EN

Case No COMP/M.6369 - HBO/ ZIGGO/ HBO NEDERLAND

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 21/12/2011

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

Dear Sir/Madam,

Subject: **Case No COMP/M.6369 – HBO/ Ziggo/ HBO Nederland**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1]

1. On 17.11.2011, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation") by which the undertakings HBO Netherlands Holdings, S.R.O. ("HBO Sub", the Netherlands) and Ziggo B.V. ("Ziggo", the Netherlands) intend to form a new full-function joint venture within the meaning of Article 3(4) of the Merger Regulation comprising the companies HBO Nederland Coöperatief U.A and its two wholly-owned subsidiaries HBO Netherlands Channels S.R.O. and HBO Nederland Distribution B.V. (collectively, the "Joint Venture" or "HBO Nederland", the Netherlands).[2]

I. THE PARTIES

2. **HBO Sub** is a subsidiary of Home Box Office, Inc. ("HBO", USA). HBO produces audiovisual content, including television series, specials, documentaries and made-for-TV movies. HBO is a subsidiary of Time Warner Inc. ("Time Warner", USA), a global media company, with operations in film, TV and magazine publishing.

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

2 Publication in the Official Journal of the European Union No C 345, 25.11.2011, p.18.

3. **Ziggo** is a media and communications cable services provider in the Netherlands. Ziggo's products and services comprise telephony, internet, radio and TV, data communications and electronic payment systems. The majority of the share capital of Ziggo is held (through holding companies) by two private equity firms: Cinven Limited ("Cinven") and Warburg Pincus International LLC ("Warburg Pincus"), which exercise joint control over Ziggo.[3]

4. **HBO Nederland** will develop and operate six new, HBO-branded pay-TV channels offering current films, exclusive television shows and other entertainment content. These channels will be distributed on a wholesale basis to pay TV retail suppliers in the Netherlands.[4]

II. THE OPERATION

5. HBO Nederland will be a full-function joint venture jointly controlled by each of HBO Sub and Ziggo.

6. As regards joint control, […] HBO Sub and Ziggo will own […]% equity interest in HBO Nederland. The Joint Venture will have a management board comprising […] representatives […]. Each of HBO Sub and Ziggo will have the ability to block actions which determine the Joint Venture's strategic commercial behaviour. […]

7. Based on the above, and in line with the provisions of the Commission Consolidated Jurisdictional Notice,[5] it can be concluded that HBO Nederland will be jointly controlled by each of HBO Sub and Ziggo.

8. As regards full-functionality, the Joint Venture will have sufficient resources to operate independently on the market, as it will have a CEO, who will be dedicated to its day-to-day operation (pursuant to a delegation of powers from the management board), and sufficient resources including finance (each of HBO Sub and Ziggo agreed to contribute up to EUR […] million to the Joint Venture), staff (around […] employees, including finance, PR, and marketing and sales personnel) and assets (*e.g.*, the required broadcasting license and the licensing agreements with content owners) to conduct its business activities.[6]

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3 Ziggo is the result of the merger, which took place in 2008, between three Dutch cable operators, namely Casema and Multikabel, which had been jointly acquired by Cinven and Warburg Pincus in 2006 (see decision of the European Commission, case COMP/M.4338, *Cinven/Warburg Pincus/Casema. Multikabel*, 6 September 2006), and Essent Kabelcom which was also jointly acquired by Cinven and Warburg Pincus in a separate transaction in 2006 (decision of the NMa, case 5796, *Cinven/Warbug Pincus/Essent Kabelcom*, 8 December 2006). Casema, Multikabel and Essent Kabelcom were merged to create Ziggo in 2008.

4 For completeness, it is noted that the Joint Venture's channels will also be made available at no additional cost over the Internet to those end users who would have purchased a subscription to view these channels from any TV retailer.

5 See, in particular, paras. 91-105.

6 The fact that HBO will provide certain ancillary […] services, and that Ziggo will provide certain […] services ([…]) to the Joint Venture on an arm's length basis is consistent with the notion of the joint venture operating autonomously on the market.

9. Moreover, the Joint Venture will carry out activities going beyond one specific function of the parents in that it will have its own market presence by both licensing-in third party content for its channels and wholesaling its pay-TV channels to third parties.

