



EUROPEAN COMMISSION
DG Competition

***CASE M.7194-LIBERTY GLOBAL/
CORELIO/ W&W/ DE VIJVER MEDIA***

(Only the English text is authentic)

**MERGER PROCEDURE
REGULATION (EC) 139/2004**

Article 8(2) Regulation (EC) 139/2004

Date: 24/02/2015

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EUROPEAN
COMMISSION

Brussels, 24.2.2015
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COMMISSION DECISION

of 24.2.2015

declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7194 – LIBERTY GLOBAL/CORELIO/W&W/DE VIJVER MEDIA)

(Only the English text is authentic)

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COMMISSION DECISION

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THE EUROPEAN COMMISSION,

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

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 22 September 2014 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations²,

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. INTRODUCTION

- (1) On 18 August 2014 the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ('the Merger Regulation'), by which the undertaking Liberty Global plc ('Liberty Global') (United Kingdom), along with the undertakings Waterman & Waterman NV ('W&W') (Belgium) and Corelio Publishing NV ('Corelio') (Belgium), acquires within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking De Vijver Media NV ('De Vijver Media') (Belgium) by way of purchase of shares (the 'Transaction').⁴ Liberty Global, W&W and Corelio are collectively referred to as the 'Notifying Parties'. The Notifying Parties and De Vijver Media are collectively referred to as the 'Parties'.
- (2) Based on the results of the Phase I market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 22 September 2014 (the 'Article 6(1)(c) Decision').

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 OJ C200. , p....

³ OJ C200. , p....

⁴ OJ C 281, 23.8.2014, p. 5.

- (3) The Notifying Parties submitted their written comments to the Article 6(1)(c) Decision on 6 October 2014.
- (4) On 16 October 2014, the Commission adopted a decision on the basis of the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation, extending the Phase II proceedings by a total of 20 working days.
- (5) During the Phase II market investigation, the Commission sent several requests for information to the Notifying Parties and to third party market participants. Information was also provided to the Commission at several meetings and conference calls with the Notifying Parties and with third parties. The Commission also analysed internal documents of the Notifying Parties and data from the Notifying Parties and some third parties. Throughout the Phase II market investigation, the Commission had regular contacts with the Belgian Competition Authority (the ‘BCA’)⁵, the Flemish media regulator (the ‘VRM’)⁶ and the Belgian telecommunications regulator (the ‘BIPT’)⁷.
- (6) On 24 November 2014, the Notifying Parties proposed formal commitments to eliminate the Commission’s serious doubts that the Transaction would give rise to a significant impediment to effective competition. The Commission launched the market test for the commitments on 24 November 2014.
- (7) Taking into account the Commission’s comments and the feedback from the market test, the Notifying Parties subsequently submitted improved and revised commitments on 9 December 2014, 12 December 2014 and a final set of commitments on 9 February 2015.

2. THE TRANSACTION

- (8) Liberty Global provides TV, broadband internet and voice telephony services via its cable networks in 12 countries across Europe, as well as in certain countries outside of Europe. In Belgium, Liberty Global is the controlling shareholder of Telenet Group Holding NV (‘Telenet’). Telenet owns and operates a cable network in the Flemish Region of Belgium,⁸ parts of the Brussels Capital Region and one municipality in the Walloon Region (the ‘Telenet footprint’).⁹ Telenet also operates a number of pay TV channels, under the brands ‘Sporting Telenet’ and ‘PRIME’, and video-on-demand (‘VOD’) services.¹⁰
- (9) W&W is a financial holding company controlled by two individuals, namely Wouter Vandenhoute and Erik Watté.
- (10) Corelio is active in the publishing of newspapers, online news and the selling of advertising space.

⁵ Belgische Mededingingsautoriteit / Autorité belge de la concurrence.

⁶ Vlaamse Regulator voor de Media.

⁷ The Belgian Institute for Postal services and Telecommunications (Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications).

⁸ Belgium is made up of three regions: the Flemish Region, the Walloon Region and the Brussels Capital Region. In this Decision, the term ‘Flanders’ is also used to designate the geographic area corresponding to the territory of the Flemish Region. The term ‘Brussels’ is also used to designate the geographic area corresponding to the territory of the Brussels Capital Region.

⁹ Telenet owns most of the cable network it operates but leases part of it on a long-term basis.

¹⁰ Originally these services were offered under the brands Rex and Rio but, in December 2015, they became part of Telenet’s Play and Play More offer, which combines VOD services with catch-up TV.

- (11) De Vijver Media broadcasts the Dutch language TV channels ‘Vier’ and ‘Vijf’ through its subsidiary SBS Belgium NV (‘SBS Belgium’). It also produces TV content, mostly through its subsidiary Woestijnvis NV (‘Woestijnvis’). Moreover, De Vijver Media sells advertising space on several TV channels through its subsidiary SBS Sales Belgium NV.
- (12) On 17 June 2014, Telenet, W&W and Corelio entered into an agreement for Telenet to acquire 33.33 % of the shares of De Vijver Media and also subscribe to a capital increase of De Vijver Media. As a result, Telenet will hold 50 % of the shares of De Vijver Media while W&W and Corelio will each hold 25 % of the shares. According to the Notifying Parties, upon the closing of the Transaction Telenet, W&W, Corelio and De Vijver Media will enter into a shareholders agreement (the ‘Shareholder Agreement’), pursuant to which [...]*. Telenet, W&W and Corelio will thus acquire joint control over De Vijver Media.
- (13) It follows that the Transaction is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

- (14) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million¹¹ (Liberty Global: EUR 10 898.4 million, W&W: EUR [...]* million, Corelio: EUR [...]* million and De Vijver Media: EUR 126 million). Two of the undertakings concerned have a Union-wide turnover in excess of EUR 250 million (Liberty Global: EUR [...]* million and Corelio: EUR [...]* million), but Liberty Global does not achieve more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.¹²
- (15) Therefore, the Transaction has a Union dimension.

