed in this Decision, nor is the authorisation of the Transaction conditional upon compliance with the proposed commitments.

## **1. THE PARTIES AND THE TRANSACTION**

- (4) TMA is mainly a mobile network operator ("MNO") which owns a 2G, 3G and 4G network with nationwide coverage in Austria and offers inter alia mobile telecommunications services to private and business customers at retail level and to mobile virtual network operators ("MVNOs") at wholesale level. TMA also offers retail internet access services. TMA is ultimately controlled by DTAG.
- (5) UPC owns and operates a hybrid fibre-coaxial cable network in parts of Austria, primarily in urban areas such as Vienna, Graz, Innsbruck and Klagenfurt. UPC offers cable TV, fixed internet and fixed telecommunications services to private and business customers over its cable network. In addition, UPC offers fixed internet and fixed telecommunications services on the basis of wholesale DSL products outside of the footprint of its own cable network. UPC also offers voice, internet and data services to business customers and wholesale customers. UPC has minor activities in the area of retail mobile telecommunications services as an MVNO, on the basis of a wholesale agreement with Hutchison 3G Austria ("H3A").
- (6) On 22 December 2017, a Sale and Purchase Agreement was concluded between Liberty Global Europe Holdco 2 BV, an indirect wholly-owned subsidiary of LG, as the seller and TMA-H as the purchaser, pursuant to which TMA-H would acquire the entire issued share capital of UPC. As a result, TMA-H will acquire sole control of UPC within the meaning of Article 3(1)(b) of the Merger Regulation.
- (7) The Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **2. EU DIMENSION**

- (8) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>4</sup>. Each of them has an EU-wide turnover in excess of EUR 250 million, but the Parties do not achieve more than two-

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<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p. 1).

thirds of their respective aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

### **3. RELEVANT MARKETS**

- (9) In Austria, the Parties' activities mainly overlap in the areas of: (i) retail internet access services; (ii) retail mobile telecommunications services; and (iii) wholesale leased lines.
- (10) Besides there are minor horizontal overlaps between the Parties' activities in: (i) retail internet hosting services in the EEA; (ii) wholesale internet connectivity services (worldwide), and (iii) global telecommunications services on retail level (worldwide).
- (11) In addition, TMA and/or UPC are present upstream in: (i) wholesale access and call origination on mobile networks (TMA); (ii) wholesale mobile call termination services (TMA and UPC); (iii) wholesale fixed call termination services (TMA and UPC); (iv) wholesale international roaming services (TMA); (v) and in wholesale leased lines (TMA and UPC). Those services are vertically linked to (i) retail mobile telecommunications services, (ii) retail fixed telephony services, (iii) retail home internet access services (including both fixed and mobile technologies), (iv) wholesale end-to-end calls, (v) retail business connectivity services; (vi) wholesale broadband access, and (vii) global telecommunications services at wholesale level. Further details on the vertical relationships between the Parties are in the table under section 4.3 and in paragraph (324).
- (12) Finally, since UPC offers multiple-play packages in Austria and both Parties offer communications services that can be included in multiple-play offers, a potential multiple-play market is analysed as well.

#### **3.1. Internet access services**

##### ***3.1.1. Retail internet access services***

- (13) Retail internet access services consist of the provision of a telecommunications link enabling end customers to access the internet.

##### **3.1.1.1. Product market definition**

###### **(a) The Notifying Party's views**

- (14) The Notifying Party submits that the product market for retail fixed internet services is separate from mobile internet (data) services which are part of the overall retail market for mobile telecommunications services in Austria. The Austrian market environment does not exhibit characteristics which would justify a deviation from the Commission's definition of the relevant product

market in previous cases.<sup>5</sup> The Notifying Party refers to the following main reasons for this conclusion:

- i) The bandwidth, performance, quality and actual speed of mobile networks in Austria are supposedly inferior to those of fixed networks, in particular those of UPC's high-speed HFC cable network. This would be demonstrated by a network throughput analysis carried out by TMA which shows that the average download user throughput of TMA's customers of unlimited data only tariffs (probably used together with routers ("cubes")) is only approximately [...] Mbps. This is low compared to fixed networks in Austria. Considering this limited capacity of mobile broadband connections, TMA's mobile data-only product would face a high return rate of approximately [...] % during the first two to four weeks after purchasing the product.
  - ii) Customers of fixed internet connections and mobile customers show very different usage patterns in Austria. The average monthly data usage of fixed customers is substantially higher than the usage of mobile customers.
  - iii) In Austria, fixed internet services are mostly purchased in bundles with other services (e.g., fixed telephony services or retail TV services) whereas mobile internet (data) services are not. From a demand side perspective, mobile internet (data) services could not substitute those product bundles.
  - iv) The volume of sales and prices of fixed internet services on the one hand and those of mobile internet (data) services on the other hand in Austria develop independently of each other.
  - v) Fixed internet services and mobile internet (data) services are typically used as complementary products in Austria.
  - vi) Mobile data-only products offered in combination with a router are niche products. Due to the enormous increase in data consumption over the last years, [confidential information about the implications of the increase in data consumption for mobile data-only products].
- (15) The Notifying Party submits that these arguments apply both to services offered to residential customers and to services offered to business customers. In any event, the Notifying Party submits that the precise definition of the relevant product market can be left open in the present case.
- (16) Finally, according to the Notifying Party, no distinctions should be made within mobile internet (data) services as mobile internet (data) services are all mobile data enabled SIM cards that can be used with a multitude of various

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<sup>5</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 57; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 38; Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 59 and 61; Commission decision of 19 May 2005 in case M.7421 – *Orange/Jazztel*, recitals 50-53; Commission decision of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, recital 20.

mobile devices (hardware) such as routers (cubes), dongles, tablets or smartphones. An MNO has no control over the actual use of a SIM card by a customer. According to the Notifying Party, distinguishing mobile internet (data) services on the basis of the hardware product with which the mobile internet (data) services (i.e., the SIM card) have been sold would, therefore, be meaningless.

(b) The Commission's assessment

- (17) The Commission notes that in previous cases, it has distinguished between fixed and mobile internet access services (both for residential and business customers) as (i) mobile internet access services often do not offer the same product functionalities as fixed services, specifically with respect to network quality (speed, bandwidth, security of the connection); and (ii) mobile and fixed data services are mainly aimed at different customer needs, i.e. to access the internet whilst on the move for mobile data services. In particular, the Commission found that in Spain fixed and mobile internet access services were not substitutable for a number of reasons, such as different uses (mobile broadband permits mobility but also access to mobile applications), different capacity and pricing models (mobile broadband unlike fixed broadband was almost always capped at a certain amount of data transferred and was also invoiced per amount of data traffic) as well as different speeds (only 4G/LTE mobile technology could provide comparable speeds to fixed broadband). In addition, customers demanded both mobile and fixed broadband which demonstrated the complementary character of the two services. Finally, it was considered that mobile internet access could in some cases substitute fixed internet access services but not the other way around.<sup>6</sup>
- (18) The issue of substitution between fixed and mobile internet access services was analysed specifically for Austria in another case, where the Commission found that there was only limited substitutability for mobile data services by fixed internet access services.<sup>7</sup> However, the question in that case was whether fixed internet access services were a substitute for mobile data services in general or for mobile internet access services specifically.
- (19) In the present case the question is the reverse, namely whether mobile internet access services for fixed connections can be a substitute for fixed internet access, i.e. whether mobile internet access services can be used for accessing the internet at home, in the same way as fixed connections are used. The mentioned decision relating to Austria did not assess the latter question, as it was not relevant for the case at issue. However, that decision made express reference to an ordinance of the national Austrian Regulatory Authority for Broadcasting and Telecommunications ("RTR")<sup>8</sup> from 2003, which found that

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<sup>6</sup> Commission decision of 19 May 2005 in case M.7421 – *Orange/Jazztel*, recitals 50-53.

<sup>7</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 54-57.

<sup>8</sup> Formally, the Telekom-Control-Commission (TKK) is responsible for regulating the Austrian telecommunications market and the RTR provides operational support inter alia to TKK in the fulfilment of TKK's duties. For the purpose of this decision, the term RTR refers also to the TKK.

for residential customers mobile internet access was a substitute for fixed line internet services.<sup>9</sup>

- (20) Notably the RTR found in its ordinance that there existed a high degree of demand substitution between fixed internet products and fixed-mobile substitution ("FMS") products<sup>10</sup> (such as cubes) for residential customers, and defined a residential "home broadband" market that included both fixed and FMS products.
- (21) This market definition was recognised in 2009 by the Commission in the periodic review of market definitions in the telecommunications sector for the purposes of ex-ante regulation.<sup>11</sup> In its position the Commission noted that *"fixed and mobile retail broadband services are normally not belonging to the same market. However, on the basis of the following circumstances closely related to the specificity of the Austrian market, the Commission accepts the inclusion of mobile and broadband connections into the retail residential market for the purposes of the present notification [...] according to the evidence submitted by RTR, product characteristic differences as detailed above do not currently have a considerable impact on demand-side substitutability in Austria, as they are not preventing residential customers from using applications needing secure connections, such as online banking. Moreover, RTR also provides evidence that the data transfer limits imposed by mobile operators would not prevent subscribers from using advanced multimedia services, such as streaming media or downloading large files, as even low price packages currently offered already include rather high volumes, and attractive pre- and post-paid tariffs exist. Finally, the particularly high HSDPA network coverage in Austria should also be taken into account in this respect. In light of the above information regarding the similar use and pricing of fixed and mobile broadband products in Austria, the Commission considers that, despite the different product characteristics, the information provided by RTR adequately supports the conclusion that, on the basis of specific national circumstances relating to demand-side substitutability in the Austrian market, mobile broadband connections can be considered as an adequate substitute to fixed broadband connections within the current review period. Thus, mobile broadband connections can be included in the residential customers' retail broadband access market. For those reasons the Commission considers that RTR has provided sufficient evidence supporting its conclusion that fixed and mobile broadband connections can be considered as substitutes in the residential customers' retail broadband access market in Austria"*.
- (22) The analysis of the RTR in its ordinance is confirmed in more recent documents. In an expert opinion from February 2016 (the "2016 Opinion"),

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<sup>9</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 54.

<sup>10</sup> FMS products are mobile products that are conceived and promoted to substitute fixed products. Currently hybrid products are emerging, i.e. broadband services offered on the basis of a hybrid router where the data transfer takes place both over a fixed connection (usually DSL) and a mobile connection. To be noted that not all mobile data-only products are FMS products, since some of them are conceived and used for connectivity on the move.

<sup>11</sup> Commission decision C(2009) 7720 of 7 December 2009 in case AT/2009/0970, Wholesale broadband access (WBA) in Austria.

RTR found evidence that fixed and mobile internet access services are likely to be part of the same retail market for residential users but not for business users. This evidence was mainly based on survey data from January 2015 and data from the operators up to end 2014. The 2016 Opinion observed that with the introduction of 4G/LTE, the number of mobile broadband lines increased, as mobile operators were aggressively marketing FMS products for the use at home with unlimited data allowance.

- (23) Also, according to recent RTR documents, data from network/speed tests showed that mobile broadband on average performed better than fixed broadband (although bandwidths decreased somewhat in the last year as the networks were getting closer to capacity limits).<sup>12</sup>
- (24) The Notifying Party claims that the Commission cannot rely on the 2016 Opinion, because it is based on data of a survey conducted in 2015. According to the Notifying Party, RTR found indications in its opinion that the competitive pressure resulting from mobile broadband services was decreasing.
- (25) In this respect, the RTR has confirmed this market definition in a decision on the local access market of July 2017.<sup>13</sup> This market definition has also been accepted by the Commission in relation to Austria.<sup>14</sup>
- (26) As for the alleged indication found by the RTR of a decreasing competitive pressure exerted by mobile broadband products on fixed, the RTR found that mobile broadband connections declined in the years 2013 and 2014. However, with the introduction of 4G/LTE, the number of mobile broadband lines increased again, as mobile operators were aggressively marketing FMS products for the use at home with unlimited data allowance. Recently, the number of DSL lines even decreased (see Figure 1).

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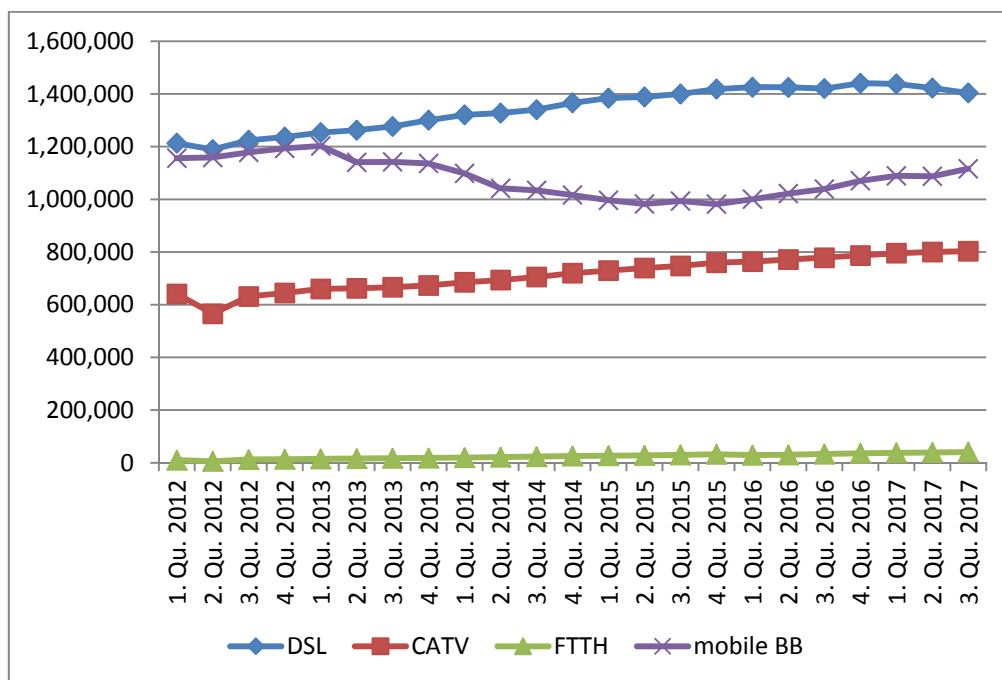
<sup>12</sup> See RTR Telekom Monitor 2. Quartal 2017, p. 28 ([https://www.rtr.at/de/inf/TK\\_Monitor\\_Q2\\_2017/RTR\\_Telekom\\_Monitor\\_Q2\\_2017.pdf](https://www.rtr.at/de/inf/TK_Monitor_Q2_2017/RTR_Telekom_Monitor_Q2_2017.pdf));

<sup>13</sup> Available on [https://www.rtr.at/de/tk/M\\_1\\_5\\_15](https://www.rtr.at/de/tk/M_1_5_15), see in particular pp. 34-37.

<sup>14</sup> Commission Decision C(2017) 4687 of 30 June 2017 in cases AT/2017/1987 and AT/2017/1988.



Figure 1: Development of number of access lines by technology (residential segment, mobile BB without prepaid) - RTR<sup>15</sup>



- (27) The substitution trend is confirmed in 2017 by the Commission in the 2017 Europe's Digital Progress Report (EDPR) on Austria: "*The area where Austria performs considerably lower is take-up, which in the case of fixed and fast broadband may be attributed to a considerable mobile substitution trend. The Austrian telecommunications market is characterised by price-driven competition and the prominent role of mobile services, on both voice and broadband markets*".<sup>16</sup>
- (28) The Notifying Party further maintains that in any case the results of the analysis in the 2016 Opinion cannot be relied on in the present merger control proceedings, as the purpose of the analysis was to assess whether A1, the incumbent telecommunications provider in Austria and which mainly offered DSL broadband services, held significant market power. As a consequence, DSL broadband services served as the starting point of RTR's market definition and hypothetical monopolist test. On the contrary, the Parties are mainly active in the provision of cable broadband services and mobile broadband services (and not DSL broadband services), respectively. In the present case, the starting point of the definition of relevant markets and of any hypothetical monopolist test would need to be the Parties' products.
- (29) In this respect, the Commission notes that the market analysis carried out by the RTR involved explicitly DSL and cable and concluded that mobile internet access services were to be included in the relevant market. DSL broadband services are commonly included in the internet access services

<sup>15</sup> RTR database

<sup>16</sup> Available on <https://ec.europa.eu/digital-single-market/en/news/europes-digital-progress-report-2017>, page 4.

market and compete directly with other fixed access technologies such as cable and FTTX, although they can differ in terms of performance, quality and speed. In general, even though different services at the two opposite extremes of the spectrum may not be direct substitutes, they can belong to the same market as long as there is a chain of substitution between them. It can be added that the conclusions of the documents mentioned in paragraphs (18) to (27) do not make any distinctions on the basis of the fixed technologies.

- (30) A market definition covering both fixed and mobile technologies is supported by the submissions of a number of Austrian telecom providers received by the Commission in the present case. Those providers point out that in Austria the mobile network is a viable alternative for residential customers to access the internet at home. According to them, internet access at home is often provided via mobile connections, e.g. through routers which are connected to the provider via mobile technology ("cubes"). Their performance is similar to the one of comparable fixed products; fixed and mobile internet tariffs are equally positioned in terms of pricing, data volumes and down-/ upload-speeds.
- (31) One Austrian telecom provider (Ventocom) has also submitted an economic study, based on RTR data, which in its view confirms that:
- in Austria, differently than in other countries, mobile internet devices are used from a fixed (static) location;
  - mobile internet access is predominantly used as standalone home access solution;
  - fixed and mobile internet access tariffs are equally positioned in terms of prices, included data volumes and down-/ upload speeds;
  - network tests suggest that mobile internet access is of at least similar quality as fixed one.
- (32) The Notifying Party submits that the speed-test used by Ventocom is inappropriate to address the serious performance issues of mobile data services, as it provides monthly average speeds, not taking account of the time of the day and different tariffs, suppliers and products; it is hence entirely undifferentiated. According to the Notifying Party, the performance of mobile data services depends on a variety of factors and is particularly low during peak hours. The tool used in Ventocom's study does not address these points nor does it take account of congested cells at many locations. Therefore, according to the Notifying Party, the results of that study provide a distorted picture of the reality.
- (33) In any case, the Commission notes that a number of the responses to the market investigation provide indications that a market for home internet access services including both fixed and mobile solutions can be considered. The majority of respondents<sup>17</sup> have considered fixed internet access services

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<sup>17</sup> Throughout this decision, when the Commission refers to the (number of) respondents in relation to a given question of the market investigation this excludes all respondents that have not provided an answer to that question or replied "I do not know", unless stated otherwise. For example, "a majority

and FMS internet access services to a certain extent comparable in terms of product characteristics.<sup>18</sup> It is to be noted that some respondents pointed out that the differences were mainly relevant for customers having specific needs (in particular for business customers). In general, respondents have stated that, from a technical perspective, quality, reliability and steadiness of dedicated, high-speed fixed internet services is still difficult to reach for FMS products. However, due to the good performance of mobile networks in recent years, customers with the need of access to standard internet services (as most residential customers) do not experience significant disadvantages in using a mobile technology where transmission capacity is shared. In any case, hybrid internet access solutions are gaining importance.

- (34) In terms of price, the result is mixed, with some respondents considering the two categories of products comparable to each other, while some other respondents consider that FMS products can be cheaper than purely fixed ones.<sup>19</sup>
- (35) The Commission notes that in general even if the different products in the spectrum are not perfectly similar in terms of price and quality, they may still be considered substitutes for many customers and that also different products/services which are not direct substitutes can belong to the same market as long as there is a chain of substitution between them.
- (36) This market definition also appears to be supported, as regards residential customers, by the Parties' internal documents regarding the Transaction and recent developments in the Austrian telecommunications market. Some of these documents define a "BB@home" (broadband at home) market, where both mobile and fixed operators are active and compete directly. In internal documents, it is also pointed out that the Austrian market differs from other mature markets within the EU: in particular, the mobile networks in Austria are of very high quality, while the fixed networks have low penetration and quality.<sup>20</sup> According to a document, these circumstances favoured the emergence of FMS products, such as cubes or hybrid solutions. A document dated January 2017 expressly refers to mobile broadband providers as a rising threat to fixed-line operators, pointing out that in Austria 16% of households only had mobile connections, compared to the 8% EU average. Several documents highlight the relevance of mobile 4G/LTE offers as home solutions, directly competing with fixed offers. Market shares of the main actors in this market are reported in some documents, where both fixed and mobile offers are included.
- (37) In order to provide the Commission with further information on the possible home internet access services market, the Notifying Party conducted a specific customer survey in Austria in May 2018. This consumer survey was

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of respondents" means a majority of respondents having replied to a given question and not having ticked "I do not know".

<sup>18</sup> Questionnaire Q2, reply to question B.A.6; Questionnaire Q3, reply to question B.A.4.

<sup>19</sup> Questionnaire Q2, reply to question B.A.7; Questionnaire Q3, reply to question B.A.5.

<sup>20</sup> The Commission notes that, partially in contradiction to the content of these internal documents, according to DG Connect's 2018 EDPR/DESI report, Austria ranked 11<sup>th</sup> for 4G Convergence, 9<sup>th</sup> for NGA coverage and 18<sup>th</sup> in ultrafast broadband coverage, above the EU average (see <https://digital-agenda-data.eu/>).

designed to reveal diversion ratios between the Parties, but also included questions about whether fixed and mobile internet access services are in the same relevant market. However, the Notifying Party has underlined that the survey has important limitations and that the results are distorted and biased. In particular, a substantial number of respondents submitted implausible second-preferred choices. The Notifying Party concludes that in light of these limitations, the Commission should interpret the results of the survey with great caution.

- (38) The Commission considers that the evidentiary value of the survey is substantially undermined by a number of flaws (see paragraph (250) below). The results appear to be of limited use, primarily because, looking at the replies in detail, those can be interpreted in several different ways due to a significant number of respondents choosing counterintuitive answers that are difficult to reconcile. As a consequence, it is difficult to draw any meaningful conclusion on market definition or diversion ratios on the basis of the survey.
- (39) In conclusion, the Commission considers that a series of elements, mentioned above, seems to indicate that in Austria a relevant product market for home internet access services, including both fixed and mobile technologies, could be defined as far as residential customers are concerned. In any case, the question of the inclusion of mobile internet access services in this home internet services market can be left open, as the assessment would not change irrespective of the definition of the market in this respect.
- (40) Also the question as to whether all pre-paid and post-paid mobile data-only access services should be included in the relevant market, or only post-paid mobile data-only access services, or just services based on cubes (i.e. on devices specifically designed for home mobile connection), can be left open, as the assessment would not change irrespective of the definition of the market in this respect.
- (41) Finally, the Commission notes that market participants seem to agree that the specific needs of business customers in terms of stability, performance, quality and speed of the connections are better satisfied by (high quality) fixed connections and that FMS products do not exert a sufficient competitive constraint for this customer group. The elements gathered also indicate that, with respect to business customers, the degree of substitutability between fixed and mobile internet access services appears to be rather low.<sup>21</sup> However, it can be left open whether internet access services for business customers are part of the same market as those for residential customers, as the assessment would not change irrespective of the definition of the market in this respect.

