Summary of Commission Decision

of 12 December 2012

declaring a concentration compatible with the internal market and the functioning of the EEA Agreement

(Case COMP/M.6497 — Hutchison 3G Austria/Orange Austria)

(notified under document C(2012) 9198 final)

(Only the English text is authentic)

(Text with EEA relevance)

(2013/C 224/06)

On 12 December 2012 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1], and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address:

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

I. THE OPERATION AND THE PROCEDURE

(1) On 7 May 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 (the 'Merger Regulation') by which the undertaking Hutchison 3G Austria Holdings GmbH ('H3G Austria Holdings', Austria) (the 'Notifying Party'), the parent company of Hutchison 3G Austria GmbH ('H3G', Austria) and an indirect wholly owned subsidiary of Hutchison Whampoa Limited ('HWL', Hong Kong), would acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of Styrol Holding 1 GmbH ('Styrol', Austria) and its indirect wholly owned subsidiary Orange Austria Telecommunications GmbH ('Orange', Austria), excluding Yesss! Telekommunikation GmbH ('Yesss!'), by way of purchase of shares (together 'the Parties').

(2) This transaction was conditional upon the onward sale of Orange's 'no frills' mobile brand Yesss! to Telekom Austria ('TA'). The latter transaction was to be dealt with by the Austrian National Competition Authority ('Bundeswettbewerbsbehörde' or 'BWB'). So the concentration subject to Union jurisdiction was the acquisition of Orange Austria (minus the 'Yesss!' business) by H3G.

(3) Moreover, TA was also to acquire from H3G certain sites, spectrum frequencies and intellectual property rights currently owned by Orange. This transfer of frequencies requires approval by the Austrian Telecommunications Regulator, the Rundfunk & Telekom Regulierungs-GmbH, ('RTR') and the Telekom-Control Kommission ('TKK').

(4) On 29 May 2012, the BWB requested, on the basis of Article 9(2)(a) of the Merger Regulation, a referral of the Proposed Transaction from the Commission to Austria (the 'Referral Request'). Based on a market investigation, the Commission raised serious doubts as to the compatibility of the proposed transaction with the internal market. Subsequently the BWB did not send any reminder pursuant to Article 9(5) of the Merger Regulation after the Commission adopted the Article 6(1)(c) decision on 28 July 2012. The Commission therefore decided to deal with the aspects raised by the BWB itself pursuant to Article 9(3)(a) of the Merger Regulation.

(5) On 21 August 2012, the Notifying Party submitted commitments pursuant to Articles 8(2) and 10(2) of the Merger Regulation in order to remove the Commission's concerns as regards the compatibility of the proposed concentration with the internal market.

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

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

II. THE PARTIES

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

[1] OJ L 24, 29.1.2004, p. 1.

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

(10) Orange is an Austrian MNO. Orange and its parent company Styrol were at the moment of notification owned by Stubai S.C.A., a wholly-owned subsidiary of the private equity investment fund Mid Europa Partners ('MEP'), and by Orange Belgium SA, a wholly-owned subsidiary of France Télécom SA Yesss! was a fully-owned subsidiary of Orange.

III. SUMMARY

(11) On the basis of the turnover data of the parties the proposed transaction had a Union dimension. It would lead to a reduction of network operators from four to three (with the remaining MNOs, Telekom Austria and T-Mobile having respectively [40-50 %] and [30-40 %] market shares by total number of subscribers) and creates the third largest Austrian MNO with an overall market share of [20-30 %].

(12) The Commission's market investigation identified competition concerns due to the removal of Orange from a market which was already highly concentrated and where there was no prospect of entry. The concern was therefore that the transaction as notified would lead to competition concerns in the retail market for the provision of mobile communication services to end customers in Austria as a result of unilateral effects.

(13) To remove the Commission's concerns, H3G submitted a package of commitments consisting, in their final version, of three elements.

(a) First, H3G committed to divest radio spectrum and additional rights to an interested new entrant in the Austrian mobile telephony market. The potential new MNO would have the right to acquire spectrum not only from H3G but also additional spectrum at an auction planned in 2013 by the Austrian telecom regulator. The latter would reserve spectrum for a new entrant, in order to enable such an operator to build up a physical network for mobile telecommunication services in Austria. The new entrant would also benefit from privileged conditions for the purchase and lease of sites for building up its own network in Austria.

(b) Second, H3G committed to provide, on agreed terms, wholesale access to its network for up to 30 % of its capacity to up to 16 mobile virtual network operators ('MVNOs') in the coming 10 years. This would enable interested MVNOs to offer mobile telecommunications services to end customers in Austria at competitive terms and conditions.

(c) Third, an up-front commitment ensured that H3G would not complete the acquisition of Orange before it had entered into a wholesale access agreement with at least one MVNO.