4. RELEVANT MARKETS

- (16) The Transaction relates to all the levels of the TV value chain. This section first provides an overview of the TV value chain and describes the Parties’ activities therein. It then discusses the product and geographic market definition for each level of the TV value chain.

4.1. Introduction – the TV value chain and the Parties’ activities

- (17) Audio-visual TV content (‘TV content’) comprises entertainment products (films, sports, series, shows, live events, documentaries, etc.) that can be broadcast via TV.¹³ In its past decisional practice, the Commission has distinguished different activities in the value chain for TV-related content, namely: (a) the production of TV content; (b) the licensing of broadcasting rights relating to TV content; (c) the wholesale supply of TV channels; and (d) the retail provision of TV services to end customers.¹⁴ As a part of its

¹¹ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.4.2008, p1).

¹² All data provided for the last financial year running from 1 January 2013 to 31 December 2013.

¹³ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 28.

¹⁴ See, for example, Commission decision of 21 December 2010 in case M.5932, *News Corp/BskyB*; Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, and Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, 15 April 2013.

* 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.

analysis of the Notifying Parties' activities, the Commission also analyses the impact of Transaction on (e) the sale of advertising on TV channels.

- (18) In sections 4.1.1 to 4.1.5, the Commission briefly describes the activities of the Parties in the TV value chain in Belgium and, in particular, within the Telenet footprint, which is the geographic area where the Transaction will have a competitive impact.

4.1.1. *Production of TV content*

- (19) This part of the value chain concerns the production of new TV content. TV production companies produce TV content either (a) for internal use on their own TV channels or retail TV services if they are vertically integrated in the wholesale supply of TV channels and/or in the retail provision of TV services (that is to say, captive TV production), or (b) for supply to third-party customers (that is to say, non-captive TV production). Third-party customers are typically: (i) TV channel suppliers ('TV broadcasters'), which then incorporate the TV content into linear TV channels, or (ii) content platform operators, which then retail the TV content to end users on a non-linear basis (that is to say, Pay-Per-View ('PPV') or VOD), including non-traditional platforms, that is to say internet or so-called Over-The-Top ('OTT').
- (20) TV broadcasters and TV distributors who seek TV content for their TV channels or retail TV services generally have a choice between a number of sourcing models, which can be broadly categorised as follows:
- (a) acquiring broadcasting rights from TV production companies for pre-produced TV content (sometimes referred to as 'off-the-shelf' or 'tape sales');
 - (b) obtaining TV content produced on an 'ad hoc' basis (that is to say tailor-made), by:
 - (i) commissioning TV content from a TV production company (which owns the relevant TV format),
 - (ii) hiring a TV production company to provide the technical means and deliver the finished TV content based on a format owned by the broadcaster, or
 - (iii) producing the content themselves by relying on their in-house facilities (captive TV production).
- (21) In most cases, TV production companies produce TV content tailored to the needs of their customers on the basis of original TV formats¹⁵ that they develop themselves or that they acquire from right holders (so-called 'commissioned production'). However, in some instances, TV production companies are hired by TV broadcasters or content platform operators to simply provide the technical production means and deliver the finished programme based on a TV format owned or acquired by the hiring company (so-called 'production-for-hire' or 'supply of TV production services').
- (22) The production costs are usually borne entirely or almost entirely by the TV broadcasters or content platform operators. As regards ownership of the various rights relating to the TV content (for example, primary TV broadcast rights, 'catch-up', VOD, etc.), the extent to which those rights are retained by the production company – as opposed to the acquirer of TV content – may vary based on a number of factors, such as national regulation in the country concerned, the type of broadcasting, the outcome of the commercial negotiations between the parties, etc.

¹⁵ TV format refers to the overall concept and branding of a copyrighted TV programme.

Producers or the acquirers of TV content may then achieve secondary revenues by further licensing/distributing the TV content or the TV format to third parties.

- (23) In light of the above, the supply-side of this market comprises TV production companies, while the demand-side comprises third parties that commission the production of TV content or hire TV production services, typically TV broadcasters or content platform operators.
- (24) As regards the supply-side of the market:
- (a) De Vijver Media, through its subsidiary Woestijnvis, produces TV content mainly for its own TV channels Vier and Vijf, but also for third parties;
 - (b) Liberty Global is active in the production of TV content through All3Media Holdings Limited ('All3Media').¹⁶
- (25) As regards the demand-side of the market:
- (a) De Vijver Media commissions TV content from other producers;
 - (b) Telenet sources TV production services for the live broadcasting of the Belgian Jupiler Pro League on its pay TV channels.

4.1.2. *Licensing of broadcasting rights relating to TV content*

- (26) This part of the value chain concerns the licensing of broadcasting rights relating to pre-existing TV content – that is to say TV content that has been previously produced and is subsequently made available 'off-the-shelf' by the rights holder (so-called pre-produced TV content) – and broadcasting rights relating to sports events.
- (27) The broadcasting rights relating to TV content can belong to one or more of the following: the holder of the rights to the TV format; the production company that produced the TV content; the company that commissioned the production of the TV content. In addition, the broadcasting rights can belong to a third-party distributor, to which they were licensed by the original owner, along with a right to sub-license.
- (28) All of these categories of rights owners, which constitute the supply-side of the market, license broadcasting rights to content aggregators, which constitute the demand-side of the market, namely: (a) TV broadcasters; or (b) content platform operators.
- (29) As regards the supply-side of the market:
- (a) De Vijver Media licenses the broadcasting rights to its productions and/or formats mainly to its subsidiary SBS Belgium for use on its channels Vier and Vijf, and to a limited extent outside Belgium. In addition, De Vijver Media's subsidiary Loft International NV owns the rights for the U.S. remake of the film *The Loft*;
 - (b) Corelio and W&W jointly control De Vijver NV, a company that owns the rights to several cycling events in Flanders. Flanders Classics NV, which is controlled by De Vijver NV, has been granted a licence to broadcast and merchandise those cycling events as well as three cycling events owned by third parties. Flanders Classics NV sub-licenses the TV broadcasting rights for those cycling events to TV channels;

¹⁶ In September 2014, Liberty Global and Discovery Communications, Inc. acquired joint control over All3Media. See Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*.

