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⁽¹⁾ Text with EEA relevance

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Euro exchange rates ⁽¹⁾

6 March 2013

(2013/C 66/01)

1 euro =

Currency	Exchange rate	Currency	Exchange rate		
USD	US dollar	1,3035	AUD	Australian dollar	1,2670
JPY	Japanese yen	121,85	CAD	Canadian dollar	1,3408
DKK	Danish krone	7,4556	HKD	Hong Kong dollar	10,1099
GBP	Pound sterling	0,86440	NZD	New Zealand dollar	1,5630
SEK	Swedish krona	8,3159	SGD	Singapore dollar	1,6244
CHF	Swiss franc	1,2301	KRW	South Korean won	1 412,69
ISK	Iceland króna		ZAR	South African rand	11,7980
NOK	Norwegian krone	7,4250	CNY	Chinese yuan renminbi	8,1066
BGN	Bulgarian lev	1,9558	HRK	Croatian kuna	7,5928
CZK	Czech koruna	25,565	IDR	Indonesian rupiah	12 638,96
HUF	Hungarian forint	298,55	MYR	Malaysian ringgit	4,0497
LTL	Lithuanian litas	3,4528	PHP	Philippine peso	53,067
LVL	Latvian lats	0,7008	RUB	Russian rouble	39,9850
PLN	Polish zloty	4,1495	THB	Thai baht	38,792
RON	Romanian leu	4,3578	BRL	Brazilian real	2,5631
TRY	Turkish lira	2,3365	MXN	Mexican peso	16,5647
			INR	Indian rupee	71,3700

⁽¹⁾ Source: reference exchange rate published by the ECB.

Opinion of the Advisory Committee on mergers given at its meeting of 8 August 2012 regarding a draft decision relating to Case COMP/M.6314 — Telefónica UK/Vodafone UK/Everything Everywhere/JV

Rapporteur: Portugal

(2013/C 66/02)

Concentration

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
2. The Advisory Committee agrees with the Commission that the notified transaction has a Community dimension pursuant to Article 1(3) of the Merger Regulation.

Market definition

3. The Advisory Committee agrees with the Commission's definitions of the relevant product and geographic markets in the draft decision.
4. In particular, does the Advisory Committee agree that the operation needs to be assessed on the following markets:
 - (a) market for the wholesale supply of mobile wallet platforms, at least UK-wide;
 - (b) market for secure storage, at least UK-wide;
 - (c) market for the retail distribution of mobile wallet services to customers, at least UK-wide;
 - (d) market for advertising services, at least UK-wide;
 - (e) market for mobile advertising intermediation services, at least UK-wide;
 - (f) market for retail and wholesale bulk SMS services, at least UK-wide;
 - (g) market for data analytics services, at least UK-wide;
 - (h) UK market for retail mobile telephony services?

Competition assessment

Vertical effects

5. The Advisory Committee agrees with the Commission's assessment that the proposed operation is not likely to give rise to non-coordinated and coordinated vertical effects that would significantly impede effective competition on the at least UK-wide market for the wholesale supply of mobile wallet platforms.
6. In particular, the Advisory Committee agrees with the Commission's assessment that the Notifying Parties are not likely to have:
 - (a) the technical ability to substantially foreclose competing mobile wallet providers;
 - (b) the commercial ability, to substantially foreclose competing mobile wallet providers; and
 - (c) the unilateral or coordinated incentives to foreclose competing mobile wallet providers.

7. The Advisory Committee agrees with the Commission's assessment that the proposed operation is not likely to give rise to non-coordinated and coordinated vertical effects that would significantly impede effective competition on the at least UK-wide market for the wholesale and retail supply of bulk SMS services.

Conglomerate effects

8. The Advisory Committee agrees with the Commission's assessment that the proposed operation is not likely to give rise to non-coordinated and coordinated effects that would significantly impede effective competition on the UK-wide market for the retail mobile telephony services.

Horizontal effects

9. The Advisory Committee agrees with the Commission's assessment that the proposed operation is not likely to give rise to horizontal effects that would significantly impede effective competition on the relevant markets.

Conclusion

10. The Advisory Committee agrees with the Commission's conclusion that the proposed operation is not likely to significantly impede effective competition in the internal market or in a substantial part of it, and that as a result it must be declared compatible with the internal market and the functioning of the EEA Agreement in accordance with Articles 2(2) and 8(1) of the Merger regulation and Article 57 of the EEA Agreement.
-

Final report of the Hearing Officer ⁽¹⁾**COMP/M.6314 — Telefónica UK/Vodafone UK/Everything Everywhere/JV**

(2013/C 66/03)

On 6 March 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation ⁽²⁾ by which Telefónica UK Limited, Vodafone Group plc, and Everything Everywhere Limited (jointly controlled by France Télécom and Deutsche Telekom), acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of a newly created joint venture company, which will offer various mobile commerce services to businesses in the United Kingdom. The Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 13 April 2012.

On 14 June and 10 July 2012, I accepted requests from, respectively, Hutchinson 3G UK Limited (Three UK) and Lloyds Banking Group to be heard as interested third persons pursuant to Article 18(4) of the Merger Regulation. Three UK and Lloyds Banking Group demonstrated sufficient interest in the proceedings. The notified concentration is likely to affect their competitive position with respect to the offer of mobile wallet services in the United Kingdom. Lloyds Banking Group is also a potential customer of the future joint venture. Moreover, both parties have made a number of contributions in the course of the procedure. Accordingly, I informed the notifying parties of my decision to recognise Three UK and Lloyds Banking Group as interested third persons.

On the basis of the additional evidence gathered during the in-depth phase of the investigation, the Commission services concluded that the proposed transaction would not significantly impede effective competition in the internal market, and is therefore compatible with the internal market and the functioning of the EEA Agreement. Consequently, no statement of objections was sent to the parties.

The draft decision provides for an unconditional clearance of the proposed concentration. I have not received any complaint about the effective exercise of procedural rights by the notifying parties or other parties. The draft decision does not contain any objections on which the parties have not had the opportunity to make known their views. In view thereof, I consider that all participants in the proceeding have been able to effectively exercise their procedural rights in this case.

Brussels, 8 August 2012.

Michael ALBERS

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

⁽²⁾ Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (OJ L 24, 29.1.2004, p. 1).

Summary of Commission Decision

of 4 September 2012

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

(Case COMP/M.6314 — Telefónica UK/Vodafone UK/Everything Everywhere/JV)

(notified under document C(2012) 6063 final)

(Only the English version is authentic)

(Text with EEA relevance)

(2013/C 66/04)

(Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.)

On 4 September 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(1) of that Regulation. A non-confidential version of the full decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address:

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

I. THE PROCEDURE

- (1) On 6 March 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 undertakings Everything Everywhere Limited ('Everything Everywhere'), Telefónica UK Limited ('Telefónica UK') and Vodafone Group Plc ('Vodafone Group') (together 'the notifying parties') would acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, joint control of a newly created company constituting a joint venture (the 'JV Co'), which will offer various mobile commerce ('mCommerce') services to businesses in the United Kingdom (the 'operation').
- (2) The operation has an EU dimension in accordance with Article 1(2) of the Merger Regulation.
- (3) After the first phase assessment, the Commission concluded that the operation fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the internal market and with the EEA Agreement. The Commission therefore initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation (hereafter the 'decision opening proceedings') on 13 April 2012.
- (4) The notifying parties provided several separated submissions aimed at replying to specific aspects raised in the decision opening the proceedings.

- (5) On 2 May 2012, the notifying parties requested an extension of the time period for the second phase investigation by 17 working days pursuant to Article 10, paragraph 3, second sub-paragraph of the Merger Regulation.

II. THE NOTIFYING PARTIES

- (6) Everything Everywhere is a joint venture created by the merger of T-Mobile UK and Orange UK that was declared compatible with the internal market by the Commission Decision of 1 March 2010 in Case COMP/M.5650 — T-Mobile/Orange⁽²⁾. Everything Everywhere is ultimately owned by France Télécom and Deutsche Telekom, which are involved in fixed and mobile telephony services in a number of EU Member States and worldwide.
- (7) Telefónica UK is a wholly-owned subsidiary of Telefónica SA and belongs to the Telefónica Group, which mainly offers fixed and mobile telephony services in a number of EU Member States as well as in a number of countries outside Europe, in particular in Latin America.
- (8) Vodafone Group is the holding company of a group of companies that is involved in the operation of mobile telecommunications networks and the provision of related telecommunications services. Vodafone Group has equity interests in 30 mobile operators globally. Vodafone Group is active elsewhere in the European Union through its wholly owned or controlled subsidiaries, and also has relationships with partner networks in over 40 further countries, including countries within the European Union. Vodafone UK

⁽¹⁾ OJ L 24, 29.1.2004, p. 1 (hereinafter referred to as the 'Merger Regulation').

⁽²⁾ Paragraph 239.

Limited ('Vodafone UK'), a wholly owned and controlled subsidiary of Vodafone Group, is active in particular in the mobile telephony retail market in the United Kingdom.

(9) The JV Co would offer various services directed at business customers in the United Kingdom. None of the JV Co's activities would be directly provided to consumers. The JV Co would provide services to the notifying parties as well as to third party mobile operators (the 'service users'). In particular the JV Co plans to offer the following services:

(a) the provision of a platform enabling the supply of (for example payment or ticketing) transaction services accessible offline through a Near Field Communication ('NFC') enabled mobile handset as well as online via the Internet (the 'wallet platform')⁽³⁾. The wallet platform would support the supply of various related NFC services including payment in shops, ticketing, and access services as well as voucher and loyalty services, enabling the provision of digital vouchers to consumers (the 'transactions'). These services would be provided to commercial entities including banks, other payment card issuers (credit, debit card, stored value etc.), loyalty card issuers, ticket issuers and other retailers) (the 'service providers');

(b) the provision and sourcing of mobile marketing platform services so as to provide a single point of contact for advertisers and media agencies who wish to develop advertising campaigns targeted at customers of mobile network operators ('MNOs') and mobile virtual network operators ('MVNOs') (together 'mobile operators') whether through push messages, coupons and vouchers, or through the sale of advertising space;

(c) the provision of data analytics services to the JV Co's transactions and advertising customers in respect of

⁽³⁾ There are two approaches to what is commonly described as a mobile wallet: (i) a container wallet: the container wallet at a minimum provides the consumer with an overview of all applications that are loaded into the secure element and allows him or her to select which payment cards are switched on and off and to set priorities between them. This mobile wallet serves as a container for all the consumer's virtual payment cards (the graphical user interface component) and allows the configuration of the secure element (the technical component) even from different card issuers, in a similar fashion to a consumer having several payment cards physically on his or her leather; (ii) an app-centric wallet: it contains only one application which can include several cards, but from the same issuer. Each individual card stored on the secure element (for example, a payment card) is represented by a corresponding (graphical user interface) application on the mobile handset. A card belonging to an individual service provider therefore shows up as an individual application on the handset. In the physical world, it would be equivalent to a plastic card.

data collected from both its transaction services and advertising services⁽⁴⁾.