#### 3.1.1.2. Geographic market definition

##### (a) The Notifying Party's views

- (42) The Notifying Party considers that the retail market for the provision of internet access services is national in scope. The Notifying Party points out

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<sup>21</sup> See above, paragraphs (22) and (33) and Questionnaire Q1, replies to questions B.A.4., B.A.5. and B.A.6.

that the Commission has in the past found that the geographic scope of the retail market for fixed internet services is national, including in cases which concerned the acquisition of a provider of fixed internet services not active on a nationwide level.

- (43) The Notifying Party submits that the arguments used in past Commission decisions would also be fully applicable to the geographic scope of a retail market for the supply of home internet services including fixed internet services and mobile internet services. In this respect, the Notifying Party points out that the providers of mobile internet connections (MNOs and MVNOs) compete at national level. Moreover, mobile telecommunications services providers would have no control over how and where its customers use a mobile data-only SIM card in Austria.
- (44) The Notifying Party further submits that TMA offers its mobile and hybrid broadband services on the basis of a national pricing and marketing policy. Occasional regional campaigns are only aimed at [description of objective of occasional regional campaigns], but they are not based on the competitive conditions in the area concerned and prices and conditions that are promoted in such regional campaigns are available nationally throughout Austria. Similarly, UPC sets prices for fixed internet services at the national level and does not differentiate per region or location of customers, the only exception being occasional short-term localised promotion campaigns targeted at [description of UPC's sales strategy].

(b) The Commission's assessment

- (45) The majority of respondents to the market investigation in the present case submitted that the market for the provision of retail internet services is national in scope. Most respondents, in particular fixed operators, stated that there are no relevant price differences for internet access services across different regions in Austria.<sup>22</sup> With specific regard to the internet services provided by mobile operators, although some of them pointed to price differences in some regions, all of them are active at national level and one respondent highlighted that MNOs operate nationwide high quality mobile networks and are subject to coverage obligations required under their licenses.<sup>23</sup>
- (46) A1 submitted that decisions by the Belgian, Polish and Hungarian authorities support the view that the geographic market should be defined locally on the basis of the footprint of the network in question. In A1's view, a regional market definition is also supported by the technological differences between rural and urban areas, mainly served respectively by DSL networks and by cable networks. In addition, different players are active in the various regions, with alternative players holding a strong position in urban areas. Finally, there is regional price differentiation. A1 also submitted (i) an economic study pointing to a regional segmentation of the market, with particular reference to the urban area of Vienna, where UPC's presence is particularly relevant and

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<sup>22</sup> Questionnaire Q3, reply to question B.B.2.

<sup>23</sup> Questionnaire Q2, reply to question B.B.1 and questionnaire Q5, reply to question 11.1.

- (ii) a few examples of promotions addressed exclusively to customers in Vienna.
- (47) The Commission considers that the market for the provision of internet access services is national in scope.
- (48) First of all, the Commission notes that the RTR has expressly qualified as national the internet access service market in Austria and this definition has been accepted by the Commission.<sup>24</sup>
- (49) Moreover, in line with previous Commission decisions related to the market for the provision of fixed internet access services and with the result of the market investigation in the present case, the Commission considers that although operators of cable networks have sometimes a presence limited to a certain part of the national territory, they compete with nationwide providers of other fixed internet services which offer their services on the basis of a national strategy across the national territory.<sup>25</sup>
- (50) In the present case, it has to be added that mobile operators normally offer their services at national level and that mobile connections – including FMS products – can usually be used in the whole territory of Austria. The penetration of FMS products does not appear to be substantially different in areas covered by cable networks (such as the UPC one) compared to other areas.
- (51) In particular, with respect to the argument that operators such as UPC provide telecommunications services via a cable network only in certain areas, the Commission notes that UPC interacts within its footprint with providers of fixed internet services such as A1 and mobile operators such as TMA that operate nationally. Moreover, UPC offers internet access services to residential customers also outside of its HFC footprint mainly based on A1's regulated wholesale access. Hence, UPC ultimately competes on the basis of nation-wide dynamics.
- (52) The Commission also did not find material geographic price discrimination. In particular, the Parties appear to charge largely uniform prices among different locations. TMA does not engage in regional or local pricing. Where TMA runs occasional marketing campaigns that target certain regions, these do never involve any regional/local pricing or conditions<sup>26</sup>. UPC sets prices for fixed internet services at the national level and does not differentiate per region or location of customers. UPC harmonises prices and quality to ensure a consistent product offering throughout its footprint.<sup>27</sup>
- (53) Most fixed (cable) operators have also confirmed that pricing is generally uniform in Austria and all mobile operators (including MVNO) are active at nationwide level. This element indicates that the market should be defined to

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<sup>24</sup> Commission decision C(2009)7720 of 7 December 2009 in case AT/2009/0970.

<sup>25</sup> Commission decision of 2 July 2014 in Case M.7231 - *Vodafone/Ono*, recitals 19-22.

<sup>26</sup> Reply of the Notifying Party to RFI 8 of 26 June 2018.

<sup>27</sup> [Description of UPC's sales policy and strategy].

be nationwide. Occasional local promotions cannot call into question this conclusion.

- (54) As for the different number and size of competitors in densely populated areas compared to rural areas, the Commission considers that the availability of competitors as a supply source is more relevant for market definition purposes than the extent of their current sales presence. Accordingly, the Commission has consistently defined the market for retail internet access services to be national in scope.<sup>28</sup> Moreover, the two main technologies (DSL vs. cable) available in the different areas (rural vs. urban) are included in the same product market(s) because they compete directly (see above paragraph (29)) and the Commission does not see how, conversely, they could justify the definition of different geographic markets.
- (55) Therefore, the Commission concludes that the retail market for the provision of internet access services is national in scope.

#### 3.1.1.3. Affected market

- (56) In the market for retail home internet access services including both fixed and mobile connections in Austria the Parties have a combined market share of [20-30]% (UPC [10-20]% and TMA [10-20]%), according to data provided by the Notifying Party.<sup>29</sup> The market in question is horizontally affected.<sup>30</sup>
- (57) Should the market be defined as the retail market for fixed internet access services (excluding mobile connections) in 2017 UPC had a market share of [20-30]% in terms of revenues and of [20-30]% in terms of subscribers (residential and business). TMA was not active in 2017 in the fixed internet sector and only in January 2018 launched a hybrid broadband product for residential customers on the basis of its 4G/LTE mobile network in combination with a DSL component based on wholesale access provided by A1. Should this offer be considered as part of the retail fixed internet access market, TMA's market share would be marginal, in any case inferior to

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<sup>28</sup> Commission decision of 20 September 2013 in Case M.6990 - *Vodafone/Kable Deutschland*, recital 197.

<sup>29</sup> The market shares are based on data including fixed internet services and all mobile data-only services – pre paid and post paid – in Austria. The Notifying Party has also provided data (i) on a market including fixed internet services and only Mobile Cubes – post paid – in Austria, and (ii) on a market including fixed internet services and mobile data-only services – post paid – in Austria. The market shares of the Parties and of the competitors would not substantially change in the three different scenarios and therefore the question on which exact mobile data services have to be included in the market can be left open (see above paragraph (40)).

<sup>30</sup> Where this Decision makes reference to "affected markets", it refers to instances where: for horizontal overlaps, both Parties are engaged in business activities in the same relevant market and where the concentration will lead to a combined market share of 20% or more; for vertical overlaps, where one or more of the Parties are engaged in business activities in a relevant market, which is upstream or downstream of a relevant market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 30% or more, regardless of whether there is or is not any existing supplier/customer relationship between the Parties. See section 6.3. of Annex I (Form CO relating to the notification of a concentration pursuant to regulation (EC) No 139/2004) of Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. Official Journal OJ L 336, 14.12.2013, p. 1-36.

[0-5]% (limited to residential customers). In any case, this market would be horizontally affected.

- (58) In addition, the market for retail internet access services in Austria is vertically affected also insofar as there is a vertical link to the wholesale leased lines market if defined on the level of communes. In 24 communes where TMA is active and the Parties combined market share is equal or larger than 30%.

### **3.1.2. Retail internet hosting services**

- (59) Internet hosting service providers operate Internet servers and offer organisations and individuals to serve content to the Internet via these servers. By using internet hosting services, organisations outsource their internal IT applications and infrastructure.

#### **3.1.2.1. Product market definition**

- (60) In the *KPNQWEST / EBONE / GTS* decision, the Commission considered four market segments within the general web-hosting sector, based on the range of different services and products offered: (a) the local (limited to the area where the web-hosting centre is located) supply of basic co-location services such as connectivity, power, and the facilities; (b) the national supply of shared and dedicated hosting consisting of hosting a customer's web-site on the web host's servers and providing the necessary support applications; (c) the national, possibly cross-border regional, supply of managed services to outsource complex enterprise applications and support infrastructure, including "front-end" and "back-office" applications hosted on the providers' platforms (so-called ASP), and (d) the national supply of content delivery services (CDS) such as Streaming Content Delivery Services and Static Content Delivery Products.<sup>31</sup> However, the Commission did not conclude on the exact market definition.
- (61) The Commission agrees with the Notifying Party that, for the purpose of the present decision, there is no need to take a definitive view on the precise product market definition, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

#### **3.1.2.2. Geographic market definition**

- (62) The Notifying Party submits that for the purposes of this Transaction, the retail market for internet hosting services is wider than national in scope, although the precise market definition can be left open. In previous decisions, the Commission did not conclude on the exact definition of the geographic market for retail internet hosting services, whether it is national, EEA-wide or worldwide.<sup>32</sup> As the Transaction does not raise serious doubts as to its compatibility with the internal market under any geographic market

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<sup>31</sup> Commission decisions of 20 September 2013 in case M.6990 – *Vodafone/Kable Deutschland*, recital 201; and of 16 January 2002 in case M.2648 *Kpnqwest / Ebone / GTS*, recitals 19 and 20.

<sup>32</sup> Commission decisions of 20 September 2013 in case M.6990 – *Vodafone/Kable Deutschland*, recital 205; and of 16 January 2002 in case M.2648 *Kpnqwest / Ebone / GTS*, recital 23.



definition, it is not necessary to conclude on the precise definition for the purpose of the current decision.

### 3.1.2.3. Affected markets

- (63) The retail market for internet hosting services is horizontally not affected. The Transaction only leads to a potential minor horizontal overlap (if any) on the retail market for internet hosting services, whether in Austria or in the EEA. Both Parties have only minor activities on this market. According to the Notifying Party's estimates UPC achieved revenues of approximately EUR [...] in Austria<sup>33</sup> from retail internet hosting services in 2017 which would amount to a market share of only approximately [0-5]% in Austria and to less than [0-5]% in the EEA. DTAG sold its subsidiary Strato, which used to be DTAG's dedicated subsidiary for internet hosting activities, in the first half of 2017. DTAG's remaining activities in the wider area of internet hosting services are very limited,<sup>34</sup> and consequently, also the overlap between UPC's and DTAG's activities in the area of internet hosting services.
- (64) The retail market for internet hosting services is vertically not affected either. There is a potential vertical link between the Parties' minor activities on the retail market for internet hosting services in the EEA and the Parties' activities on the upstream worldwide wholesale market for internet connectivity services which, however, does not constitute an affected market due to the Parties' negligible market shares on the worldwide wholesale market for internet connectivity services (TMA: approx. [0-5]% UPC: below [0-5]%).

### 3.1.3. Retail business connectivity services

- (65) The retail market for business connectivity includes fixed telecommunications services purchased by large businesses, enterprises and public sector customers in order to provide data connectivity between multiple sites.

#### 3.1.3.1. Product market definition

- (66) The Notifying Party considers that retail business connectivity services constitute a separate product market. In its decisional practice, the Commission<sup>35</sup> considered potential subdivisions into: (i) broadband access for large business customers;<sup>36</sup> (ii) leased lines;<sup>37</sup> and (iii) VPN services.<sup>38</sup> The Notifying Party does not take a view with regard to these sub-segmentations of the market. It considers that, in any event, the exact definition of the

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<sup>33</sup> [Confidential information on UPC's revenues].

<sup>34</sup> DTAG offers a website builder as well as e-commerce solutions enabling customers to set up their own web shops. Its subsidiary T-Systems offers various cloud solutions such as IT-infrastructure solutions (IaaS/PaaS) and cloud software (SaaS) for SMEs. UPC does not offer services similar to the services of T-Systems.

<sup>35</sup> Commission decisions of 14 April 2014 in case M.7109 – *Deutsche Telekom / GTS* recital 26; and of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, recital 6 and subsequent.

<sup>36</sup> Retail broadband access to business customers with significant needs which require higher performance in terms of security, bandwidth and functionality.

<sup>37</sup> Leased lines are part-circuits that allow communication providers to connect their own networks to end user sites for the supply of business connectivity (Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 28 and subsequent).

<sup>38</sup> An encryption technology enabling to secure shared access as if it were a dedicated one.

product market can be left open in this case as the Transaction does not raise any competitive concern under any plausible market definition.

- (67) In previous decisions, the Commission noted that the requirements and purchase processes of larger business customers with respect to the combinations of fixed or fixed-mobile services for business connectivity are different than those of SMEs and SOHOs, but left the market definition open.<sup>39</sup>
- (68) In any event, for the purposes of the present decision the exact product market definition for the retail provision of business connectivity services can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any alternative product market definition.

#### 3.1.3.2. Geographic market definition

- (69) In its decisional practice, the Commission has found that the retail market for business connectivity was national in scope.<sup>40</sup> The Notifying Party agrees that the geographic scope of the retail market for business connectivity services is national and corresponds to the territory of Austria.
- (70) The Commission considers that in the present case there is no reason to depart from the geographic market definition adopted in its past decisional practice.

#### 3.1.3.3. Affected markets

- (71) The Transaction does not lead to a horizontal overlap on the retail market for business connectivity services in Austria: Only UPC has some activities on this market whereas TMA is not active on this fixed telecommunications market.
- (72) However, the retail market for business connectivity services is vertically affected with regard to the Parties' activities on the upstream wholesale market for leased lines if defined locally, at the level of communes. Based on the data submitted by the Austrian regulator RTR, there are 24 communes<sup>41</sup> where, based on the overall leased lines market but also on the various technological sub-segmentations thereof, the Parties' combined market shares in the wholesale upstream market, in terms of number of terminating segments, are equal or above 30%.

#### 3.1.4. Wholesale broadband access

- (73) Wholesale broadband access includes different types of access to fixed connections that allow internet service providers to provide services to end

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<sup>39</sup> Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 126.

<sup>40</sup> Commission decisions of 14 April 2014 in case M.7109 – *Deutsche Telekom / GTS* recital 30 and of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 10 and of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, recital 28.

<sup>41</sup> Please see footnote 62 below.

consumers. It comprises physical access at a fixed location, such as LLU<sup>42</sup>; non-physical or virtual network access, such as bitstream access, at a fixed location; and resale of a fixed provider's internet access services.<sup>43</sup>

#### 3.1.4.1. Product market definition

- (74) The Notifying Party does not take a view on the exact definition of the market for wholesale broadband access.
- (75) In previous decisions<sup>44</sup>, the Commission defined a separate market for wholesale broadband access and left open the question of whether it should be sub-divided per type of access (LLU, bitstream or resale of the incumbent's offering).
- (76) For the purposes of this Decision, the Commission considers that the question of the exact scope of the wholesale market for broadband access with respect to its possible segmentations (standalone access to DSL, standalone access to cable, access to cable for TV and internet together) can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any product market definition.

#### 3.1.4.2. Geographic market definition

- (77) The Notifying Party does not take a view on the exact geographic definition of the wholesale market for broadband access.
- (78) In *Carphone Warehouse/Tiscali UK*, while there were indications supporting a national scope of the market, the Commission ultimately left open the exact geographic market definition.<sup>45</sup>
- (79) For the purposes of this Decision, the Commission considers that the question of whether the geographic scope of the wholesale broadband access is national (that is to say Austria) or limited to the footprint of UPC's cable network can be left open, as Transaction does not raise serious doubts as to its compatibility with the internal market under any geographic market definition.

#### 3.1.4.3. Affected markets

- (80) The market for wholesale broadband access is horizontally not affected. Only UPC is active on this market. Moreover, the market for wholesale broadband access is not vertically affected with respect to the vertical link with the

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<sup>42</sup> LLU (local loop unbundling): unbundled (shared) access to metallic loops of the local access network in a number of local telecommunications exchanges (in particular in urban areas), as this is the most cost-efficient way for alternative operators to provide differentiated retail broadband services.

<sup>43</sup> Even assuming that at the retail level, the internet access service market includes both mobile and fixed technologies, at wholesale level the relevant markets are considered as separate for the purpose of the present decision, in line with previous Commission decisions.

<sup>44</sup> Commission decision of 20 September 2013 in Case M.6990 - *Vodafone/Kabel Deutschland*, recital 161; Commission decision of 29 June 2009 in Case M.5532 - *Carphone Warehouse/Tiscali UK*, recitals 28- 34.

<sup>45</sup> Commission decision of 29 June 2009 in Case M.5532 - *Carphone Warehouse/Tiscali UK*, recitals 48-53.

downstream market for internet access services since UPC's market share in the upstream market for wholesale broadband access is below 30% and the combined market share of the merged entity in the downstream market for internet access services would be similarly below 30%.

- (81) Some operators need wholesale leased lines as an input for their network based on which wholesale broadband access is provided. The market for wholesale broadband access could hence be vertically affected insofar as the Parties' combined market shares on the wholesale leased lines market if defined on the level of communes, in 24 communes<sup>46</sup> are equal or larger than 30%.

### **3.1.5. Wholesale leased lines**

- (82) Wholesale leased lines are part-circuits that allow telecommunications providers to connect their own networks to end user sites for the supply of business connectivity services. In addition, wholesale leased lines are an input for the provision of telecommunications services.

#### **3.1.5.1. Product market definition**

##### **(a) The Notifying Party's views**

- (83) The Notifying Party submits that that the relevant market definition may be left open, as the Transaction will not give rise to any competition concerns under any possible segmentation of the wholesale market for leased lines.
- (84) The RTR segments the wholesale leased lines between the element that can be considered to be customer access or backhaul (*terminating segments*) and that which can be considered part of the core network (*trunk segments*).<sup>47</sup> In its recommendation on market definitions in the electronic communications sector, the Commission considers a separate market for terminating segments for leased lines<sup>48</sup>.

##### **(b) The Commission's assessment**

- (85) In previous decisions, the Commission considered that the market for wholesale leased lines could be further segmented between trunk and terminating segments but ultimately left the market definition open.<sup>49</sup> The

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<sup>46</sup> See footnote 62 below.

<sup>47</sup> TKK decision of 28 July 2014, M 1.5/2012-135. Wholesale trunk segments of leased lines are leased lines between the 28 trunk cities in which A1 installed the points of interconnection of its telephony network. These are the following 28 cities: Wien, Graz, Linz, Salzburg, Innsbruck, Klagenfurt, Villach, Wels, Sankt Pölten, Dornbirn, Steyr, Wiener Neustadt, Feldkirch, Baden, Amstetten, Mödling, Spittal an der Drau, Bruck an der Mur, Telfs, Lienz, Vöcklabruck, Ried im Innkreis, Eisenstadt, Korneuburg, Wörgl, Hollabrunn, Judenburg, Bruck an der Leitha.

<sup>48</sup> No. 6 in Annex to Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Official Journal of the European Union L 344/65.

<sup>49</sup> Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 30; Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recital 146; Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telecom/GTS*, recital 70.

market investigation carried out for the assessment of the Transaction was not conclusive as to whether the market for wholesale leased lines should be further segmented between trunk and terminating segments.

- (86) In the past the Commission has also considered a further segmentation of the wholesale leased lines market into terminating leased lines with bandwidth above and below 2 Mbps respectively but ultimately left the exact product market definition open.<sup>50</sup> Respondents to the market investigation indicated that terminating segments of leased lines with bandwidth below 2 Mbps may not be substitutable with terminating segments of leased lines with bandwidth above 2 Mbps in Austria because bandwidth below 2 Mbps would be legacy services and not of interest anymore.
- (87) The Commission has not yet considered a segmentation of the wholesale leased lines market into terminating leased lines with bandwidth above 10 Mbps versus terminating leased lines with bandwidth below 10 Mbps. Respondents to the market investigation indicated that terminating leased lines with bandwidth below 10 Mbps and terminating leased lines with bandwidth above 10 Mbps may not be substitutable since bandwidth above 10 Mbps is not available everywhere in Austria.
- (88) In past decisions, the Commission has considered a further segmentation of the wholesale leased lines market into passive (dark fibre) and active infrastructure (traditional managed leased lines, Ethernet services with guaranteed bandwidth) but finally left the exact product market definition open.<sup>51</sup> Responses to the market investigation were not conclusive on the question whether passive infrastructure (dark fibre) and active infrastructure (leased lines with traditional interfaces, Ethernet services with guaranteed bandwidth) are substitutable for each other.<sup>52</sup> UPC primarily offers Ethernet services and currently supplies only [0-5] dark fibre connections at wholesale level. TMA supplies wholesale trunk segments and wholesale terminating segments of leased lines on the basis of Ethernet services and currently only supplies [5-10] dark fibre connections at wholesale level.
- (89) The Commission has not yet considered whether the wholesale leased lines market should be further divided into leased lines with traditional interfaces and Ethernet services with guaranteed bandwidth. The market investigation was not conclusive as to whether leased lines with traditional interfaces and Ethernet services with guaranteed bandwidth are substitutable. There were however indications that traditional interfaces are outdated. [UPC's sales policy regarding leased lines with traditional interfaces].
- (90) The Commission considers that in the present case the exact definition of the product market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

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<sup>50</sup> Commission decision of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, recital 70.

<sup>51</sup> Commission decision of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, recital 70.

<sup>52</sup> Questionnaire Q6, reply to question B.A.1.4. and B.A.1.4.1.

### 3.1.5.2. Geographic market definition

#### (a) The Notifying Party's views

- (91) The Notifying Party considers that the geographic scope of the wholesale market for leased lines is national and corresponds to the territory of Austria irrespective of the precise definition of the product market.
- (92) The Notifying Party submits that the definition of narrower geographic markets would not reflect the actual market realities since negotiations between providers of wholesale leased lines (including Ethernet services and dark fibre) and wholesale customers often take place on a project basis and concern a larger number of customer sites across the whole of Austria or at least across a large number of regions in Austria. In addition, prices and conditions of contracts agreed on a project basis depend on the number of customer sites and lines included in the project (and not on the theoretical competitive conditions at the level of single communes).