- (c) Telenet has until recently sub-licensed broadcasting rights to the Belgian Jupiler Pro League¹⁷ and Liberty Global is, through All3Media, active in the licensing of broadcasting rights relating to TV content.
- (30) As regards the demand-side of the market:
- (a) De Vijver Media acquires broadcasting rights for its TV channels Vier and Vijf and for VOD services;
 - (b) Telenet acquires broadcasting rights for its pay TV channels and for VOD services.

4.1.3. Wholesale supply of TV channels

- (31) TV broadcasters use the TV content that they have acquired or produced in-house in order to package it into linear TV channels. (Linear) TV channels are broadcast to end users either on a free-to-air ('FTA') basis or on a pay TV basis.
- (32) At a very general level and as explained in more detail in recitals (33) to (38), FTA channels are TV channels that are available to viewers free of charge. Pay TV channels are channels for which the viewer must pay a subscription fee in order to watch the content. Traditionally, FTA channels finance their operations via advertising revenues (with the exception of the publicly-owned TV channels in a number of Member States, including Belgium, which are not allowed to sell advertising space), while pay TV channels generate revenues through subscription fees.
- (33) The viewer experience of TV is evolving and shifting from traditional linear viewing to non-linear viewing. The development of new forms of TV consumption as a result of new technology has made it possible to distinguish between rights relating to conventional ('linear') TV and those relating to 'non-linear' TV services.
- (34) In the context of linear television, viewers must watch TV content at the established time it is broadcast, and on the channel on which it is presented, according to the specific schedule defined by the broadcaster, with no possibility to interact with it or change the time. In contrast, non-linear TV services allow a more enriched viewing experience by enabling the viewer to interact with TV programming and choose the time and manner of watching content according to tailored needs and demands.
- (35) Non-linear TV services have gradually been integrated in traditional TV channels to enhance the viewer experience. TV broadcasters thus can offer viewers a vast array of functions and services as part of the experience of the TV channels. For instance, VOD is a pay-as-you-go service that makes the content of a channel available for a certain period to the viewer, who can choose when to view it.
- (36) VOD services can be further differentiated into three types. First, Subscription VOD ('SVOD') designates a service whereby the end user obtains the right to watch multiple titles during a designated time period, for instance one month, through a single payment. Second, Transactional VOD ('TVOD') designates a service whereby the end user obtains the right to watch a single selected title within a designated time frame, for instance within 24 hours, through a single payment. Third, PPV designates a service whereby the end user makes a payment to watch a single title that is being broadcast at a specific time, which is the same for all viewers. In the case of TVOD and SVOD, viewers can select, purchase and view the titles at times of their own preference,

¹⁷ For the coming three seasons, 2014/2015, 2015/2016 and 2016/2017, Telenet has not acquired exclusive broadcasting rights and will not be active as a licensor of these rights.

whereas in the case of a title available for PPV, viewers purchase the right to watch that title at the given time it is broadcast, which is the same for everyone (for instance, the right to watch the live broadcast of a football match can be purchased for PPV).

- (37) Additional non-linear services include catch-up service and Personal Video Recorder ('PVR') services. Catch up TV (or Replay TV) is a service allowing the viewer to watch a certain title for a period of days after the original broadcast of the title, for instance within seven days after the original showing. PVR services enable a viewer to record a certain title broadcast over television, and store its data on a hard drive or online (sometimes referred to as 'in the cloud' or Network PVR), to watch at a later moment.
- (38) The Commission notes that TV broadcasters are increasingly complementing their traditional linear TV channel offering with non-linear services such as those described in recitals (35), (36) and (37), some of which have become an integral part of the viewer experience of a (linear) TV channel. For example, when viewing a linear TV channel on their digital platform, end users now expect to be able to 'interact' with the channel and benefit from one or more of the above outlined non-linear services. Both Telenet and Belgacom, for example, offer their users the following non-linear ancillary services in addition to the linear broadcasting of a number of TV channels:
- De Vijver Media's non-linear services Meer Vier and Meer Vijf, through which viewers can watch a selection of programmes and series that have been broadcast on Vier and Vijf.¹⁸
 - The services Net gemist and Ooit gemist of the Flemish public broadcaster VRT; Net gemist is a catch-up service that allows viewers to watch all programmes broadcast on VRT's linear channels in the past seven days in return for a monthly subscription fee; Ooit gemist allows viewers to watch any programme from the past seven days and a large number of older programmes in return for a fee per programme.¹⁹
 - The non-linear service iWatch of Medialaan NV ('Medialaan'), which enables viewers to watch content from Medialaan's catalogue in return for a fee per programme.²⁰
- (39) Some TV broadcasters are vertically integrated as they are also active as a retail TV operator ('TV distributor') in the market for the retail provision of TV services to end users. Other TV broadcasters are not vertically integrated and rely on third party TV distributors to distribute their TV channels at the retail level.