10. In addition, based on its initial business plan, the Joint Venture is expected to license-in significant amounts of content from third parties ([…]). The Joint Venture also intends to provide its pay-TV channels to, and hence derive revenues from, not only Ziggo, but also other third-party retail pay-TV suppliers in the Netherlands ([…]). Further, the Joint Venture, while licensing-in content from Time Warner/HBO, it will not resell such content as such, but it will package it, together with third party content, into stand-alone TV channels.

11. Finally, the Joint Venture is set up for an indefinite period of time and the parties' intention to operate the company on a lasting basis is confirmed by the resources that each of HBO Sub and Ziggo intend to commit to the Joint Venture. […].

12. Based on the above, and in line with the provisions of the Commission Consolidated Jurisdictional Notice,[7] it can be concluded that HBO Nederland will be a full-function joint venture and that therefore the transaction constitutes a concentration within the meaning of Article 3(4) of the Merger Regulation.

III. EU DIMENSION

13. The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 000 million[8] in 2010 (HBO: EUR 20 467 million, Ziggo: […]). They had a combined aggregate EU-wide turnover of more than EUR 250 million each in 2010 (HBO: […], Ziggo […]) and they did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The transaction therefore has an EU dimension.

IV. RELEVANT MARKETS

Background

14. Since the Joint Venture will only be active in the linear TV sector in the Netherlands, the Commission focused its analysis on the possible impact of the transaction in this sector.[9]

15. The parties' and the Joint Venture's activities in the linear TV sector in the Netherlands can be summarised as follows:

   - Time Warner: licensing of films and other TV programs to TV broadcasters and retailers and wholesale supply of TV channels to TV retail suppliers.

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7 See, in particular, paras. 62-73.

8 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

9 Consistent with the Commission decisional practice (decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010), for the purposes of this decision, it is considered that that linear and non-linear TV service belong to separate product markets. The market investigation in this case confirmed that linear and non-linear TV service are not substitutable (see reply to questions 19-23 of the questionnaire to TV wholesalers / broadcasters; and reply to questions 22-26 of the questionnaire to TV retailers).

- HBO: licensing of films and other TV programs to TV broadcasters and retailers.

- Ziggo: retail supply of TV services.

- Joint Venture: wholesale supply of TV channels.

Relevant product market

16. As confirmed by the results of the market investigation in this case,[10] it is possible to distinguish three levels in the TV sector value chain, namely the: (1) licensing of audiovisual content; (2) wholesale supply of TV channels, and (3) retail supply of TV services.

(i) Licensing of audiovisual content

17. Audiovisual content comprises “entertainment products” (films, sports, TV programmes, etc.) that can be broadcast via TV.[11] The broadcasting rights belong to the creators of the content. These rights holders license them to broadcasters who subsequently incorporate this content into linear streams (*i.e.*, TV channels) or non-linear streams such as Pay-Per-View ("PPV") or Video-On-Demand ("VOD") platforms.

18. In previous decisions, the Commission identified separate product markets for the licensing of broadcasting rights for the different exhibition windows, namely: (1) VOD; (2) PPV; (3) first pay-TV window; (4) second pay-TV window (where applicable); and (5) free-to-air ("FTA") TV.[12] Moreover, within the market for licensing of broadcasting rights for pay-TV, the Commission considered that, from a demand and supply-side perspective, certain types of content are not substitutable, and defined separate product markets for the licensing of broadcasting rights for: (i) films, (ii) sport events and (iii) other TV content.[13] The Commission also considered that the market for the licensing of pay-TV broadcasting rights to films could be further divided into separate product markets for: (i) films produced by Hollywood studios and (ii) films produced by independent studios.[14]

19. The parties did not express a view on the exact definition of the relevant product market.

20. The market investigation did not put into question the existence of separate markets for different exhibition windows. The majority of content owners,[15] TV channel wholesalers / broadcasters and TV retailers[16] also agreed on a segmentation of the relevant market

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10 See reply to question 5 of the questionnaire to content owners; reply to question 9 of the questionnaire to TV wholesalers / broadcasters; and reply to question 12 of the questionnaire to TV retailers.