#### (b) The Commission's assessment

- (93) In previous decisions, the Commission considered that the market for wholesale leased lines irrespective of its precise product market definition is nationwide in scope.<sup>53</sup>
- (94) With regard to terminating segments of wholesale leased lines and its potential sub-segments the RTR distinguishes in principle two broad sub-markets within Austria by grouping together on the one hand communes in Austria where A1 was found to hold significant market power and on the other hand communes where the market was found to be competitive with no suppliers having single or joint significant market power.<sup>54</sup> The market investigation suggests that regional differences in competitive conditions may exist in Austria.<sup>55</sup> Some respondents indicated that competitive conditions (including pricing) are better in urban areas like Vienna where there are more competitors present than in rural areas.<sup>56</sup>
- (95) For terminating segments of leased lines and its potential sub-segments the Commission considers that in the present case the exact definition of the geographic market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market even under the narrowest market definition that is on the level of single communes.
- (96) As regards wholesale trunk segments of leased lines, (i.e. leased lines between the 28 trunk cities in which A1 installed the points of interconnection of its

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<sup>53</sup> Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 31; Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recital 148; Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telecom/GTS*, recital 74.

<sup>54</sup> RTR decision of 28 July 2014, M 1.5/2012-135; TKK Draft Decision of 16 April 2018, M 1.8/15-61.

<sup>55</sup> Questionnaire Q6, reply to question B.B.1; Questionnaire to MNOs reply to question 36, 36.1, 37, 37.1.

<sup>56</sup> Questionnaire Q6, reply to question B.B.1.1.

telephony network)<sup>57</sup> the Commission recalls that in previous cases the market for wholesale leased lines irrespective of its precise product market definition was found by the Commission to be national as described in paragraph (93) above.

- (97) Past decisions of the RTR also suggest that the wholesale trunk market is national. In particular, in its latest regulatory review of this market (dating back in 2006, before the market was deregulated), the RTR found this market to be national in scope, which was not objected to by the Commission.<sup>58</sup>
- (98) The market investigation carried out in the present case did not provide any indication in relation to wholesale trunk leased lines that would clearly point to a sub-national geographical dimension.
- (99) The Commission, hence, considers that in the present case the definition of the geographic market for trunk segments of leased lines and its potential sub-segments is national in scope.

#### 3.1.5.3. Affected market

- (100) Both Parties have activities in the area of wholesale leased lines. UPC achieved revenues of approximately EUR [...] in 2017 from wholesale leased lines in Austria. It achieved approximately [...] from wholesale trunk segments and approximately EUR [...] from wholesale terminating segments of leased lines (including leased lines with traditional interfaces and Ethernet services with guaranteed bandwidth) in 2017. UPC has negligible activities regarding dark fibre; it currently supplies [0-5] dark fibre connections at wholesale level.<sup>59</sup>
- (101) TMA, which provides wholesale leased lines services on the basis of the backbone infrastructure of its mobile network, generated revenues of approximately EUR [...] with wholesale leased lines services in Austria in 2017. According to TMA's estimates, approximately [60-80]% of its wholesale leased lines revenues originated from the lease of wholesale trunk segments and the rest [30-40]% from the lease of wholesale terminating segments (including leased lines with traditional interfaces and Ethernet services with guaranteed bandwidth).<sup>60</sup>
- (102) At the national level, the wholesale leased lines market and its potential product segments are not horizontally affected. In the overall wholesale leased lines market the Parties have a combined market share in terms of revenues of [0-5]% in Austria (UPC with [0-5]% and TMA with [0-5]%). As regards wholesale trunk segments the Parties have a combined share of [10-20]% (UPC with [0-5]% and TMA with [10-20]% in terms of revenues) in Austria. Regarding wholesale terminating segment the Parties have a combined share

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<sup>57</sup> These are the following 28 cities: Wien, Graz, Linz, Salzburg, Innsbruck, Klagenfurt, Villach, Wels, Sankt Pölten, Dornbirn, Steyr, Wiener Neustadt, Feldkirch, Baden, Amstetten, Mödling, Spittal an der Drau, Bruck an der Mur, Telfs, Lienz, Vöcklabruck, Ried im Innkreis, Eisenstadt, Korneuburg, Wörgl, Hollabrunn, Judenburg, Bruck an der Leitha.

<sup>58</sup> See Commission decision of 28.8.2006 in Case AT/2006/0467.

<sup>59</sup> Form CO, paragraph 417.

<sup>60</sup> Form CO, paragraph 418.

of [0-5]% (UPC with [0-5]% and TMA with [0-5]% in terms of revenues) in Austria. In relation to terminating leased lines with bandwidth above 2 Mbps the Parties have a combined market share of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues). In relation to terminating leased lines with bandwidth equal and below 2 Mbps, the Parties have a combined market shares of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues). As regards terminating leased lines with bandwidth above 10 Mbps the Parties have a combined market share of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues). In relation to terminating leased lines with bandwidth equal and below 10 Mbps the Parties have a combined market share of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues). As regards passive infrastructure (dark fibre) the Parties have a combined market share of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues). Regarding active infrastructure (traditional managed leased lines and Ethernet services with guaranteed bandwidth) the Parties have a combined market share of [0-5]% (UPC: [0-5]%; TMA: [0-5]% in terms of revenues).

- (103) At the commune level, based on data submitted by the RTR on the number of terminating segments leased per technology in each commune in 2015, and data submitted by the Parties on the terminating segments per technology they currently (2017Q4) lease, a single potentially horizontally affected market exists in the sub-segment of *Ethernet services with guaranteed bandwidth* in a single commune<sup>61</sup> representing less than 0.1% of the Austrian population where each of the Parties leases [...] of the [...] Ethernet based leased lines in total (thus [20-30]%; TMA: [10-20]% and UPC:[10-20]%) of total Ethernet lines. When considering the sub-segment of *Ethernet services with guaranteed bandwidth with bandwidth above 10Mbit/s* in this commune the combined market share increases to [40-50]% (TMA: [20-30]% and UPC: [20-30]%).
- (104) According to the Notifying Party, the Parties' activities on the wholesale market for leased lines are vertically related (as a necessary input to telecommunications service providers that do not own their own fixed network infrastructure or only own a fixed network that covers specific geographic locations) to (i) the Parties' activities on the downstream retail market for retail mobile telecommunications services, (ii) TMA's activities on the downstream wholesale market for access and call origination on mobile networks, (iii) UPC's activities on the downstream retail market for fixed telephony services, (iv) UPC's activities on the downstream retail market for business connectivity services, (v) DTAG's activities on the downstream worldwide wholesale market for global telecommunications services, and (vi) the Parties' activities on the downstream worldwide retail market for global telecommunications services. The Commission further notes that to the

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<sup>61</sup> That is the Commune of [...] (TMA: [10-20]%; UPC: [10-20]% in the sub-segment of *Ethernet services with guaranteed bandwidth*); (TMA: [20-30]%; UPC: [20-30]% in the sub-segment of *Ethernet services with guaranteed bandwidth with bandwidth above 10Mbit/s*). No recent market data at the commune level was available from the RTR distinguishing leased lines with a bandwidth of less than or equal to 2 Mbit/s and those with a bandwidth of more than 2 Mbit/s. However, given that TMA does not have any leased line with a bandwidth of less than or equal to 2 Mbit/s and because terminating segments with a guaranteed bandwidth of less than or equal to 2 Mbit/s account for only roughly 10% of the terminating segments in Austria, the results would not significantly change when considering such a split.



extent that the retail internet access services market includes both mobile and fixed offerings it follows from point (i) that a vertical relationship exists also between the wholesale market for leased lines and the Parties' activities in the downstream retail internet access services market. Finally, a vertical relationship exists between the wholesale market for leased lines and UPC's activities in the wholesale broadband access services market for which leased lines can also be an input.

- (105) Based on these vertical relationships, the market for wholesale leased lines is vertically affected both at the national level as well as the level of communes.
- (106) At the national level, there is no plausible segmentation of the wholesale leased lines market where the Parties have a market share exceeding 30% (see paragraph (102)). However, this is still a vertically affected market on account of the Parties' combined shares on the downstream wholesale mobile access and call originations services market, which are [70-80]% in terms of revenue, in Austria (TMA: approx. [70-80]%; UPC: [0-5]%).
- (107) At the commune level, and based on recent (2017Q4) data submitted by the Parties and the 2015 RTR data, there exist 24 communes<sup>62</sup> where, based on the overall leased lines market and on sub-segmentations thereof based on technology and bandwidth speed, the Parties' combined market shares, in terms of number of terminating segments, are above 30%. The wholesale leased lines market is therefore vertically affected in these 24 communes with respect to the vertical relationship to all the downstream markets described in paragraph (104) for which access to leased lines is potentially necessary for the provision of telecommunication services.

### **3.1.6. Wholesale internet connectivity services**

- (108) Internet connectivity services allow corporate customers to be present on the internet by providing access to the entire routing table of the global internet or to a subset of the same, in which case the customer will need to cover the totality of its needs by means of a multi-homing strategy. Connectivity to the internet can be achieved (i) by the purchasing of transit services, (ii) by means of peering with selected networks, or (iii) by means of a combination of the two. Entities which do not connect directly to the internet may also call upon hosting providers, who aggregate hosting needs and procure in turn internet connectivity for their customers.<sup>63</sup> Whilst global coverage is a primary requirement, more specific performance criteria also enter into a customer's

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<sup>62</sup> Based on data of the RTR in combination with data provided by the Parties, in terms of numbers of leased lines the merged entity would hold a market share equal or larger than 30% (i) in a total of 13 communes in the sub-segment of *Ethernet services with guaranteed bandwidth*: [...]; (ii) in a total of 4 communes in the sub-segment of *Ethernet services with guaranteed bandwidth with bandwidth below 10Mbit/s*: [...]; (iii) in a total of 13 communes in the sub-segment of *Ethernet services with guaranteed bandwidth with bandwidth above 10Mbit/s*: [...]; (iv) in a total of 3 communes in the sub-segment of *Dark Fibre*: [...]; and (iv) in a total of 11 communes in the overall leased lines market, not segmented per technology: [...]. For the reasons explained in footnote 61, no analysis was made for a split of 2 Mbit/s because of the low number of terminating segments of the Parties in Austria the results would not materially differ.

<sup>63</sup> Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 260; see also Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telecom/GTS*, recital 19.

internet connectivity strategy such as latency, reliability, speed and minimization of traffic-related costs.

- (109) Transit is a service whereby a customer pays for access to all or a large part of the internet, with performance characteristics which may vary according to the destination of the traffic. Peering, on the other hand, whether settlement-free or paid, provides access to individual networks but no further onward connectivity. Providers of transit services will in their turn use a combination of peering relationships and paid commercial relationships with other transit providers in order to provide global internet coverage. A transit provider which does not purchase transit services from other providers because it is able to reach the entire internet merely by means of peering relationships is referred to as "Tier 1".
- (110) Operators of retail internet access networks, sometimes called "eyeball networks", procure internet connectivity in the same way as any other corporate customer, and may themselves also provide wholesale internet connectivity services. Certain internet access providers ("IAPs") offer transit services, whereas many offer direct connectivity to their own network and subscribers. To the extent that the IAP purchases transit services, these may also be used to reach its users. The end users of a given IAP can also be reached by means of relationships with those networks which peer with the IAP in question.

#### 3.1.6.1. Product market definition

- (111) In previous Commission decisions, the Commission considered a market for wholesale internet connectivity services. In addition, the Commission considered a possible segmentation between peering and transit, but ultimately left the exact product market definition open.<sup>64</sup> In *MCI/Verizon* the Commission identified a separate market for Tier 1 transit providers.<sup>65</sup>
- (112) In line with the Notifying Party's view, in the present case, the exact definition of the product market can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 3.1.6.2. Geographic market definition

- (113) The Commission has in the past considered that markets for internet connectivity were global in scope but ultimately left the exact market definition open.<sup>66</sup>
- (114) The Notifying Party submits that the market for internet connectivity is worldwide in scope.<sup>67</sup>

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<sup>64</sup> Commission decisions of 7 October 2015 in Case M.3752 - *MCI/Verizon*; and of 14 April 2014 in case M.7109 – *Deutsche Telekom / GTS*, recital 21.

<sup>65</sup> See Commission decision of 7 October 2015 in Case M.3752 - *MCI/Verizon*, recital 24.

<sup>66</sup> See Commission decisions of 7 October 2015 in Case M.3752 - *MCI/Verizon*; and of 14 April 2014 in Case M.7109 – *Deutsche Telekom / GTS*, recital 24.

<sup>67</sup> According to the Notifying Party, both the demand and the supply side for internet connectivity services are fundamentally global: Content provider and commercial internet service providers want to

- (115) In the present case, the precise geographic market definition can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market regardless of the market definition considered.

#### 3.1.6.3. Affected markets

- (116) The market for wholesale internet connectivity services and its potential sub-markets are not horizontally affected. Both Parties have only minor activities on this market. DTAG achieved worldwide revenues of approximately EUR [...] from wholesale internet connectivity services in 2017 which corresponds to an estimated market share of approximately [0-5]%. UPC has only very limited activities in the area of wholesale internet connectivity services. It achieved revenues of approximately EUR [...] from wholesale internet connectivity services in 2017 which corresponds to an estimated market share of below [0-5]%. Based on the Parties' estimates the Parties' combined market share in each potential segment of worldwide wholesale internet connectivity services would be in any event below 20%.

### 3.2. Mobile services

#### 3.2.1. Retail mobile telecommunications services

- (117) Mobile telecommunications services to end customers include services for national and international voice calls<sup>68</sup>, SMS (including MMS and other messages), mobile internet data services and retail international roaming services.

##### 3.2.1.1. Product market definition

- (118) The Notifying Party submits that there is a single retail market for mobile telecommunications services and that "over-the-top" ("OTT") services should be considered as part of the retail market for mobile telecommunications services. The Notifying Party also considers that it is not appropriate to distinguish between residential and business customers, notably because of a high level of supply-side substitutability between the services provided to business and private customers.
- (119) The Notifying Party also submits that it is not appropriate to further segment the retail mobile telecommunications services market on the basis either of post-paid and pre-paid customers, or of network technology. A company offering only pre-paid or post-paid services could start offering the other type of services without incurring significant additional cost, as the network used for both services is the same. Moreover, all MNOs active in Austria could offer 4G services in parallel with 2G and 3G services at no extra cost.

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reach as many end customers (eyeballs) as they can. On the other hand, telecommunications operators such as DTAG need connectivity to all IP addresses in the public domain in order to satisfy their end customers' demand. This requires enabling any-to-any connections across the Internet that virtually all network providers may offer anywhere. Thus, numerous global carriers such as AT&T, Verizon, NTT, Cogent, Level 3, Telefónica and DTAG provide global internet connectivity services in various locations (e.g. internet exchanges) all over the world.

<sup>68</sup> The term international voice calls is used for calls that are made by a domestic user when in its home country, but that terminate at destinations which are abroad such as if the receiving number is a foreign one.

- (120) The Commission considers that, in line with its previous practice,<sup>69</sup> the product market for retail mobile telecommunications includes mobile services such as voice, SMS/MMS, data and international roaming services.
- (121) The Commission has also considered whether the product market can be further segmented between residential and business customers. The market investigation in the present case is not conclusive in this regard.<sup>70</sup>
- (122) As for the inclusion of OTT services in the relevant market, the majority of respondents consider that OTT services are not part of the market for the provision of mobile telecommunications services.<sup>71</sup>
- (123) For the purpose of the present decision, the exact product market definition in relation to the provision of retail mobile telecommunications services can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

#### 3.2.1.2. Geographic market definition

- (124) The Notifying Party considers that the market should be considered national in scope in line with previous Commission's decisions.
- (125) The Commission has consistently found that the markets for retail mobile services provided to end consumers are national in scope.<sup>72</sup>
- (126) The majority of respondents to the market investigation in the present case indicated that the market for the provision of retail mobile telecommunications services is national in scope.<sup>73</sup> Licenses are granted on a nation-wide basis and the competitive conditions existing in each Member State are still different.
- (127) The Commission considers the retail market for mobile telecommunications services to be national in scope.

#### 3.2.1.3. Affected markets

- (128) The retail market for mobile telecommunications services in Austria and its potential segments for private and for business customers are horizontally affected. In the overall retail market for mobile telecommunications sector (excluding OTT services), the Parties have a combined share of [20-30]% in Austria (UPC with [0-5]% and TMA with [20-30]% in terms of subscribers). On the potential segment for residential customers the Parties have a combined share of [20-30]% (UPC with [0-5]% and TMA with [20-30]% in

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<sup>69</sup> For example Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*; Commission decision of 11 May 2016, in case M.7612 - *Hutchison 3G UK / Telefónica*, Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*.

<sup>70</sup> Questionnaire Q2, reply to question C.A.2.

<sup>71</sup> Questionnaire Q2, reply to question C.A.4.

<sup>72</sup> Commission decisions of 26 April 2006 in case COMP/M.3916 – *T-Mobile Austria/Tele.ring*, recital 19; Commission decision of 20 September 2013 in case COMP/M.6990 – *Vodafone/Kabel Deutschland*, recitals 218-219.

<sup>73</sup> Questionnaire Q2, reply to question C.B.1.

terms of subscribers) and on the potential segment for business customers the Parties have a combined share of [20-30]% (UPC with [0-5]% and TMA with [20-30]% in terms of revenues) in Austria.<sup>74</sup>

- (129) The retail market for mobile telecommunications services in Austria and its potential segments for private and for business customers are vertically affected insofar as they are related to the upstream wholesale market for mobile access and call origination on which TMA has a market share of approximately [70-80]% in terms of subscribers and [80-90]% in terms of revenues. In addition, the retail market for mobile telecommunications services in Austria and its potential sub-segments for private and for business customers are also (technically) vertically affected due to a vertical link with (i) the upstream wholesale markets for international roaming services in other Member States in which DTAG offers international roaming services (provided that DTAG has a market share of more than 30% on such national wholesale market for international roaming services), and (ii) the upstream markets for call termination services on mobile and fixed networks on which TMA, UPC and DTAG (outside Austria) are active. Finally, the Parties' activities on the retail market for mobile telecommunications services in Austria are vertically affected insofar as there is a vertical link to the Parties' activities on the wholesale market for leased lines to the extent that this market is defined locally and the combined market shares of the Parties are equal or more than 30% in the respective commune<sup>75</sup>.

### **3.2.2. Wholesale access and call origination services on mobile networks**

- (130) MNOs, such as TMA, provide wholesale access and call origination services, which enable operators without their own mobile network, MVNOs, to provide retail mobile services to end customers. There is a wide variety of MVNOs, ranging from MVNOs that have a fully operational proprietary core network and that purchase access to the radio access network of MNOs on the one end, to pure re-sellers of a MNO services on the other end.

#### **3.2.2.1. Product market definition**

- (131) The Notifying Party submits that there is an overall wholesale market for access and call origination on mobile networks, without any further segmentation by type of service (i.e. access and call origination) or by type of MVNO (i.e. full MVNOs, light MVNOs or branded resellers). In any case, the Notifying Party submits that the exact product market definition in this case can be left open.
- (132) The Commission has previously defined a single wholesale market including both access and call origination on mobile networks without segmenting the market by type of services on mobile networks, since MNOs generally supply

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<sup>74</sup> The market data include also mobile data-only services, which may be also included in the possible market for home internet access service. The issue of whether those services should be included in the mobile telecommunications market does not have a material impact on the assessment, considering that with any market definition UPC's market share would be very limited.

<sup>75</sup> See footnote 62 above.

these services jointly to MVNOs and both services are essential to MVNOs.<sup>76</sup> The Commission sees no reason to depart from this approach in the present case.

- (133) The Commission has also considered that branded resellers should not be regarded as buyers of wholesale access to a network as they merely resell SIM cards and services of an MNO under a different brand.<sup>77</sup> For the purpose of the present decision, the question whether branded resellers should be included as buyers of wholesale access to a network can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

#### 3.2.2.2. Geographic market definition

- (134) In line with previous Commission decisions, the Notifying Party considers that the relevant geographic scope of the market for wholesale access and call origination on mobile networks is national, limited to the territory of Austria.<sup>78</sup>

- (135) The Commission considers that the relevant geographic market is national.

#### 3.2.2.3. Affected markets

- (136) The wholesale market for access and call origination services on mobile networks is not horizontally affected since only TMA is active on this market. However, since TMA's market share on the wholesale market for access and call origination services on mobile networks is approximately [70-80]% in terms of subscribers and approximately [80-90]% in terms of revenues and UPC is active on the downstream retail mobile market as MVNO, this market is vertically affected.

### 3.2.3. Wholesale mobile call termination services

- (137) When someone calls a mobile phone connected to a different network that call is terminated on the network of the receiving mobile phone. In order for a retail mobile service provider to be able to provide calls to a different network, it must purchase wholesale terminations services on these other networks. This is done through interconnection agreements between the various network operators.

#### 3.2.3.1. Product market definition

- (138) The Notifying Party submits that each individual mobile network constitutes a separate market for call termination because the operator transmitting the call can reach the intended recipient only through the operator of the network to which the recipient is connected. There is thus no substitute for call termination on each individual network.

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<sup>76</sup> Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/ JV*, recitals 170-175.

<sup>77</sup> Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/ JV*, recital 174.

<sup>78</sup> Commission decisions of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK* and of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*.

- (139) The Notifying Party submits that also full MVNOs (such as UPC) provide wholesale call termination services given that full MVNOs own certain parts of the mobile core network.<sup>79</sup>
- (140) The Commission considers that 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.
- (141) The Commission concludes, in line with previous decisions, that termination on each individual mobile network constitutes a separate product market.<sup>80</sup> As for the question whether full MVNOs also provide wholesale call termination services, for the purpose of the present decision it can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

#### 3.2.3.2. Geographic market definition

- (142) In line with previous Commission decisions, the Notifying Party submits that the market for mobile call termination services should be considered national in scope.
- (143) The Commission concludes, in line with previous decisions<sup>81</sup>, that the market for mobile call termination services is national in scope.

#### 3.2.3.3. Affected markets

- (144) The wholesale market for mobile call termination services is horizontally not affected since each network constitutes a separate relevant market. However, since each of the Parties has a 100% market share on the wholesale market for mobile call termination services on its own mobile networks and each of the Parties is active in the downstream retail markets (mobile and fixed telecommunications services), the wholesale markets for mobile call termination services where the Parties are active, in Austria and in other Member States (for TMA/DTAG)<sup>82</sup>, are vertically affected.