¹⁸ For Telenet, see the Carriage agreement dated [...] between Telenet and SBS Belgium – Overeenkomst lineaire en niet-lineaire diensten SBS-Telenet [...] [Agreement for Linear and Non-linear Services SBS-Telenet] (defining 'Meer Vier' and 'Meer Vijf' as a non-linear service through which SBS offers in a catalogue a selection of TV programmes and/or series, broadcast on Vier and Vijf, on a pay per view basis to Telenet TV subscribers).

¹⁹ See VRT – webpage about Ooit gemist, [ID 1266] and webpage about Net gemist, [ID 1265].

²⁰ For Telenet, see the carriage agreement dated [...] between Telenet and Medialaan – Overeenkomst lineaire en niet-lineaire diensten, dadingsovereenkomst Medialaan-Telenet [...] [Agreement linear and non-linear services, settlement agreement Medialaan-Telenet [...]] (defining iWatch as a non-linear service by which Medialaan offers a catalogue of TV programmes and series, broadcast or still to be broadcast on its channels, to Telenet TV subscribers on a pay per view basis).

- (40) As regards the supply-side of the market:
- (a) De Vijver Media offers its basic pay TV channels Vier and Vijf to TV distributors in Belgium;
 - (b) Telenet supplies its premium pay TV sports channel, Sporting Telenet, to cable operator Numericable which is active in the Brussels Capital Region and the municipality of Wemmel in the Flemish Region.²¹
- (41) As regards the demand-side of the market, Telenet enters into agreements with TV broadcasters for the distribution of TV channels on its cable network.²²

4.1.4. Retail provision of TV services to end users

- (42) TV distributors either limit themselves to ‘carrying’ the TV channels and making them available to end users, or also act as channel aggregators, which ‘package’ TV channels. The TV services supplied by TV distributors to end users consist of (a) packages of linear TV channels (which they have either acquired or produced themselves) and (b) content aggregated in non-linear services, such as VOD, SVOD, TVOD and PPV. TV content can be delivered to end users through a number of technical means including cable, satellite and IPTV.²³ OTT players deliver channels and content in both a linear and non-linear fashion through the use of the internet.
- (43) The content offered by the TV distributor is presented in an Electronic Programme Guide (EPG), which is an application used on television sets to list current and scheduled programmes that are or will be available on each channel and a short summary or commentary for each programme. Each channel broadcast on the TV platform receives an EPG position, which is usually agreed between the TV broadcaster and the TV distributor.
- (44) In the retail provision of TV services to end users, Telenet offers retail services in the Flemish Region, parts of the Brussels Capital Region and one municipality in the Walloon Region. De Vijver Media is not active at this level of the TV value chain.

4.1.5. Sale of advertising on TV channels

- (45) TV broadcasters sell advertising space on their TV channels. The sale of advertising space is an important source of revenues for FTA channels, while pay TV channels in general rely more on fees from TV distributors or from end users.
- (46) As regards the supply-side of the market,²⁴ De Vijver Media sells, via its subsidiary SBS Sales Belgium NV, advertising space on Vier and Vijf and acts as an intermediary for the sale of advertising space on third party TV channels.²⁵

²¹ By virtue of a decision of the BCA, Telenet is required to make its channels Sporting Telenet and PRIME available to alternative infrastructures who request such access. See decision of the BCA’s Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 12 November 2003 in case 2003-C/C-89 N.V. Telenet Bidco – N.V. Canal+.

²² Liberty Global is also active on the demand side for the distribution of TV channels on its cable networks outside Belgium, but these activities are not relevant for the assessment of this case.

²³ IPTV is the abbreviation for Internet Protocol TV; it is a system through which television services are delivered using the Internet protocol over a packet-switched network such as the internet, instead of being delivered through traditional terrestrial, satellite signal and cable television formats.

²⁴ Corelio is active in publishing of newspapers, online news and selling of advertising space, but these activities are not relevant for the assessment of this case.

²⁵ Nick Jr, Nickelodeon, TMF, MTV, Discovery Channel and Libelle TV.

(47) As regards the demand-side of the market, Telenet buys advertising space on TV channels.

4.2. Production and licensing of broadcasting rights for TV content

(48) From a demand side perspective, the production of TV content and the licensing of broadcasting rights for TV content constitute alternative ways through which TV broadcasters and TV distributors may source TV content.

(49) Therefore, for the purpose of the market definition, in the following section the Commission analyzes the production and licensing of TV content together.

4.2.1. Product market

4.2.1.1. Previous Commission decisions

(50) In past decisions the Commission has considered separately (i) the market for the production of non-captive TV content and (ii) the market for licensing/acquisition of broadcasting rights for TV content,²⁶

(51) Regarding the production of TV content, the Commission has found the product market for the production of TV content to be limited to non-captive TV production, thereby excluding captive TV production (TV content produced by TV broadcasters for use on their own channels), as this TV content is not offered on the market.²⁷

(52) Regarding the licensing of broadcasting rights for TV content, the Commission previously identified separate markets depending on the type of TV content, such as (a) films, (b) sports and (c) other TV content.²⁸ Within each of the films and sports segments, the Commission also discussed possible additional sub-segments. Ultimately, the Commission left the exact scope of the product market open, as there were no competition concerns in those cases.

(53) In previous decisions,, the Commission further divided the market for the licensing of broadcasting rights for TV content (a) by exhibition window, that is to say SVOD,

²⁶ Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recital 41 and Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 40.

²⁷ Commission decision of 3 August 1999 in case M.1574 *Kirch/Mediaset*, recital 14; Commission decision of 11 July 2000 in case M.1943 *Telefónica/Endemol*, recital 8; Commission decision of 29 June 2000 in case M.1958 *Bertelsmann/GBL/Pearson TV*, recitals 11–12; and Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, recitals 11–12; Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 36.