11 Decision of the European Commission, case COMP/M.5121, *News Corp/Premiere*, 2 April 2003.

12 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

13 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

14 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

15 See reply to question 6 of the questionnaire to content owners.

16 See reply to question 10 of the questionnaire to TV wholesalers/broadcasters; and reply to question 13 of the questionnaire to TV retailers.

between broadcasting rights for: (1) films; (2) sport events; and (3) other TV content. Moreover, while some content owners contested the existence of a separate product market for films produced by Hollywood studios,[17] all other market participants confirmed this segmentation.[18] Finally, the majority of the respondents to the market investigation indicated there may be a separate market for so-called "premium" content, typically consisting of (the first run of) the most successful films and other TV programs, as well as of the live broadcasting of the most attractive sport events.[19]

21. In any event, since the transaction will not raise competition concerns under any of the above outlined product markets in the licensing of audiovisual content, the exact scope of the relevant product market can be left open.

(ii) Wholesale supply of TV channels

22. On the wholesale market for the supply of TV channels, broadcasters and retail TV suppliers negotiate the terms and conditions for the distribution of TV channels to end-consumers. Within this market, the Commission identified two separate product markets for the wholesale supply of FTA and pay-TV channels, based on the different financial models of these two types of channels.[20] Moreover, within the market for the wholesale supply of pay-TV channels, the Commission indicated that there is a differentiation between "basic" and "premium" pay-TV channels, without, however, reaching a final conclusion as to whether these channels constitute separate markets.[21] In addition, the Commission considered, also without taking a final position on this issue, whether separate markets should be identified based on the theme of the channel (*e.g.*, films, sports, news etc.).[22] Finally, the Commission assessed whether the relevant market should be segmented based on the type of transmission infrastructure (cable, satellite, digital terrestrial, xDSL, etc), but, with specific respect to the Dutch market, ultimately left this question open.[23]

23. The parties did not express a view on the exact definition of the relevant product market.

24. The market investigation by and large confirmed that FTA TV and pay-TV channels belong to separate product markets.[24] Respondents to the market investigation also

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[17] See reply to question 8 of the questionnaire to content owners.

[18] See reply to question 12 of the questionnaire to TV wholesalers / broadcasters; and reply to question 15 of the questionnaire to TV retailers.

[19] See reply to question 7 of the questionnaire to content owners; reply to question 14 of the questionnaire to TV wholesalers / broadcasters; and reply to question 11 of the questionnaire to TV retailers.

[20] Decision of the European Commission, case COMP/M.4505 – *SFR/Télé2*, 18 July 2007; and decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

[21] Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

[22] See decision of the European Commission, case COMP/M.2876, *Newscorp/Telepiù*, 2 April 2003; decision of the European Commission, case COMP/M.4505, *SFR/Télé 2*, 18 July 2007; and decision of the European Commission, case COMP/M.5779, *Comcast/NBC Universal*, 13 July 2010.

[23] Decision of the European Commission, case COMP/M. 4338, *Cinven/Warburg Pincus/Casema/Multikabel*, 6 September 2006.

[24] See reply to question 11 of the questionnaire to content owners; reply to question 15 of the questionnaire to TV wholesalers / broadcasters; and reply to question 18 of the questionnaire to TV retailers.

explained, however, that, in the Netherlands, "real" FTA TV channels in practice no longer exist (with the exception of the three national public channels which are accessible at no charge via DVB-T and satellite).[25] This reflects the fact that, in order to be able to watch any other TV channels, end users have to purchase a basic pay-TV subscription. As a result, some respondents to the market investigation indicated that a market segmentation between basic pay-TV and premium pay-TV channels would more appropriately reflect the current Dutch market situation than the traditional segmentation between FTA TV and pay-TV channels.[26]

25. The majority of the respondents to the market investigation further indicated that it may be appropriate to segment the relevant market based on the theme of the channel.[27]

26. Finally, the market investigation was inconclusive as to a possible segmentation of the relevant market according to the transmission infrastructure.[28] Some respondents stated that, given the reach of cable in the Netherlands, access to the cable network is essential for the distribution of their channels and not substitutable with other means of transmission. Some respondents also noted that the various transmission infrastructures are more complementary than substitutable from the point of view of TV channel wholesalers. Other respondents, however, noted that the different transmission infrastructures are substitutable for TV channel broadcasters.

27. In any event, since the transaction will not raise competition concerns under any of the above outlined product markets in the wholesale supply of TV channels, for the purpose of this decision, the exact scope of the relevant product market can be left open.