#### 3.2.4. Wholesale market for international roaming

- (145) For a provider of retail mobile services to be able to provide its end customers with telecommunication services outside their home countries, it enters into

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<sup>79</sup> Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*. The Notifying Party also mentions that the Austrian Telekom-Control Kommission ("TKK") found in a decision issued in 2015 that UPC, through its subsidiary UPC Telekabel Wien GmbH, provides call termination services on its mobile core network. The TKK identified a separate relevant market for wholesale call termination services on UPC's mobile core network and imposed various regulatory obligations regarding price and quality of the service on UPC Telekabel Wien GmbH (TKK Decision of 15 June 2015, M 1/14-50, as amended by TKK Decision of 21 December 2015, M 1.1/15-51).

<sup>80</sup> Commission decision of 1 September 2016 in case M.7758, *Hutchison 3G Italy / Wind / JV*, recital 192.

<sup>81</sup> Commission decision of 1 September 2016 in case M.7758, *Hutchison 3G Italy / Wind / JV*, recital 196.

<sup>82</sup> Notably Croatia, the Czech Republic, Germany, Greece, Hungary, the Netherlands, Poland, Romania and Slovakia.

wholesale roaming agreements with providers of wholesale international roaming on other national markets. Roaming consists of both terminating calls and originating calls.

- (146) Retail mobile service providers sometimes have preferred roaming partners in certain countries. This means that the preferred partners' network will be used in the first instance when it has coverage and the mobile user has not manually chosen a different network. A home network will normally have multiple agreements with operators in a particular country in order to provide optimal coverage.

#### 3.2.4.1. Product market definition

- (147) In line with previous Commission decisions, the Notifying Party submits that there is a relevant product market for wholesale international roaming services.
- (148) Wholesale international roaming services are regulated.<sup>83</sup> Mobile network operators must meet all reasonable requests for wholesale roaming access under a reference offer and wholesale charges for the making of regulated roaming services (voice, message and data roaming) are capped.
- (149) The Commission concludes, in line with previous decisions, that the market for international roaming comprising both terminating calls and originating calls constitutes a separate product market.<sup>84</sup>

#### 3.2.4.2. Geographic market definition

- (150) In line with previous Commission decisions, the Notifying Party submits that the relevant geographic scope of the market for the supply of wholesale international roaming services is national.
- (151) In previous decisions, the Commission found that the wholesale market for international roaming is national in scope, given that wholesale international agreements can be concluded only with companies which have an operating licence in the relevant country and the licences to provide mobile services are restricted to a national territory.<sup>85</sup>
- (152) The Commission concludes that the markets for international roaming are national.

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<sup>83</sup> Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications network within the Union (OJ 2012 L 172/10), last amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 147/1).

<sup>84</sup> Commission decision of 1 September 2016 in case M.7758, *Hutchison 3G Italy / Wind / JV*, recitals 182-184.

<sup>85</sup> Commission decision of 28 May 2014 in case M. 6992 – *H3G/Telefónica Ireland*, recital 151; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 78; Commission decision of 1 March 2010 in case M.5650 – *T-Mobile/Orange*, recital 35; Commission decision of 20 August 2007 in case M.4748 – *T-Mobile/Orange Netherlands*, recital 27; Commission decision of 26 April 2006 in case M.3916 – *T-Mobile Austria/Tele.ring*, recital 28; Commission decision of 20 September 2013 in case M. 6990 – *Vodafone/Kabel Deutschland*, recital 252.



#### 3.2.4.3. Affected markets

- (153) The wholesale market for international roaming is horizontally not affected since UPC is not active in this market. However, since DTAG is active in the wholesale market for international roaming in Member States other than Austria<sup>86</sup> and UPC is active in the downstream retail market for the provision of mobile telecommunications services in Austria, the wholesale markets for international roaming in other Member States where DTAG is active and has a market share of more than 30%, are vertically affected.

### 3.3. Fixed telephony and related services

#### 3.3.1. Retail market for the supply of fixed telephony services

- (154) On the market for retail supply of fixed telephony services, operators provide fixed voice services to end-customers. In line with previous Commission decisions, fixed voice services include the provision of connection services or access at a fixed location or address to the public telephone network for the purpose of making and receiving calls and related services.<sup>87</sup>

##### 3.3.1.1. Product market definition

- (155) The Notifying Party submits that there is an overall retail fixed telephony services market, which includes managed VoIP services, in line with recent Commission decisions.
- (156) In previous decisions, the Commission considered that a distinction between local / national and international calls as well as between residential and business customers may not be relevant.<sup>88</sup> The Commission did not take a definitive view with regard to these possible further segmentations of the retail fixed voice services market. The Commission concluded however that traditional fixed voice services and managed VoIP services are interchangeable within a single market for the retail supply of fixed voice services.<sup>89</sup>
- (157) For the purpose of the present decision, the exact product market definition can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

##### 3.3.1.2. Geographic market definition

- (158) The Notifying Party considers the market to be national in scope, based on the Commission's precedents.
- (159) The Commission considers the market for the supply of fixed telephony service to be national in scope.

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<sup>86</sup> Notably Croatia, the Czech Republic, Germany, Greece, Hungary, the Netherlands, Poland, Romania and Slovakia.

<sup>87</sup> Commission decision in case M.6584 – *Vodafone/Cable&Wireless*, recital 11.

<sup>88</sup> Commission decision in case M.5532 – *Carphone Warehouse/Tiscali UK*, recital 37.

<sup>89</sup> Commission decision in case M.6990 – *Vodafone/Kabel Deutschland*, recital 130-131.

### 3.3.1.3. Affected markets

- (160) The market for retail supply of fixed telephony services is horizontally not affected since only UPC is active on this market, with a market share of [10-20]% in revenue and [10-20]% in subscribers.<sup>90</sup> However, since TMA has a 100% market share on the upstream wholesale market for mobile call termination services on its own mobile network in Austria and DTAG has a 100% market share on the upstream wholesale markets for mobile and fixed call termination services in other Member States, the market for retail supply of fixed telephony services in Austria is vertically affected. In addition, the market for retail supply of fixed telephony services in Austria is vertically affected also insofar as there is a vertical link to the wholesale leased lines market if defined on the level of communes, in 24 communes where TMA is active and the Parties combined market share is equal or larger than 30%.<sup>91</sup>

### 3.3.2. Wholesale market for fixed call termination services

- (161) Call termination is the service provided by a network operator on the supply side to other network operators on the demand side, whereby a call originating in a demand side operator's network is delivered to a user in the supply side operator's network. This service is required by every originating operator, as it is necessary for its customers to be able to communicate with the customers of other networks. Call termination is therefore a wholesale service that is resold or used as an input for the provision of downstream retail telephony services.

#### 3.3.2.1. Product market definition

- (162) In line with previous Commission decisions, the Notifying Party submits that the relevant product market is the wholesale market for call termination on each individual fixed network.
- (163) The Commission considers that 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.
- (164) The Commission considers that, as regards wholesale call termination services, termination on each individual fixed network constitutes a separate product market.

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<sup>90</sup> TMA offers a product referred to as "All in Communication Mobile" ("AIC Mobile") to business customers. This product is marketed as "mobile fixed network" or "fixed to take away" but is provided via TMA's *mobile* network. The AIC Mobile service requires a router with an integrated SIM card which technically serves as a fixed termination point and to which a geographic number can be allocated. The router can be connected to a telephone. In particular, the AIC Mobile service enables business customers to receive calls on their mobile device also when they receive calls to their fixed (geographic) number. The Notifying Party submits that the AIC Mobile service does not qualify as fixed telephony service as it is provided via TMA's mobile network. In any case, the hypothetical market share of TMA would be below [0-5]%.

<sup>91</sup> See footnote 62 above.

### 3.3.2.2. Geographic market definition

- (165) In line with previous Commission decisions, the Notifying Party considers the relevant geographic market for call termination services on fixed networks to be national in scope. This is primarily due to regulatory barriers as the geographic scope of licenses is in principle limited to areas which do not extend beyond the borders of a Member State.
- (166) In previous decisions, the Commission considered the geographic market to be national in scope.<sup>92</sup>
- (167) The Commission concludes that the wholesale market for fixed call termination services is national in scope.

### 3.3.2.3. Affected markets

- (168) The wholesale market for fixed call termination services is horizontally not affected since each network constitutes a separate relevant market. However, since UPC has a 100% market share on the wholesale market for fixed call termination services on its own fixed network in Austria and TMA is active in the downstream retail mobile market, the wholesale market for fixed call termination services in Austria is vertically affected.

### 3.3.3. *Wholesale market for end-to-end calls*

- (169) Fixed network operators package origination and termination services and provide communication providers without their own networks with a package which they can use to offer retail fixed voice services to consumers without the need to invest in network infrastructure.

#### 3.3.3.1. Product market definition

- (170) In previous decisions, the Commission considered the existence of a separate wholesale market for end-to-end calls, which is separate from the wholesale markets for call origination, transit and termination, but left the exact market definition open.<sup>93</sup>
- (171) The Notifying Party submits that the precise product market definition can be left open as the Transaction does not give rise to competition concerns under any alternative market definition.
- (172) In the present case, the exact definition of the product market can be left open, notably whether the wholesale market for end-to-end calls is a separate market from call origination and call termination and transit, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

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<sup>92</sup> Commission decision of 20 September 2013 in case M. 6990 – *Vodafone/Kabel Deutschland*, recital 121.

<sup>93</sup> Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 20.

### 3.3.3.2. Geographic market definition

- (173) In line with previous decisional practice of the Commission, the Notifying Party considers that the geographic scope of the wholesale market for end-to-end calls is national.<sup>94</sup>
- (174) The Commission considers for the purpose of the present decision that the geographic scope of the wholesale market for end-to-end calls services is national.

### 3.3.3.3. Affected markets

- (175) The wholesale market for end-to-end calls in Austria is horizontally not affected since only UPC is active in this market. However, since TMA and DTAG have a 100% market share on the upstream wholesale markets for fixed and mobile call termination services on their respective networks in Austria and in other Member States where DTAG is active, the wholesale market for end-to-end calls in Austria is vertically affected.

### 3.3.4. *Global telecommunications services*

- (176) Global telecommunications services (GTS) are telecommunications services linking a number of different customer locations, generally in at least two different continents and across a larger number of different countries. They are generally purchased by multinational companies with presence in many countries and a number of continents. The services provided are enhanced services to provide customers with package solutions including virtual private networks ("VPN") for both voice and data services and advanced functionalities.<sup>95</sup>
- (177) Global telecommunications services are supplied at retail level and wholesale level. In the latter case, they can also be referred to as "international carrier services". Wholesale global telecommunications services comprise (i) the lease of transmission capacity and (ii) the provision of related services to third party telecommunications traffic carriers and service providers and are an input for retail global telecommunications services.

#### 3.3.4.1. Product market definition

- (178) The Notifying Party submits that the exact market definition may be left open, as the Transaction does not raise any competitive concern under any plausible market definition due to the Parties' negligible activities on that market.
- (179) In *Vodafone/Cable&Wireless*,<sup>96</sup> the Commission considered a possible distinction between retail GTS and international carrier services but ultimately left the exact product market definition open. While the Commission considered a possible distinction between the lease of transmission capacity

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<sup>94</sup> Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 21.

<sup>95</sup> Commission decisions of 28 June 2000 in case M.1741 – *Verizon / MCI*, recital 70; and of 14 April 2014 in case M.7109 – *Deutsche Telekom / GTS*, recital 10.

<sup>96</sup> Commission Decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 33.

and the provision of services to third-party carriers, it ultimately left open the exact product market definition.<sup>97</sup>

- (180) In the present case, the exact definition of the product market can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 3.3.4.2. Geographic market definition

- (181) The Notifying Party submits that the exact definition of the geographic market can be left open, as the Transaction does not raise any competitive concern under any plausible market definition.

- (182) In past decisions, the Commission has considered both the wholesale and retail global telecommunications services markets to be worldwide in scope.<sup>98</sup> The Commission considered that from a demand-side perspective, retail global telecommunications services customers are mainly internationally active multinational companies. It also considered that most suppliers have an international portfolio of customers and are in a position of rendering global telecommunications services on a worldwide basis.<sup>99</sup>

- (183) While the Commission's past decisional practice indicates that global telecommunication services are worldwide in scope, in the present case, the exact definition of the geographic market can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 3.3.4.3. Affected market

- (184) The global telecommunications services market is horizontally not affected, either at wholesale or at retail level. However, the global telecommunications services market – either on wholesale or on retail level – is vertically affected insofar as there is a vertical link to the Parties' activities on the upstream wholesale market for leased lines if defined on the level of communes.

##### *Wholesale global telecommunication services*

- (185) There is no horizontal overlap between the Parties on wholesale global telecommunications services. UPC is not active in the area of wholesale global telecommunications services. DTAG provides wholesale global telecommunications services across national borders on a global scale to other international carriers and the Notifying Party estimates based on the *Deutsche Telekom / GTS* decision that DTAG has a market share of approximately [0-5]% worldwide and around [5-10]% on a hypothetical EEA-wide market.

- (186) The global telecommunications services market on wholesale level is vertically affected insofar as there is a vertical link to the Parties' activities on the upstream wholesale market for leased lines if defined on the level of

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<sup>97</sup> Commission Decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 33.

<sup>98</sup> Commission Decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 34.

<sup>99</sup> Commission Decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 19 et seq.

communes, in 24 communes where the Parties' combined market share is equal or larger than 30%.<sup>100</sup>

#### *Retail global telecommunication services*

- (187) The retail market for global telecommunications services is horizontally not affected. Both parties have only minor activities in this market. In *Deutsche Telekom/GTS*, the Commission noted that in 2012 the combined market share of DTAG and GTS on the retail market for global telecommunications services was approximately [0-5]% worldwide and approximately [5-10]% on a hypothetical EEA-wide market. UPC occasionally offers, to a very limited extent, Austrian customers which also have locations abroad telecommunications services linking their Austrian and foreign locations. UPC can only offer such services [confidential information on how UPC offers its services]. In 2017, UPC achieved revenues of approximately EUR [...] from this type of services which would translate into a market share of below [0-5]%
- (188) The retail market for global telecommunications services is vertically affected only in so far as there is a vertical link to the Parties' activities on the upstream wholesale market for leased lines if defined at the level of communes, in 24 communes where the Parties' combined market share are equal or larger than 30%.<sup>101</sup>

### **3.4. Multiple-play bundles**

- (189) The term "multiple-play" relates to offers comprising two or more of the following services provided to retail consumers: mobile telecommunications services, fixed telephony, fixed internet access and TV services. Multiple-play comprising two, three or four of these services is referred to as double play, triple play and quadruple play respectively.<sup>102</sup>

#### *3.4.1. Product market definition*

- (190) The Commission has analysed potential multiple-play markets in earlier cases, in light of some specific features and conditions of the national market involved.<sup>103</sup> The Notifying Party submits that those conditions are not fulfilled in Austria (inter alia pointing to a study that shows that only 2% of all consumers of fixed broadband services have a fixed-mobile bundle) and that in any event it would not be necessary for the Commission to make an ultimate determination, since the Transaction would not raise concerns even based on this market definition.

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<sup>100</sup> See footnote 62 above.

<sup>101</sup> See footnote 62 above.

<sup>102</sup> Multiple play comprising any combination of two or more of fixed services without a mobile component is referred to as "fixed multiple play". Multiple play comprising one or more of these fixed services in combination with a mobile component (including either voice or data, or both together) is referred to as "fixed-mobile multiple play". Fixed-mobile multiple play may involve a single mobile subscription (SIM card) or more than one mobile subscription combined with the fixed subscription.

<sup>103</sup> Commission decisions of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recitals 77- 108, and of 19 May 2005 in case M.7421 – *Orange/Jazztel*, recitals 72-86.

- (191) The results of the market investigation seem to confirm the limited relevance of bundled offers in Austria, especially fixed-mobile bundles. The majority of respondents have stated that the ability to also provide fixed telecommunication services (fixed internet services, fixed telephony) is currently not essential in order for mobile providers to compete effectively on the mobile market in Austria.<sup>104</sup> The response is less clear with regard to TV services, which according to some respondents are relevant in order to differentiate the mobile offers and to reduce the churn rate.<sup>105</sup>
- (192) In any event, for the purpose of the present decision, the question whether the different types of multiple play constitute separate relevant markets from each of the markets of their components can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market under either product market definition.

#### 3.4.2. *Geographic market definition*

- (193) The Notifying Party submits that the geographic scope of any potential retail market for multiple-play services is national and corresponds to the territory of Austria, since the components of the multiple-play bundles are offered individually at national level and the bundling of the services would not change the geographic scope of the components.
- (194) In previous decisions, the Commission considered that the geographic scope of any possible retail market for multiple-play could be national since the components of the multiple play offers are offered individually at national level and the bundling of the services would not change the geographic scope of the components. It nevertheless ultimately left the question of the exact geographic delineation of the possible multiple-play market open.<sup>106</sup> In *Liberty Global/Ziggo* and in *Vodafone/Liberty Global/Dutch JV*, the Commission considered the geographic scope of the possible market for multiple-play products to be national.<sup>107</sup>
- (195) For the purpose of the present decision, the exact geographic market definition can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible market definition.

#### 3.4.3. *Affected markets*

- (196) TMA is not active in the provision of multiple-play offers that include retail fixed services.<sup>108</sup>

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<sup>104</sup> Questionnaire Q2, reply to question C.C.1.

<sup>105</sup> Questionnaire Q2, reply to question C.C.2.

<sup>106</sup> Commission decision of 19 May 2005 in case M.7421 – *Orange/Jazztel*, recitals 87-90.

<sup>107</sup> Commission decisions of 10 October 2014 in Case M.7000 - *Liberty Global/Ziggo*, recitals 152-153 and of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recitals 110-112.

<sup>108</sup> TMA offers existing customers of a mobile subscription a discount on their additional (second, third, etc.) mobile subscriptions with TMA. This means that a customer of a combined mobile voice-and-data subscription can purchase another subscription for mobile-data only services, at a discounted price. Should the retail market for internet access services include both fixed and mobile connections, this discounted offer could be considered a "double play" offer, mobile-(mobile) internet. In any case,

- (197) UPC offers fixed dual and triple play services in Austria. Its main bundled product offerings are (i) dual play services including fixed internet and fixed telephony, and (ii) triple play services including fixed internet, TV and fixed telephony. In addition, it offers (iii) dual play services including fixed internet and TV, and (iv) dual play services including TV and fixed telephony. According to the Parties' estimates, UPC would have a market share of [10-20]% as regards dual play offers including fixed Internet and TV, [10-20]% as regards dual play offers including fixed internet and fixed telephony, and [50-60]% regarding fixed triple play offers (Internet, telephony and TV).
- (198) UPC has also a marginal number of fixed/mobile customers. Notably from October 2015 to November 2017, UPC offered existing customers of its fixed telecommunications services a discount on its mobile products. Then in November 2017, UPC launched a new product offering on the basis of which it offers new customers a discount on a mobile subscription if they purchase UPC's fixed telephony, fixed internet and cable TV services at the same time. On the basis of these two offers, at present the number of UPC fixed/mobile customers is extremely limited.
- (199) Since TMA essentially does not offer fixed/fixed or fixed/mobile bundles, this potential market is not horizontally affected. However, both Parties are active in at least some of the product components of multiple-play bundles and UPC has a market share of more than 30% in the possible market of fixed triple play offers. The Commission will therefore assess whether the Transaction may have a significant competitive impact in the potential multiple-play market in Austria through conglomerate effects.<sup>109</sup>

#### **4. COMPETITIVE ASSESSMENT**

- (200) The Transaction gives rise to the following horizontally affected markets for (i) home retail internet access services including both fixed and mobile technologies in Austria; for (ii) retail mobile telecommunications services in Austria and for (iii) the wholesale market for leased lines in one commune in Austria, if the relevant geographic market was defined at the commune level.
- (201) In addition, the Transaction gives rise to a number of vertically affected markets in Austria as set out in Table 1 in Section 4.3. below.
- (202) Finally, since both Parties offer communications services that can be included in multiple-play offers, the Commission will assess whether the Transaction could potentially give rise to conglomerate concerns.

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considering that UPC has a marginal number of fixed mobile bundles and in particular of fixed internet/mobile bundles, the question can be left open as the horizontal overlap would be irrelevant.

<sup>109</sup> It could be argued that there is a vertical link between (i) wholesale leased lines (upstream) and multiple play bundles (downstream) as well as (ii) wholesale access and call origination services on mobile networks (upstream) and multiple play bundles (downstream). For the reasons set out in sections 3.1.5.3 and 3.2.2.3, the potential markets for multiple play bundles would then be vertically affected. However, the Transaction does not raise serious doubts as to its compatibility with the internal market with regard the potential markets for multiple play bundles, for essentially the same reasons as those provided in sections 4.3.1 and 4.3.2 respectively. Therefore, the potential market for multiple play bundles is not explicitly mentioned in section 4.3.



## 4.1. Analytical framework

- (203) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.
- (204) In this respect, a merger may entail horizontal and/or non-horizontal (i.e. vertical or conglomerate) effects. Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. Conglomerate effects are those deriving from a concentration where the undertakings concerned are in a relationship which is neither horizontal nor vertical. A concentration may involve all three types of effects. In such a case, the Commission will appraise horizontal and non-horizontal effects in accordance with the guidance set out in the relevant notices, that is to say the Horizontal Merger Guidelines<sup>110</sup> and the Non-horizontal Merger Guidelines<sup>111</sup>.

### 4.1.1. Horizontal effects

- (205) The Horizontal Merger Guidelines describe horizontal non-coordinated effects as follows:

*“A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms’ price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.”<sup>112</sup>*

- (206) Therefore, a merger giving rise to such non-coordinated effects might significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger.
- (207) However, under the substantive test set out in Article 2(2) and (3) of the Merger Regulation, also mergers that do not lead to the creation or the strengthening of the dominant position of a single firm may create

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<sup>110</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C31, 5.2.2004, p. 5.

<sup>111</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008.

<sup>112</sup> Horizontal Merger Guidelines, paragraph 24.

competition concerns. Indeed, the Merger Regulation recognises that in oligopolistic markets, it is all the more necessary to maintain effective competition.<sup>113</sup> This is in view of the significant consequences that mergers may have on such markets. For this reason, the Merger Regulation provides that "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition*".<sup>114</sup>

- (208) The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger, such as the large market shares of the merging firms, the fact that the merging firms are close competitors, the limited possibilities for customers to switch suppliers, or the fact that the merger would eliminate an important competitive force.<sup>115</sup> That list of factors applies equally regardless of whether a merger would create or strengthen a dominant position, or would otherwise significantly impede effective competition due to non-coordinated effects. Furthermore, not all of these factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.<sup>116</sup> Finally, the Horizontal Merger Guidelines describe a number of factors, which could counteract the harmful effects of the merger on competition, including the likelihood of buyer power, entry and efficiencies.
- (209) A merger in a concentrated market may also significantly impede effective competition due to horizontal coordinated effects where, through the creation or the strengthening of a collective dominant position, it increases the likelihood that firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU. A merger may also make coordination easier, more stable or more effective for firms that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.<sup>117</sup>
- (210) To assess whether a merger gives rise to horizontal coordinated effects, the Commission should examine, first, whether it would be possible to reach terms of coordination and, second, whether the coordination would be likely to be sustainable.<sup>118</sup>

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<sup>113</sup> Merger Regulation, recital 25.