²⁸ See Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recitals 18–20; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 19. Moreover, as regards sports, the Commission has also previously considered a distinction between football and other sports and further distinctions within football, for example between regular football events and football events that are played more intermittently (Commission decision of 18 January 2007 in case M.4519 *Lagardère/Sportfive*, recital 10). As regards films, the Commission has considered distinguishing between US-produced films and other films (Commission decision of 2 April 2003 in case M.2876 *News Corp/Telepiù*, recitals 58 and 61).

TVOD, PPV, first pay TV window, second pay TV window, and FTA;²⁹ and (b) by content type, that is to say films, sports, other content.³⁰

- (54) As regards a subsegmentation by exhibition window, in *SFR/Tele2* the Commission identified a separate market for the acquisition of film rights for VOD due to the fact that non-linear services differ significantly from conventional TV channels in terms of demand, the applicable legislation and prices.³¹ In *NewsCorp/Premiere*, the Commission concluded that the market for the acquisition of TV broadcasting rights is separated between pay TV and FTA TV, since the business model in the context of which the acquired content is used by TV broadcasters plays an important role in distinguishing between pay TV and FTA TV.³²
- (55) As for a subsegmentation per type of TV content, in *NewsCorp/Telepiù* the Commission considered as separate the markets for, among others, (a) exclusive rights to premium films; (b) exclusive rights to football events that take place every year where national teams participate (mainly national league, national cup, UEFA Cup and UEFA Champions League); and (c) exclusive rights to other sport events, after considering the respective structures of supply, the characteristics of this type of contents and the pricing terms.³³

4.2.1.2. Notifying Parties' view

- (56) The Notifying Parties argue that the production of TV content and the licensing of broadcasting rights for TV content should be distinguished as two levels of the supply chain and as two separate markets. The Notifying Parties further submit that the supply side of the market for TV production comprises both in-house divisions of TV broadcasters and independent production companies.
- (57) With regard to a possible subsegmentation of licensing on the basis of type of TV content, the Notifying Parties submit that the question of distinction between usage for linear services versus non-linear and division by content type can be left open.

4.2.1.3. The Commission's assessment

- (58) The information gathered during the Phase I market investigation indicated that TV broadcasters' choice between the various sourcing models for TV content, and their willingness to substitute one for the other in response to a price increase, depends on several factors, including: the cost of the content, the type of content, the profile of the channel, the total size of the channel's programming budget, the type of audience and time slots. Respondents indicated that for larger TV channels pre-produced content is likely not a close substitute to commissioned TV content, and that

²⁹ Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 18; Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recitals 46–48; Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recitals 45–47, Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 38–44.

³⁰ See Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recitals 18–20; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 19, Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recitals 42–45, Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recitals 41–44, and Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 45–48.

³¹ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 24–36.

³² Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recitals 28–35.

³³ Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 55.

international versions of TV programmes are not substitutes to the commissioned production of local adaptations.³⁴

- (59) The results of the Phase I market investigation also indicated that from the supply side it is not possible for a company only active in the production of commissioned TV to start licensing pre-produced TV content within a short timeframe and without incurring significant additional costs. Such production would involve a greater risk than commissioned TV.³⁵
- (60) Therefore, it appears that the production of TV content and the licensing of broadcasting rights related to TV content are two separate product markets.
- (61) The results of the Phase I market investigation also suggested that at least the market for the licensing of broadcasting rights for TV content could be further segmented according to the exhibition window and the type of TV content, in line with the Commission's previous decisions.
- (62) With regard to the different exhibition windows, the results of the Phase I market investigation indicated that the majority of the content owners licensed their content on the basis of different exhibition windows.³⁶ One of the respondents stated that such a distinction is a common practice in the market³⁷.
- (63) On the demand side, the majority of the TV broadcasters also acknowledged the difference between these segments.³⁸ In particular, TV broadcasters acknowledged that producing a FTA channel is a different business from producing a pay TV channel, since it would imply a significant change in the content offered, as well as the respective cost.
- (64) Given the different conditions for the acquisition of rights for each exhibition window, and the limited instances in which a window can be replaced by another, there are indications that a different possible market/segment for each exhibition window can be distinguished.
- (65) The Commission also considers that the segmentation between films, sports and other TV content identified in previous Commission decisions may be applied to the market for the production of TV content as well.
- (66) TV content producers and rights holders responding to the Phase I market investigation indicated that the costs and skills required for the production of TV content differ depending on the type of content. None of the responding producers believed that a company which is only active in the production of films or sports content would be able to start producing TV programmes other than films and sports within a short timeframe and without incurring significant additional costs.³⁹ The results of the Phase I market investigation were not conclusive as regards potential further distinctions based on content type.
- (67) On the demand side, the results of the Phase I market investigation indicate that TV broadcasters' general interest channels and thematic channels have different target

³⁴ Replies to Questionnaire – Q2 to TV broadcasters of 19 August 2014, questions 22, 24 and 25.

³⁵ Replies to Questionnaire – Q1 to TV production companies and other TV content suppliers of 19 August 2014, questions 9, 10 and 11.

³⁶ Replies to Questionnaire Q4 to content owners of 9 October 2014, questions 1 and 2.

³⁷ Reply of Belga Films S.A. to Questionnaire Q4 to content owners of 9 October 2014, question 1.1.

³⁸ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, questions 7, 8 and 9.

³⁹ Replies to Questionnaire Q1 to TV production companies and other TV content suppliers of 19 August 2014, questions 19, 20 and 21.

audiences and are not substitutable⁴⁰, but it was not conclusive regarding the specific segmentation.