(iii) <u>Retail supply of TV services</u>

28. In previous decisions, the Commission indicated that, within the market for the retail supply of TV services, a distinction should be made between FTA-TV and pay-TV services.[29] As regards a possible segmentation of the retail market based on the different types of transmission infrastructure (*e.g.*, cable, satellite, digital terrestrial, xDSL, etc.), in previous cases, the Commission did not deem it necessary to proceed to any such segmentation,[30] including with specific respect to the Dutch market.[31]

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25 See reply to question 15 of the questionnaire to TV wholesalers / broadcasters; and reply to question 18 of the questionnaire to TV retailers.

26 See reply to question 15 of the questionnaire to TV wholesalers / broadcasters; and reply to question 18 of the questionnaire to TV retailers.

27 See reply to question 10 of the questionnaire to content owners; reply to question 14 of the questionnaire to TV wholesalers / broadcasters; and reply to question 17 of the questionnaire to TV retailers.

28 See reply to questions 13, 21 of the questionnaire to content owners; reply to questions 18, 46 of the questionnaire to TV wholesalers / broadcasters; and reply to questions 21, 49 of the questionnaire to TV retailers.

29 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

30 Decision of the European Commission, case COMP/M.4505 – *SFR/Télé2*, 18 July 2007, and decision of the European Commission, case COMP/M.5121 – *News Corp/ Premiere*, 25 June 2008.

31 Decision of the European Commission, case COMP/M.4338, *Cinven/Warburg Pincus/Casema.* Multikabel, 6 September 2006. The Dutch national competition authority also takes the position that no distinction should

29. The parties consider that all forms of retail supply of pay TV channels belong to the same relevant product market.

30. Some of the respondents to the market investigation questioned whether pay-TV and FTA services belong to separate product markets.[32] Also, the market investigation was inconclusive as to the existence of separate markets based on the transmission infrastructure.[33] Some respondents emphasized the high costs associated with switching infrastructure, particularly for cable end users. Other respondents noted that switching is possible and does take place and identified IP-TV as exercising a strong competitive constraint over cable at the retail level, particularly in light of the ability of IP-TV providers to offer triple plays, including fixed telephony, broadband Internet and TV.

31. In any event, since the transaction will not raise competition concerns under any of the above outlined product markets in the retail supply of TV channels, the exact scope of the relevant product market can be left open.

<u>Relevant geographic market</u>

(i) <u>Licensing of audiovisual content</u>

32. In past decisions, the Commission considered that the market for the licensing of broadcasting rights to audiovisual content is either national in scope or relates to linguistically homogeneous areas.[34]

33. The parties did not express a view on the exact definition of the relevant geographic market.

34. The majority of the respondents confirmed that the market for the licensing of audiovisual content is national in scope.[35]

35. In light of the above, and for the purposes of the present decision, it can therefore be concluded that the geographic scope of the market for the licensing of audiovisual content (and its possible segments) is national.

(ii) <u>Wholesale supply of TV channels</u>

36. In previous decisions, the Commission consistently held that the market for the wholesale supply of TV channels is national or delineated along linguistically homogenous areas.[36]

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be made according to the infrastructure used to supply TV services at the retail level, see Decision of the NMa, Case 7203 – *KPN – CAIW*, August 5, 2011.

32 See reply to questions 19-23 of the questionnaire to TV wholesalers / broadcasters; and reply to questions 22-26 of the questionnaire to TV retailers.

33 See reply to questions 24-28 of the questionnaire to TV wholesalers / broadcasters; and reply to questions 27-32 of the questionnaire to TV retailers.

34 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

35 See reply to question 14 of the questionnaire to content owners; reply to question 32 of the questionnaire to TV wholesalers / broadcasters; and reply to question 36 of the questionnaire to TV retailers.

36 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

37. The parties did not express a view on the exact definition of the relevant geographic market.

38. The market investigation confirmed the national scope of the relevant market.[37] Moreover, the majority of the respondents do not observe an increasing trend towards a pan-European dimension to the wholesale of TV channels.[38]

39. In light of the above, and for the purposes of the present decision, it can therefore be concluded that the geographic scope of the market for the wholesale supply of TV channels (and its possible segments) is national.

(iii) Retail supply of TV services

40. With regard to the retail supply of TV services, the Commission considered that the markets for organisation of television, including the retail markets for pay-TV, are national in nature or relate to linguistically homogeneous areas.[39]

41. The parties submit that the geographic scope of this market is national and that the fact that the network of the various cable operators, including that of Ziggo, does not cover the entire territory of a Member State is irrelevant for the purposes of defining the exact scope of the relevant geographic market, as competitive conditions are similar across the different cable networks nationwide.