<sup>114</sup> Merger Regulation, recital 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines. See also Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 113; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 179; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 88.

<sup>115</sup> Horizontal Merger Guidelines, paragraphs 27 *et seq.*

<sup>116</sup> Horizontal Merger Guidelines, paragraph 26.

<sup>117</sup> Horizontal Merger Guidelines, paragraph 39.

<sup>118</sup> Horizontal Merger Guidelines, paragraph 42.

- (211) As regards the possibility of reaching terms of coordination, coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.<sup>119</sup> Coordination may take various forms, including keeping prices above the competitive level, or dividing the market, for instance by customer characteristics or by allocating contracts in bidding markets.<sup>120</sup>
- (212) As regards the sustainability of coordination, three conditions are necessary for coordination to be sustainable.<sup>121</sup> First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to.<sup>122</sup> Second, discipline requires that there is a credible deterrent mechanism that can be activated if deviation is detected.<sup>123</sup> Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.<sup>124</sup>
- (213) Moreover, in examining the possibility and sustainability of coordination, the Commission should specifically consider the changes that the Transaction brings about.<sup>125</sup> The reduction in the number of firms in a market may in itself be a factor that facilitates coordination.

#### *4.1.2. Vertical effects*

- (214) A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete.<sup>126</sup> Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers.<sup>127</sup>
- (215) Two forms of foreclosure can be distinguished. The first — which is of particular relevance for the present case — is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to result in foreclosure of upstream rivals by restricting their access to a sufficiently large customer base (customer foreclosure).
- (216) Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices

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<sup>119</sup> Horizontal Merger Guidelines, paragraph 41.

<sup>120</sup> Horizontal Merger Guidelines, paragraph 40.

<sup>121</sup> Horizontal Merger Guidelines, paragraph 42.

<sup>122</sup> Horizontal Merger Guidelines, paragraph 42.

<sup>123</sup> Horizontal Merger Guidelines, paragraph 42.

<sup>124</sup> Horizontal Merger Guidelines, paragraph 42.

<sup>125</sup> Horizontal Merger Guidelines, paragraph 42.

<sup>126</sup> Non-horizontal Merger Guidelines, paragraph 29.

<sup>127</sup> Non-horizontal Merger Guidelines, paragraph 29.

and conditions as absent the merger.<sup>128</sup> This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm's rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers.<sup>129</sup> Any efficiencies resulting from the merger may, however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive.<sup>130</sup>

- (217) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream.<sup>131</sup> In practice, these factors are often examined together since they are closely intertwined.<sup>132</sup>

#### 4.1.3. *Conglomerate effects*

- (218) In the majority of circumstances, conglomerate mergers do not lead to any competition problems but in certain specific cases there may be harm to competition.<sup>133</sup> The main concern in the context of conglomerate effects is that of foreclosure.<sup>134</sup> Conglomerate mergers may allow the merged entity to combine products in related markets and this may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling, or other exclusionary practices.<sup>135</sup>
- (219) In assessing the likelihood of conglomerate effects, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers. In practice, these factors are often examined together as they are closely intertwined.<sup>136</sup>

## 4.2. **Assessment of horizontal effects**

- (220) Considering that TMA does not practically offer pure fixed internet access services, no significant horizontal overlap would arise if separate markets for fixed and mobile internet access services were to be defined. Therefore, the following assessment focuses on a possible market for retail internet access services for residential customers in Austria as defined above, including both

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<sup>128</sup> Non-Horizontal Merger Guidelines, paragraph 31.

<sup>129</sup> Non-Horizontal Merger Guidelines, paragraph 31.

<sup>130</sup> Non-Horizontal Merger Guidelines, paragraph 31.

<sup>131</sup> Non-Horizontal Merger Guidelines, paragraph 32.

<sup>132</sup> Non-Horizontal Merger Guidelines, paragraph 32.

<sup>133</sup> Non-horizontal Merger Guidelines, paragraph 92.

<sup>134</sup> Non-horizontal Merger Guidelines, paragraph 93.

<sup>135</sup> Non-horizontal Merger Guidelines, paragraph 93.

<sup>136</sup> Non-horizontal Merger Guidelines, paragraph 94.

fixed and mobile broadband connections,<sup>137</sup> as this is the market configuration where the horizontal overlap would be largest.<sup>138</sup>

#### **4.2.1. Retail internet access services**

##### 4.2.1.1. Horizontal non-coordinated effects

###### (a) The Notifying Party's views

- (221) The Notifying Party submits that the Transaction will not lead to competition concerns on the retail market for the provision of internet access services to residential customers in Austria.
- (222) First, the Notifying Party submits that even when considering a market for retail home internet access services including mobile and fixed products, the Parties' estimated combined shares would only slightly exceed [20-30]% in this market. The Parties' combined market shares would not be significant in UPC's footprint either, where they would have a combined market share of [30-40]%. The merged entity would be just the third largest player in Austria, in terms of market shares, behind A1 ([40-50]%) and H3A ([20-30]%). In UPC's footprint, A1 would have a [30-40]% market share and H3A [20-30]%.
- (223) Second, UPC's fixed broadband offering on the one hand and TMA's mobile data-only services would not be close substitutes, because of significant differences in technology, use, speed, quality of service, and mobility. UPC currently offers high and stable data download speeds of up to 300 Mbit/s which significantly exceeds the performance, quality and actual speed which TMA can offer via its mobile network.
- (224) According to the Notifying Party, this conclusion is confirmed by the survey conducted by TMA (see paragraph (37)), in accordance to which (i) the diversion ratio from TMA to UPC would be significantly lower than the diversion ratios from TMA to the other MNOs (A1 and H3A), and (ii) the diversion ratio from UPC to TMA would be significantly lower than the diversion ratio from UPC to A1 (that is also a fixed internet access provider).
- (225) The Notifying Party has also submitted a paper which examines competitive actions (such as launches of new products, improvements of existing offers, price promotions, etc.) of each of the Parties. According to the Notifying Party, the analysis shows that TMA's actions that resulted in significant gross adds increases did not have any visible impact on UPC's sales, confirming that TMA cannot be qualified as a close competitor of UPC.

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<sup>137</sup> Unless otherwise specified in the text, the analysis is based on a market for retail internet access services including all mobile data-only connections. In any case, the outcome of the assessment would not change irrespective of the market definition (mobile data-only services pre-paid and post-paid; mobile data-only services post-paid; mobile cubes post-paid) as the market shares are similar.

<sup>138</sup> The competition assessment is limited to residential customers, considering that business customers are probably not included in this market. In any case the Parties' market shares in the market for business customers including fixed and mobile internet connections are lower than the ones in the residential segment: TMA [10-20]% and UPC [0-5]% (considering only cubes TMA [5-10]% and UPC [5-10]%). Hence, the Parties' combined market shares would be even more limited in a potential overall market including internet access services to both residential and business customers or in a potential separate market for internet access services to business customers.

- (226) Third, most of UPC's residential customers of internet services purchase these services in a bundle with either UPC's TV services or UPC's fixed telephony VoIP services. Only approximately [10-20]% of UPC's fixed internet customers have purchased UPC's fixed internet services on a stand-alone basis. Therefore, TMA's stand-alone mobile data-only services could not exert a competitive constraint on UPC's cable broadband services.
- (227) The Notifying Party submitted the replies to a questionnaire that is routinely sent to fixed internet customers who cancel their contract with UPC, asking why they had decided to terminate their contract. According to this analysis, only [0-5]% of UPC customers ending their fixed internet subscription explained that they had decided to terminate their contract because they wanted to sign up to mobile internet service instead.
- (228) According to the Notifying Party, the two major players in the Austrian telecommunications sector (A1 and H3A), as well as other competitors will continue to constrain the merged entity on this retail market. This would be the case also because these competitors offer very close substitutes to the products of UPC and TMA. On the contrary, the degree of substitutability between the internet services offered by the merging parties would be negligible.
- (229) The Notifying Party further submits that new market participants can easily enter the home internet access services market on the basis of A1 regulated wholesale virtual unbundled local access ("VULA") offer in the fixed segment or on the basis of a wholesale access agreement with any MNO in the mobile segment.
- (230) According to the Notifying Party, potential entry and expansion on the basis of the H3A Retail-Minus Offer and the A1 regulated VULA offer will impose a significant competitive constraint on the merged entity despite being based on a "retail-minus" wholesale access offer, because any alleged merger-induced increase of the retail prices of A1 and H3A would be small, and any effect on their wholesale access prices as a consequence of the "retail-minus" mechanism would also be small.
- (231) In particular, the Notifying Party submits that H3A's retail-minus offer for mobile broadband services would enable MVNO market entry at large scale: MVNOs could viably offer home mobile broadband services on the basis of the existing H3A retail-minus offer which forms part of H3A's commitments to the Commission in the *Hutchison 3G Austria/Orange Austria* case (M.6497). The Notifying Party has submitted an analysis showing that H3A would still have available capacity allowing for further mobile data-only services and has presented some evidence demonstrating that MVNOs hosted on H3A's network already offer home mobile broadband services and compete effectively in this market segment. The Notifying Party has submitted elements showing that MVNOs can actually compete in the home internet market using both the H3A Retail-Minus Offer and/or the unit-based pricing option, also offered by H3A on the basis of the commitments in case M.6497. In this last respect, the current unit-based MB rates offered by H3A, subject to RTR's monitoring, would enable an MVNO to offer very aggressive, even unlimited home broadband packages in the market, regardless of whether the H3A retail price increased or decreased.

- (232) With respect to the A1 regulated wholesale VULA offer, the Notifying Party submits that the RTR ensures that its conditions are margin-squeeze free by requiring the incumbent A1 to allow for a minimum retail margin, which increases with the bandwidths offered. The Notifying Party submitted data showing that the VULA wholesale costs leave a sufficient margin to a wholesale customer to compete with UPC's current standard retail prices for its cable broadband services, including in the segments for higher bandwidths (although the Notifying Party concedes that A1's fixed infrastructure is less performant than UPC's cable infrastructure). In any event, the relevance of the A1 wholesale offer would be confirmed by the fact that TMA launched a fixed/mobile (hybrid) broadband product on the basis of A1's offer and there would be no reason why other mobile operators should not be able to do the same and launch a hybrid broadband product. According to the Notifying Party, H3A is preparing a hybrid broadband product on the basis of the A1 wholesale offer as well.
- (233) The Notifying Party further submits that in any case market entry/expansion is taking place and additional players are highly likely to enter soon. In particular, TMA had some advanced negotiations with [name of third party], and has ongoing discussions with [name of third party].
- (234) Finally, the Notifying Party submits that the Transaction will establish TMA as a fixed-mobile convergent operator which will be able to offer converged products and to challenge the incumbent A1, which will create more choice for consumers.<sup>139</sup> According to the Notifying Party, the Transaction allows the merged entity to significantly invest into fixed infrastructure which is underdeveloped in Austria compared to other Member States. The Notifying Party further submits that the Transaction will also incentivize the incumbent A1 to invest more in fixed infrastructure in competition with the merged entity. A1 has so far not been willing to invest sufficiently due to its entrenched market power. The Notifying Party claims that the Transaction is, therefore, clearly pro-competitive.

(b) The Commission's assessment

- (235) First of all, the Commission recalls the analysis carried out in previous paragraphs (17) to (41), where it is explained that, in the specific case of Austria, the relevant product market potentially includes both fixed and mobile retail access services for residential customers.

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<sup>139</sup> TMA submission on the Austrian broadband sector of 12.06.2018.

(i) Market structure

(236) In the possible market for retail internet access services for residential customers in Austria the Notifying Party has provided the following market shares for 2017:

**Table 1: 2017 market shares in retail internet access services for residential customers in Austria (in terms of subscribers)**

	Fixed internet services and mobile broadband services (pre- and post-paid)	Fixed internet services and mobile cubes only	Fixed internet services and mobile broadband services (post-paid only)
TMA	[10-20]%	[5-10]%	[5-10]%
UPC	[10-20]%	[10-20]%	[10-20]%
<b>Combined</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[20-30]%</b>
<i>AI</i>	<i>[40-50]%</i>	<i>[40-50]%</i>	<i>[40-50]%</i>
<i>H3A</i>	<i>[20-30]%</i>	<i>[20-30]%</i>	<i>[20-30]%</i>
<i>Other Fixed operators</i>	<i>[5-10]%</i>	<i>[10-20]%</i>	<i>[5-10]%</i>
<i>Other mobile operators</i>	<i>[0-5]%</i>	<i>[0-5]%</i>	<i>[0-5]%</i>

Source: Form CO, Tables 7C(2)(a), (b) and (c)

(237) Following the Transaction, the market share of the merged entity will increase from [10-20]% to [20-30]% (considering all mobile data-only products), with an increment of approximately [10-20]%.

(238) The market presence of the Parties is more significant in the area corresponding to UPC's footprint, where the Parties have a joint market share of more than [30-40]%. In particular in the city of Vienna, the Parties together have a market share of more than [30-40]%. Although the market investigation has shown the national dimension of the relevant market, the strong position held by UPC (and consequently by the merged entity) in its footprint and notably in the most densely populated areas of Austria is further assessed in paragraph (267) below.

(ii) Closeness of competition

(239) The Commission has assessed in detail the Notifying Party's claim that there is only limited substitutability between the respective products of the Parties.

(240) While it appears that there is some degree of substitutability between the Parties' products,<sup>140</sup> it should be noted that TMA and UPC use different technologies for their main internet access services: TMA relies mainly on

<sup>140</sup> This is supported by the internal documents of the Parties. In some of these documents, as already reported in paragraph (33), the Parties mention "FMS" (fixed-mobile substitution) products, such as cubes or hybrid solutions, expressly aimed to "substitute" (i.e. compete with) pure fixed products for the provision of home internet access services to residential customers. Mobile broadband providers are qualified as a rising threat to fixed-line operators and several documents highlight the relevance of mobile 4G/LTE offers as home solutions, directly competing with fixed offers.



mobile technologies while UPC on fixed connections, largely based on its coaxial cable network.

- (241) The underlying technology has important implications on the user experience. UPC's HFC cable network offers particular high speeds of up to 300 Mbps on the basis of the DOCSIS 3.0 standard. Although DOCSIS uses a shared medium between several households, UPC guarantees to the customers of its 300 Mbps offering that a minimum download speed of 135 Mbps is available to the customer during 95% of the day. UPC's HFC cable network can also achieve much higher download speeds compared to other fixed internet access technologies, such as in XDSL.
- (242) In contrast, the actual speed of mobile broadband services is much more dependent on the number of concurrent users and their usage pattern in each cell. The actual speed of mobile internet (data) services may hence vary considerably and is generally substantially lower than the theoretically possible maximum speed. In this regard, TMA submits that its actual speed is often as low as [0-5] Mbps and that it does not provide speed guarantees to its mobile broadband customers similar to those offered by UPC.
- (243) These differences in terms of (guaranteed) download speed also translate into differences in usage patterns. Whereas the average monthly data download usage of TMA's customers of mobile broadband services was approximately [40-60] GB ([60-100] GB for cubes with fixed monthly payment) in December 2017, the average monthly downstream data usage of UPC's HFC internet customers was approximately [130-170] GB in Q1/2018. UPC's figures of data usage do however exclude the consumption of cable TV services and, therefore, underestimate the throughput differences between cable broadband connections and mobile internet connections.
- (244) The Commission also notes that only a limited percentage of UPC's fixed internet customers have purchased fixed internet access services on a standalone basis,<sup>141</sup> whilst TMA's mobile data services are not available with retail TV or fixed telephony services. This also suggests that mobile broadband services may not be direct substitutes to those product bundles for a significant part of UPC's customers.
- (245) These differences in terms of user experience suggest that the products of the Parties are differentiated. Moreover, all MNOs in Austria offer mobile broadband products and in particular mobile cubes. This provides a first indication that the degree of substitutability between the Parties' main products may be limited, in particular compared to the degree of substitutability between the (rather similar) mobile broadband products of the three Austrian MNOs.<sup>142</sup>

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<sup>141</sup> According to data provided by the Notifying Party, only [0-20]% of UPC's current fixed internet customers have purchased UPC's fixed internet services on a stand-alone basis (Form CO, paragraph 735).

<sup>142</sup> To be noted that this limited substitutability between mobile and cable connections is confirmed by A1, according to which although cubes should be in general considered substitutes to fixed broadband access, on the other hand they may not be with respect to true high speed internet such as UPC's own network features.

- (246) The Commission has further examined closeness of competition based on a survey prepared by the Parties. The Commission considers that generally customer surveys can be a useful tool for eliciting diversion ratios between competing products. In particular, surveys can be used to elicit user preferences and are hence suited to assess how differences in product characteristics translate into substitution patterns.
- (247) However, with respect to the survey carried out by TMA, the Commission first recalls that the Notifying Party submits that (i) the survey suffers from significant limitations and that only limited evidentiary weight can be given to its results, and (ii) if anything, the survey shows that UPC is not a close competitor of TMA and that TMA is not a close competitor of UPC (see paragraph (224)).
- (248) The reliability of any survey results depends inter alia on the survey design and on the selection of the participants to the survey. In the case at hand, in order to determine the degree of substitutability between the merging Parties' products the views of the Parties' subscribers are particularly important. By selecting the Parties' products, these customers expressed their preference for the Parties' products. Moreover, the survey should be focused on customers that are familiar with the various offerings currently in the market.<sup>143</sup>
- (249) The survey carried out by the Notifying Party was addressed to an online panel in co-operation with Marketmind, a marketing research company.<sup>144</sup> Such panels are usually designed to make up a representative sample of the underlying population, in this case Austrian households. However, reaching a sufficient number of respondents of the narrowly defined focus groups of interest, in this case inter alia recently acquired TMA subscribers of mobile cubes and UPC subscribers of fixed products, through the use of online panels is generally challenging since the probability of those specific individuals being members of such panels is low.
- (250) The Commission considers that the survey submitted by the Notifying Party suffers from a number of limitations. First, the online panels used for the survey fall in the category of so-called "non-probability panels", that is, the panellists are not recruited in a statistically controlled manner and, hence, are likely to be unrepresentative of the overall population.<sup>145</sup> Second, the number of respondents with TMA cubes or UPC fixed pure internet products as their preferred choice was very low. Third, of these respondents, only few stated that they switched or screened the market in the last 12 months, indicating that many respondents were not familiar with the products on the market. Fourth, many respondents expressed choices that are at odds with the offers on the market, casting further doubt on the reliability of the survey results.

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<sup>143</sup> A practical way to achieve this is to carry out a targeted survey addressed to those customers of respective telecom operator that acquired (or modified) their subscription in the recent past, for example within the last 6 or 12 months, and presumably carried out a comparison of the various offerings available in the market at the time of the purchase.

<sup>144</sup> Marketmind has developed a consumer online access panel together with its partner Talk Online Panel GmbH ("Talk"). For the purpose of the current survey, Talk's panel was supplemented through the use of several other providers.

<sup>145</sup> Commission decision of 1 September 2016 in case M.7758, *Hutchinson 3G Italy / Wind / JV*, recitals 1498 and seq.

- (251) In light of these shortcomings, the Commission considers that only limited evidentiary weight can be given to the results of the survey.<sup>146</sup>
- (252) As for the relevance of the UPC internal questionnaire allegedly showing that only [0-5]% of UPC customers terminating their contracts would sign up to a mobile internet service instead, the Commission notes that the results of such a questionnaire provide only a limited indication that the Parties may not be close competitors, if considered in combination with other elements in the file pointing to such conclusion.
- (253) Finally, the Commission takes note of the event study submitted by the Notifying Party, mentioned in paragraph (225). The study seeks to identify promotional events that had a significant (positive) impact on TMA's and UPC's respective number of gross adds and asks whether these events had a measureable (negative) impact on the customer base of the other party. The Commission notes that such studies must be interpreted with caution since promotional events are only one of many factors that can affect relative changes in the demand of competing products. However, the Commission also considers that the results of the event study are consistent with the remaining qualitative evidence available suggesting that the Parties are not particularly close competitors in this market.
- (254) Therefore, while a certain degree of substitution between the different technologies offered respectively by TMA and UPC appears to exist, on the basis of the above considerations, the Commission concludes that TMA's and UPC's respective home internet access products do not closely compete.

(iii) Potential loss of competition

- (255) Certain respondents to the market investigation consider that the Transaction could have negative effects on the retail internet access services market (including mobile broadband services).<sup>147</sup> Some respondents have pointed to possible price increases, due to the reduced competition and the increased market power of the merged entity.
- (256) In particular H3A pointed out that the reduction in the number of players will result in reduced competition on the relevant market that in turn will lead to consumer harm through potential price increases, reduction of choice and reduction in the levels of market innovation. H3A added that it will be [...], because of [mobile network related issues]. According to H3A, the A1 regulated wholesale VULA access to its fixed network would be economically unfavourable: on average, wholesale access prices see an advantage for low and a disadvantage for high bandwidths, which means that [...]. According to H3A, the situation will be particularly problematic in Vienna, due to the significant position of UPC.

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<sup>146</sup> The Commission also notes that the Notifying Party's conclusion on the closeness of competition between the Parties depends on disregarding as irrational a significant number of choices that are at odds with the observed popularity of the relevant products. This opens up the results of the survey to multiple interpretations, only one of which is the one ascribed to the results by the Notifying Party.

<sup>147</sup> Questionnaires Q2, reply to question F.1.2; Q3, reply to question D.1.2; Q4, reply to question 41.2 and Q5, reply to question 42.2.