(14) In light of these commitments, the Commission concluded that the transaction would no longer raise competition concerns, as the decision is conditional upon full compliance with the commitments.

IV. EXPLANATORY MEMORANDUM

A. The relevant product markets

(15) In previous Commission decisions the mobile telecommunications services product markets have been defined as follows:

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

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

(c) wholesale market for international roaming; and

(d) wholesale market for mobile call termination

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

Mobile telecommunications services to end customers

(17) The Commission considered whether for the purposes of this case it was necessary to further subdivide the market for mobile telecommunications services to end customers by type of customer (business or private, post-paid subscribers or pre-paid customers) or by type of network technology (2G/GSM or 3G/UMTS).

(18) On the basis of the market test and supply side considerations the Commission considered an overall product market for private and business customers as regards mobile telecommunications services to end customers.

(19) As regards a possible distinction between pre-paid and post-paid services the Commission considered that there were some arguments in support of this position in this case. Even though the Commission's conclusion was that pre-paid and post-paid are part of the same market, at least in view of supply-side substitution, the specificities and the interaction between these segments was further considered in the competitive assessment.

(20) Notwithstanding clear performance differences for data traffic over 2G, 3G and LTE networks, in the light of the results of the market test, the Commission considered that the subdivision of the mobile end-customer market by type of network technology (2G, 3G and Future 4G Technologies) was not appropriate.

(21) From a demand perspective, services designed for use on a voice-enabled device are distinguished from services designed for use on a data-only device. However, the Commission concluded that it was not appropriate to depart from its previous practice of defining a single market including all services provided whether for data-only devices or for voice-enabled devices.

(22) The Austrian RTR/TKK in its Telecommunications Markets Ordinance has found that mobile broadband access by residential customers is a substitute for fixed line internet services. The Commission did not dispute this finding in relation to Austria. However, for the assessment in this case, the question was the reverse, namely whether fixed broadband services are a substitute for mobile data services in general or for mobile broadband specifically. The Commission concluded that fixed broadband services were not a substitute for mobile data services and therefore did not form part of the same product market.

(23) The relevant product market for the purpose of the decision was defined as a single market in Austria for the provision of mobile telecommunications services to end customers.

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

(24) Wholesale network access is provided by MNOs to MVNOs. In previous decisions, the Commission considered wholesale network access and call origination to be part of the same product market. In the market investigation, market participants unanimously confirmed that this approach is also appropriate in this case.

Wholesale market for international roaming

(25) Demand for wholesale international roaming services comes from foreign mobile operators who wish to provide their own customers with mobile services outside their own network and, downstream, from subscribers wishing to use their mobile telephones outside their own countries. The Commission concluded that there was a separate wholesale market for international roaming.

Wholesale market for mobile call termination

(26) As established in previous Commission Decisions, 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. Therefore the Commission concluded that there was a separate wholesale market for mobile call termination.

B. **The relevant geographic markets**

(27) In the market investigation the vast majority of respondents considered the relevant geographic markets to be national, that is to say, limited to the territory of Austria but no smaller. There appeared to be no relevant commercial practice or ability to discriminate between users on the basis of their location within the Austrian territory as far as mobile telecommunications services to end customers are concerned.

(28) In line with the Commission's previous decisions and based on the results of the market investigation also the markets for wholesale access and call origination on public mobile telephone networks, the wholesale market for international roaming and the wholesale market for mobile call termination were defined as national in scope (that is to say, Austria).

C. **Competitive assessment**

(29) The competitive assessment focused on the market for mobile telecommunications services to end customers.

1. ***Unilateral effects***

Market shares and market structure post-merger

(30) The Austrian Market for mobile telecommunication services to end customers was already highly concentrated prior to the transaction, as a result of which a fully-fledged competitor would be eliminated from the market and the number of market players would be reduced from four to three. The competition concerns identified by the Commission in this case were a consequence of a number of factors: the market structure, the high diversion ratios between the Parties, the significant margins which they realised, and the pre-merger importance of the Parties with regard to the acquisition of new business.

(31) Competition concerns would have arisen as a result of the proposed transaction in particular owing to high barriers to entry, the absence of significant buyer power and the existence on the part of competitors of an incentive to follow price increases by the merged entity. Furthermore, the argument of the Notifying Party according to which the competitive constraint posed by Orange in the market was likely to deteriorate in the near to medium term could not be accepted on the basis of the evidence.

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

(33) In addition to the MNOs there were only two independent MVNOs active on the Austrian market which did not own their network and were hosted by one of the MNOs. And even though there was a significant number of independent resellers active in Austria, in practice they accounted for a negligible portion of the total subscribers.