42. The market investigation confirmed the national scope of the relevant market.[40]

43. In light of the above, and for the purposes of the present decision, it can therefore be concluded that the geographic scope of the market for the retail supply of TV channels (and its possible segments) is national.

V. COMPETITIVE ASSESSMENT

44. As a preliminary remark, it is noted that the transaction would likely have pro-competitive effects in the Dutch TV sector, as it will likely increase competition in the acquisition of pay-TV content and in the wholesale of pay-TV channels.

45. The Joint Venture will operate and distribute to TV service retailers (and, indirectly, to end users) in the Netherlands six new pay-TV channels broadcasting films and other TV content (mainly TV series). As of today, there are only two suppliers active in the wholesale supply of pay-TV channels in the Netherlands, namely UPC/Chellomedia, with its Film1 and Sport1 channels, and Eredivisie, with the football channel Eredivisie Live. Moreover, only one player (UPC/Chellomedia, with its Film1 channels) is currently active in the narrower market

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37 See reply to questions 16-17, and 19 of the questionnaire to content owners; reply to questions 34-35, and 37 of the questionnaire to TV wholesalers / broadcasters; and reply to questions 38-39, and 41 of the questionnaire to TV retailers.

38 See reply to question 18 of the questionnaire to content owners; reply to question 36 of the questionnaire to TV wholesalers / broadcasters; and reply to question 40 of the questionnaire to TV retailers.

39 Decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

40 See reply to questions 16-17 of the questionnaire to content owners; reply to question 42 of the questionnaire to TV wholesalers / broadcasters; and reply to question 46 of the questionnaire to TV retailers.

for the wholesale supply of film pay-TV channels in the Netherlands, where the Joint Venture will operate. The transaction will therefore create a new competitor both in the acquisition of pay-TV broadcasting rights (for films and other TV content) and in the wholesale supply of pay-TV channels. The transaction will also increase consumer choice for pay-TV channels. These findings were confirmed by a number of respondents to the market investigation.[41]

46. The transaction will nonetheless give rise to certain horizontal overlaps and vertical relationship between the activities of the parties and the Joint Venture, which are analysed below.

Horizontal aspects

47. The only horizontal overlap between the activities of the parties' and the Joint Venture is in the wholesale supply of TV channels.

48. While neither HBO nor Ziggo is active in any market where the joint venture will operate, Time Warner, through its subsidiary Turner Broadcasting Systems Inc. ("Turner"), will be active in the wholesale supply to TV retailers of the following TV channels in the Netherlands: (1) Turner Classic Movies (featuring library films from Warner Bros); (2) CNN International (news channel); and (3) Cartoon Network and Boomerang (children channels).

49. The parties submit that Turner's channels are to be considered as FTA channels since: (1) they are offered by retail suppliers as part of standard or additional packages, which include bouquets of large numbers of channels and, unlike pay-TV channels, are not supplied to consumers of retail TV services for a specified, per-channel cost; and (2) the programs and content broadcast by Turner’s channels are substitutable for the content and programs offered by “traditional” FTA-TV channels, such as Dutch public broadcasters and the BBC, rather than for the content and programs offered by pay-TV channels. The parties also note that, post transaction, Turner channels will continue to be operated separately from the Joint Venture's channels.

50. If the relevant product market were to be segmented between pay-TV and FTA TV (or between premium pay-TV and basic pay-TV channels) and, as it would appear appropriate to do, Turner's channels were to be considered as FTA channels (or basic pay-TV channels), there would be no overlap between the activities of Turner and those of the Joint Venture (which will only provide wholesale premium pay-TV channels).

51. If, however, the relevant product market were to be defined as including all TV channels (or even all film TV channels, which would be the narrower market where the activities of Time Warner and of the Joint Venture would overlap), the market share of the Turner channels would be below [0-5]%, with the Joint Venture currently having no presence on such market.

52. None of the respondents to the market investigation raised any concerns deriving from the horizontal overlap between the activities of the parties and the Joint Venture.

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[41] See reply to questions 28-30 of the questionnaire to content owners; reply to questions 66-68 of the questionnaire to TV wholesalers / broadcasters.

53. In light of the above, it can therefore be concluded that the transaction will not give rise to any horizontal competition concerns and is therefore unlikely to harm consumer choice and cultural diversity in the EEA.