III. THE RELEVANT MARKETS

3.1. Relevant product markets

Market for wholesale supply of mobile wallet platforms

(10) A relevant market could be defined for wholesale supply of mobile wallet platforms⁽⁵⁾, distinct from the market for the retail distribution of mobile wallet services to customers. However, for the purpose of this Decision, this can be left open as the operation would not significantly impede effective competition under any alternative product market definition.

Market for secure storage

(11) A mobile wallet requires secure storage of information, in particular payment credentials. Such storage can, in principle, be provided by a variety of means such as storage in the cloud and storage on a secure element ('SE') which can be located in various places in or on the mobile handset.

(12) The Commission does not exclude that a distinction could be made between a market for wholesale supply of mobile wallet platform services and a market for the provision of secure storage only. However, a market for the provision of secure storage would not only comprise the provision of secure storage on SIM cards but at least

⁽⁴⁾ The JV Co would also act as a virtual transaction processor ('VTP'), enabling retailers to analyse consumers' retail activity. The JV Co would not actually process any transactions itself. Instead, the JV Co would partner with existing third party transaction processors, acting as an intermediary in order to capture basic information on online and physical purchases made by users of the mobile wallet, together with certain details about the user. The JV Co could then pass this information back to the relevant merchant as a value-added service. Although not a relevant product market (as the JV Co's VTP services are not being offered as a distinct product offering), such services are linked to the advertising and data analytics elements of the JV Co.

⁽⁵⁾ Several companies (Ericsson, Microsoft, etc.) are offering what is often referred to as 'white label' wallets. These companies sought to provide market participants with the IT infrastructure for facilitating transactions, voucher redemption and data analytics to launch a branded wallet. The provision of 'white label' wallets therefore resembles the wallet platform offering that the JV Co itself wants to make to third party M(V)NOs. Moreover, these companies are, like the JV Co, only present at the wholesale level and, thus, the supply side of a market for wholesale supply of mobile wallet platform services would be materially different from that for the provision of retail distribution of mobile wallet services to end-customers.

also include secure storage provided on embedded SEs and, possibly, on SEs on devices attached to the mobile handset as well as cloud-based solutions.

- (13) In any event, for the purpose of the present Decision, it can be left open whether a market for secure storage comprises also secure storage on SEs on devices attached to the mobile handset or cloud-based solutions, since the operation would not significantly impede effective competition under any alternative product market definition.

Market for retail distribution of mobile wallet services to customers

- (14) The notifying parties consider that a downstream market for the retail distribution of mobile wallets services to customers exists. The JV Co itself will not be present in this market. Instead, the JV Co's offer of a wholesale supply of mobile wallet platforms will enable the notifying parties and other service users to offer an individualised mobile wallet for retail on the basis of the underlying wallet platform provided by the JV Co.

- (15) During the market investigation, the Commission assessed in particular the following:

(a) whether the retail market for the provision of mobile wallet services (including both offline and online mobile payments) would constitute a separate market from existing online payment services (through credit/debit cards/PayPal etc., via the Internet on a static PC, tablet, or on a mobile handset);

(b) whether the retail market for the provision of mobile wallet services (including both offline and online mobile payments) would constitute a separate market from existing offline payment (NFC-enabled credit and debit cards, and traditional means of payment such as credit, debit cards and cash);

(c) whether the retail market for the provision of mobile wallet services should be further subdivided between offline and online mobile payments.

- (16) The Commission considers that currently existing methods of online payments and mobile payments may belong to different relevant product markets. However, for the purpose of the present Decision it can be left

open whether currently existing methods of online payment are part of the same market as methods of mobile payment, as the operation would not significantly impede effective competition under any alternative product market definition.

- (17) The Commission considers that mobile payments are likely continue to coexist in the foreseeable future with non-mobile means of payment including NFC and non-NFC enabled credit and debit cards. Consumers will want to continue using several means of payment and suppliers of means of payment and retailers have an incentive to continue to supply and accept means of payment used by their customers. Even if these means of payments have characteristics that distinguish them from mobile payments, a certain degree of substitutability is most likely to exist, most notably between mobile payments and NFC-enabled credit and debit cards, implying that currently existing means of offline payment may exert competitive pressure on retail suppliers of mobile payment services. This will in turn create an indirect competitive constraint on wholesale suppliers of mobile wallet platforms. However, for the purpose of the present Decision, it can be left open whether currently offline payments are part of the same market as mobile payments, since the operation would not significantly impede effective competition under any alternative product market definition.

- (18) Finally, the Commission considers that online and offline mobile payments are not likely to be part of the same relevant product market at least at present. While the evolution in the short/medium term is not entirely clear,⁽⁶⁾ for the present Decision it can however be left open whether online and offline mobile payments are part of the same market, since the operation would not significantly impede effective competition under any alternative product market definition.

Market for advertising services

- (19) The JV Co would act as an intermediary for the sale of digital advertising inventory: it would offer advertisers, agencies and others a 'one stop shop' for the delivery of coupons and offers or brand advertising campaigns onto the mobile handsets of the opted-in customers of all participating M(V)NOs with a single campaign.

⁽⁶⁾ This is consistent with the Commission's Green Paper 'Towards an integrated European market for card, Internet and mobile payments' which state that that the line between e-payments and m-payments is blurred, and may become even more so in the future. See point 2.4 of the Green Paper at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0941:EN:NOT>

(20) In particular, the JV Co would offer the following services:

- (a) push SMS: the JV Co would send SMS messages to participating M(V)NOs' customers opted in for marketing offers or messages;
- (b) intelligent bulk SMS: the JV Co would send SMS messages to an advertiser's own opted-in customers with the overlay of additional data/features to enhance the effectiveness of the campaign. The JV Co would provide, as an ancillary activity only, standard bulk SMS services, that is to say without intelligent overlay;
- (c) pull offers: the JV Co would provide access for advertisers and agencies to platforms such as M(V)NOs' apps or the JV Co's wallet to place offers or information in a location which consumers would be encouraged to visit to find such services, rather than offers or information being sent out to them by push SMS/MMS or in a display ad;
- (d) display advertising on M(V)NOs' assets: the JV Co would provide advertisers with advertising options including display ads, banners, pop-ups etc. across all the participating M(V)NO-owned mobile real-estate, that is to say in wallet, mobile portals and apps;
- (e) coupons and vouchers: the JV Co would provide the capability to both issue coupons and vouchers through messaging and other means, redeem them both online and at retail locations through the JV Co's wallet or other mobile apps and track such redemption where required.

(21) The JV Co would not be active in other types of mobile advertising (such as for example supply of intermediation services for search advertising), which are therefore not discussed in the present Decision.

Market for mobile advertising intermediation services

(22) According to the notifying parties, the relevant product market for the assessment of the formation of the JV Co is the market for the supply of intermediation services for digital advertising in the United Kingdom, including all forms of digital advertising (whether marketing messaging via e-mail, SMS or push notification; or search and non-search online advertising), delivered both through static Internet connections and through mobile communications devices (and indeed through intermediate devices such as laptops and tablet computers).

(23) In its previous practice, the Commission has distinguished between the provision of online and offline advertising space⁽⁷⁾. The Commission also discussed the question of whether the market for online advertising

could be subsegmented into search and non-search services but finally left this question open, because under any alternative product market definition, the transaction did not raise any competition concerns⁽⁸⁾.

(24) For the purposes of the present Decision, it can however be left open if mobile advertising constitutes a separate market from online (search or non-search) advertising or if it is part of a broader market, since the operation is not likely to lead to a significant impediment to effective competition under any possible product market definition.

Targeted marketing messaging within mobile advertising

(25) For the purposes of the present Decision, it can however be left open whether mobile marketing messaging constitutes a separate market from search and non-search mobile advertising or if it is part of a broader market, since the operation is not likely to lead to a significant impediment to effective competition under any possible product market definition.

Existence of separate submarkets within targeted marketing messaging

(26) The Commission also assessed whether within targeted marketing messaging, push SMS and intelligent bulk SMS on one hand, and IP push notifications on the other hand, would constitute separate markets.

(27) However, for the purposes of the present Decision, it can be left open if the different types of targeted mobile marketing messages constitute separate markets or are part of a broader market, as the operation is not likely to lead to a significant impediment to effective competition under any possible product market definition.

Intermediation of mobile advertising versus direct sales

(28) The JV Co will be an intermediary for targeted marketing messaging, non-search and other forms of advertising on mobile handsets (such as coupons and vouchers).

(29) On the basis of the market investigation, the Commission has concluded that direct sales of mobile advertising constrain the sale through intermediaries to a significant extent. In any event, for the purposes of the present Decision, it can be left open whether there are separate markets for direct and intermediated sales of mobile advertising or whether they are part of a broader

⁽⁷⁾ See the Commission Decision of 11 March 2008 in Case COMP/M.4731 — *Google/DoubleClick*.

⁽⁸⁾ See footnote 7.

market, as the operation is not likely to lead to a significant impediment to effective competition under any possible product market definition.

Overall conclusion

- (30) On the basis of the above, it is concluded that, as regards the JV Co's advertising activities, the precise product market definition can be left open, as the operation would not significantly impede effective competition under any alternative product market definition.

Market for retail and wholesale bulk SMS services

- (31) Retail bulk SMS is a service that enables businesses (such as retailers or financial institutions) to send high volumes of text messages to their customers (provided that these have opted in to receive such messages on their mobile handsets). It can be used for sending marketing messages but is currently mainly used for general customer communications. For example, a bank might use a retail bulk SMS service to send mini-bank statements or fraud alerts to its customers.
- (32) Delivery of messages via SMS to their intended recipients requires connectivity into one or more mobile networks and the physical conveyance of those messages to the relevant mobile subscribers. This service is referred to as the wholesale delivery of bulk SMS. The service consists of two main elements: firstly, conveyance of the message from the sender (the JV Co or an aggregator to the mobile network to which the intended recipient has subscribed — the home network) and secondly, conveyance by the home network to the recipient's mobile handset.
- (33) The notifying parties consider that there is a separate market for retail bulk SMS services and for wholesale bulk SMS delivery services, which is an upstream input into the marketing messaging services of the JV Co.
- (34) On the basis of the market investigation, retail bulk SMS services constitute a separate market from active marketing messaging. The former is downstream from the possible market for the wholesale supply of bulk SMS services. However, for the purposes of the present Decision, the precise market definition can be left open, since the operation is not likely to lead to a significant impediment to effective competition under any possible product market definition.

Market for data analytics services

- (35) In addition to its transactions and advertising services, the JV Co will offer data analytics services to its customers. The notifying parties do not envisage that the JV Co will offer data analytics services as standalone products. The JV Co intends to collect and analyse the data generated from both its transactions and advertising services in order to provide its customers with valuable

insights into consumer behaviour. The JV Co's data analytics activities will comprise three main elements: reporting analytics, business development analytics, and loyalty analytics.