(34) The Commission analysed the market shares of the Parties in a number of different ways to ensure its assessment was complete and reflected the particular characteristics of the market in question. The Commission examined HHI values and deltas, the relevance of which is referred to in the Horizontal Guidelines. The Commission then looked closely at the Parties' position in certain segments which were particularly relevant for growth and innovation (such as post-paid voice and data and data only) and which were likely to influence the overall market for telecommunications services going forward. Finally, the Commission considered the dynamic power of the Parties in the market arising from their current ability to attract new customers.

(35) Although the combined market shares of the Parties would be below [20-30 %], the HHI and delta values were above those defined as initial indicators of the absence of competition concerns in the Horizontal Guidelines.

(36) The post-paid private voice and data (that is to say, bundled offerings for use on voice-enabled devices) and the data-only segment were closely examined, given that these segments were particularly important for the market as a whole and its near-term development.

(37) Data use was already the biggest driver of growth in the market, and this trend was expected to continue and intensify in the next few years. Indeed, LTE is a network protocol designed for data, in which voice is expected to occupy only a very minor share of total traffic. The Commission found that the post-paid private voice and data and the data-only segments accounted for the largest market shares of the total revenues of both Orange and H3G.

Switching and closeness of competition

(38) Furthermore, analysing switching and closeness of competition to assess the competitive constraints imposed by the Parties on each other, the Commission revealed a significant competitive constraint imposed by H3G on Orange and similarly by Orange on H3G.

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

(40) Assessing the competitive force of H3G pre- and post-merger, the Commission considered that H3G was an important, if not the most important, competitive force in the market and its incentive to remain a driving force, in the absence of substantiated efficiencies, would be reduced after the transaction.

(41) Moreover, there was a strong expectation that H3G would have had less incentive to compete aggressively than the Parties would have in the absence of the merger.

Absence of countervailing factors

(42) The Commission analysed potential countervailing factors such as buyer power, barriers to entry and the likelihood of new entries and concluded that it was unlikely that MNO or MVNO market entry would occur in Austria following the transaction as notified. Even if an MNO were to enter, it would have needed to await suitable spectrum allocation, build a radio network and then roll out its services to customers, all of which would have taken a considerable time. It could therefore be excluded that, in the absence of appropriate remedies, any market entry would be sufficiently timely to exercise a disciplining effect on the price levels resulting from the merger.

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

Anticipated effect of the proposed transaction on prices in the post-paid phone segment (voice and data) and the reaction by other competitors post-merger

(44) The Commission analysed upward pricing pressure (UPP) in the post-paid segment. UPP makes it possible to estimate to what extent the merged firm would have an incentive to raise prices post-merger, given in particular prices, margins and diversion ratios observed in the market and making some assumptions on demand. The proposed transaction would result in a significant UPP to the detriment of consumers.

(45) The estimated gross upward pricing pressure index ('GUPPI') was computed on a per-user basis using the Parties' figures for the average revenue per user and the diversion ratios implied by the MNP (Mobile Number Portability) for the most recent 12 month period.

(46) The Commission's analysis using the GUPPI approach predicted substantial increases in quality-adjusted prices as a result of the Proposed Transaction in the post-paid private segment.

(47) The GUPPI approach looks only at the incentives faced by the Parties. Competitors would have been expected to respond to price increases by the merged entity with price increases of their own. This would have further relaxed pricing constraints on the merged entity, resulting in feedback effects which would have been expected to further inflate the price increases.

(48) Even though H3G was a particularly important competitor in the Austrian market pre-merger, as a result of which prices in that market were low compared to other Member States, as a result of the proposed transaction H3G's incentives would have changed. This change in incentives was only partially reflected in the UPP calculations and constituted an additional reason to expect quality-adjusted prices to rise compared to what would have happened in the absence of the merger.

(49) It follows that the data supported a robust prediction of significant quality-adjusted price increases by the merged entity in the post-paid segment.

(50) The Commission further analysed how competitors in the retail telecommunications market could be expected to react. It found that competitors were unlikely to increase supply or reduce prices in response to a price increase by the merged entity. Neither could the reduction in competition be fully and effectively offset by MVNOs or other service providers active on the Austrian market.

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

(51) The Commission analysed Orange's competitive position, its market shares and plans absent the merger. The Commission found that, absent the merger, Orange would have remained a relevant competitor on the Austrian market for mobile telecommunications services to end customers.

Conclusions on non-coordinated effects

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

Other markets

(53) The Proposed Transaction did not give rise to competition concerns on the other relevant markets, namely the wholesale access and call origination on public mobile telephone networks, the wholesale market for international roaming and the wholesale market for mobile call termination.

(54) Even though the Commission found some indications that the merger might possibly have affected access opportunities for MVNOs, there was no need to come to a final decision in that respect, as the commitments proposed by the Notifying Party aimed to facilitate market entry and thus equally addressed and ruled out the possibility that the transaction would lead to negative effects on the Austrian wholesale market for network access and call origination.