- (257) Similarly Ventocom stated that the Transaction would eliminate UPC as important competitive force in the retail market for home internet access services that is already characterized by high concentration and high entry barriers.
- (258) A1 pointed to the merged entity's strong position in the UPC footprint and in particular in Vienna, thanks to the performance of its cable network and [...]. A1 further submitted that the merged entity will have a dominant position in Vienna and in other areas of UPC's footprint. According to A1, UPC's actual behaviour points already today to a dominant position, as UPC has been able to implement annual price increases since 2013 without any relevant loss of customers, while overall broadband prices have generally decreased. Moreover, other competitors would not be able to upgrade their structure to a level that would be comparable to UPC's network.
- (259) The RTR considers that the Transaction may potentially have some positive effects for consumers as TMA may better compete with the market leader A1. In particular, by relying on UPC infrastructure, TMA will become more independent from (regulated) wholesale access services of A1. This might give to the merged entity more room for technical and/or product innovation and also more flexibility with regard to prices. However, the RTR also expressed concerns on the consequences of the Transaction in the retail internet access services market. In particular, considering the limited efficiencies and cost savings, the RTR submitted that the Transaction could lead to price increases. RTR's concern is linked to the high market concentration after the Transaction, as the three main operators would have a combined and stable market share close to [90-100]%.
- (260) The Austrian Competition Authority ("BWB") emphasised that the Transaction concerns a mobile network operator (with virtually no presence in fixed telecommunications markets) and a fixed telecommunications provider (with minimal presence in mobile telecommunications markets). The Parties' business activities are to a large degree complementary, with few horizontal overlaps and some potential (technical) vertical links. Therefore, according to the BWB, the Transaction is procompetitive as it will enable TMA to effectively compete with the incumbent A1 and with H3A.
- (261) First, the Commission notes that the combined market share of the Parties does not exceed 25%.<sup>148</sup>
- (262) Second, as explained in paragraphs (239) to (254) above, the two products, although part of the same product market, have a different positioning and are not closely competing. Therefore, the competitive constraint imposed by the Parties on each other is likely smaller than suggested by their market shares.
- (263) Third, following the Transaction, two strong alternative providers will remain active on the market and will continue to exercise significant competitive pressure on the merged entity. These providers include the incumbent operator, A1, with a [40-50]% market share. The other competitor, H3A, has a

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<sup>148</sup> Merger Regulation, recital 32, and Horizontal Merger Guidelines, paragraph 18.

market share ([20-30]%) comparable to the one of the merged entity. Other smaller competitors will remain active as well.

- (264) Despite the arguments submitted by H3A concerning its alleged difficulties to compete, the Commission considers that, H3A will remain a strong competitor in the potential market of retail market for internet access services to residential customers. Firstly, as regards H3A's claim of [...], the Commission considers that, a number of expected technological improvements should significantly expand the available mobile capacity in the foreseeable future.<sup>149</sup> Moreover, further spectrum will be made available by the RTR in upcoming spectrum auctions. Secondly, as regards H3A's claim that A1's regulated wholesale offer would not be viable [...], the Commission notes that based on this regulated wholesale offer TMA currently offers competitive hybrid internet access products. Given that H3A also owns a mobile infrastructure, it could also offer hybrid products at a competitive price. In addition, A1 has to allow for a minimum retail margin, which increases with the bandwidths offered<sup>150</sup>, therefore potentially allowing commercially viable offers also in the segments for higher bandwidths.
- (265) In this context, the RTR notified the wholesale regulation to the Commission and the Commission issued comments in 2017.<sup>151</sup> In its comments, the Commission listed the VULA rates and commented inter alia on the economic replicability test applied by the RTR to determine these rates. However, the Commission did not voice any doubts that those rates would not be commercially viable for potential access seekers.
- (266) Moreover, the mere observation that outside of its cable footprint UPC provides internet access to its retail customers on the basis of the regulated wholesale access to A1's fixed network suggests that the terms of this wholesale offer are viable.
- (267) As for the alleged serious negative effects stemming from a loss of competition in UPC's footprint, in Vienna in particular, the Commission notes that in all local areas that form part of the UPC footprint, the merged entity will continue to face strong competitive pressure from A1. Also H3A has a significant presence in those areas, with market shares around [20-30]%. In this respect, the Commission notes that TMA's market position and hence the overlap tends to be somewhat smaller in the UPC footprint (overlap [5-10]%) and in Vienna (overlap [5-10]%) compared to the Austrian territory as a whole. Moreover, at present H3A has a much stronger market presence than TMA in UPC's footprint (H3A [20-30]% vs. TMA [5-10]%) and in Vienna ([10-20]% vs. [5-10]%).
- (268) As for an economic submission by A1 according to which the merged entity's market shares, in terms of subscribers, in this market are significantly higher than those reported by the Parties, the Commission notes that during the market investigation it scrutinised all reported market share data by carrying

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<sup>149</sup> Commission decision of 11 May 2016, in case M.7612 - *Hutchison 3G UK / Telefónica*, Annex C.

<sup>150</sup> See TKK Decision M 1.5/15-115 of 24 July 2017, page 16.

<sup>151</sup> See Commission Decision C(2017) 4687 of 30.6.2017 pursuant to Article 7(3) of Directive 2002/21/EC concerning Case AT/2017/1987 and Case AT/2017/1988.

out a market reconstruction exercise addressed to the four main market participants (A1, H3A, TMA and UPC) as well as requesting data from the RTR. Despite minimal inconsistencies linked to different definitions of active and residential subscribers, the Commission was able to conclude that the market shares reported in the Form CO are representative of the various participants' market position and suitable for basing the Commission's competitive assessment on.

- (269) [In particular, the figures reported by the Parties are quite close to the national level market share data provided to the Commission by RTR]. Concerning the cities of Vienna, Graz, Innsbruck and Klagenfurt, for which the RTR could not provide data, the market shares reported by A1 are driven, [description of assumption], a fact that is not supported by the Commission's investigation and market reconstruction.<sup>152</sup>
- (270) As for A1's allegation that UPC would already enjoy a dominant position in Vienna, as shown by the price increases in recent years, the Commission notes that A1 has not provided any element to support this thesis, but only a short article in a local web-magazine pointing to some not quantified and not circumstantiated price increases in 2017. This element alone, confronted with the market analysis and the market reconstruction carried out by the Commission, cannot justify a conclusion of a dominant position by UPC in a part of the relevant geographic market. The alleged price increase also appears not to be limited to Vienna, and as such the allegation of [...] is similarly unsubstantiated. Moreover, even if UPC gained [...], this would not be merger-specific and already reflected in UPCs market shares.
- (271) In light of the above, the Commission considers that the Transaction is not likely to result in a significant loss of competition.

(iv) Potential entry

- (272) As regards potential entry, H3A submits that the A1 regulated wholesale access to DSL does not allow for a suitable entry in the home internet access services market, because the terms of this access are economically unfavourable. On average, wholesale access prices see an advantage for low and a disadvantage for high bandwidths, which means that an operator cannot compete with either A1 or the merged entity in the provision of fixed broadband access services to households.
- (273) The RTR submits that alternative operators can offer fixed services in the entire area of Austria based on physical unbundling, bitstream services, and in particular virtual unbundling (with local and regional handover), since access to A1's nationwide network is regulated. RTR considers this regulated access as sufficient to lower the entry barriers in the fixed segment.
- (274) The RTR submits that MVNO access is currently offered by all three MNOs and a number of new MVNOs (MVNEs and service providers) have entered the market in the last years. Therefore, the entry barriers in the mobile segment can currently also be considered to be low. However, according to

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<sup>152</sup> Reply of 23.05.2018 to RFI 1 to H3A.

the RTR, there is considerable uncertainty as to whether this will also be the case in the medium to long run, because several developments have weakened or may weaken further the competitive position of MVNOs relative to MNOs in the future. In particular, the RTR submits that:

- the increasing data volumes, in particular in the residential segment, can make it difficult for MVNOs to compete (in particular for flat rate offers) as they have to pay a per-unit price at the wholesale level;
- it is uncertain if or when MVNOs will get access to new technologies, in particular to 5G, to wholesale offers for IoT, etc.;
- The commitments from the *Hutchison/Orange* merger will expire in a few years. This will weaken the bargaining position of MVNOs versus MNOs.

(275) In this respect, the Commission notes that the material relevance of the regulated wholesale DSL offers is demonstrated by the fact that in 2017, about [10-20]% of UPC's customers were still served by the DSL connection, mainly outside of the UPC footprint, although the figure is declining. Moreover, A1's DSL wholesale offer is at the basis of TMA's new offer of hybrid broadband products, which in April 2018 accounted for roughly [10-20]% of TMA's gross adds of home broadband products.

(276) Furthermore, A1 wholesale DSL offer appears relevant for the provision of hybrid broadband products, where DSL is mainly used for network-offload and as a consequence low bandwidths are requested. Hybrid offers are relevant for the present analysis also because they alleviate potential capacity constraints related to purely mobile offers, as the mobile network capacity needed by the hybrid broadband product is only approximately 30 to 50% of the capacity used by a mobile cube.

(277) The Commission further notes that according to the Notifying Party, if A1 wants to terminate the standard wholesale offer contract and increase wholesale charges, the wholesale customer can object to the termination and the change of wholesale conditions in which case the existing standard wholesale offer remains valid. A1 would then be required to initiate a procedure with TKK and it is ultimately for TKK to decide if the price changes proposed by A1 may be implemented or not. This mechanism reduces the risk of wholesale price increases.

(278) With specific regard to the H3A commitment in case M.6497, to offer wholesale access on a retail-minus basis implies that the wholesale price could increase if the retail prices of H3A were to increase as a consequence of the Transaction. On the other hand, the Commission found that [...] based on the commitments.<sup>153</sup>

(279) In light of the above considerations, the Commission is of the view that, on the basis of the evidence in the file, barriers to entry in the home internet

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<sup>153</sup> Reply of 25.06.2018 to RFI 2 to H3A.

access services market are sufficiently low as to constrain to some extent the behaviour of the merged entity in Austria.

(c) Conclusion on horizontal non-coordinated effects

- (280) Based on all the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market by way of horizontal non-coordinated effects, in the market for retail internet access services for residential customers in Austria.

4.2.1.2. Horizontal coordinated effects

(a) The Notifying Party's views

- (281) The Notifying Party submits that the Transaction will not give rise to coordinated effects on a hypothetical retail market for internet services including fixed internet services and mobile internet (data) services irrespective of the geographic scope of this hypothetical market. Coordinated effects can, in particular, be excluded for the following reasons:

- Substantial asymmetries between firms in terms of technology and cost structure: the differences in terms of technology and cost structure between the firms active on this market (A1, H3A and TMA/UPC) make it impossible for them to reach any terms of coordination and would undermine any hypothetical coordination;
- Lack of transparency due to differentiated services and tariffs: the market is characterized (i) by differentiated services and tariffs, and (ii) by standalone and bundled offers. This extreme heterogeneity implies that the market lacks the degree of transparency which would be necessary to reach terms of coordination and to monitor deviations from any hypothetical coordination;
- Substantial growth in demand: this current relevant growth in demand prevents any coordination, irrespective of the geographic scope of the market;
- Market presence of various fixed and mobile operators: In addition to A1, H3A and TMA/UPC, various fixed and mobile operators are active on the home internet access services market, with a combined market share of approximately [10-20]%;
- Highly asymmetric market positions: A1 would be the clear market leader with an estimated share of about [40-50]%. H3A and TMA/UPC are significantly weaker with estimated shares at around only [20-30]%. Such a high asymmetry suggests that it would be impossible to reach terms of tacit coordination between firms. H3A and TMA/UPC have strong incentives to fiercely compete with A1 and to challenge A1's incumbent position.

- (282) The Notifying Party submits that coordinated effects are also excluded if one assumed that the geographic scope of a hypothetical retail market for internet services were the UPC's footprint or local (city level), for the same reasons mentioned above.



(b) The Commission's assessment

- (283) As set out in the case law<sup>154</sup> and the Horizontal Merger Guidelines,<sup>155</sup> to find coordinated effects evidence is needed that the horizontal merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.<sup>156</sup>
- (284) The following aspects are particularly relevant for the assessment of whether coordination is likely to emerge:<sup>157</sup> (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations from the terms of coordination; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reaction of outsiders such as current and future competitors not participating in the coordination, as well as customers.
- (285) The Commission notes that the RTR and some of the Parties' competitors pointed to the risk of coordinated effects.
- (286) H3A submits that the Transaction will be conducive to coordinated effects between TMA/UPC and A1, which would be collectively dominant. One key effect of the Transaction will be to remove the current asymmetry between TMA (so far only mobile) and A1 (mobile/fixed): post-merger, the merged entity will control the only significant fixed line network in Austria other than that of A1. As a result, the merged entity will have aligned interests with respect to its market strategy concerning the mobile market and fixed/mobile offerings. The merged entity will no longer pursue a mobile-only strategy but will, like A1, consider what market conduct is most profitable for its combined mobile and fixed line activities. The merged entity and A1 will be incentivised to act in coordination. H3A claims that in light of uncompetitive regulated wholesale offers for fixed access and because of capacity limitations in its mobile network, [...]. H3A adds that pricing has a high degree of transparency, as it is a main marketing tool. Finally, according to H3A there is a history of structural and contractual links already established between A1 and TMA,
- (287) Ventocom submits that the Transaction will increase the risks of coordinated effects, as it will result in a reduction of market participants in an already concentrated market, the removal of a strong competitive force, the increase in symmetry between the remaining players. The market is transparent, product differentiation in particular between MNOs is limited, and the MNOs

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<sup>154</sup> Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECRI-4951, and in particular paragraphs 122-123 regarding the conditions for tacit coordination; Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, and in particular paragraphs 58 and 82 regarding the fact that “[i]f there is no significant change in the level of competition obtaining previously, the merger should be approved because it does not restrict competition”.

<sup>155</sup> Horizontal Merger Guidelines, paragraphs 22, 39 et seq.

<sup>156</sup> Horizontal Merger Guidelines, paragraph 22(b).

<sup>157</sup> Horizontal Merger Guidelines, paragraph 41.

already cooperate in wholesale/roaming agreements. Significant price increases are to be expected due to further concentration in the market.

- (288) The feedback of the market investigation suggests that the market for home internet services in Austria has a certain degree of transparency. The prices and the product offerings are publicly available, for instance from the MNOs' websites and from retail shops.
- (289) As a preliminary remark, on the basis of the market investigation and of the analysis of the internal documents the Commission has not found any element pointing to coordination already ongoing between the main market players – or some of them in the market for retail internet access services for residential customers in Austria. This might suggest that the market conditions are currently not likely to be conducive to coordination.
- (290) In this context, the retail market for home internet services in Austria appears to be characterised by a rather high degree of transparency as regards prices and product offerings of the MNOs, the MVNOs and of the fixed operators. Nevertheless, this is apparently not sufficient for coordination to arise, as also a number of further factors need to be met.
- (291) The Commission considers that also post-Transaction the risk of coordination remains limited. The Commission has analysed in particular two potential scenarios of coordination. First, A1, the merged entity and H3A could hypothetically coordinate. Second, A1 and the merged entity could coordinate, with H3A remaining outside of the hypothetical coordination.

(i) Hypothetical coordination of A1, the merged entity and H3A

- (292) The Commission considers that there is a limited risk that A1, the merged entity and H3A would coordinate post Transaction, mainly because it appears unlikely for them to reach terms of coordination.
- (293) In this regard, the Commission notes that although the Transaction will reduce the current asymmetry between TMA (so far mainly mobile) and A1 (mobile/fixed), the offers of the three main operators will remain relatively differentiated: A1's offer is mainly based on DSL, TMA/UPC on cable networks and mobile, and H3A mainly on mobile. The technical differences also translate into differences in terms of user experience (see e.g. paragraphs (241) to (245)). Coordination is generally more difficult in market with differentiated products.<sup>158</sup> The asymmetry is also relevant on a geographic perspective, with TMA/UPC's presence more prominent in UPC's footprint and the other two operators generally active in the whole national territory with similar technologies/cost structures. Moreover, the market shares of the three main operators will not be similar, considering that A1 will hold a market share roughly double of that of the merged entity and H3A.
- (294) The Commission considers that changes in demand and supply are an element to be taken into consideration in the assessment of any possible coordinated effects. In particular, there has been a significant growth in demand of mobile

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<sup>158</sup> Horizontal Merger Guidelines, paragraph 45.

cubes, which is the main product for mobile home connections: from 2015 to 2017, the number of subscribers of TMA and A1 cubes increased by about [...] % and the respective market shares more than doubled. The recent introduction of hybrid offers and the future launch of the 5G mobile network will probably introduce further instability in the market. Therefore, demand conditions do not look sufficiently stable to make coordination likely.<sup>159</sup>

- (295) Whereas it is true that the Transaction would change the market structure by reducing the number of operators and by causing a higher degree of concentration, the three MNOs would remain differentiated and demand unstable, implying a limited risk of coordination.
- (296) There is also no evidence to suggest that the Transaction would significantly alter the existing degree of transparency on the Austrian telecommunications markets, and therefore the Commission considers that any possible impact of the Transaction on transparency will not materially change the existing ability of firms to monitor deviations.

(ii) Hypothetical coordination of A1 and the merged entity

- (297) The Commission also considers that there is a limited risk that A1 and the merged entity could reach terms of coordination and sustain such coordination over time, mainly because this would be undermined by outsiders of the coordination, in particular by H3A.
- (298) First, although A1 and the merged entity will become more symmetric (both will be fixed/mobile operators), there remain significant differences: A1 will maintain a market share nearly twice as large as the one of the merged entity and the respective offers will remain relatively differentiated: A1's offer is mainly based on DSL, while the merged entity's offer will be mainly based on cable networks and mobile.
- (299) Moreover, although A1 and TMA cooperate with respect to certain activities such as mobile infrastructure rollout and operation, this does not in itself imply that coordination on the distinct market for retail internet access services would be facilitated.
- (300) Second, the issue of changes in demand and supply as set out in paragraph (294) is equally relevant for reaching terms of coordination in this scenario.
- (301) Third, contrary to H3A's claims, the Commission considers that H3A would have both the ability and the incentive to undermine any coordination on the part of the merged entity and A1, as it will be able to compete with mobile/hybrid offers and it is also expanding in fixed offers, following the recent acquisition of a fixed operator with the explicit intention to offer a complete set of telecommunications services and to compete with the incumbent operator (see below paragraph (389)).

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<sup>159</sup> Horizontal Merger Guidelines, paragraph 45.

(c) Conclusion on horizontal coordinated effects

- (302) The Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to horizontal coordinated effects on the market for retail internet access services for residential customers.

**4.2.2. Retail mobile telecommunications services**

- (303) Both Parties provide mobile telecommunications services to end customers in Austria. In the overall retail market for mobile telecommunications services, the Parties have a combined share of [20-30]% in Austria (UPC with [0-5]% and TMA with [20-30]% in terms of subscribers). On the potential segment for private customers the Parties have a combined share of [20-30]% (UPC with [0-5]% and TMA with [20-30]% in terms of subscribers) and on the potential segment for business customers the Parties have a combined share of [20-30]% (UPC with [0-5]% and TMA with [20-30]% in terms of revenues) in Austria.

4.2.2.1. The Notifying Party's views

- (304) The Notifying Party submits that the Transaction will not lead to competition concerns on the retail market(s) for mobile telecommunications services in Austria.
- (305) First, the Notifying Party submits that the Transaction involves only a minor horizontal overlap between an MNO and a very small MVNO. UPC's market share has remained very limited since its market entry in December 2014. The increment resulting from the Transaction is negligible.
- (306) Second, UPC is not an important competitive force on the Austrian retail market for mobile telecommunications services. UPC's retail mobile activities are limited also when compared to other MVNOs one of which has an estimated market share of approximately [5-10]%.
- (307) Third, the Austrian mobile market is characterized by extremely low barriers to entry and, consequently, an ongoing wave of MVNO entry over the past three years. These MVNOs entered the retail mobile market on the basis of H3A's reference offer, offered as a commitment in connection with the merger control clearance in the *Hutchison 3G Austria/Orange Austria*<sup>160</sup> case, and also with A1 and TMA.
- (308) Austrian mobile customers can currently choose between almost 40 mobile brands on the Austrian retail mobile market (this includes brands of MNOs and MVNOs). Approximately 25 MVNO brands (including branded resellers) are present on the Austrian market most of which have entered the market over the past few years. Further market players are expected to enter the market in the course of 2018.

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<sup>160</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*.

- (309) Coordinated effects can be excluded, as UPC is a negligible player on the market and its elimination has no impact on the hypothetical ability or incentives of the remaining market participants to engage in coordination.

#### 4.2.2.2. The Commission's assessment

- (310) Based on the results of the market investigation, the Commission has not identified specific competition concerns arising from the Transaction in relation to the retail market for the supply of mobile telecommunications to end customers in Austria on a standalone basis, as regards either horizontal non-coordinated or horizontal coordinated effects. Few respondents have expressed some concerns with respect to the retail mobile market, making reference to fixed-mobile convergence and the possibility to offer fixed/mobile bundles.<sup>161</sup> This issue is analysed below in paragraphs (372) to (394), in the section 4.4 on conglomerate effects.
- (311) A1 voiced the concern that the Transaction would lead to the elimination of the remedy taker in case M.6497 and one of the few full-MVNO active on the market.
- (312) The Commission notes, first, that UPC acts as an MVNO and its presence on the market is extremely limited (less than [0-5]% market share by revenues). The increment brought about by the Transaction is not higher than [0-5]% (in terms of subscribers) in the overall market and in any market segment. The Transaction will therefore have a very marginal impact on TMA's position in the market. The combined market share of the Parties remains below 30% on all possible market segments regardless of whether it is measured by subscribers or revenue, with the exception of the private customer post-paid segment, where it is [30-40]%. However, in this segment the merged entity will remain the third operator, after A1 ([30-40]%) and H3A ([30-40]%).
- (313) Second, after the Transaction, the merged entity will continue to face competition from the two remaining MNOs in Austria, namely A1 ([30-40]% market share by subscribers) and H3A ([20-30]% by subscribers) as well as from other MVNOs such as HoT, which has a market share of [5-10]% in terms of subscribers.
- (314) As for the fact that UPC was the remedy taker in case M.6497, the Commission notes that following the adoption of that decision other MVNOs also started operating in the Austrian market, both on the basis of the commitments offered by H3A and on other MNOs' networks. In particular the reference offer provided by H3A as part of its commitments is open to all MVNOs, not just to UPC. Currently, MVNOs represent about [5-10]% of the Austrian market, in terms of subscribers.

#### 4.2.2.3. Conclusion

- (315) In the light of the above, and in particular given the small increment brought about by the Transaction, as well as the presence of relevant competitors on this market, the Commission concludes that the Transaction does not raise

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<sup>161</sup> Questionnaire Q2, reply to question F.1.4.1 and Questionnaire Q5, reply to question 42.4.1.

serious doubts as to its compatibility with the internal market in relation to horizontal effects on the retail market for mobile telecommunications services and its possible segments in Austria.

#### **4.2.3. Wholesale leased lines**

##### 4.2.3.1. The Notifying Party's views

- (316) The Notifying Party submits that the Transaction will not lead to competition concerns on the wholesale leased lines market irrespective of the precise definition of the relevant product and geographic market.