- (36) In the notifying parties' view, the JV Co would be active in the market for the supply of data analytics services in respect of online and offline advertising and transactions services. They do not consider that it is necessary to segment the overall market for the supply of data analytics services in the present case.
- (37) The Commission assessed, in the context of the present operation, whether there could be a separate product market for the provision of data analytics services for mobile advertising.
- (38) Furthermore, the Commission assessed whether within the mobile environment there could be separate markets for market research services (aimed at measuring and understanding consumers' purchasing behaviour) and market information services (aimed at supplying data on individual consumers such as age, social group, activities, address, etc. for direct marketing purposes).
- (39) In any event, for the purposes of the present Decision, the precise product market definition can be left open, since the operation would not significantly impede effective competition under any alternative product market definition.

Market for retail mobile telephony services

- (40) On this market, MNOs sell national and international voice calls, SMS (including MMS), mobile Internet with data services and access to content via the mobile network to end customers.
- (41) In previous decisions⁽⁹⁾, the Commission did not further subdivide the market for the provision of mobile communications services to end customers by type of customer (corporate or private, post-pay subscribers or pre-paid customers) or by type of network technology (2G/GSM or 3G/UMTS). The Commission therefore

⁽⁹⁾ See the Commission Decision of 1 March 2012 in Case COMP/M.5650 — *T-Mobile/Orange*, paragraph 24; the Commission Decision of 27 November 2007 in Case COMP/M.4947 — *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 14; the Commission Decision of 26 April 2006 in Case COMP/M.3916 — *T-Mobile Austria/Tele ring*, paragraph 18; the Commission Decision of 24 September 2004 in Case COMP/M.3530 — *TeliaSonera/Orange*, paragraph 13; and the Commission decision of 16 September 2003 in Case COMP/M.3245 — *Vodafone/Singlepoint*, paragraph 12.

assessed the previous cases on the basis of a single market for the provision of mobile telecommunications services to end customers.

- (42) For the purpose of the present Decision, it can be left open whether or not there are distinct submarkets as regards mobile telecommunications services to end customers, since the operation would not significantly impede effective competition under any alternative product market definition.

3.2. The relevant geographic markets

Market for wholesale supply of mobile wallet platforms

- (43) The notifying parties consider that the relevant geographic market for the wholesale supply of mobile wallet platforms is at least national in scope, covering the whole of the United Kingdom.
- (44) On the basis of the market investigation, the Commission considers that in the present case the geographical scope of the wholesale supply of mobile wallet platforms seems to be at least national (United Kingdom) and possibly wider than national. It can however be left open whether the geographical scope of the market for wholesale supply of mobile wallet platforms is wider than national since, the operation would not significantly impede effective competition under any relevant geographic market definition.

Market for secure storage

- (45) The notifying parties did not consider a market for secure storage or its geographical scope.
- (46) The provision of SIM-based SE secure storage appears intimately connected to the provision of retail mobile telephony services, markets that the Commission in previous decisions has found to be national in geographical scope⁽¹⁰⁾.
- (47) On the other hand, the provision of secure storage on embedded SEs is conceivably wider in geographical scope as the issuers of embedded SEs, in particular OEMs and OS providers and, possibly, issuers of external SEs and cloud-based secure storage are active on a worldwide basis. They therefore may be able to contract with

retail suppliers of mobile wallet services or wholesale providers of mobile wallet platforms for the provision of secure storage on a basis that is larger than national.

- (48) The Commission takes the view that in the present case the possible market for the provision of secure storage seems to be at least national (United Kingdom) in geographic scope. For the purpose of this operation, the exact geographic market definition for a possible market for secure storage can however be left open, as the proposed operation would not significantly impede effective competition under any relevant geographic market definition.

Market for retail distribution of mobile wallet services to customers

- (49) The notifying parties consider that the relevant geographic scope of the market for the retail distribution of mobile wallet services is at least national. They do not anticipate actively offering mobile wallets to consumers outside of the United Kingdom, reflecting the fact that the payment cards and services that will be offered via the mobile wallet will relate to SPs in the United Kingdom.
- (50) The notifying parties do however expect that their competitors, such as Google and PayPal, will offer these services to consumers across multiple countries⁽¹¹⁾ and would therefore be active on a global basis. They take the view that, while there is no basis for identifying regional or local markets, it can be left open whether the relevant market for the retail distribution of mobile wallet services to customers may be wider than national.
- (51) On the basis of the market investigation, the Commission takes the view in the present case that the market for the retail distribution of mobile wallet services seems to be at least national (United Kingdom) in geographic scope. For the purpose of this case, the exact geographic market definition for the retail distribution of mobile wallet services to customers can however be left open, since the operation would not significantly impede effective competition under any relevant geographic market definition.

⁽¹⁰⁾ See the Commission Decision of 24 September 2004, Case COMP/M.3530 — *TeliaSonera AB/Orange AS*, paragraph 16 and Commission Decision of 24 October 2005, Case COMP/M.3920 — *France Telecom/Amena*, paragraph 20.

⁽¹¹⁾ The notifying parties moreover have the aspiration that the JV Co mobile wallet will be interoperable with the various wallet initiatives in other EU Member States, allowing users to use their mobile wallet when they travel across the European Union (and potentially elsewhere).

Market for advertising services

- (52) In relation to the advertising services provided by the JV Co (and possible submarkets), the notifying parties submit that the geographic market definition is at least United Kingdom-wide if not wider.
- (53) In view of the market investigation, the Commission concludes that the geographic market for advertising services and its possible submarkets seems to be national (United Kingdom) in scope. However, for the purposes of the present Decision, the exact geographic market definition can be left open, since the operation would not significantly impede effective competition under any possible geographic market definition.

Market for retail and wholesale bulk SMS services

- (54) The notifying parties consider that the relevant geographic scope of the market for retail bulk SMS services is at least national, covering the whole of the United Kingdom.
- (55) The geographic scope of the (possible) market for retail bulk SMS services appears to be national (United Kingdom) or possibly wider in scope; the (possible) market for wholesale bulk SMS services appears to be broader than national.
- (56) As regards both the market for retail and wholesale bulk SMS services, the precise geographic market definition can be left open in the present case, since the operation would not significantly impede effective competition under any alternative geographic market definition.

Market for data analytics services

- (57) The notifying parties consider that the geographic scope for the market for data analytics services (and its relevant submarkets) is at least national in scope, covering the whole of the United Kingdom.
- (58) For the purposes of the present Decision, the precise geographic market definition can be left open, since the operation would not significantly impede effective competition under any alternative geographic market definition.

Market for retail mobile telephony services

- (59) In previous decisions⁽¹²⁾, the Commission considered the relevant geographic market for mobile telecommunication services to end customers (and any possible sub-

market) to be national in scope. This is based on the fact that mobile tariffs operate on a national basis and that regulation (such as spectrum allocation, numbering and mobile termination) is also done on a national basis.

- (60) The Commission concludes that, consistent with its previous decisions, the geographic market is restricted to the United Kingdom.

IV. COMPETITIVE ASSESSMENT**4.1. Introduction**

- (61) 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 common market or in a substantial part of it⁽¹³⁾. In this respect, the Commission has assessed all markets affected by the operation.
- (62) As regards mobile transaction services, the relevant markets for the assessment of the operation are the upstream market for the wholesale supply of mobile wallet platform services, the market for the access to secure storage, the downstream market for the retail distribution of mobile wallets to customers, and the market for the retail mobile telephony services. All these markets have a geographical scope that is at least as wide as the United Kingdom and maybe wider⁽¹⁴⁾.
- (63) As regards the JV Co's advertising services, the relevant markets for the competitive assessment of the operation are the markets for mobile advertising intermediation and its potential submarkets as well as the wholesale and retail supply of bulk SMS services. In addition, the market for data analytics with its possible submarkets is also relevant for the competitive assessment in the present case.
- (64) The Commission has mainly focused its market investigation on assessing the likelihood of competitive harm arising, as a result of the operation, from possible foreclosure strategies, in particular in view of the very strong positions that the notifying parties have together on the retail mobile telephony market in the United Kingdom. As a consequence, this section will first assess the possible non-horizontal effects of the operation on the markets for mobile wallet and bulk SMS and then examine the possible horizontal effects of the operation on the markets for wholesale supply of mobile wallet platform services and the markets for mobile advertising services and the supply of data analytics.

⁽¹²⁾ See the Commission Decision of 1 March 2012 in Case COMP/M.5650 — *T-Mobile/Orange*, paragraph 25; the Commission Decision of 20 August 2007 in Case COMP/M.4748 — *T-Mobile/Orange Netherlands*, paragraph 16 and the Commission Decision of 26 April 2006 in Case COMP/M.3916 — *T-Mobile Austria/Telesing*, paragraph 19.

⁽¹³⁾ See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

⁽¹⁴⁾ The competition assessment is conducted on a market constituted of the whole of the United Kingdom. On any broader geographic market, similar conclusions of absence of any likely significant impediment to effective competition would be reached.

(65) For the assessment of possible horizontal effects, the Commission has considered the situation absent the operation. On the basis of the outcome of the market investigation, the Commission considers that the notifying parties would be (and to some extent are already) able to offer their mCommerce services without the JV Co⁽¹⁵⁾. However, it is not necessary for the purpose of the present Decision to reach a conclusion on this, as the operation would not significantly impede effective competition under any alternative scenario.

4.2. Non-horizontal effects — vertical effects

Introduction

(66) In this Decision, the Commission ascertains whether the notifying parties may exercise their strong collective position in the market for retail mobile telephony services (and in any possible submarket) in order to substantially foreclose other potential entrants in the wholesale mobile wallet platform market from offering competing mobile wallet platform services. According to the Non-Horizontal Merger Guidelines, two types of foreclosure are possible: input foreclosure and customer foreclosure⁽¹⁶⁾. In the current case, the Commission assesses the likelihood of a strategy to either technically or commercially foreclose access to essential inputs for the provision of mobile wallet products offered to end consumers; these essential inputs are the SE as well as the placement of apps on a mobile handset allowing the mobile wallet to function. Such input foreclosure could harm or deteriorate competitive conditions in the wholesale mobile wallet platform services market (for example by leading to higher prices for service providers) and would also impact competitive conditions in the retail mobile wallet market downstream. Thus, the Commission examines below the notifying parties' ability and incentive to engage in such input foreclosure.

(67) The Commission has investigated in particular whether the notifying parties would:

(a) have the technical ability to substantially foreclose competing mobile wallet providers through a variety of potential means;

(b) have the ability and the incentives to engage in commercial foreclosure of competing mobile wallet providers through a variety of potential means.

⁽¹⁵⁾ See for instance responses to questionnaires Q1 and Q2 of 7 March 2012, questions 64 and 65.

⁽¹⁶⁾ See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 31 for a definition of input foreclosure.

Assessment of technical foreclosure

(68) As regards the technical ability to substantially foreclose competing mobile wallet providers, it should first be noted that a majority of respondents to the market investigation expressed the opinion that the notifying parties would not have the technical ability to prevent or limit their competitors' ⁽¹⁷⁾ ability to offer mobile wallet services other than through the JV Co⁽¹⁸⁾. It should also be noted that the notifying parties submit that the JV Co will provide access to the other MNOs and MVNOs on non-discriminatory terms⁽¹⁹⁾. In particular, all technical details will be developed by the JV Co in accordance with industry standards and circulated openly to service users and potential service users on a non-discriminatory basis⁽²⁰⁾.