Efficiencies

(55) In its response to the Statement of Objections, the Notifying Party claimed an efficiency defence.

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

(57) The analysis of the Commission revealed that the claimed efficiencies had not been shown to be verifiable, merger specific and to the benefit of consumers. Therefore, they could not be taken into account in order to offset the competitive harm resulting from the Proposed Transaction.

2. ***Coordinated effects***

(58) The Commission found that some characteristics of the Austrian mobile telecommunications market might be conducive to coordination and some past parallel behaviour of the Austrian MNOs could point to co-ordination. However, the indications did not meet the requisite standard of proof the Commission has to meet according to the case law, namely a significant impediment to effective competition leading to coordinated effects.

(59) In any event, even if coordinated effects in the market for mobile telecommunication services to end customers were assumed, the fact would remain that the commitments proposed by the Notifying Party aimed to facilitate market entry and thus also addressed possible coordinated effects. Hence, it could be ruled out that the transaction as modified by the commitments would lead to a significant impediment to effective competition in the form of coordinated effects on the Austrian market for mobile telecommunications services to end customers.

D. **Commitments submitted by the notifying party**

(60) In order to address competition concerns identified by the Commission, the Notifying Party submitted a first commitments package pursuant to Article 6(2) of the Merger Regulation on 20 August 2012. Those commitments were subsequently market tested. On 9, 19, 24 and 29 October 2012 and further on 11 and 12 November 2012, in the light of the results of the

market tests and the competition concerns communicated by the Commission, a revised commitments package was submitted pursuant to Article 8(2) of the Merger Regulation. The ultimate consolidated document is attached in Annex III to the Commission's Decision.

(61) With the aim of addressing the raised competition concerns and obtaining conditional clearance of the proposed transaction, H3G committed to make available wholesale access to the H3G Network to up to 30 % of H3G's network for up to 16 MVNOs in the coming 10 years, enabling them to offer mobile communication services to end customers in Austria. In addition, H3G made an upfront commitment to enter into an MVNO agreement with an MVNO to be approved by the Commission.

(62) The details of the terms upon which access would be made available would be published on the H3G website in the form of a Reference offer.

(63) The Reference Offer would be available to MVNOs who wished to provide mobile services to end customers under their own brand name provided that they were not controlled by an MNO active in Austria.

(64) Under the commitments, H3G is not obliged to carry out the technical implementation with more than two MVNOs at any one time. However, technical implementations which continue for more than 12 consecutive months are not counted in this limit.

(65) The wholesale prices are set out in Appendix A to the Reference Offer. The prices are not subject to any minimum volume or minimum revenue commitments.

(66) For voice and SMS transactions, per unit prices apply (for both the origination and termination legs). For data transactions, the MVNO has a choice of unit pricing — either a single unit price or a tiered unit price.

(67) In addition, the MVNO may elect a retail tariff which is offered by H3G to which retail minus pricing will be applied. Retail minus pricing shall only be available for data access SIM-only services (and shall not be available for other products or market developments such as NFC (Near Field Communication) offerings, handset subsidies or content offerings).

(68) The Reference Offer foresees a Base Rate per unit (voice, SMS, data) and a Discount Rate per unit. The Discount Rates are applicable to all units purchased after a specific annual Discount Threshold has been reached.

(69) The Reference Offer contains an offer from H3G to make available wholesale access to its network and this includes access to LTE technology.

(70) H3G will consider reasonable requests for additional services (beyond wholesale access) if required by the MVNO, subject to separate agreement of the terms.

(71) A fast-track dispute resolution procedure has been put in place for disputes which arise between an MVNO and H3G during negotiations.

(72) H3G undertook not to complete the acquisition of Orange Austria before it had entered into an MVNO agreement based on the Reference Offer with one MVNO which would need to be approved by the Commission.

(73) An independent Monitoring Trustee would be appointed to monitor H3G's compliance with the commitments. The Monitoring Trustee would report to the Commission periodically throughout the term of the commitments in relation to the negotiation of MVNO Agreements so that the Commission could assess whether H3G was complying with its obligations under the Commitments. The Monitoring Trustee would also monitor the fast-track dispute resolution procedure.

(74) The Commission market tested these commitments and, in the light of all the preceding considerations concluded that, subject to full compliance with the commitments given by H3G, the Proposed Transaction would not significantly impede effective competition in the Internal Market or a substantial part thereof.

V. **CONCLUSION**

(75) For the reasons mentioned above, the decision concluded that the proposed concentration would not significantly impede effective competition in the Internal Market or in a substantial part of it.

(76) Consequently the concentration was declared compatible with the Internal Market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.