- (68) Therefore, the Commission considers that the absence of interchangeability between the various types of content, the different target audiences and the differences in cost that have been mentioned by the respondents to the Phase I market investigation suggest that the acquisition of rights for films could be distinguished from the acquisition of rights for sport events and from the acquisition of rights for other types of content.
- (69) In light of the above, the Commission concludes that the production of TV content and the licensing of broadcasting rights for TV content constitute two separate product markets. Those markets can each be also further segmented depending on the type of TV content or exhibition window. However, for the purpose of this Decision, the question whether those subsegments constitute separate product markets can be left open, as the Transaction does not raise competitive concerns under any alternative market definition.

4.2.2. *Geographic market*

4.2.2.1. Previous Commission decisions

- (70) In past decisions, the Commission defined the market for the production of TV content as national in scope or broader, that is to say comprising a particular language region.⁴¹ Similarly, as regards the licensing of broadcasting rights for TV content, the Commission considered the market to be national in scope or encompassing a broader linguistically homogeneous area.⁴²

4.2.2.2. Notifying Parties' view

- (71) The Notifying Parties submit that in Belgium, TV production companies primarily produce TV content that is tailored specifically to the needs of a particular TV broadcaster, and that this implies a close relationship between the TV production company and the TV broadcaster.
- (72) The Notifying Parties further submit that the question of the geographic market for the licensing of broadcasting rights for individual TV content can be left open.

4.2.2.3. The Commission's assessment

- (73) According to the majority of the TV production companies responding to the Phase I market investigation, the geographic scope of contracts for the production of TV content and for the licensing of broadcasting rights for TV content is typically limited to the Dutch-speaking part of Belgium. Only a few respondents answered that contracts cover a wider area, such as the whole of Belgium or the Dutch-speaking parts of Belgium and the Netherlands.⁴³

⁴⁰ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, questions 18 and 19.

⁴¹ Commission decision of 3 August 1999 in case M.1574 *Kirch/Mediaset*, recital 17; Commission decision of 29 June 2000 in case M.1958 *Bertelsmann/GBL/Pearson TV*, recital 14; and Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, recital 15; Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recital 49 and Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 48.

⁴² Commission decision of 21 December 2010 in case M.5932 *News Corp/BSkyB*, recitals. 73–75; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 24.

⁴³ Replies to Questionnaire Q1 to TV production companies and other TV content suppliers of 19 August 2014, question 42.

- (74) The majority of the respondents among TV broadcasters and production companies considered Dutch language content as a ‘must have’. Furthermore, several TV broadcasters answered that Dutch language TV content developed for viewers in the Netherlands is not a substitute to Dutch language TV content developed for Dutch-speaking viewers in Belgium because of cultural differences. On the other hand, some international TV broadcasters focusing on sports, films and documentaries indicated that TV content in other languages could, to some extent, be regarded as a substitute to Dutch language content.⁴⁴
- (75) To illustrate the distinctive features of the Flemish media market, one respondent referred to research showing that the preference for local content is much stronger in the Flemish Community of Belgium than in the Netherlands and in the French Community of Belgium⁴⁵ where domestically-produced fiction is less popular and out-competed by content from the U.S. Also, most, if not all, of the Flemish production companies are specialised in the production of TV content in the Dutch language.
- (76) In any event, the question whether the geographic scope of the market for the production of TV content and the licensing of broadcasting rights for TV content is national or regional (the Flemish Region or the combination of the Flemish Region and the Brussels Capital Region) can be left open, as this would not change the outcome of the competitive assessment in this case.

4.3. Wholesale supply of TV channels

4.3.1. Product market

4.3.1.1. Previous Commission decisions

- (77) In previous decisions, the Commission identified a wholesale market for the supply of TV channels in which TV broadcasters and TV distributors negotiate the terms and conditions for the distribution of TV channels to end users.⁴⁶ Within that market, the Commission further identified two separate product markets for FTA TV channels and for pay TV channels.⁴⁷
- (78) In *News Corp/Premiere*, the Commission noted that there are major differences with regard to the business models of FTA and pay TV broadcasters, so that supply-side substitutability is limited. While FTA channels are mainly financed by advertising revenues and, in the case of the public owned TV channels, by public funds, pay TV channels rely on revenues stemming from subscription fees and, to an insignificant extent, from advertising. Given those differences in financial models, pay TV

⁴⁴ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, questions 33 and 34.

⁴⁵ Belgium is made up of three communities: the Flemish Community, the French Community and the German-speaking Community. The territory of these communities does not correspond to the territory of the three regions. The Flemish Community exercises its competences in Flanders and Brussels, the French Community in Wallonia (except for the German-speaking municipalities) and Brussels, and the German-speaking Community in the municipalities that form the German language area.

⁴⁶ Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 76 and 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 22.

⁴⁷ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 37–40; Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 40; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 80, 83 and 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 24; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 37.

broadcasters cannot readily switch to FTA TV in the short term and vice-versa, without incurring significant additional costs or risks.⁴⁸