##### 4.2.3.2. The Commission's assessment

- (317) If the relevant geographic market was considered nationwide, that is to say limited to the territory of Austria, the market for wholesale leased lines and its potential sub-segments would not be horizontally affected, since the Parties' combined market shares are far below 20% (see section 3.1.5.3 above). The Commission agrees with the Notifying Party's view that the Parties' are small players in the wholesale leased lines market if defined nationwide, that there are sufficient alternative suppliers (e.g. energy utilities companies) in this market, thereof the incumbent A1 who is subject to access and price regulation in large parts of Austria.
- (318) If the relevant geographic market was local (limited to individual communes), and if at a product level a distinction between different technologies was made (distinguishing also between services with a guaranteed bandwidth above or below 10 Mbit/s), the Transaction would give rise to one horizontally affected market, namely, the potential market for the provision of Ethernet services of guaranteed bandwidth with bandwidth above 10 Mbit/s in the commune of [...] (representing less than 0.01% of the Austrian population). Based on data submitted by the RTR and the Parties, in this potential market the combined market share of the merged entity would be [40-50]% (TMA: [20-30]%. UPC: [20-30]%).
- (319) The Commission notes that (i) despite this commune being an affected market the merged entity's combined market shares would not exceed 40% in this narrowest possible sub-segment of Ethernet services of guaranteed bandwidth with bandwidth above 10Mbit/s; (ii) post Transaction in this commune there will still exist four alternative suppliers of leased lines including the incumbent A1; (iv) Ethernet services with guaranteed bandwidth of less than or equal 10 Mbit/s would be available; (iv) Ethernet services of guaranteed bandwidth are not the only leased lines available in this commune but two traditional interface lines and one dark fibre line are also available<sup>162</sup>; and (v) during the market investigation none of the respondents raised any concerns with regard to this specific potential market.
- (320) The findings would not materially change if a distinction at 2 Mbit/s were considered, given that TMA does not have any leased line with a bandwidth of less than or equal to 2 Mbit/s and because the share of the merged entity in

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<sup>162</sup> In the overall wholesale leased lines product market in the commune of [...], which includes all possible sub-segments the merged entity would hold a market share of approximately only [10-20]%.

[...] (in terms of the number of terminating segments) amounts to [20-30]% (TMA: [10-20]%. UPC: [10-20]%) if no distinction concerning the minimum guaranteed bandwidth is made. In the latter case, the share also remains below 25%, providing a first indication that a concentration is not able to impede effective competition.<sup>163</sup>

- (321) Finally, except for two respondents to the market investigation that were generally pointing to the fact that a further concentration in the market for wholesale leased lines would not be beneficial to competition since prices may increase, the majority of respondents was neutral or positive towards the Transaction and its effects on their company. Only one respondent feared price increases while two other respondents indicated that the transaction would not have a material impact or would even lead to price decreases.<sup>164</sup>

#### 4.2.3.3. Conclusion

- (322) In light of the analysis above the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to horizontal effects either on a possible nationwide market for wholesale leased lines and its potential sub-segments, or on potential markets for wholesale leased lines at the level of the single communes and their potential sub-segments.

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<sup>163</sup> Merger Regulation, recital 32, and Horizontal Merger Guidelines, paragraph 18.

<sup>164</sup> Questionnaire Q6, Section C. Impact of the Transactions

### 4.3. Assessment of vertical effects

(323) The Transaction also gives rise to a number of vertically affected markets, as can be seen from the following table.<sup>165</sup>

Upstream market	Downstream market
<p><b>Wholesale access and call origination services on mobile network</b></p> <p>TMA: [70-80]% (revenues)</p> <p>UPC: not active</p>	<p><b>Retail supply of mobile telecommunication services in Austria</b></p> <p>TMA: [20-30]% (subscribers)</p> <p>UPC: [0-5]% (subscribers)</p>
	<p><b>Retail supply of internet access services in Austria</b></p> <p>including both fixed and mobile connections in Austria:</p> <p>TMA: [10-20]% UPC: [10-20]%</p> <p>Including fixed but excluding mobile connections:</p> <p>TMA: &lt;[0-5]% UPC: [20-30]% (subscribers)</p>

<sup>165</sup> As explained in paragraph (80) above, the vertical relationship between the market for wholesale broadband access and the market for retail internet access does not give rise to vertically affected markets. Nevertheless, the Commission notes that A1 submitted that the merged entity could foreclose its competitors on high speed internet access and pointed out that UPC is not under any regulated access obligations. However, the Commission notes that already pre-Transaction, UPC does not provide wholesale access to its HFC network (but only to its LLU-DSL network), and that there are no indications that UPC would start providing access to its HFC network absent the Transaction. As a result, in this context no merger-specific effects can arise and the Transaction does not raise serious doubts as to its compatibility with the internal market in this respect.



Upstream market	Downstream market
<p><b>Wholesale leased lines</b></p> <p><b>If market is defined on the level of communes</b></p> <p>Please see footnote 62 above for the communes where the merged entity would hold a market share equal or larger than 30%.</p>	<p><b>Retail supply of mobile telecommunication services</b></p> <p>TMA: [20-30]% (subscribers)</p> <p>UPC: [0-5]% (subscribers)</p>
<p><b>If market is defined nationwide:</b></p> <p>In the overall wholesale leased lines market TMA: [0-5]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for wholesale trunk segments TMA: [10-20]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for wholesale terminating segments: TMA: [0-5]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for terminating leased lines with bandwidth above 2 Mbps: TMA: [0-5]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for terminating leased lines with bandwidth equal and below 2 Mbps: TMA: [0-5]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for terminating leased lines with bandwidth above 10 Mbps TMA: [0-5]% (revenues) UPC: [0-5]% (revenues)</p> <p>In the potential segment for terminating leased lines with bandwidth equal and below 10 Mbps: UPC: [0-5]% (revenues) TMA: [0-5]% (revenues)</p> <p>In the potential segment for passive infrastructure (dark fibre): UPC: [0-5]% (revenues) TMA: [0-5]% (revenues)</p> <p>In the potential segment of active infrastructure (traditional managed leased lines and Ethernet services with guaranteed bandwidth): UPC: [0-5]% (revenues) TMA: [0-5]% (revenues)</p>	<p><b>Retail home internet access services market</b></p> <p>including both fixed and mobile connections in Austria: TMA: [10-20]% UPC: [10-20]%</p> <p>including fixed but excluding mobile connections: TMA: &lt;[0-5]% UPC: [20-30]% (subscribers)</p>
	<p><b>Retail business connectivity market</b></p> <p>TMA: not active</p> <p>UPC: [0-5]% (on the overall Austrian retail market for business connectivity services); below 20% (in potential segments)</p>
	<p><b>Retail fixed telephony services</b></p> <p>TMA: not active</p> <p>UPC: [10-20]%</p>
	<p><b>Wholesale broadband access services market</b></p> <p>TMA: not active</p> <p>UPC: &lt;[0-5]%</p>
	<p><b>Wholesale access and call origination services on mobile network</b></p> <p>TMA:[70-80]% (revenues)</p> <p>UPC: not active</p>

(324) In addition to the links displayed in the table above, the Transaction gives rise to a number of further vertically affected markets:

(I) the upstream wholesale markets for international roaming services in Member States (other than Austria) in which DTAG offers such services and the downstream retail market for mobile telecommunications services in Austria (where UPC is active);

(II) the upstream wholesale markets for call termination services respectively on TMA's mobile network in Austria and on DTAG's mobile networks (outside Austria), and both (i) the downstream retail market for mobile telecommunications services in Austria (where UPC is active) and (ii) the downstream retail market for fixed telecommunications services in Austria (where UPC is active);

(III) the upstream wholesale market for call termination services on UPC's mobile network and (i) the downstream retail market for mobile telecommunications services in Austria (where TMA is active), (ii) the downstream retail markets for mobile telecommunications services in Member States where DTAG is active, and (iii) the downstream retail markets for fixed telecommunications services in Member States where DTAG is active;

(IV) the upstream wholesale markets for call termination services respectively on TMA's fixed network in Austria and on DTAG's fixed networks (outside Austria), and both (i) the downstream retail market for mobile telecommunications services in Austria (where UPC is active) and (ii) the downstream retail market for fixed telecommunications services in Austria (where UPC is active);

(V) the upstream wholesale market for call termination services on UPC's fixed network and (i) the downstream retail market for mobile telecommunications services in Austria (where TMA is active), (ii) the downstream retail markets for mobile telecommunications services in Member States where DTAG is active, and (iii) the downstream retail markets for fixed telecommunications services in Member States where DTAG is active;

(VI) the downstream wholesale market for end-to-end calls in Austria (where UPC is active) and (i) the upstream wholesale markets for call termination services respectively on TMA's mobile network in Austria and on DTAG's mobile networks (outside Austria), and (ii) the upstream wholesale markets for call termination services respectively on TMA's fixed network in Austria and on DTAG's fixed networks (outside Austria).

(325) The Notifying Party submits that the markets mentioned in the previous paragraph are only technically vertically affected, implying that the Transaction cannot raise any competition concerns. The mentioned wholesale markets are regulated under the EU telecommunications rules, in order to prevent any foreclosure or anticompetitive discrimination. According to the Notifying Party, the Commission has already recognised this as a relevant

factor in several past decisions. Furthermore, some of the vertical links are due to the international activities of DTAG that would not be materially impacted by the Transaction.

- (326) The Commission notes that no complaint has been received regarding the vertical relationships indicated in previous paragraph (324). Given the low increment brought by the Transaction in the downstream markets, as well as the fact that the upstream markets are extensively regulated,<sup>166</sup> the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationships mentioned in paragraph (324) .

#### **4.3.1. Wholesale access and call origination services on mobile networks**

- (327) In Austria there are three MNOs, which are currently providing wholesale access and call origination services on mobile networks (TMA, A1 and H3A). On the market for wholesale access and call origination services only TMA, and not UPC, is active (with a market share of [70-80]% in terms of subscribers and [80-90]% in terms of revenues).

##### 4.3.1.1. The Notifying Party's views

- (328) The Notifying Party submits that the Transaction will not lead to any input or customer foreclosure concerns since:
- i. the structure of the Austrian market for wholesale access and call origination on mobile networks would not be affected by the Transaction as it will not reduce the number of MNOs that provide wholesale access to MVNOs in Austria;
  - ii. market shares in the wholesale market for access and call origination on mobile networks would not be informative, as they can be subject to large variations, should a large wholesale customer switch its host MNO. TMA's current relevant position on the Austrian market for wholesale access and call origination on mobile networks merely results from the fact that TMA hosts HoT, the by far largest Austrian MVNO;
  - iii. TMA would not have the ability to foreclose MVNOs from wholesale access and call origination on mobile networks in Austria because any MVNO could obtain wholesale access to H3A's and A1's mobile

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<sup>166</sup> Commission decision of 1 September 2016 in case M.7758, *Hutchinson 3G Italy / Wind / JV*, recitals 218 to 226. With respect to the market for international roaming services, see Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications network within the Union (OJ 2012 L 172/10), last amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 147/1). With respect to the wholesale market for call termination on mobile networks in Austria, see: with regard to TMA's mobile network, RTR Decision of 30 September 2013, M 1.10/12-100, as amended by RTR Decision of 21 December 2015, M 1.1/15-47; in respect of UPC's mobile core network, see RTR Decision of 15 June 2015, M 1/14-50, as amended by RTR Decision of 21 December 2015, M 1.1/15-51. With respect to the wholesale market for call termination on fixed networks in Austria, see: with regard to UPC's fixed network, see RTR Decision of 30 September 2013, M 1.8/2012-176, as amended by RTR Decision of 21 December 2015, M 1.2/15-70; in respect of TMA's hypothetical fixed network, see RTR Decision of 30 September 2013, M 1.8/2012-174, as amended by RTR Decision of 21 December 2015, M 1.2/15-68.

networks. Furthermore, H3A would even be legally obliged, on the basis of the commitment which H3A had offered in the *Hutchison 3G Austria/Orange Austria* case<sup>167</sup>, to grant wholesale access to H3A's mobile network;

- iv. TMA would not have any incentive to foreclose MVNOs from wholesale access and call origination on mobile networks in Austria, as wholesale revenues achieved with MVNOs – in particular with HoT – account for an important share of TMA's revenues. Moreover, the MVNOs hosted on TMA's mobile network would overwhelmingly target customer groups and segments which [confidential information about customer groups and segments targeted by TMA].

#### 4.3.1.2. The Commission's assessment

- a. Vertical link between wholesale market for access and call origination services on mobile network and retail supply of mobile telecommunications services

(329) The Commission considers that pre-Transaction, TMA's ability to foreclose MVNOs is limited despite its very high market share in the wholesale market for access and call origination services. As pointed out by the Notifying Party, there are two further potential hosts for MVNOs, namely A1 and H3A. Moreover, until 2022 H3A is legally obliged to grant wholesale access to H3A's mobile network at fixed rates (which are adapted to the prevailing market conditions), on the basis of the commitment which H3A had offered in the *Hutchison 3G Austria/Orange Austria* case.<sup>168</sup> Moreover, internal documents submitted by the Notifying Party suggest that MVNOs raise the possibility of switching to H3A. Moreover, these documents suggest that the wholesale terms offered by TMA are internally discussed with reference to wholesale terms offered by H3A.

(330) The Commission notes that UPC is active in the retail market of the supply of mobile telecommunications services through an MVNO agreement with H3A and therefore owns no mobile infrastructure. The merged entity's ability to engage in input foreclosure will therefore not differ compared to that of TMA prior to the Transaction.

(331) Second, the Commission notes that there are no indications that TMA has engaged in any foreclosure strategy so far, which seems to indicate that before the merger it lacked the ability and/or the incentive in that respect. Nevertheless, the Commission has assessed whether, following the Transaction, the merged entity will have an (increased) incentive to engage in input foreclosure towards MVNOs including those currently hosted on TMA's mobile network.<sup>169</sup> By engaging in input foreclosure either partially (by increasing the wholesale access and call origination service prices or offering worse quality of service), or fully (by no longer offering wholesale access and

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<sup>167</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*.

<sup>168</sup> Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*.

<sup>169</sup> TMA currently hosts a total of 9 MVNOs (corresponding to 10 mobile brands), of which HoT is by far the largest (see Table 7A(3), page 175 of the Form CO).

call origination services), the merged entity could trigger subscribers of the MVNOs hosted on TMA's mobile network to switch to other providers. Pre-merger, TMA can be expected to have an incentive to engage in such a strategy if the increased retail profit from MVNO subscribers switching to TMA more than compensates for the foregone TMA wholesale profit on the MVNO subscribers switching away. This trade-off depends crucially on what percentage of the various MVNO subscribers would choose TMA as their alternative provider and how TMA's wholesale profit margin relates to its retail profit margin. Based on the observation that TMA does not currently engage in such a strategy it can be considered that the potential retail profits on recaptured subscribers pre-Transaction would not exceed the foregone profits on the corresponding wholesale access towards the MVNOs.<sup>170</sup>

(332) The Commission notes that, first, UPC is not active on the wholesale market for access and call origination services on mobile networks in Austria and therefore no merger-specific change to TMA's wholesale profit margins towards MVNOs is to be expected due to horizontal effects. Second, as concluded in Section 4.2.1, the Transaction is not expected to lead to higher prices, and therefore higher margins, in the retail mobile telecommunication services as a result of horizontal effects either. Therefore, the only potential difference in incentives to engage in input foreclosure for the merged entity compared to TMA pre-Transaction relates to the fact that the merged entity would recapture not only MVNO subscribers switching to TMA but also those that would potentially switch to UPC. Given the marginal presence of UPC in the retail market for mobile telecommunication services in Austria ([0-5]%<sup>171</sup>) the Commission concludes that the merged entity's incentive to engage in input foreclosure would not be appreciably higher compared to that of TMA pre-merger.<sup>172</sup> Therefore, the Commission considers that the merged entity will have no incentive to engage in input foreclosure.

(333) The views of the respondents to the market investigation are mixed with respect to the expected impact of the Transaction on the business of MVNOs.<sup>173</sup> The majority of respondents believe that there will be no material change of price and/or other conditions of competition in the wholesale access and call origination market in Austria as a result of the Transaction. However, the market investigation revealed mixed views as to whether the Transaction will have an impact on the incentives of the merged entity to provide wholesale access. Similarly, there are mixed views as to whether the incentive of A1 and H3A to grant wholesale access to their respective networks will

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<sup>170</sup> As an illustrative example, the market share of HoT, the largest MVNO hosted on TMA's network, in the retail market for mobile telecommunication services in Austria is currently [5-10]% whereas TMA's is [20-30]% (Form CO, Table 7A(4)(a), page 178). Assuming that all providers in this market are equally close competitors to each other and any subscribers switching would be distributed to competing providers proportionally to their respective market shares, TMA would only recapture approximately [20-30]% of all HoT subscribers switching away. This means that TMA's retail margin would need to be roughly [3 to 5] times larger than its wholesale margin for input foreclosure to be profitable, which does not appear to be the case.

<sup>171</sup> See above paragraph (128).

<sup>172</sup> Whereas TMA could be expected to recapture approximately [20-30]% of HoT switchers, the merged entity could be expected to recapture approximately [20-30]% of those, and the wholesale margin of the merged entity would need to be approximately [3 to 5 times] the size of the retail margin for input foreclosure to be profitable, a marginal difference compared to TMA's stand-alone incentives.

<sup>173</sup> Questionnaire Q2, reply to question F.1.5.

change.<sup>174</sup> Finally, a majority of respondents consider that the Transaction will have a negative impact on the ability of existing MVNOs to continue operating in Austria<sup>175</sup> However, the Commission notes that the provided justifications do not suggest that this would be caused by anti-competitive foreclosure as three respondents consider that competition at the retail level will become fiercer. The Commission therefore considers that results of the market investigation, although not entirely consistent, seems to suggest that anti-competitive foreclosure on the wholesale market for access and call origination services is unlikely, considering that the few concerns expressed are either unsubstantiated or not merger-specific.

(334) In light of the analysis above, the Commission concludes the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationship between the market for wholesale access and call origination on mobile network and the market for retail supply of mobile telecommunications services.

b. Vertical link between wholesale market for access and call origination services on mobile networks and retail internet access services

(335) Wholesale access and call origination services are also an input for the provision of retail (mobile) internet access services by MVNOs that do not have an own mobile infrastructure. During the Commission's market investigation one respondent (Ventocom) raised the concern that following the Transaction, the merged entity would be likely to foreclose MVNOs from access to TMA's mobile infrastructure, with a view to protecting its position on the market for retail internet access services.<sup>176</sup> Further feedback from the market investigation also relevant for this assessment is set out in paragraph (333) above.

(336) In terms of ability, the Commission notes that the merged entity's ability to foreclose MVNOs from wholesale access on mobile networks is limited as these could be either hosted by H3A or by A1 (see above). In this respect the Commission recalls the finding that entry in the retail internet access services market is relatively easy (see Section 4.2.1). In particular, MVNOs have the ability to switch to H3A which is under an obligation to provide non-discriminatory access to its mobile network under the commitments in case M.6497.

(337) In terms of incentive, the key question is whether, following the Transaction, the merged entity will have an (increased) incentive to engage in input foreclosure towards the MVNOs in view of its increased market position in the downstream market due to the addition of UPC's retail internet access services customers.

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<sup>174</sup> Questionnaire Q2, reply to question F.3.1 and F.3.2

<sup>175</sup> Questionnaire Q2, reply to question F.4 and F.4.1.

<sup>176</sup> Ventocom also submitted that the Transaction would enable the merged entity to offer multiple play bundles which would create an incentive to foreclose Ventocom. The Commission's assessment contained in paragraphs (335) to (340) applies equally to multiple play bundles. In particular, the Commission notes that TMA's mobile data services are not available with retail TV or fixed telephony services (paragraph (244)) suggesting that mobile broadband services may not be direct substitutes to those product bundles.

- (338) In this respect the Commission notes that in its assessment of potential horizontal non-coordinated effects in the retail internet access services market (see Section 4.2.1) it reached the conclusion that TMA and UPC are relatively distant competitors within this market. This was mainly based on an assessment of the closeness of competition between TMA's mobile cubes and UPC's fixed broadband offering. However, more than [70-90]% of internet service subscribers of those MVNOs hosted by TMA use mobile data-only products other than mobile cubes that, if anything, are even more distant substitutes to UPC's fixed broadband offering than mobile cubes. Based on these findings, the Commission considers that if TMA were to foreclose access to its mobile network to the MVNOs hosted on it, the percentage of potential switchers that would divert to UPC's internet access services on its fixed network would be very small. The Commission therefore concludes on this point that the Transaction would not have an appreciable effect on the incentives of the merged entity, compared to those of TMA, to engage in input foreclosure of its mobile network for the downstream provision of retail internet access services by host MVNOs.
- (339) In relation to the potential impact of foreclosing MVNOs on the retail market for internet access services, the Commission notes that currently the competitive position of MVNOs in the retail market of internet access services is very limited. When focusing on residential customers, according to data provided by the Notifying Party the total market share of all MVNOs was merely [0-5]% in 2017 (the market share of MVNOs is [0-5%] for business customers). It follows that the impact of potential input foreclosure on this market would not be significant.
- (340) In light of the analysis above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationship between the market for wholesale access and call origination on mobile networks and the market of retail supply of internet access services.

#### **4.3.2. Wholesale leased lines**

- (341) The wholesale leased lines market lies upstream from several downstream markets, as explained in paragraph (104). Since the upstream product of wholesale leased lines is basically the same irrespective of the downstream market in which it is used, the analysis that follows holds true *mutatis mutandis* for all these vertical links.

##### 4.3.2.1. The Notifying Party's view

- (342) The Notifying Party submits that the Transaction will not lead to any input foreclosure with respect to wholesale leased lines.

*If the wholesale market for leased lines is defined nationwide*

- (343) First, according to the Notifying Party the merged entity will remain a negligible supplier of wholesale leased lines in Austria post-merger. The Parties' combined shares are low both in the overall Austrian market for wholesale leased lines (approximately [0-5]%) as well as in all plausible sub-segments thereof (see 3.1.5.3 above) and, hence, it is excluded that the

merged entity would have the ability to foreclose customers, including other MNOs, from access to wholesale leased lines.

- (344) Second, according to the Notifying Party there are an important number of suppliers of wholesale leased lines such as A1 and energy utility companies from which customers, including MNOs, can obtain access to wholesale leased lines.
- (345) Third, according to the Notifying Party A1 is subject to access and price regulation with regard to the supply of wholesale terminating segments of leased lines (including dark fibre) in large parts of Austria with the exception of those product and geographic segments where the TKK found the existence of a sufficient degree of competition and the absence of significant market power by any supplier.