Non-horizontal aspects

Licensing of audiovisual content and wholesale supply of TV channels

54. Time Warner/HBO produces and licenses audiovisual content to third parties. Ziggo is active as a licensee in the acquisition of rights for VOD content broadcasting in the Netherlands. The Joint Venture will also be active as a licensee, since it will contract for the licensing of (pay-TV) broadcasting rights for content from Time Warner/HBO, as well as from third parties.

55. The Commission therefore analysed whether the transaction could give rise to vertical concerns (whether input or customer foreclosure) in these markets.

Input foreclosure

56. Some respondents to the market investigation submitted that, post transaction, Time Warner/HBO would reserve to the Joint Venture its films and other TV content, at least as far as the pay-TV window is concerned.[42] It was also noted that access to Time Warner/HBO content is important (or even essential) for third parties to be able to compete with the Joint Venture at the wholesale and retail level.[43] One respondent further argued that, if Time Warner/HBO were to exclusively license its content to the Joint Venture for the pay-TV window, also in light of Ziggo's strength as a pay-TV retailer, other Hollywood majors would likely follow suit thus making it impossible for other pay-TV channels to compete with the Joint Venture at the wholesale level.[44]

57. The Commission does not share these input foreclosure concerns for a number of reasons, including the fact that: (1) Time Warner/HBO's share is below [20-30]% even on the narrowest product market definition (licensing of TV broadcasting rights for Hollywood films or of "premium" content for the pay-TV exhibition window); and (2) there are a number of strong competing content (including premium content) providers, including the other five Hollywood majors, independent film producers, and US and European TV broadcasters, such as NBC, the BBC and local players, from which the Joint Venture's competitors could continue to source content. Moreover, none of the respondents to the market investigation has explained why Time Warner/HBO's content is not substitutable with content from other content providers, including, in particular, other Hollywood studios.

58. The Commission also rejects the argument raised by one of the respondents to the market investigation, according to which the fact of having an exclusive license for Time

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42 See reply to question 50 of the questionnaire to TV wholesalers / broadcasters; and reply to question 53 of the questionnaire to TV retailers.

43 See reply to question 24 of the questionnaire to content owners; see reply to question 49 of the questionnaire to TV wholesalers / broadcasters; and reply to question 52 of the questionnaire to TV retailers.

44 See reply to question 50 of the questionnaire to TV wholesalers / broadcasters; and reply to question 53 of the questionnaire to TV retailers.

Warner/HBO's content for pay-TV broadcasting and of Ziggo being one of its parent companies would make it more likely for the Joint Venture to secure additional rights from other licensors. The very fact that, Film1, the Joint Venture's only competitor in the acquisition of these rights in the future already has, and will continue to hold in the coming years, exclusive licences for the pay-TV broadcasting of content of a number of Hollywood majors and other licensors, and it also vertically integrated downstream in TV retailing via cable, shows that the Joint Venture will not enjoy any competitive advantage *vis-à-vis* this competitor in the future.

Customer foreclosure

59. Since the Joint Venture and/or the parties are currently not active in the acquisition of pay-TV broadcasting rights in the Netherlands, the transaction will not give rise to any customer foreclosure concerns. Moreover, none of the respondents to the market investigation raised any such concerns.

60. For completeness, it is noted that Ziggo's presence as a customer in the market for the licensing of audiovisual content is only limited to the acquisition of broadcasting rights for the VOD exhibition window and the creation of the Joint Venture will not have any impact on Ziggo's ability and incentive to source VOD content from third parties other than Time Warner/HBO. To the contrary, post transaction, Ziggo will likely continue to have the incentive to source content from as many sources as possible to improve the quality and attractiveness of its VOD offering.

61. In light of the above, and consistent with the provisions of Commission's Guidelines on the assessment of non-horizontal mergers,[45] it can therefore be concluded that the transaction will not give rise to any vertical concerns as a result of the combination of the parties' and the Joint Venture's activities in the licensing of audiovisual content and in the wholesale supply of TV channels. The transaction is equally unlikely to harm consumer choice and cultural diversity in the EEA.

Wholesale supply of TV channels and retail supply of TV services

62. Time Warner is active in the wholesale supply of TV channels through Turner, which, as noted at para. 49-51 above, has a very limited presence and only wholesales FTA channels. The Joint Venture will also operate as a TV channel wholesale supplier since it will sell its pay-TV channels to retailers of TV services. Ziggo operates as TV channel retailer and purchases channels from wholesalers with a view to retailing them to end users.