(69) Access to an SE appears to be fundamental to the functioning of mobile wallets. Although it is, in principle, possible that transactions made from a mobile handset could be completed via solutions which would use software-based secure solutions where the payment credentials would be stored in the cloud, such solutions are considered at this stage to be less secure or too slow to be used at the PoS as they require entering username and passwords. Such solutions would appear as viable in the medium to long term⁽²¹⁾.

(70) The Commission therefore considers that the current most likely means of providing a mobile wallet to customers is by using a SIM-based SE, or alternatively an embedded SE.

(71) Thus, the Commission first assesses whether the notifying parties would be able to substantially foreclose competitors from offering customers a mobile wallet competing with the one offered through the JV Co by refusing access to the SE located in the SIM-based SE.

(72) Secondly, assuming that access to the SIM-based SE was refused, the Commission assesses whether competitors could still offer their mobile wallets by accessing an alternative SE embedded inside the mobile handset's hardware, or whether the notifying parties would also be able to substantially foreclose competitors from offering customers a mobile wallet competing with the one offered through the JV Co by refusing access to this alternative embedded SE.

⁽¹⁷⁾ E.g. competing M(V)NOs, Google Wallet, PayPal or other providers of mobile wallets.

⁽¹⁸⁾ Responses to Questionnaire Q3 of 7 March 2012, question 7.

⁽¹⁹⁾ See response from the notifying parties to the Commission's Request for Information of 13 September 2011, question 6.

⁽²⁰⁾ See Form CO, paragraphs 994 and 995.

⁽²¹⁾ Software-based or cloud-based services may also be used to store payment credentials. This is a new and developing technology and it is not yet very clear how this might be deployed in the mass market. However it potentially provides an alternative to MNO led service provision.

(73) The Commission nevertheless notes, as this is a nascent and evolving market, that if in the future new technologies based on software, cloud-based SEs, micro-SD, NFC stickers or sleeves, or alternative solutions were to come to market, as could reasonably be expected considering technological evolutions, they would provide significant additional competition and subsequently competitive constraints to the JV Co and the notifying parties.

Technical ability to substantially foreclose competing mobile wallet providers by foreclosing access to the SIM-based SE

(74) The Commission concludes that the notifying parties would have the technical ability to substantially foreclose access to SIM-based SEs to competing mobile wallet providers for the retail mobile telephony contracts they sign with their customers (where they provide the SIM card to the customer) in the United Kingdom. This conclusion would not change if the delineation of the geographic market was wider than the United Kingdom, as the notifying parties predominantly offer their retail mobile telephony contracts to customers resident in the United Kingdom.

Technical ability to block/degrade competing mobile wallets functioning with an alternative SE

(75) Access to the SIM-based SE could in principle be bypassed by competing mobile wallet providers if they could access other SEs placed somewhere in the mobile handset other than inside the SIM card of the notifying parties.

(76) SEs can either be embedded in the hardware of the mobile handset (a solution proposed by several OEMs⁽²²⁾ selling mobile handsets in the United Kingdom), or inserted in an external device tagged onto the mobile handset. As an example, Visa already offers mobile payment solution using such SE in the United Kingdom.

(77) These alternatives are very likely to be used by competitors offering transaction services. This clearly opens the way for competitors to propose their products to consumers using embedded SEs, like Google Wallet.

(78) As the most likely alternative to the SIM-based SE would be the embedded SE, the Commission focuses its assessment of technical foreclosure on the ability by the notifying parties to degrade the functionality of rival mobile wallets that would require the use of an

embedded SE. This degradation could essentially take one of a variety of forms, which we consider in turn below.

Technical ability to block/degrade a competing mobile wallet app, that required an embedded SE, from being downloaded, installed and/or updated on a handset operating on the networks of the notifying parties

(79) The Commission assessed whether the notifying parties may be technically able to ensure that consumers would be unable to download the necessary mobile wallet app or use it. The notifying parties submit that it is not technically possible for an MNO to block (or degrade) the downloading/installation or updating of a (competing) mobile wallet app⁽²³⁾.

(80) During this market investigation, the Commission has entered into close communication with the United Kingdom telecom regulator (Ofcom), which has proven independent technical expertise. Ofcom assessed in detail the submission of the notifying parties on technical foreclosure. In substance, Ofcom concluded that the notifying parties' assertions are reasonable in the current state of technology and application of mobile wallet services.

(81) As regards the technical possibility for MNOs to prevent the downloading of a competing mobile wallet app without blocking access to the entire app store, two MNOs which are not part of the JV Co confirmed that it would not be possible.

(82) Furthermore, as regards the technical possibility for MNOs to stop a consumer using their 3G or Wi-Fi connection to download apps (for example from PayPal) from app stores such as Google Play or iTunes, several respondents stated that it was not possible.

(83) Attempt by the notifying parties to block websites or apps for reasons other than traffic management or blocking of illegal content would be likely detected by consumers or the owners of these websites and Ofcom, which would affect the behaviour of the notifying parties in this regard. The Commission considers that this would also likely apply to the other technical foreclosure strategies assessed in the Decision.

⁽²²⁾ For instance, RIM with its Blackberry Curve 9360, Bold 9900, Bold 9790, and 9860 models, HTC with its One X and Desire C models, Samsung with its Galaxy Nexus and Galaxy SIII models, and Sony Ericsson with its Xperia S model, which all support dual SE architecture (embedded SE and SIM-based SE), and Samsung with its Galaxy Note which supports embedded SE only.

⁽²³⁾ Response of the notifying parties to the Commission's Request for Information of 24 April 2012, question 14, and Technical Paper of 8 May 2012 submitted by [...] on behalf of the notifying parties, p. 21, 22.

(84) On the basis of the above, it is most likely that the notifying parties have no ability to technically block or degrade a competing mobile wallet app from being downloaded, installed or updated on a handset operating on the network of the notifying parties.

Technical ability to block/degrade the functionality of or deactivate an embedded SE after it has been installed

(85) The notifying parties submit that the OEMs are the issuers of embedded SEs and control access to them, as OEMs will have the content management rights. The notifying parties cannot block access or degrade the functionality of the embedded SE because they do not have the necessary technical keys to enter the embedded SE. They cannot change or determine access rights to embedded SEs.

(86) The Commission considers, in particular on the basis of the Ofcom report ⁽²⁴⁾, that MNOs do not 'own' non-SIM based SEs, and, as a result, activating and controlling such a SE would not be under the control of the MNO (although enabling some aspects may rely either in part or in whole on access services, such as mobile broadband connections, that the MNO may provide for some customers). If access to the MNO broadband connection can be used to initially activate an embedded SE, this can alternatively also be done with USB or a Wi-Fi connection. As a result, if the MNO wished to foreclose access, it could do so with respect to the MNO's broadband connection (that is to say it may be technically feasible) but unlikely to be technically feasible to prevent the use of other access services (for example USB or Wi-Fi) ⁽²⁵⁾.

(87) On the basis of the market investigation, it is most likely that the notifying parties have no technical ability to technically block or degrade the functionality of or deactivate an embedded SE after it has been installed.

Technical ability to subordinate the operation of a competing mobile wallet so that preference is automatically given to the SIM-based SE/notifying parties' mobile wallet

(88) The notifying parties submit that it is possible to have both a SIM-based SE and a mobile handset-embedded SE functioning on one and the same mobile handset. It is also technically possible to have both a SIM-based SE and an embedded SE 'active' at the same time, that is to say operating in a mode such that the contactless reader would be able to call on either SE. Furthermore, MNOs

do not have the technical ability to subordinate the operation of a rival mobile wallet so that preference is automatically given to the SIM-based SE or the mobile wallet based on the JV Co platform.

(89) On the basis of the market investigation and looking in particular at Ofcom's submissions, the Commission considers that the selection of the default SE will ultimately be a matter for the customer to decide.

(90) The Commission acknowledges that there may be advantages for a mobile wallet to be pre-selected as the default mobile wallet in the settings of the mobile handset. However, the Commission considers that for an app enabling payments in shops or online, which may be considered as an important app for consumers, in terms of perceived security, benefits, etc., the consumer will likely select the payment app that he or she chooses to pay its goods or services with.

(91) It can therefore be concluded that in case of a mobile handset with a SIM-based SE and an embedded SE, it is the OS provider and not the OEMs that would likely do the first configuration of the preference settings for the SE, and that it will ultimately be the consumer that will be able to configure the settings as he or she wishes.

Creating de facto standards or specifications which would foreclose competing mobile wallet providers

(92) The notifying parties submit that it is not envisaged that the JV Co will be creating any new standards. Instead, it will be using pre-existing openly available standards in the creation of its mobile wallet platform.

(93) The Commission investigated whether the notifying parties could create de facto standards and specifications, to which they would prevent providers of rival wholesale mobile wallet platform services having access, thereby foreclosing them from offering competing mobile wallets.

(94) The result of the market investigation as regards the question of whether or not there already exist standards or specifications governing the interoperability between SIM-based SEs and mobile wallet apps was not conclusive. The Commission considers that this may reflect the evolving nature of this nascent technology.

(95) Moreover, as far as enabling customers to pay, redeem coupons and claim loyalty points at the same time with their mobile handsets (the 'one-tap' solution), on the basis

⁽²⁴⁾ Ofcom's submission of 31 May 2012, paragraph 2.4.4.

⁽²⁵⁾ See in particular agreed minutes of telephone conference call with Ofcom of 6 June 2012.

of the Commission has found that no standard specification exists and that it is likely that the notifying parties would have to create their own specifications⁽²⁶⁾, or use the standards and specifications developed by market participants such as Google or VeriFone⁽²⁷⁾.

(96) Nevertheless, Google, in order for its Google Wallet to work, also developed proprietary specifications to enable simultaneous payment-coupons-loyalty points' redemption and manufacturers of PoS readers stated that these proprietary specifications could coexist on PoS readers for different mobile wallets to function⁽²⁸⁾.

(97) In May 2010, the Cityzi project for interoperable commercial services combining transport ticketing systems, secure mobile payments, several retail projects and other tourism services on mobile handsets was launched in France. More than 1 million NFC mobile handsets are currently using this service. During the experiment it appears that the current GlobalPlatform standard or specification for the connections between the TSM and the management of the SEs were not clear enough for example for loyalty cards. Therefore, the Association Française Sans Contact Mobile has created new standards or specifications to resolve the issue⁽²⁹⁾. These standards or specifications are now under discussion and approval by GlobalPlatform and are also included in the GSMA Fast track project.

⁽²⁶⁾ First Data submits that PoS terminals are not yet equipped with standards or specifications for the processing of non-payment transactions such as voucher redemption and loyalty points awarding. There are different potential ways to set these standards and to upgrade terminals accordingly. The development of such standards or specifications is expected to take place within industry association type bodies, such as EMVCO or according to international card schemes (Visa, MasterCard). First Data will adopt those standards or specifications as required by the industry.

