

H3G/Orange Austria - Commission starts using UPP

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On 24 July, the Commission published the non-confidential version of the decision in the *Hutchison 3G Austria/Orange Austria* case. The case, cleared subject to commitments following a Phase II investigation, represents a significant development in the Commission's merger enforcement policy because, for the first time, the Commission has applied an Upward Pricing Pressure (UPP)-analysis as part of its competitive assessment. The case is furthermore notable because the combined market share of the parties was less than 25%.

The case concerned the Austrian mobile telecommunications market. Prior to the transaction, a total of four mobile network operators (MNOs) were active on the market, with the Parties to the transaction representing the two smallest ones. Based on publicly available information from the Austrian telecommunications regulator, the combined market share of the Parties at the time was 22%.

In the decision, the Commission concludes that H3G was an important competitive force in the market with a greater influence on the competitive process than its market share would suggest. Among other things, the Commission bases this conclusion on switching data, which are readily available in the mobile telecommunications market. These data for example showed that about one-third of Orange's post-paid customers switch to H3G.

As discussed in an [earlier post on this blog](#), UPP is a tool with which it is possible to estimate the risk of a merger giving rise to unilateral effects. The two main ingredients of UPP-type calculations are diversion ratios (switching data) and margins. Given the availability of switching data and given that UPP was applied in the *AT&T-Mobile* case in the U.S., it is perhaps not surprising that the Commission chose the *H3G/Orange Austria* case as the first case to apply a UPP-analysis itself.

As also discussed in the [earlier post](#), UPP-analyses come in a number of flavours. Some variants measure the "impetus" to increase prices while others provide an indication of the expected magnitude of the price increases. The approach taken by the Commission is of the latter type. The estimated price increases on the basis of the Commission's analysis, which related to the post-paid segment, range from 10-20%.

The UPP-analysis features prominently in the Commission decision, which does not contain any other detailed economic analyses. The Commission rejects the arguments put forward by the Parties that UPP was developed only as a Phase I screening device. In fact, the Commission claims that there exists no other robust approach that could have been used instead. The decision also states that UPP is a generally accepted component of a merger analysis.

As such, the *H3G/Orange Austria* case suggests that the Commission is starting to follow the approaches pioneered in the UK and the US, paying more attention to diversion ratios and less to market shares. It will be interesting to see whether under the tenure of the new Chief Economist, UPP will also be applied in other cases and other industries.