63. The Commission therefore analysed whether the transaction could give rise to vertical concerns (whether input or customer foreclosure) in these markets.

Input foreclosure

64. Some respondents to the market investigation stated that, post transaction, the Joint Venture may have the incentive to only license its channels to Ziggo to the exclusion of Ziggo's retail competitors, including not only Ziggo's direct competitors, *i.e.*, satellite and IPTV operators which are able to reach end users connected to Ziggo's cable network, but also other cable operators, which do not compete directly with Ziggo because of the different footprints of the

45 See, in particular, paras. 33-46.

various cable networks. According to one of the respondents, this latter conduct would be motivated by the fact that the Joint Venture's also plans to distribute its channels via the Internet, which would allow it to reach directly all customers nationwide, including those which are located outside the Ziggo's cable area.[46] It was also submitted that, if the Joint Venture were to license its channels to Ziggo's retail competitors, it would do so at worse terms and conditions than those applied to Ziggo.[47]

65. The Commission does not share these input foreclosure concerns for a number of reasons:

- No market power. As noted, Turner has a very limited market share in the wholesale supply of TV channels. Moreover, Turner only wholesales FTA channels, as opposed to the Joint Venture, which will only wholesale pay-TV channels. In addition, post transaction, Turner will continue to be operated independently of the Joint Venture.

  Further, the Joint Venture is a new entrant and does not currently hold any market power even in the narrowest possible market for the wholesale supply of premium pay-TV film channels, which, as of today, only features one player, Film 1. While the Joint Venture would likely acquire a certain market position after its launch, it is uncertain if and, within which time frame, it would acquire such a market presence to confer upon it the necessary degree of market power for any input foreclosure conduct to possibly raise concerns.

- No ability. The Joint Venture will not have the ability to license its channels exclusively to Ziggo. This reflects the fact that one of the two joint venture's partners, Time Warner/HBO, will have the incentive to wholesale of the Joint Venture's channels as broadly as possible and, due to its joint control over the Joint Venture, it will have the ability to block any input foreclosure strategy that Ziggo may be willing to implement. Time Warner/HBO's has an incentive to achieve the largest possible distribution of the Joint Venture's channels. According to the notifying parties, any input foreclosure strategy consisting of limiting the sale of the channels to Ziggo, would only be profitable for Time Warner/HBO if the retail price of these channels were to be around […]% higher than the price forecasted in the business plan ([…]) and assuming no reduction in the number of subscribers. It is, however, unlikely that the Joint Venture could sustain such a high retail price without losing subscribers, also in light of the fact that its channels will continue to compete with Film1's channels post merger. […][48] […].

- No incentive. Not only Time Warner/HBO, but also Ziggo, will not have the incentive to license the Joint Venture's channels exclusively to itself. Based on calculations provided by the parties, it appears that, if the Joint Venture were

46 See reply to question 22 of the questionnaire to content owners; see reply to question 47 of the questionnaire to TV wholesalers / broadcasters; and reply to question 51 of the questionnaire to TV retailers.

47 See reply to question 22 of the questionnaire to content owners; see reply to question 47 of the questionnaire to TV wholesalers / broadcasters; and reply to question 51 of the questionnaire to TV retailers.

48 See document […] submitted as Annex 13 to the Form CO.

to license its channels only to Ziggo, it would achieve around EUR […] less in revenues than the forecast included in the business plan over the time period contemplated by such plan ([…]). Similarly, if the Joint Venture were to license its channels only to other cable operators (which do not directly compete with Ziggo for end users connected to Ziggo's network), but not to satellite and IPTV operators, which compete directly with Ziggo, it would achieve around EUR […] less in revenues than the forecast included in the business plan over the same time period.

Further evidence of the fact that Ziggo will not have the incentive to license the Joint Venture's channels exclusively to itself is provided for by: (1) the Joint Venture's business plan, which was jointly established by Time Warner/HBO and Ziggo, […]; (2) Ziggo's internal documents,[49] which confirm that Ziggo foresees that the Joint Venture's channels will be wholesaled to third party TV retailers; and (3) the fact that, today, UPC/Chellomedia, which owns both the Film 1 and Sport1 channels and a cable network in the Netherlands, licenses its channels to other TV retailers, including other cable operators and satellite and IPTV providers; and (3) contrary to a submission from a third party, the Joint Venture's channels will not be retailed via the Internet to all end consumers nationwide, but will only be made available via the Internet to those subscribers who already have a retail TV subscription for these channels.