⁽²⁷⁾ Verifone submits that there are only standards and specifications for payment transactions (set by Visa and MasterCard). For vouchers and loyalty points, operators as Google have to develop a specific protocol. VeriFone tries to also provide an open API framework so any mobile wallet which enables vouchers could interact with its terminals. VeriFone expects that global standards will ultimately develop. Regarding the certification process for VeriFone terminals, there is no standard certification for contactless payment terminals. VeriFone has its terminals certified separately by Visa, MasterCard, etc. The different certification processes change regularly, but they are valid worldwide, except for Visa which has developed different versions in some regions (e.g. Visawave for ASPAC).

⁽²⁸⁾ Verifone submits that there are no patents covering single tap. Google would have developed its specifications for Google wallet and would own the respective proprietary rights. The API for implementing these specifications on VeriFone's terminals is developed by VeriFone on the basis of these specifications; VeriFone owns the property rights to this API. VeriFone has also developed its own general environment for supporting mobile wallets to function on its terminals. Therefore, it would be simple to propose service similar to Google single tap to other undertakings.

⁽²⁹⁾ See press release (20.12.2011): <http://www.afscm.org/en/news/the-afscm-releases-a-new-set-of-specifications.htm?id=59>

(98) Based on the above, it can be concluded that it is most likely that the notifying parties will not be in a position to create de facto standards and specifications that no other market participant could use, hereby substantially foreclosing competing mobile wallet providers.

Assessment of commercial foreclosure

Introduction

(99) For the purpose of the Decision, the Commission considers 'commercial foreclosure' as a strategy which relies on the notifying parties' ability and incentive to substantially foreclose rival mobile wallet providers using commercial, rather than technical, means. Commercial foreclosure is therefore mainly implemented indirectly⁽³⁰⁾, for instance by negotiating with third parties, such as OEMs, to induce them to take commercial measures which may block or hamper rival mobile wallet providers, or by incentivising third parties such as independent retailers to market mobile handsets bundled with the JV Co mobile wallet over mobile handsets that include rival mobile wallets.

(100) The Commission considered whether a commercial foreclosure strategy could be implemented by a single notifying party on its own, irrespective of the strategies of the remaining notifying parties, or whether under any potential foreclosure scenario the notifying parties would rely on joint (or collective) implementation of a foreclosure strategy.

(101) To understand whether the notifying parties would have the commercial ability to substantially foreclose rival mobile wallet providers, the Commission examined the mobile supply chain. The following are the main participants in the supply chain:

- (a) OEMs, responsible for the hardware and software specification of the mobile handsets which are supplied to the retailers;

⁽³⁰⁾ Except for commercial foreclosure based on delisting of mobile handsets containing rival mobile wallets which could be implemented directly by the foreclosing parties.

(b) OS developers who supply software to OEMs and often set minimum hardware requirements and control which apps run on their OS and/or the major app stores where apps can be downloaded from;

(c) M(V)NOs as suppliers of airtime;

(d) retailers of mobile handsets and airtime, both M(V)NO direct sales channels and independent retailers.

(102) The Commission analyses, for each route of commercial foreclosure, whether the notifying parties have the ability and the incentive to engage in a joint commercial foreclosure strategy. In addition, the Commission has analysed whether the notifying parties together with banks have the ability and the incentive to substantially foreclose non-bank payment solutions.

Commercial pressure on OEMs not to install or to block the pre-installed embedded SE

(103) The Commission has examined whether the notifying parties would have the ability and the incentive to put commercial pressure on OEMs not to install an embedded SE on their mobile handset models, or to block a pre-installed embedded SE. The Commission has examined the notifying parties' commercial influence in relation to mobile handsets sourced by the notifying parties themselves for distribution through their direct sales channels and also in relation to 'vanilla' mobile handsets sourced by independent retailers.

(104) A number of OEMs have responded to the Commission's questions during the market investigation that MNOs sometimes seek to buy a specific 'operator variant' of a given mobile handset sold in their own MNO retailer channels. Thus, some features may differ in the 'operator variant' mobile handset, depending on the wishes of the MNO as to the features that need to be supported by the mobile handset and that they are willing to support as preloaded content. However, these features (such as an embedded SE) would be available in the 'vanilla variant' open-market mobile handset, which would be available to independent retailers, subject to technical certification by MNOs. This technical certification is given by MNOs to all mobile handsets that are technically compatible with its network and is not

impacted by commercial considerations. This is evidenced by the fact that NFC-enabled mobile handsets with an embedded SE (which could carry a competing mobile wallet) are already being widely stocked by the notifying parties as well as by the independent retailers in the United Kingdom. A notable exception is Apple which does not offer operator variants.

(105) On this basis, the notifying parties could in theory request OEMs to remove or block the pre-installed embedded SE on the mobile handsets sourced for their own direct, own-brand retail channel. However, OS providers or fully vertically integrated OEMs could engage in counterstrategies against such an attempt to foreclose. OS providers are involved much earlier than the MNOs in the development process of a mobile handset and this limits the extent of the influence the notifying parties have on the mobile handset specifications compared to the OS providers. An OS provider anticipating any such request by the notifying parties could try to influence OEMs' mobile handset specifications early on by making it mandatory that any OS branded mobile handset has a functioning embedded SE on the mobile handset. This would be the case in particular for Google, whose control over Android gives it a strong position in possible negotiations with OEMs⁽³¹⁾. Google's position in the market for the supply of handsets is becoming increasingly important as the proportion of mobile handset sales that use Android has grown significantly over time. In the period of 2010-2011, Android mobile handsets in the United Kingdom have increased their share from below 5 % to around 40 %. Fully vertically integrated OEMs that

⁽³¹⁾ See the Commission Decision of 13 February 2012 in Case COMP/M.6381 — *Google/Motorola Mobility*. Besides, even if Google is moving in the hardware business, independent experts confirm that: 'Despite the open philosophy on which Android was first introduced, there has been a steady trend of Google becoming more controlling over the platform. This was initially through the release of its own-branded Nexus devices, which it has used to showcase the latest release of Android, but this has been followed by its refusal to open source the code for the tablet-optimised Honeycomb version of Android. There have also been reports of Google being more selective as to which OEMs it provides with early access to the latest releases of the Android source code, essentially creating a select club of OEMs which must stay close to Google in order to keep at the leading edge of technological development. Google maintains a number of proprietary control points over the "open" OS, such as the trademark to the term "Android", in addition to the core Google-branded apps on the device, such as Google Mail, Maps, and Android Marketplace. Additionally, the Apache 2.0 open source license which Google has chosen for Android means that it is not legally obliged to release the source code, which is why it was able to keep the Honeycomb code private. These factors mean that OEMs must maintain a close relationship with Google and have the company's blessing in order to access the source code, use its popular services, and use the Android brand on their devices. With this in mind, it is clear that Google is not only keen to exert more control over who uses Android, but also how they use it. The company has clearly seen the benefits that greater control and vertical integration can bring, by watching the value of its close competitor Apple rise, and may be keen to also tap into the benefits of becoming more vertically integrated.' [...] report, p. 6, attached as Annex 4 to the notifying parties' submission of 6 June 2012.

would offer a rival wallet over an embedded SE could also ensure that the hardware of the mobile handset was fully compatible with the operation of their mobile wallet ⁽³²⁾.

(106) Moreover, any ability to commercially foreclose based on the blocking or disabling of the embedded SE would in any event be limited in scope, and at least partially ineffective. The commercial ability of the notifying parties to block or disable the pre-installed embedded SEs would only lead to partial foreclosure of rival mobile wallets as the notifying parties would not have the ability and incentives to substantially foreclose the indirect retail channel, or to foreclose wallets located on Apple mobile handsets, should Apple decide to enter into the market. Independent retailers have a strong position in the market with up to 49 % market share and 41 % of the number of retail stores in the United Kingdom. According to a Mintel Report ⁽³³⁾, Phones 4U and Carphone Warehouse collectively have 1 258 stores. This compares to Everything Everywhere with 672 stores, Telefónica with 450 stores and Vodafone with 365 stores. Three UK has another 300 stores in the United Kingdom.

(107) The Commission therefore concludes that the notifying parties' commercial ability to substantially foreclose by exerting commercial pressure on OEMs to block or deactivate the pre-installed embedded SE would at most lead to partial foreclosure (excluding Apple mobile handsets and the indirect retailers). Moreover, it may fail altogether if OS providers were able to implement effective counterstrategies which would prevent the notifying parties from blocking the functioning of embedded SEs.

(108) The fact that a commercial foreclosure strategy based on not installing or blocking embedded SEs would only lead to partial foreclosure would considerably limit the effectiveness and — even if used — significantly reduce the incentives to engage in such a strategy, since the incremental profits from foreclosure would be limited. This is reinforced by the strong asymmetry that exists between the expected profits of the JV Co and the profits in the

retail mobile telephony market, as highlighted by the notifying parties. In particular, gross profits for the retail mobile telephony activities of the notifying parties (including interconnection profits, and net of customer acquisitions costs) are roughly about [...] * times higher than the expected profits of the JV Co after its initial ramping-up period ⁽³⁴⁾.

(109) Moreover, the notifying parties have also shown that competitive conditions in the markets for advertising and data analytics markets differ significantly from those in the wholesale mobile wallet market. Furthermore, revenues and profits for these two activities are not directly linked to the transaction activities of the JV Co, and would not be directly affected by a strategy that forecloses rival mobile wallet operators.

(110) In addition, adverse consumer reaction to the impairment of rival mobile wallet offers represents the primary mechanism through which commercial foreclosure would lead to losses in the retail mobile telephony market. What is more, competitors could engage in counterstrategies aimed at increasing adverse consumer reaction. These counterstrategies would make rival mobile wallets attractive to customers thereby increasing the cost of foreclosure.

(111) These factors, taken together, mean that commercial foreclosure would be associated with significant incentives for any notifying party to deviate from the conduct, so as to avoid any adverse consumer reaction to the impairment of their mobile offer, and to gain an advantage over the other notifying parties which would engage in foreclosure. Any notifying party deviating from foreclosure would also avoid a loss of market share to the M(V)NOs outside of the JV Co.

(112) Overall, it appears very likely that at least one of the notifying parties would have a unilateral incentive to deviate from any a joint commercial foreclosure strategy predicated on exerting pressure on OEMs to block the pre-installed embedded SE. This would undermine a joint commercial foreclosure strategy.

(113) Concerning a joint foreclosure strategy based on tacit and ongoing coordination between the notifying parties, it is unlikely that all of the conditions laid down in the *Airtours* judgment ⁽³⁵⁾ would be met in the case of commercial foreclosure.

⁽³²⁾ Blackberry mobile handset manufacturer RIM has recently announced that developing NFC apps will be a priority for its Blackberry smartphones and stated that 'NFC will be a big push for RIM for the next 12 months' (see <http://www.forbes.com/sites/elizabethwoyke/2011/11/08/rim-plans-big-push-for-nfc-enabled-blackberry-apps/>). The Commission however takes note of the evolving situation of RIM, which appears to go through some restructuring measures. Blackberry likely possesses the necessary power in the mobile supply chain to ensure a route to the market for its popular mobile handsets. According to [...] *, 3 of the top 10 handsets for post-pay customers in Q1 2012 in the United Kingdom were Blackberry mobile handsets (see the notifying parties' submission 'No commercial ability to foreclose rival wholesale mobile wallet platform services', p. 35).