- (79) In its *Liberty Global/Ziggo* decision, the Commission reiterated that FTA channels differ from pay TV ones in several aspects, including financing models, pricing and window patterns.⁴⁹ In particular, FTA channels are available to virtually all consumers free of charge, whereas a paid subscription is necessary in order to watch a pay TV channel. FTA and pay TV also have different window patterns, as pay TV constitutes an earlier segment of exploitation for film content and for a different customer basis (that is to say, customers who are willing to pay in order to watch films earlier and without commercial breaks).
- (80) However, given the limited significance of FTA channels in the Netherlands and the fact that the competitive assessment would remain unchanged regardless of whether FTA channels and pay TV channels were regarded as belonging to the same or separate product markets, in *Liberty Global/Ziggo* the Commission left the exact market definition open and did not consider FTA channels separately from pay TV channels.⁵⁰
- (81) Within the market for the wholesale supply of pay TV channels, in several cases the Commission has also previously indicated that there is a differentiation between basic and premium pay TV channels, but ultimately left open whether those two categories of pay TV channels constitute separate product markets.⁵¹
- (82) More recently, in *Liberty Global/Ziggo* the Commission found that within pay TV, basic pay TV channels and premium pay TV channels belong to separate product markets, given *inter alia* the following differences: (a) the difference in channel offering in terms of content – premium pay TV channels in general feature premium films and sport events with fewer interruptions for advertising; (b) the difference in pricing conditions, as basic pay TV channels are typically included in broader pay TV packages, while premium pay TV channels are offered under a dedicated additional subscription; and (c) the difference in the size of the audience attracted – premium pay TV channels generally have a smaller audience given the additional cost. Therefore, the Commission concluded that premium pay TV was a separate market from that of basic pay TV. FTA channels were included with basic pay TV channels, given that they were not considered separately.⁵²
- (83) In previous decisions, the Commission also examined, but ultimately left open, whether the market should be further segmented by genre or thematic content (such as films, sports, news, youth channels, and others.).⁵³ The Commission has also considered whether a distinction could be drawn between linear channels and those

⁴⁸ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recitals 17–19.

⁴⁹ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 30 and 78.

⁵⁰ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 80.

⁵¹ Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 76; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recitals 24 and 27.

⁵² Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 82–83.

⁵³ Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 76; Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 41–42; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 35; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 81; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 89.

non-linear services (VOD, PPV), as well as within non-linear services, but has left the market definition open.⁵⁴

- (84) Finally, the Commission has not further distinguished between the different means of infrastructure used for the delivery to the viewer (cable, satellite, terrestrial TV⁵⁵ and IPTV).⁵⁶ In *Liberty Global/Ziggo*, the Commission found that at least cable, IPTV and possibly satellite belong to the same product market.⁵⁷

4.3.1.2. Notifying Parties' view

- (85) The Notifying Parties consider that the question whether the wholesale market for the supply of TV channels must be further segmented according to the type of TV channels or according to the type of platform can be left open.

4.3.1.3. The Commission's assessment

- (86) As respondents to the Phase I market investigation point out, in Belgium, only the TV channels of the public broadcaster are broadcast free via terrestrial TV broadcasting and according to the Notifying Parties' estimate, only [0-5]* % of the households in Belgium receive only terrestrial signals.⁵⁸ The vast majority of households subscribe to a basic pay TV package which includes both the public broadcasters' TV channels and several commercial broadcasters' TV channels and for which they pay a monthly fee.
- (87) Pay TV channels comprise two types of channels: basic pay TV channels and premium pay TV channels. The results of the Phase I market investigation suggest that a distinction should be made between basic pay TV and premium pay TV. Respondents argue that there are differences both in price and types of content between the different types of TV channels: premium pay TV typically offers more exclusive content for which TV distributors can charge a higher price.⁵⁹ From the supply side, TV broadcasters claim that there are significant barriers to entry for a TV broadcaster to enter the market for premium pay TV. According to one respondent, it is very difficult to get access to distribution of a premium pay TV channel, and in Flanders, only the TV distributors themselves (Telenet and Belgacom) own premium pay TV channels.⁶⁰
- (88) In the Article 6(1)(c) Decision, the Commission reached the preliminary conclusion that the wholesale supply of basic pay TV channels on the one hand and the wholesale supply of premium pay TV channels on the other hand were two separate product markets. In their reply to the Article 6(1)(c) Decision, the Parties did not contest the findings of the Phase I market investigation and the Commission's conclusions.

⁵⁴ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 43; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 21.

⁵⁵ Terrestrial TV broadcasts land-based (terrestrial) signals from radio masts and towers, and is often referred to as DTT (Digital Terrestrial Television) or DVB-T (Digital Video Broadcasting – Terrestrial, which is the technical standard used for terrestrial TV in Europe).

⁵⁶ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 44; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 22.

⁵⁷ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 91.

⁵⁸ Form CO, table 4.

⁵⁹ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, questions 11, 12 and 13, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], [ID 809]. Replies to Questionnaire Q3 to TV distributors of 19 August 2014, questions 14–18, [ID 290], [ID 296], [ID 355], [ID 378], [ID 403], [ID 505].

⁶⁰ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, questions 11–13, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], [ID 809].