As regards the Joint Venture's ability and incentive to engage in discriminatory conduct *vis-à-vis* Ziggo's retail competitors, it is sufficient to note that, given the Joint Venture's incentives to license its channels as broadly as possible, the scope for the Joint Venture to engage in any such conduct is rather limited. Indeed, if the terms and conditions that the Joint Venture were to apply to third parties were to be too unfavourable, these players would in all likelihood decide not to license the Joint Venture's channels, which would be against the Joint Venture's and its partner's commercial interest. […].

– <u>No foreclosure</u>. Finally, even if the Joint Venture had the ability and the incentive to engage in total or partial input foreclosure *vis-à-vis* TV retailers, it is doubtful whether any such strategy would lead to the foreclosure or marginalisation of these competitors. This reflects, in particular, the fact that these players will continue to have access to at least another premium film pay-TV channel (Film1), as well as to other non-film premium channels (such as Sport1 and Eredivisie Live) and to a wide variety of pay-TV and FTA TV channels.

<u>Customer foreclosure</u>

66. A minority of the respondents to the market investigation also submitted that, post transaction, Ziggo could stop purchasing Film1, *i.e.*, the other premium pay-TV channel currently broadcast in the Netherlands and/or would remove from its analogue and/or digital bouquets other third party channels.[50] Due to Ziggo's strong market position at the retail level

49 See document […], submitted as Annex 13 to the Form CO.

50 See reply to question 22 of the questionnaire to content owners; reply to question 64 of the questionnaire to TV wholesalers / broadcasters; and reply to question 50 of the questionnaire to TV retailers.

(Ziggo's share in the retail supply of TV services in the Netherlands was [40-50]% in terms of revenues and [40-50]% in terms of subscribers in 2010) any such conduct may lead to the foreclosure of these channel broadcasters.

67. The Commission does not share these customer foreclosure concerns for a number of reasons, including the fact that: (1) as a retailer of pay-TV services, post transaction, it will continue to be essential for Ziggo to be able to offer wide-ranging bouquets of channels to its customers (this is consistent with the Commission's findings in previous cases, according to which the most important parameter for competition in the retail market is content and that platform operators seek to carry the largest and most interesting bundle of channels);[51] (2) Film 1 and the Joint Venture's channels will be differentiated in terms of content (they will broadcast films from different studios) and therefore complementary; and (3) Ziggo will have an economic incentive to continue to distribute third party pay-TV channels, including Film1, not to forego the revenues deriving from the revenue-sharing agreements currently in place with the relevant wholesalers (Ziggo does not anticipate that any extra revenues that it may achieve through increased wholesale sales of the Joint Venture's channels would offset the revenues that it would forego by not distributing competing pay-TV channels).

68. The fact that the Joint Venture's and Film1's channels will be complementary […] is further confirmed by an internal document submitted by Ziggo.[52]

69. Finally, the concerns according to which Ziggo, post transaction, would remove third party channels from its basic analogue and/or digital packages due to lack of space are also unfounded. First, the launch of the Joint Venture's channels will not have any impact on the composition of Ziggo's analogue basic package since the Joint Venture's channels will not be included in Ziggo's analogue basic package, but will only be distributed to end users, which have purchased a digital basic package and are willing to pay an additional fee to access these channels. Second, as far as the digital packages are concerned, due to digital transmission, bouquet space is not an issue and Ziggo confirmed that it will be able to carry both all channels in its existing portfolio and the Joint Venture's channels.

70. In light of the above, and consistent with the provisions of Commission's Guidelines on the assessment of non-horizontal mergers,[53] it can therefore be concluded that the transaction will not give rise to any vertical concerns as a result of the combination of the parties' and the Joint Venture's activities in the wholesale supply of TV channels and retail of pay-TV services. The transaction is equally unlikely to harm consumer choice and cultural diversity in the EEA.

VI. CONCLUSION

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

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51 Decision of the European Commission, case COMP/M.5121, *News Corp/Premiere*, 2 April 2003; and decision of the European Commission, case COMP/M.5932, *News Corp/BSkyB*, 21 December 2010.

52 See document […] and document […]submitted as Annex 13 to the Form CO.

53 See, in particular, paras. 60-71.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President