⁽³³⁾ Mintel, *Telecoms Retailing* (January 2011), Figure 27.

⁽³⁴⁾ See for instance the notifying parties' responses to the Commission's Request for Information of 31 May 2012, 8 June 2012, and 14 June 2012.

⁽³⁵⁾ Case T-342/99 — *Airtours v Commission*, European Court reports 2002, p. II-02585.

- (114) Firstly, coordinated commercial foreclosure would be complex to implement given that it depends on the outcome of bilateral negotiations between each notifying party and third parties which are confidential and which depend on the bargaining power of each party in the negotiations.
- (115) Secondly, coordinated foreclosure may not be internally stable, since the unilateral gains from deviation may exceed the cost of punishment following the collapse of the coordinated outcome. Given the significant asymmetry between retail mobile telephony profits and the JV Co's expected profits in the transaction activities, the threat of punishment may not be sufficient to outweigh the incentive to deviate. Moreover, deviations from coordination would likely only be detected with a lag in this market, since commercial negotiations are confidential and deviation would only be detected once the mobile handset comes on the market. This would further undermine the effectiveness of any punishment mechanism, making a collusive agreement even more difficult to sustain.
- (116) Overall, based on the above analysis, the Commission concludes that it is very unlikely that the notifying parties would have the ability and the incentive to engage in a joint foreclosure strategy that would entail putting commercial pressure on OEMs to block the pre-installed embedded SE which could support a rival mobile wallet.
- Influence over OS developers or OEMs to block mobile wallet apps*
- (117) The Commission has examined whether the notifying parties would have the ability and the incentive to influence OS developers or OEMs to block the preloading of, or to remove, mobile wallet apps on mobile handsets.
- (118) A number of respondents to the questions raised during the market investigation highlighted the importance of pre-loading an app and noted that the notifying parties could influence where a specific app sits on the handset screen in their 'operator variant' mobile handsets.
- (119) However, rival mobile wallet providers would be able to take countermeasures, promoting the placement of their mobile wallets in a prominent location in the app store. Moreover, OS providers could also tie the mobile wallet app to the OS in anticipation of requests to OEMs. In particular, such a counterstrategy may be implemented by Google, who, for instance, has the ability to influence software choices via their mobile app distribution agreements with OEMs that stipulate which of the Google mobile suite of apps are pre-loaded onto a mobile handset. The potential effectiveness of such a strategy is also reflected in the influence Google currently has on the mobile OS market.
- (120) Overall, given the limited effectiveness of commercial foreclosure based on pressuring OEMs not to install or to block the pre-installed embedded SE and the strength of counterstrategies by rival mobile wallet providers, it is unlikely that the notifying parties have the commercial ability to substantially foreclose by blocking rival mobile wallet apps.
- (121) The majority of incentive arguments that apply to the first commercial foreclosure strategy discussed in the section on foreclosure by pressuring OEMs not to install or to block the pre-installed embedded SE also apply to a commercial strategy based on influencing OS developers or OEMs to block mobile wallets.
- (122) Overall, on the basis of the above analysis, the Commission concludes that it is very unlikely that the notifying parties would have the ability and the incentive to engage in a joint foreclosure strategy that would be based on influencing OS developers or OEMs to block or to remove mobile wallet apps.
- Disadvantage or delist mobile handsets that contain rival mobile wallets*
- (123) The Commission has examined whether the notifying parties would have the ability and the incentive to disadvantage or delist mobile handsets capable of supporting rival wallets.
- (124) Given that the delisted or disadvantaged mobile handsets that may contain rival mobile wallets will have an alternative route to the market through the independent retailers, MNOs delisting or disadvantaging mobile handsets that contain rival mobile wallets on their own retail network will only partially foreclose the market. In addition, such a strategy will have a high commercial cost. Competitors could engage in counterstrategies that would make rival mobile wallets attractive to customers which would increase the cost of foreclosure.
- (125) Delisting of mobile handsets carrying rival mobile wallets would imply that these mobile handsets would not be stocked anymore in the direct retail channel controlled by the notifying parties. Disadvantaging of mobile handsets carrying rival mobile wallets would be a more subtle form of foreclosure based on reducing the subsidies paid on such mobile handsets in the direct retail channel controlled by the notifying parties.

(126) The majority of the incentive arguments made in the section discussing a foreclosure strategy based on putting commercial pressure on OEMs not to install or block the pre-installed embedded SE also apply to a commercial foreclosure strategy based on disadvantaging or delisting mobile handsets.

(127) In the light of the above analysis, the Commission concludes that it is very unlikely that the notifying parties would have the ability and the incentive to engage in a joint foreclosure strategy based on disadvantaging or delisting of mobile handsets.

Incentivise independent retailers to market mobile handsets that do not contain rival mobile wallets or to set certain default settings which favour their notifying parties' mobile wallet

(128) The Commission has examined whether the notifying parties would have the ability and the incentive to induce independent retailers to market mobile handsets that do not contain rival mobile wallets or to set certain default settings which favour the notifying parties' mobile wallet.

(129) In order to follow a cautious approach as regards a commercial foreclosure strategy based on incentivising independent retailers to market mobile handsets that do not contain rival mobile wallets or to set certain default settings which favour the notifying parties' mobile wallet, the Commission assesses this commercial foreclosure strategy in combination with one of the three strategies discussed above (foreclosure of the direct retail channel controlled by the notifying parties).

(130) Unlike the case of foreclosure strategies targeting the direct retail channel, the notifying parties would have a more constrained ability to commercially foreclose their competitors through incentivising independent retailers. While the notifying parties may be in a position to incentivise independent retailers as they already grant commissions and [...] subsidies to them (even though these clearly tend not to be handset-specific), OEMs and OS providers also grant selective marketing subsidies to independent retailers and could engage in a parallel counterstrategy in order to incentivise the sale of mobile handsets that do contain a rival mobile wallet on the open market. In particular, the Commission considers that a potential entrant on the mobile wallet market could engage in revenue-sharing agreements with

OEMs in order to ensure that handsets are equipped with embedded SEs. At the margin, it is not apparent why the notifying parties would face a greater incentive than OEMs or OS providers to subsidise specific mobile handsets in order to foreclose the mobile wallet market.

(131) Therefore, while the notifying parties would have some commercial ability to incentivise independent retailers to market mobile handsets that do not contain rival mobile wallets or to set certain default settings which favour the notifying parties' mobile wallet, the effectiveness of such a strategy could be significantly constrained by similar counterstrategies by third parties.

(132) Some of the incentive arguments made in the previous sections discussing the other commercial foreclosure strategies also apply to a commercial foreclosure strategy based on incentivising independent retailers to market mobile handsets that do not contain rival mobile wallets or based on setting certain default settings which favour the notifying parties' mobile wallet.

(133) In order to achieve effective foreclosure of competing offers in the indirect retail channel, the notifying parties would have to incur significant costs in order to outbid OEMs or OS providers to gain support from independent resellers. This would in turn considerably raise the cost of foreclosure, again reinforcing unilateral incentives to deviate from this commercial foreclosure strategy. It is therefore unlikely that a strategy based on foreclosure by incentivising retailers to market mobile handsets that do not contain rival mobile wallets or to set certain default settings which favour the notifying parties' mobile wallets will lead to the foreclosure of the indirect retail channel.

Potential foreclosure of non-bank payment solutions

(134) The Commission considers that the JV Co would not change anything in relation to the banks' ability and incentive to disadvantage non-bank payment systems as a result of the creation of the JV Co, relative to a scenario in which each shareholder would offer its own mobile wallet, as banks are not shareholders to the operation.

(135) In conclusion, the Commission considers that it is very unlikely that the banks and the MNOs would have aligned incentives to substantially foreclose non-bank payments systems.

Overall conclusion

- (136) The Commission concludes that it is unlikely that the notifying parties have the ability or the incentive to engage in commercial foreclosure.

Bulk SMS services

- (137) The JV Co would also be active as an aggregator on the market for retail bulk SMS, which buys origination and termination services from the MNOs on the market for wholesale bulk SMS services in the United Kingdom.

- (138) The upstream market for wholesale delivery of bulk SMS consists of two main elements: the conveyance of the message from the sender (that is to say the JV Co or an aggregator) to the mobile network to which the intended recipient has subscribed (the home network) and the conveyance by the home network to the recipient's mobile handset.

- (139) Wholesale delivery of bulk SMS can only be provided by MNOs and it is provided by all MNOs in the United Kingdom on a competitive basis. Aggregators typically contract with one MNO for the delivery of all their bulk SMS messages irrespective of the home network of individual recipients of messages. MNOs are able to offer this service, which comprises both on-net and off-net delivery, because of the underlying interconnection arrangements that are in place between MNOs for the exchange of SMS messages.

- (140) Aggregation requires a computer equipped with software for originating messages and a connection to one, globally-connected, MNO that is able to route SMS messages to any destination through that operator's underlying interconnection arrangements with other MNOs. Aggregators who generate sufficient volumes of messages to a particular network to justify the investment typically establish their own interconnection arrangements with individual networks for the sending of messages to (and from) mobile subscribers to that network.

- (141) The Commission assessed whether the combined position of the notifying parties on the upstream wholesale market for bulk SMS could lead to a substantial foreclosure of bulk SMS aggregators competing with the JV Co on the retail bulk SMS market by refusing to terminate bulk SMS that come from competing aggregators on their respective networks or by offering higher termination rates to the JV Co's competitors. The vast majority of respondents consider that the notifying parties would continue to supply them with termination of bulk SMS services.

- (142) In view of the market investigation, the Commission considers that it is unlikely that the notifying parties would have the ability to discriminate between the bulk

SMSs sent by the JV Co and those sent by their competitors that are to be terminated on their networks; therefore, the notifying parties are unlikely to engage in foreclosure.

- (143) Furthermore, it would be difficult to reach coordinated foreclosure. In particular, due to the lack of transparency in the wholesale market and the rapidly changing market shares, there would only be very limited ability for the notifying parties to reach an agreement on the foreclosure strategy.

- (144) To conclude, the operation is unlikely to create a significant impediment to effective competition on any of the markets related to the JV Co's bulk SMS activities.

4.3. Non-horizontal effects — conglomerate effects

- (145) The Commission analysed how important it would be for a competing M(V)NO to be able to offer a mobile wallet in order to remain a credible competitor in the retail mobile telephony market.

- (146) A majority of respondents to the market investigation expect that, at least in the short term, the presence of mobile wallets will not be a key differentiating factor for consumers when selecting a mobile handset or airtime contract with a MNO.

- (147) Furthermore, even if having the capability to offer a mobile wallet was to become a 'must-have' factor — a contention that Three UK strongly makes⁽³⁶⁾ — it is likely that Three UK would be in a position to offer its own mobile wallet to customers, possibly partnering with third parties such as Google or financial institutions.