*If the wholesale market for leased lines is defined on the level of communes*

- (346) According to the Notifying Party vertical input foreclosure concerns would also not arise if one considered hypothetical local markets for wholesale terminating segments of leased lines at the level of communes.
- (347) First, according to the Notifying Party, amongst the communes in which UPC is currently supplying wholesale terminating segments of leased lines and/or has negotiated about wholesale leased lines with [name of third party] since 2014, there are no communes where UPC is the single supplier of wholesale terminating segments of leased lines or where A1 and UPC would be the only two suppliers. Based on UPC's estimates, in approximately [30-40%] of these communes there are two competitors in addition to UPC, in approximately [20-30%] there are three additional competitors, in approximately [20-30%] there are four additional competitors, and in approximately [20-30%] there are five or more additional competitors.
- (348) Second, in most of the communes in which UPC is currently supplying wholesale terminating segments of leased lines<sup>177</sup> and/or has negotiated about access to wholesale terminating segments of leased lines with [name of third party] since 2014, A1 is subject to access and price regulation with regard to wholesale terminating segments of leased lines (including leased lines with traditional interfaces, Ethernet services with guaranteed bandwidth and dark fibre). Approximately 70% of these communes are not included in the list of 359 communes of the TKK 2014 decision<sup>178</sup> and approximately 64% of these communes are not included in the list of 355 communes of the TKK 2018 Draft Decision<sup>179</sup>. Consequently, alternative offers are available to any potential access seeker.
- (349) Third, the merged entity also does not have any incentive to foreclose customers, including other MNOs, from access to wholesale terminating segments of leased lines. According to the Notifying Party TMA currently supplies wholesale leased lines and dark fibre to [name of third party] on the

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<sup>177</sup> Meaning that, at least one of the two ends of the leased line is found in such a commune.

<sup>178</sup> TKK decision of 28 July 2014, M 1.5/2012-135.

<sup>179</sup> TKK draft Decision of 16 April 2018, M 1.8/15-61.



basis of commercial conditions regardless of the fact that TMA and [name of third party] are competitors on the retail market for mobile telecommunications services and the Transaction does not alter TMA's incentives to supply wholesale leased lines and dark fibre to [name of third party] under commercial conditions.

- (350) Finally, the Notifying Party submits that [name of third party] is in any event not dependent on access to UPC's wholesale leased lines services for [purpose of wholesale access to leased lines] purposes. In the scope of the negotiations between UPC and [name of third party] which took place between April 2014 and August 2017 UPC submitted offers for 221 sites to [name of third party] at attractive commercial conditions, however, [name of third party] only ordered Ethernet services for two sites for testing purposes and for two additional sites. In August 2017, after [event in time], [name of third party] informed UPC that [name of third party] does not intend to order wholesale leased lines services for additional sites from UPC anymore.

#### 4.3.2.2. The Commission's assessment

- (351) During the market investigation, some respondents argued that the Transaction could raise competition concerns in relation to the upstream market for wholesale leased lines services (and all plausible sub-segments of this product market) and (i) the downstream market of retail mobile telecommunications services and (ii) the downstream market of the retail internet access services market (but not with regard to other relevant downstream markets as described in paragraph (341)).
- (352) One H3A raised concerns that leased lines and dark fibre services are indispensable for mobile transmission purposes and that through the Transaction TMA will acquire one important provider of such services, UPC, and will thus gain a significant competitive edge. According to H3A it will see its choice of infrastructure suppliers significantly reduced as the merged entity, unlike UPC pre-merger,<sup>180</sup> will no longer have an interest in offering commercially attractive services [...]. The same would apply to A1 which is already vertically integrated in areas where it is not regulated. This would have a negative impact on [...] in the retail telecommunications market as well as in the retail internet access market (“spill-over effects”).
- (353) The Commission has carefully assessed this complaint and the competitive conditions in this sector.
- (354) First, with respect to the prospect of the Transaction having an appreciable effect on the merged entity's *ability* to foreclose downstream competitors from the upstream input of wholesale leased lines the Commission notes that the Parties' commercial activities in this wholesale leased lines market are currently extremely limited with insignificant markets shares at the national level. With regard to the trunk segment the Commission notes that the

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<sup>180</sup> According to that MNO low-priced leased line (etherlink) prices offered to date by UPC exerted competitive pressure in contract negotiations with other suppliers of fixed line access. This has led to prices with other vendors materially lower than A1's regulated prices. Hence, the de facto disappearance of UPC as a potential vendor for that MNO will damage H3A's position for access to indispensable infrastructure.

combined market shares of the Parties is low ([10-20]%) and the increment of [0-5]% very low and that there are at least ten other competitors present, among these the incumbent and market leader A1, as well as Tele2(H3A).<sup>181</sup> At the commune level, based on a comparison of data submitted by RTR and the Parties there exist only 24 communes<sup>182</sup> where the merged entity would hold significant market shares (>30% market share in terms of number of lines) in potential sub-segments of wholesale terminating segments of leased lines. However, those communes represent less than 3% of the Austrian population.

- (355) The Commission also notes that in many of those communes, A1 also has a strong presence and could provide access to its wholesale terminating segments of leased lines. Specifically, in 18 out of these 24 communes TKK found, in the 2014 Decision<sup>183</sup>, that A1 had significant market power within the meaning of electronic communications regulation in the wholesale leased lines market. Consequently, in those communes A1 is subject to access and price regulation with regard to wholesale terminating segments of leased lines (including leased lines with traditional interfaces, Ethernet services with guaranteed bandwidth and dark fibre) which have at least one end in these communes, bringing the percentage of the Austrian population living in a commune where foreclosure might be a hypothetical possibility down to less than 0.04%.
- (356) In the remaining 6 communes, TKK found that there is sufficient competition so that wholesale regulation would not be necessary. This in turn suggests that the Parties' ability to foreclose is likely limited, even after the Transaction.
- (357) Furthermore, the Transaction is unlikely to have an appreciable effect on the merged entity's ability to foreclose downstream competitors for similar reasons to those for which the Transaction would not lead to anti-competitive horizontal effects on the market for wholesale leased lines (see Section 4.3.2).
- (358) Second, with respect to the prospect of the Transaction having an appreciable effect on the merged entity's *incentive* to foreclose downstream competitors from the upstream input of wholesale leased lines the Commission notes that such an incentive would be limited. Indeed, on national as well as on commune level there are other competitors present to which customers could easily switch to. These include the incumbent A1, who is subject to access and price regulation with regard to wholesale terminating segments of leased lines (including leased lines with traditional interfaces, Ethernet services with guaranteed bandwidth and dark fibre) in large parts of Austria and in the majority of the communes listed in paragraphs (354) and (355) above.
- (359) Third, even if the merged entity were assumed to have an incentive to engage in input foreclosure the Commission considers that the likely *impact* on effective competition in the relevant downstream markets would be

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<sup>181</sup> Based on data of RTR submission of 3 July 2018.

<sup>182</sup> This assumes a segmentation of the guaranteed bandwidth at 10 Mbit/s. See Footnote 62. The results would be similar and hence the same reasoning would apply if a segmentation of the guaranteed bandwidth at 2 Mbit/s were applied.

<sup>183</sup> TKK Decision of 28 July 2014, M 1.5/2012-125, sections 2.1.1. and 2.1.2.

insignificant. All the relevant markets that are downstream to the wholesale leased lines market are national in scope. Hence, the Commission considers that any foreclosure strategy affecting at most a tiny share of the Austrian population would be incapable of leading to an appreciable increase of the costs of downstream products and hence there would be no upwards pricing pressure on their sales prices.

- (360) Fourth, during its market investigation the Commission found no evidence undermining any of the points put forward by the Parties in paragraphs (342) until (350) above, which the Commission considers valid and relevant.
- (361) Fifth, the fact that according to the Notifying Party [name of third party] only procures Ethernet services for [0-5] sites and has informed UPC that it does not intend to order wholesale leased lines services for additional sites from UPC anymore demonstrates that [name of third party] is not dependent on wholesale access to leased lines from UPC in order to be able to provide its retail telecommunications and retail internet access services in Austria.<sup>184</sup> This limits any potential impact from a possible foreclosure strategy of the merged entity. In addition, [name of third party] appears to rely in many instances on microwave connections for mobile backhauling purposes. The possibility to rely on microwave technology instead of fixed infrastructure in the form of leased lines further limits any potential impact from hypothetical foreclosure.
- (362) Finally, other respondents to the market investigation than [name of third party] did not raise specific vertical foreclosure concerns.<sup>185</sup> No respondent to the market investigation (except for [name of third party]) indicated that post transaction (i) MNOs will not have wholesale access to UPC's leased lines at similar conditions as those today or (ii) that A1's access conditions will deteriorate post Transaction.<sup>186</sup> In contrast, two respondents indicated that (i) MNOs will not have wholesale access to UPC's leased lines at similar conditions as those today and (ii) two respondents indicated that A1's access conditions will either remain more or less the same or will even improve.<sup>187</sup>

#### 4.3.2.3. Conclusion

- (363) In light of the analysis above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationship between the market for wholesale access to leased lines and the relevant downstream markets mentioned in paragraph (341) above.

#### 4.4. Assessment of conglomerate effects: Multiple-play bundles

- (364) TMA's services in the market(s) for retail mobile telecommunications services and UPC's services in the markets for fixed telecommunications services are

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<sup>184</sup> According to the Notifying Party's information even though UPC and [confidential information about the customer relationship between UPC and the third party].

<sup>185</sup> Two respondents to the market investigation were generally pointing to the fact that a further concentration in the market for wholesale leased lines would not be beneficial to competition since prices may increase, Questionnaire Q6, Section C. Impact of the Transactions.

<sup>186</sup> Replies to Questionnaire Q6, Section B. .C.2, B.C.3.

<sup>187</sup> Replies to Questionnaire Q6, Section B. .C.2, B.C.3.

complementary or at least closely related. Accordingly, the Commission has examined whether the Transaction would give rise to conglomerate effects by foreclosing competitors in the retail market for mobile telecommunications services, the retail market for fixed telephony services, the retail market for internet access services, the retail market for fixed telephony services and/or a potential market for multiple-play bundles with mobile and fixed components.

- (365) According to the Commission's Guidelines on the assessment of Non-horizontal Merger Guidelines,<sup>188</sup> conglomerate effects require (a) the ability to foreclose, (b) the incentives to foreclose and (c) the likelihood that a foreclosure strategy would have a significant detrimental effect on competition and harm consumers. In order to be taken into account, any conglomerate effect must be merger specific. In other words, the conglomerate effect must result from TMA's acquisition of UPC.

#### ***4.4.1. The Notifying Party's views***

- (366) The Notifying Party submits that the Transaction does not raise any concerns with regard to a hypothetical market for multiple-play services in Austria.
- (367) First of all, as TMA is essentially not active on such a hypothetical market, the Parties' activities do not overlap.
- (368) According to the Notifying Party, the Transaction will establish a third fixed-mobile operator which owns fixed and mobile infrastructure and will be able to offer a broad range of fixed and mobile telecommunications services (fixed telephony, fixed internet, cable TV and mobile telecommunications) to business and private customers in Austria. As such, TMA/UPC will be able to compete with the incumbent A1 and with H3A in an increasingly convergent market environment.
- (369) The significant market share detained by UPC in the triple play segment is not very informative, because of the interaction between the different bundles. In any event, the market shares of the individual services included in a multiple-play offering are much more informative than shares of hypothetical segments for multiple-play services and show that (i) the merged entity's estimated market shares do not exceed 30% on any of the four retail markets for the single components of multiple-play services and (ii) A1 is the clear market leader in the area of fixed and mobile telecommunications services in Austria, including in the field of multiple-play services.
- (370) In any case, the Notifying Party submits that the Transaction will neither create nor increase the merged entity's ability or incentive to engage in practices which result in anticompetitive foreclosure of competitors:
- the Transaction will neither create nor increase the merged entity's ability or incentive to offer fixed-mobile multiple-play services, because (i) UPC is already active as fixed and mobile provider and therefore is already in a position to sell both fixed and mobile services as well as fixed-mobile multiple-play services regardless of the Transaction, and

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<sup>188</sup> Non-horizontal Merger Guidelines, paragraph 91 onwards.

(ii) UPC's position on the retail fixed markets will remain substantially unchanged, as TMA is not active on any of these markets;

- there will not be any incentive to increase price of fixed services to cross-subsidize a mobile component in fixed-mobile bundles, because (i) the demand for fixed-mobile bundles is still underdeveloped in Austria and therefore customers would switch to another provider of fixed products, and (ii) A1 and other providers of fixed services would have strong incentives to undermine any hypothetical strategy to increase prices for fixed services by continuing to compete aggressively for standalone fixed customers;
- as a counterstrategy, mobile-only operators could decide to launch fixed-mobile multiple-play services on the basis of A1's regulated wholesale access services to engage in bundle-to-bundle competition;
- more than 50% of Austrian TV households have satellite connections and do not usually purchase TV services in a bundle with mobile telecommunications services. Consequently, there is a large customer base in Austria which is not interested in purchasing TV services in a bundle with mobile telecommunications services;
- outside the UPC footprint, the merged entity will not be in a position to offer fixed-mobile multiple-play services on the basis of UPC's cable network;
- fixed-mobile convergence is still at a nascent stage in Austria compared to other Member States.

(371) The Notifying Party concludes that the Transaction does not give rise to anticompetitive conglomerate effects. On the contrary, the merged entity's ability to offer fixed-mobile multiple-play services is pro-competitive.

#### **4.4.2. The Commission's assessment**

(372) The Commission has assessed the likely impact of the Transaction on the merged entity's ability and incentive to engage in practices related to multiple play bundles which would result in anticompetitive foreclosure of competitors in the retail market for mobile telecommunications services, in the retail market for fixed telephony services, in the retail market for internet access services, the retail market for fixed telephony services and/or in a potential market for multiple-play bundles with mobile and fixed components..

(373) Some participants to the market investigation have expressed concerns with respect to the possibility for the merged entity to foreclose mobile operators by offering multiple play bundles.

(374) Ventocom submits that the Transaction will enable TMA to market multiple play products and consequently to leverage its market power in the mobile area to the fixed services markets, with a consequential "lock in" effect for subscribers, in particular also with respect to bundles of residential broadband and mobile. That would be detrimental for MVNOs which cannot offer bundles (for lacking access to residential broadband market).

- (375) Similarly, H3A submits that the Transaction can have exclusionary effects, as it will create a symmetric duopoly (A1/TMA-UPC) of two incumbents with market power in the retail markets of both fixed and mobile telecommunications services. According to H3A, the two incumbents will pursue a fixed-mobile convergence (FMC) strategy with the intention and effect of marginalising mobile-only players [...]. H3A submits that the merged entity will have [...].
- (376) A1 also submits that the merged entity could leverage the strong market position in the fixed broadband segment to other business areas, and ultimately increase prices in such areas as well. In particular, the combination of UPC with TMA as a strong mobile provider would enable the merged entity to expand and secure UPC's existing strong position through the offering of bundled (fixed and mobile) products.
- (377) Another respondent to the market investigation argues that following the Transaction the merged entity would be able to provide stronger multiple play offers which would further strengthen its position and attract customers from mobile operators.<sup>189</sup> Other respondents pointed to negative effects because of the reinforcement of TMA and the ability of the merged entity to offer fixed/mobile products.
- (378) The Commission has assessed whether the merged entity could be able to use its market power in one market to foreclose competitors in another market by bundling fixed and mobile products after the Transaction.
- (379) As regards the ability to engage in bundling, the Commission notes that UPC is currently able to offer fixed-mobile bundles, by relying on an MVNO agreement. As such, one of the Parties already has prior to the Transaction the ability to engage in bundling. The Transaction will allow the merged entity to offer fixed-mobile bundles that are based on its own fixed and mobile network infrastructure.
- (380) As regards the ability to foreclose rivals, the new entity must have a significant degree of market power in at least one of the concerned markets. That is, at least one of the merging parties' products must be viewed by many customers as particularly important and there must be few relevant alternatives for that product.<sup>190</sup>
- (381) With respect to the market for retail mobile telecommunications services in Austria, the merged entity's market share will be below 30%, which can be seen as a first indication of the lack of market power. Moreover, there are at least two significant competitors with comparable market position (A1 and H3A). The Commission is therefore of the view that based on its position in the retail mobile market, it is unlikely that after the Transaction the merged entity will have the ability to leverage its position in the retail mobile market into the retail market for fixed telephony services, the retail market for internet access services, the retail market for TV and/or in a potential market for multiple-play bundles with mobile and fixed components.

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<sup>189</sup> Questionnaire Q2, reply to question F.1.1.1.

<sup>190</sup> Non-horizontal Merger Guidelines, paragraph 99.

- (382) Similarly, the merged entity's estimated market shares will not exceed 30% on any of the three retail markets for the single fixed components.<sup>191</sup> With respect to dual play offers, currently UPC has a limited market share of [10-20]% in the fixed Internet and TV segment and [10-20]% in the fixed internet and fixed telephony segment.
- (383) The only potential market where UPC has a sizable market share is the fixed triple play offers (internet, telephony and TV), where it has an estimated share of [50-60]%. However, the Commission notes that customers in Austria have relevant alternatives in the TV market: triple play bundles including TV represent just about 15% of the total TV households in Austria. Satellite TV connections are common in Austria and satellite customers do not normally buy fixed triple play bundles. Furthermore, triple bundles are offered by A1, which is also the market leader in the single components, and by other fixed operators active at local level. Moreover, irrespectively of the market definition, fixed triple play products can be substituted by the included components. For example, instead of a fixed triple play product, customers could buy separately TV and fixed internet/telephony. Therefore, the merged entity will not enjoy a strong enough position even in this specific segment to foreclose in the adjacent markets.
- (384) In any case, the Commission has also assessed whether the merged entity will have an incentive to engage in bundling of fixed and mobile services to foreclose mobile-only rivals from effectively competing for customers who purchase both fixed and mobile services.
- (385) After the Transaction, the merged entity might have an incentive to introduce a price-discrimination strategy consisting of somewhat increasing the price of the standalone products and/or to lower the price of fixed-mobile bundles.<sup>192</sup>
- (386) However, as regards the incentive for the merged entity to increase the price of the standalone fixed components after the Transaction, in light of the merged entity's market position in the relevant markets (see paragraphs (381) - (383)) and the fact that many consumers in Austria still subscribe separately to fixed and mobile products, in particular the incentives to increase the prices of the standalone products are limited.<sup>193</sup> In this regard, in particular A1 enjoys a strong market position and offers alternative fixed and mobile products. The incentives are further mitigated by the fact that the merged entity will have a fixed cable infrastructure that covers only about [30-40]% of the Austrian households and hence cannot rely on this infrastructure to offer fixed and mobile bundles in large parts of Austria. As regards the claim that low churn rates for bundles would allow the merged entity to raise price,

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<sup>191</sup> The retail market for fixed telephony services, the retail market for internet access services and the retail TV distribution market.

<sup>192</sup> Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 625. The Commission considers that that the merged entity will have no incentive to "subsidize" mobile-only products, offering such products at a price below average variable costs or average total costs. Such a predatory strategy cannot be expected to induce H3A to leave the market as H3A is a well-established market participant and there are no indications that it would suffer from any liquidity constraints.

<sup>193</sup> In light of this the Commission also considers that the merged entity will have no incentive to engage in pure bundling, that is, to exclusively offer fixed-mobile bundles.

the Commission notes that churn rates may well increase if prices of bundles were increased.

- (387) As a result of this price discrimination strategy, customers who buy fixed and mobile products separately could incur an increase in their total cost of ownership while customers who opt into the bundle could be better-off. However, unless it has the (intended or unintended) consequence of marginalising mobile-only competitors, price discrimination is unlikely to have significant anticompetitive effects.
- (388) As for the possible impact on mobile-only operators, it appears that only relatively few customers currently use fixed-mobile bundles<sup>194</sup> and a significant demand for mobile-only products will remain on the market. Moreover, any potential impact of such price discrimination strategy is further mitigated (i) by the ability of mobile-only operators to respond by lowering the price of the mobile component, and (ii) by the possibility for mobile-only operators to start offering fixed/mobile bundles (possibly including hybrid products) based on A1's regulated fixed wholesale offer.
- (389) It can be added that H3A is not a pure mobile operator, as in November 2017 H3A completed the acquisition of Tele2's Austrian unit, active as provider of fixed telecommunications services mainly to business customers in Austria. H3A itself has publicly announced that after the consolidation, it plans to roll out new offers of complete telecommunication and IT, as well as innovative bundles for its residential customers.<sup>195</sup>
- (390) Based on the above, the Commission considers that the Transaction may only confer to the merged entity a limited ability (if any) to leverage its market position in the fixed triple play market to foreclose mobile competitors. The Commission does not consider that the Transaction would confer to the merged entity the ability to impact the market share of mobile-only players to such an extent that they would be marginalised or entirely foreclosed.
- (391) The Transaction might accelerate the trend towards fixed-mobile convergence. By joining a strong fixed offer with a strong mobile offer, the Transaction could somewhat speed up the uptake of fixed-mobile bundles. However, the Commission considers that even where customers would be converted more rapidly into fixed-mobile bundles, this does not in itself undermine the ability of mobile-only competitors to effectively compete for customers.
- (392) As for the concerns regarding coordination between the merged entity and A1 with respect to fixed-mobile bundles, leading to higher prices, the Commission considers that there is no increased risk of stable coordination emerging post-Transaction.

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<sup>194</sup> The Notifying Party mentions a market study of 2017 by Informa/Ovum in accordance to which only 2% of fixed broadband services customers purchase those services as part of a bundle including mobile voice.

<sup>195</sup> See <https://www.telegeography.com/products/commsupdate/articles/2017/11/09/hutchison-drei-completes-takeover-of-tele2-austria/>.



(393) Given that at present TMA is not active in this market, the Transaction will not decrease the number of providers that offer a full range of bundles. There are also no indications that coordination with the merged entity would be materially easier than with UPC pre-Transaction. In any case, the Commission has already analysed a possible scenario of coordination for the home internet access services market in paragraphs (283) to (302) and has concluded that there is not sufficient evidence to find that the Transaction would give rise to serious doubts as a result of coordinated effects on that market. Most of the observations made in this respect are valid for multiple-play bundles as well. It can be added that the number of multiple play bundles is currently increasing and that multiple play bundles are more complex products than the included components, which also makes coordination more difficult.<sup>196</sup> The Commission hence draws the conclusion that the Transaction does not give rise to serious doubts as a result of coordinated effects with respect to multiple-play bundles.

#### 4.4.2.1. Conclusion on conglomerate effects

(394) Based on the above considerations, the Commission is of the view that the Transaction does not give rise to serious doubts as to its compatibility with the internal market in relation to anti-competitive conglomerate effects. In particular, the Commission considers that the Transaction would not lead to the marginalisation of mobile-only rivals.

## 5. CONCLUSION

(395) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

*(Signed)*

*Margrethe VESTAGER  
Member of the Commission*

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<sup>196</sup> Horizontal Merger Guidelines, paragraph 45.