- (148) Based on the above, it is concluded that it is most likely that no competition concern would arise from conglomerate effects induced by the creation of the JV Co.

4.4. Horizontal effects

- (149) The Commission has also examined whether the operation will raise horizontal competition concerns. The assessment in this section is divided in two parts, dedicated respectively to the market for wholesale supply of mobile wallet platform services and to the markets for the supply of mobile advertising services and data analytics. The most direct effect of the merger will be the loss of competition between the merging firms.

⁽³⁶⁾ Three UK submits that the availability of a mobile wallet will become a key parameter of competition when consumers decide on a tariff plan with an operator, as handsets will become increasingly multifunctional and the mobile wallet is going to be the next step of an already existing natural evolution, becoming a 'hygiene factor' in the sense that it will be an integral part of the mobile phone, like e.g. the camera, or access to the Internet.

Wholesale supply of mobile wallet platform services and secure storage

- (150) The JV Co will be a new entrant in the nascent market for the wholesale supply of mobile wallet platform services. The notifying parties are either new entrants in the market (for example the Orange/Barclaycard Quicktap product and the Telefónica O2 wallet) or they are potential entrants. They are also either new entrants or potential entrants on the possible market for secure storage.
- (151) The Commission has investigated these barriers to entry in this nascent market for mobile wallet platform services and secure storage. A number of initiatives have already been announced in a number of countries. A number of initiatives have also been launched in the United Kingdom. Potential entrants are banks and financial institutions, other MNOs/MVNOs (notably Three UK) and online or OTT players such as Google and PayPal. The Commission considers it also likely that Apple would enter if market conditions are favourable. Apart from SIM-based SE, access would also be available to embedded SEs, and also to SEs included in additional hardware (stickers, tags, etc.). As described above in the vertical and conglomerate sections, the notifying parties will have neither the ability nor the incentive to substantially foreclose entrants in this market. This implies that the notifying parties would not be able to deter entry in the downstream market for retail mobile wallets.
- (152) On this basis, the Commission concludes that the operation will not likely lead to a significant impediment to effective competition, as the JV Co would face competition from a variety of other market participants. Therefore, even if the operation eliminates the potential competition between the notifying parties, it is not likely to significantly impede effective competition as it will not be able to deter significant undertakings (for example Google, Apple) from entering this nascent market and competing effectively with the JV Co.

Data analytics services

- (153) Currently none of the notifying parties is individually active in the provision of data analytics services in respect of online and offline advertising and transactions services. The JV Co will be active in the supply of data analytics services in the United Kingdom in respect of online and offline advertising and transactions, providing reporting analytics, business development analytics and loyalty analytics.

- (154) The JV Co will be providing elements of all three types of data analytics services. However, the JV Co will not be providing the data analytics software⁽³⁷⁾, but will be providing some analytics of web trends which these companies also provide. Similarly, the JV Co will not be selling pure data (as BlueKai or Experian do), but instead will be selling the information produced by applying analytics services.
- (155) Information available to the JV Co is however also available to a large extent to both existing and new market players such as Google, Apple, Facebook, card issuers, reference agencies or retailers⁽³⁸⁾. In addition, other ways to reach large numbers of consumers exist, as utilities providers for instance (almost all consumers use utility providers). Moreover, it is also acknowledged that some other companies, like RIM, would have access to a similar amount of data from the handset, as the JV Co.
- (156) The Commission also assessed whether absent the operation, the notifying parties would be able to provide (mobile) data analytics services individually. The vast majority of respondents considered this to be possible. Nevertheless, many respondents to the market investigation consider it more efficient to have the JV Co as a single point of contact and that as data analytics is not a core business to them, the investment would not have been justified to provide this service alone.
- (157) Considering all information available, the Commission concludes that, on all possible submarkets, the JV Co would indeed be able to collect a broad range of consumer information, which will be very valuable for its (mobile) data analytics services and advertising services. However, many other strong and established players are also able to offer comparable solutions to the JV Co. Therefore, other providers of advertising services competing with the JV Co would not be foreclosed from an essential input and the creation of the JV Co would not have a negative effect on competition on the market for (mobile) data analytics, as well as for market research services or marketing information services. The question whether the notifying parties could have entered the market individually absent the operation can thus be left open.

- (158) In light of the above, the operation is not likely to significantly impede effective competition on any of the possible markets related to the JV Co's data analytics activities.

⁽³⁷⁾ [...]*.

⁽³⁸⁾ The absence of foreclosure in the transaction activities is also helping to ensure that these companies will be in a position to gather the relevant data post-operation.

Advertising services

- (159) The JV Co will act as an advertising intermediary offering a variety of advertising services, among others: non-search advertising (on MNOs or MVNOs participating in the JV Co and third parties inventories), push SMS, intelligent bulk SMS and pull messaging (coupons and vouchers).
- (160) The Commission assessed the effects of the creation of the JV Co on the market for intermediation of mobile advertising and all possible submarkets. Many services are still nascent, even if a significant development is expected by analysts in the near future ⁽³⁹⁾.
- (161) None of the notifying parties is currently separately engaged in intermediation services for any form of digital advertising. Each of them is currently only active in the sale of its own inventory to a very limited extent.
- (162) On an overall market for mobile advertising, the Commission considers that the JV Co would face strong global competitors like Google (DoubleClick, AdMob, Admeld), Apple (Quattro Wireless/iAd), Yahoo! (Blue Lithium and RightMedia), Microsoft (Screentonic, aQuantive), AOL (AOL Advertising), WPP (24/7 RealMedia), or independent mobile ad networks such as Millennial Media. On such a market, the JV Co would operate as an alternative to these established market players.
- (163) On a narrower market for targeted marketing messaging and in particular, the possible submarkets for intelligent bulk SMS and push SMS, the Commission assessed whether the JV Co would become a strong player having access to the notifying parties end customers and have the ability to send them targeted marketing messages.
- (164) The market for targeted marketing messaging (and in particular push SMS and intelligent bulk SMS) is at present insignificant compared to mobile advertising. Moreover, the JV Co's ability to provide targeted SMS messages would not be unique, since there are various players (like Apple or Google) ⁽⁴⁰⁾, who also have the mobile numbers of (most of) their customers combined with other customer information and could easily create a similar service or provide the required data to third

parties ⁽⁴¹⁾. Other market players, like credit card issuers, payment systems, retailers, and credit reference companies, possibly in combination, could also create offerings or provide data to third parties.

- (165) In addition, it has to be noted, that even under the narrowest possible market definition only for push SMS and for intelligent bulk SMS, the JV Co will likely be sufficiently constrained by alternative forms of messaging such as IP push notifications or e-mail messaging.
- (166) The Commission concludes that the operation is not likely to significantly impede effective competition on any of the possible relevant markets related to the JV Co's advertising services.

Coordination on the retail mobile telephony market

- (167) The Commission also analysed, in accordance with Article 2(4) of the Merger Regulation, whether the JV Co would create scope for coordination among the notifying parties in the retail mobile telephony market, which is to be appraised in accordance with the criteria of Article 101(1) and (3) of the TFEU. A restriction of competition under Article 101(1) of the TFEU is established when the coordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture ⁽⁴²⁾.
- (168) All three notifying parties are active and will retain their activities in the retail mobile telephony market in the UK, which is a neighbouring market to those of the activities of the JV Co.
- (169) However, the creation of the JV Co is unlikely to affect any of the key parameters of competition in the retail mobile telephony market, such as the availability of different mobile handsets or the number of inclusive minutes, data volume or text messages.
- (170) The Commission concludes that there should be no practical scope for coordination of the notifying parties in the retail mobile telephony market through the JV Co.

V. EFFICIENCIES

- (171) The overall impact of the operation will also be affected by the likely efficiencies that are brought about by the operation. While there is a lack of anti-competitive effects irrespective of efficiencies, these efficiencies form a part of the overall competitive assessment.

⁽³⁹⁾ Ofcom report from August 2011, pp. 201-202.

⁽⁴⁰⁾ The notifying parties highlight that for instance Apple and Google collect mobile numbers when customers create their identities on iTunes or Google Play.

⁽⁴¹⁾ The Commission understands from other market participants that Apple or Google do not currently sell this type of data directly.

⁽⁴²⁾ See the Commission Decision of 27 May 1998, Case IV/JV. 1 — *Telia/Telenor/Schibsted*, paragraph 28.

(172) The notifying parties have not provided a detailed analysis showing that any such efficiencies meet the criteria of the Horizontal Merger Guidelines, and in particular that they could not be achieved through less anticompetitive alternatives.

(173) However, it is not necessary to precisely estimate the magnitude of these likely efficiencies given the operation's lack of anti-competitive effect irrespective of efficiencies.

VI. GENERAL CONCLUSION OF THE COMPETITIVE ASSESSMENT IN THE RELEVANT MARKETS

(174) MCommerce is nascent with a number of interested parties entering the sector and a number of different technologies emerging. The JV Co will not likely have the technical or commercial ability, nor the incentive, to substantially foreclose entry or hinder expansion by competitors in relation to wholesale or retail mobile wallet platform services, advertising services or data analytics services.

(175) A sufficient number of competitors are already emerging or are very likely to emerge in the near future. Some of these competitors are companies with significant market power, customer base and expertise in their field. They include financial service providers, Internet and OTT players, players already active in online payments and

other M(V)NOs. The Commission does not consider that the operation may significantly raise barriers to entry, for example by making it more difficult for potential entrants to obtain the necessary inputs. Therefore, the Commission concludes that even if the notifying parties do not emerge individually as actual competitors because of the JV Co, a sufficient number of other competitors will remain to ensure adequate competitive pressure post-operation. Similarly, the Commission concludes that the JV Co will not likely be able to stifle innovation; indeed, the mCommerce market will likely continue to be characterised by the development of new initiatives and the emergence of a variety of possible commercial and technical evolutions in the coming years.

(176) The Commission concludes that the operation will not likely lead to a significant impediment to effective competition within the meaning of Article 2(2) of the Merger Regulation in any of the relevant markets or potential submarkets.

(177) The operation should therefore be declared compatible with the internal market and the functioning of the European Economic Area Agreement pursuant to Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.

COMMISSION DECISION

of 6 March 2013

amending Commission Decision of 6 October 2010 setting up the group of experts on the mission evolution of the European navigation satellite systems, the 'Mission Evolution Advisory Group'

(Text with EEA relevance)

(2013/C 66/05)

THE EUROPEAN COMMISSION,

HAS ADOPTED THIS DECISION:

Having regard to the Treaty on the Functioning of the European Union,

Article 1

Whereas:

In Article 4 of the Decision of 6 October 2010 setting up the group of experts on the mission evolution of the European navigation satellite systems, the 'Mission Evolution Advisory Group', paragraphs 2 and 3 shall be replaced by the following text:

- (1) Commission Decision of 6 October 2010 set up the group of experts on the mission evolution of the European navigation satellite systems, the 'Mission Evolution Advisory Group' ⁽¹⁾ (hereafter 'the group') with a view to providing the Commission with independent advice on EGNOS and Galileo mission evolution matters.
- (2) When establishing the group, the Commission decided that the group should be composed of individuals appointed in their personal capacity.
- (3) According to the Commission's rules on expert groups ⁽²⁾, members appointed in their personal capacity must act independently and in the public interest.
- (4) Some of the members of the group, as appointed by the Commission ⁽³⁾, are employees and managers from private companies, which are directly concerned by the work of the group. Therefore, such employees and managers cannot serve as members in a personal capacity; they may participate in the work of the group as representatives of stakeholders.
- (5) In light of the above, members of the group should be individuals appointed in their personal capacity, individuals appointed to represent a common interest shared by stakeholders and organisations. In line with the Commission's rules on expert groups ⁽⁴⁾, the term organisations is understood in the broad sense of the word, referring, inter alia, to companies, associations, non-governmental organisations, trade unions, Union agencies and bodies, as well as international organisations.
- (6) Commission Decision of 6 October 2010 setting up the group of experts on the mission evolution of the European navigation satellite systems, the 'Mission Evolution Advisory Group' should therefore be amended accordingly,

'2. The members shall be appointed by the Commission from specialists with competence in the areas referred to in Article 2 and from organisations with a record of activity in these areas who have responded to the call for applications.

3. The members of the group shall be:

- individuals appointed in a personal capacity;
- individuals appointed to represent a common interest shared by stakeholders in the satellite navigation domain; they shall not represent an individual stakeholder; or
- organisations in the broad sense of the word, including companies, associations, non-governmental organisations, trade unions, Union agencies and bodies, as well as international organisations; organisations shall nominate their representatives.'

Article 2

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*. It shall apply until 31 December 2014.

Done at Brussels, 6 March 2013.

For the Commission
Antonio TAJANI
Vice-President

⁽¹⁾ OJ C 271, 7.10.2010, p. 2.

⁽²⁾ C(2010) 7649 final, rule 9.

⁽³⁾ C(2011) 3624 final.

⁽⁴⁾ C(2010) 7649 final, rule 8.

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

Information communicated by the EFTA States regarding State aid granted under the Act referred to in point 1j of Annex XV to the EEA Agreement (Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation))

(2013/C 66/06)

PART I

Aid No	GBER 12/12/ENV	
EFTA State	Norway	
Granting authority	Name	Directorate of Customs and Excise (regional customs authorities)
	Address	Postbox 8122 Dep 0032 Oslo NORWAY
	Webpage	http://www.toll.no
Title of the aid measure	Reduced CO ₂ -tax on mineral oil for aviation covered by the European emissions trading scheme	
National legal basis (reference to the relevant national official publication)	— The Norwegian Parliament's annual decision on the CO ₂ -tax — Regulation No 1451 of 11 December 2001 concerning excise duties § 4-6-1 (2)	
Web link to the full text of the aid measure	http://www.lovddata.no/for/sf/sv/fd-20121127-1217.html and http://www.lovddata.no/for/sf/fd/td-20011211-1451-029.html	
Type of measure	Scheme	Tax reduction
Duration	Scheme	1.1.2012-31.12.2021
Economic sector(s) concerned	Limited to specific sectors — please specify in accordance with NACE Rev. 2	51.10 Passenger air transport 51.21 Freight air transport
Type of beneficiary	SME	Both SME and large enterprises
	Large enterprises	Both SME and large enterprises
Budget	Annual overall amount of the budget planned under the scheme	NOK 70 million
Aid instrument (Article 5)	Fiscal measure	Tax reduction

PART II

General objectives (list)	Objectives (list)	Maximum aid intensity in % or maximum aid amount in NOK	SME — bonuses in %
Aid for environmental protection (Articles 17-25)	Aid in the form of reductions in environmental taxes (Article 25)	NOK 70 million	

The EFTA Surveillance Authority's notice on current State aid recovery interest rates and reference/discount rates for three EFTA States applicable as from 1 January 2013

(Published in accordance with Article 10 of the Authority's Decision No 195/04/COL of 14 July 2004 (OJ L 139, 25.5.2006, p. 37 and in the EEA Supplement No 26/2006, 25.5.2006, p. 1))

(2013/C 66/07)

Base rates are calculated in accordance with the Chapter on the method for setting reference and discount rates of the Authority's State aid Guidelines as amended by the Authority's Decision No 788/08/COL of 17 December 2008. To get the applicable reference rate, appropriate margins have to be added in accordance with the State aid Guidelines. For the discount rate this means that the appropriate margin of 100 basis points has to be added to the base rate. The recovery rate will also normally be calculated by adding 100 basis points to the base rate as foreseen in the Authority's Decision No 789/08/COL of 17 December 2008 amending the Authority's Decision No 195/04/COL of 14 July 2004 (published in OJ L 340, 22.12.2010, p. 1 and in the EEA Supplement No 72/2010, 22.12.2010, p. 1). Base rates have been determined as follows:

	Iceland	Liechtenstein	Norway
1.1.2013-	6,14	0,34	2,39

V

(Announcements)

COURT PROCEEDINGS

EFTA COURT

Action brought on 4 December 2012 by the EFTA Surveillance Authority against the Principality of Liechtenstein**(Case E-14/12)**

(2013/C 66/08)

An action against the Principality of Liechtenstein was brought before the EFTA Court on 4 December 2012 by the EFTA Surveillance Authority, represented by Xavier Lewis, Clémence Perrin and Catherine Howdle, acting as Agents, Rue Belliard 35, 1040 Brussels, Belgium.

The EFTA Surveillance Authority requests the EFTA Court to declare that:

1. by maintaining in force a legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligation to supply a guarantee of CHF 50 000, whereas the guarantee of CHF 100 000 is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border, the Principality of Liechtenstein ('Liechtenstein') has failed to fulfil its obligations under Articles 31 and 36 of the Agreement on the European Economic Area;
2. the Principality of Liechtenstein bears the costs of these proceedings.

Legal and factual background and pleas in law adduced in support:

- The EFTA Surveillance Authority submits that Liechtenstein has failed to comply with a reasoned opinion delivered by the EFTA Surveillance Authority on 25 January 2012 on a failure to fulfil its obligation under Articles 31 and 36 of the EEA Agreement in the field of temporary work and employment services.
- The Liechtenstein measures at issue are Articles 25 and 26 of Verordnung vom 11. Juli 2000 zum Gesetz über die Arbeitsvermittlung und den Personalverleih (Regulation of 11 July 2000 concerning job placement and temporary employment services).

The EFTA Surveillance Authority submits that by these measures, Liechtenstein's national legislation imposes on persons resident in that country who are responsible for a temporary work agency the obligation to supply a guarantee of CHF 50 000. By the same legislation, an obligation to supply a guarantee of CHF 100 000 when delivering temporary work services is imposed upon persons performing a similar function who are resident outside of Liechtenstein. A guarantee of CHF 100 000 is also required from temporary work agencies established outside of Liechtenstein who seek to provide such services cross-border.

- The EFTA Surveillance Authority submits that by maintaining in force its legislation, as it currently stands, Liechtenstein is in breach of its obligations under Articles 31 and 36 EEA.
-

Action brought on 30 November 2012 by the EFTA Surveillance Authority against Iceland**(Case E-12/12)**

(2013/C 66/09)

An action against Iceland was brought before the EFTA Court on 30 November 2012 by the EFTA Surveillance Authority, represented by Markus Schneider and Clémence Perrin, acting as Agents, Rue Belliard 35, 1040 Brussels, Belgium.

The EFTA Surveillance Authority requests the EFTA Court to:

1. declare that by failing to adopt, or to notify the Authority of, the measures necessary to implement the Act referred to at point 7h of Annex XIX to the Agreement on the European Economic Area (Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC), as adapted to the Agreement by way of Protocol 1 thereto, within the time limit prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement; and
2. order Iceland to bear the costs of the proceedings.

Legal and factual background and pleas in law adduced in support:

- The EFTA Surveillance Authority submits that Iceland is required, under Article 27 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 ('the Directive'), and Article 7 of the EEA Agreement, to take, and to inform the EFTA Surveillance Authority of, the measures it has taken in order to implement the Directive.
 - The EFTA Surveillance Authority submits that it has received no such information from the Icelandic Government, nor is it in possession of any other information which would enable it to conclude that the measures necessary to implement the Directive have been taken.
 - The EFTA Surveillance Authority submits that Iceland has failed to fulfil its obligations under Article 27 of the Directive and under Article 7 of the EEA Agreement by failing to adopt, or to notify the Authority of, the measures necessary to implement the Directive within the time prescribed.
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Action brought on 30 November 2012 by the EFTA Surveillance Authority against Iceland
(Case E-13/12)
(2013/C 66/10)

An action against Iceland was brought before the EFTA Court on 30 November 2012 by the EFTA Surveillance Authority, represented by Xavier Lewis and Maria Moustakali, acting as Agents, Rue Belliard 35, 1040 Brussels, Belgium.

The EFTA Surveillance Authority requests the EFTA Court to:

1. declare that by failing to adopt, or to notify the Authority of, the measures necessary to implement the Act referred to at point 10 of Part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area (Council Directive 90/167/EEC of 26 March 1990 laying down the conditions governing the preparations, placing on the market and use of medicated feedingstuffs in the Community), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement; and
2. order Iceland to bear the costs of the proceedings.

Legal and factual background and pleas in law adduced in support:

- The EFTA Surveillance Authority submits that Iceland is required under Article 15 of Council Directive 90/167/EEC of 26 March 1990 ('the Directive'), and Article 7 of the EEA Agreement, to take the necessary measures in order to implement the Directive, and to inform the EFTA Surveillance Authority of the measures taken.
 - The EFTA Surveillance Authority submits that it has received no such information from the Icelandic Government, nor is it in possession of any other information which would enable it to conclude that the measures necessary to implement the Directive have been taken.
 - The EFTA Surveillance Authority submits that Iceland has failed to fulfil its obligations under Article 15 of the Directive and under Article 7 of the EEA Agreement by failing to adopt, or to notify the Authority of, the measures necessary to implement the Directive within the time prescribed.
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PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION
POLICY

EUROPEAN COMMISSION

Prior notification of a concentration

(Case COMP/M.6869 — GM/Ispol)

Candidate case for simplified procedure

(Text with EEA relevance)

(2013/C 66/11)

1. On 1 March 2013, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ⁽¹⁾ by which the undertaking General Motors Europe Holdings SL ('GMEH', Spain), belonging to the group General Motors Company ('GM', USA), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Ispol Holding BV G ('Ispol', the Netherlands) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for GM: production and sale of passenger cars and light commercial vehicles worldwide,

— for Ispol: production and sale of automotive diesel engines for vehicles.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of the EC Merger Regulation. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under the EC Merger Regulation ⁽²⁾ it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301), by email to COMP-MERGER-REGISTRY@ec.europa.eu or by post, under reference number COMP/M.6869 — GM/Ispol, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
J-70
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

⁽¹⁾ OJ L 24, 29.1.2004, p. 1 (the 'EC Merger Regulation').

⁽²⁾ OJ C 56, 5.3.2005, p. 32 ('Notice on a simplified procedure').

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