- (89) In light of the above, for the purposes of this Decision the Commission considers that wholesale supply of premium pay TV constitutes a product market that is separate from the wholesale supply of basic pay TV channels.
- (90) With regard to FTA channels, these channels have distinct features which distinguish them from premium pay TV channels, as noted in recitals (78) and (79). However, as explained in recital (86), very few customers receive those channels separately in the Flemish market, whereas most customers receive them together with a basic pay TV channel subscription. Therefore, given the limited standalone presence of FTA channels, the fact that those channels are mostly supplied together with basic pay TV channels and the fact that the competitive assessment would remain the same even if FTA channels were regarded as belonging to a separate product market from that of basic pay TV, it is not necessary to make a distinction between FTA and basic pay TV channels on the market for wholesale supply of TV channels in this case.
- (91) Therefore, the Commission concludes that at the level of the wholesale supply of TV channels there are two separate product markets, one consisting of the wholesale supply of premium pay TV channels and one consisting of the wholesale supply of basic pay TV/FTA channels.
- (92) The results of the Phase I market investigation also indicate that a distinction could be made between general interest TV channels and thematic TV channels. However, this question can be left open as it would not change the outcome of the competitive assessment. Both Vier and Vijf are general interest channels, and the results of the Phase I market investigation show that they are considered important by TV distributors in order for their offer to be attractive for end users. The results of the market investigation also show that Vier and Vijf's closest competitors are other general interest channels such as those of Medialaan and VRT. Therefore, a further segmentation between general interest and thematic channels is not necessary, as it would only further confirm Vier and Vijf's relevance for viewers and the closeness of competition with other general interest channels.
- (93) Additionally, as explained in recitals (33) to (38), the Commission notes that TV channels increasingly offer ancillary non-linear services to enhance the viewer experience of linear channels, such as VOD, PPV, PVR and catch-up services. Customers increasingly expect to be able to 'interact' with linear channels and benefit from built-in non-linear services, such as catch-up and PVR, as part of their standard viewing experience.
- (94) However, for the purpose of the competitive assessment in this case, there is no need to draw a distinction between linear TV channels and those functionally related non-linear TV services. These non-linear services are ancillary to the main linear channels and are licensed by the TV broadcasters to the TV distributors along with, or in addition to, those channels, and not on a distinct stand-alone basis separately from the channels to which they relate.
- (95) With regard to a possible segmentation of TV channels depending on the type of infrastructure used for their transmission, the results of the Phase I market investigation did not indicate that there are any differences on the demand side of the market for the wholesale supply of TV channels as to what type of infrastructure the TV distributor has, at least not between the two main infrastructures in Belgium, cable and IPTV. In other words, it does not appear that TV distributors have different preferences in terms of TV channels depending on the distribution infrastructure they operate. Regardless of the distribution infrastructure they rely upon, all TV distributors have similar demands in terms of channels.

- (96) However, that does not imply that all distribution networks are also necessarily substitutes from the TV broadcasters' point of view. TV broadcasters have an interest in reaching the widest possible audience with their TV channels. In this way, they can maximize revenues from the sale of advertising space and the licence fees paid to them by TV distributors. In line with this, the Commission has, in a previous decision, concluded that access to cable cannot be forgone by TV channel and programme suppliers in favour of other modes of transmission in Belgium.⁶¹
- (97) Among the TV broadcasters responding to the Phase I market investigation, most answered that the different infrastructures (namely cable, satellite, IPTV or terrestrial TV) are substitutable.⁶² On the other hand, one respondent noted that the two main retail infrastructures in Belgium are cable and IPTV and that it is essential for a channel to be broadcast on the platforms using those infrastructures. That respondent also noted that satellite and terrestrial TV are niche infrastructures with limited reach and with less available functionalities as compared to cable and IPTV.
- (98) In any event, for the purposes of this Decision, the question whether the wholesale supply of TV channels should be further segmented based on the type of distribution infrastructure can be left open, as this would not change the outcome of the competitive assessment.
- (99) In the Phase I market investigation all TV broadcasters highlighted the importance of being on Telenet's platform, which is based on cable. Channels must appear on Telenet's platform in light of the latter's strong market position at the retail level (see sections 5.4.1.4 and 5.4.2.2). For the purpose of the competitive assessment, this finding is established regardless of whether distribution infrastructures other than cable, such as satellite, are included within the relevant product market.
- (100) If TV distribution markets were to be distinguished on the basis of distribution infrastructure, Telenet's dominance would be even more apparent. If, on the other hand, platforms based on infrastructures other than cable (such as satellite) were included in the same product market, they would exert some competitive constraint on Telenet, and TV broadcasters would aim to be diffused on those platforms as well. Nonetheless, TV broadcasters would still need to have their channels on Telenet's platform to reach most of their viewers. Therefore, the Commission considers that, for the purpose of the competitive assessment in this case, the question of whether the market for the wholesale supply of TV channels should be differentiated according to the type of infrastructures can be left open.
- (101) In light of the above, the Commission concludes that the relevant product markets for the purposes of this Decision are each of the markets for the wholesale supply of FTA/basic pay TV channels and of premium pay TV channels. The question whether these markets should be further segmented based on the genre of the channel and/or the distribution technology can be left open, as this would not change the outcome of the competitive assessment in this case.

⁶¹ Commission decision of 26 February 2007 in case M.4521 *LGI/Telenet*, recital 29.

⁶² Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 20, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], [ID 809].

4.3.2. Geographic market

4.3.2.1. Previous decisions of the Commission and of the BCA

- (102) In previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope⁶³ or potentially to comprise a broader linguistically homogeneous area encompassing more Member States.⁶⁴
- (103) Concerning the Dutch language, the Commission concluded in *RTL/Veronica/Endemol* that the differences in regulatory requirements, characteristics of the demand and viewers share were such that the Dutch and Flemish markets for TV services were geographically distinct.⁶⁵
- (104) The BCA has in its decisions considered the geographic scope of the market to be limited to the coverage area of the cable network.⁶⁶

4.3.2.2. Notifying Parties' view

- (105) The Notifying Parties submit that the precise geographic scope of the market can be left open in this case.

4.3.2.3. The Commission's assessment

- (106) According to the respondents to the Phase I market investigation, agreements between TV broadcasters and TV distributors are negotiated on either a national, sub-national or linguistic basis, or for the area covered by the TV distributor's network.⁶⁷ All Belgian TV broadcasters responding to the Phase I market investigation negotiate contracts with TV distributors on a national or sub-national basis.⁶⁸
- (107) The viewer shares of TV channels in the Flemish Region and among the Dutch-speaking population of the Brussels Capital Region are dominated by Flemish TV channels. All the top eight TV channels in 2013 were Flemish channels and they had a combined viewer share of approximately 80 %.
- (108) On the basis of the results of the market investigation and in line with the decisions of the BCA, the Commission considers that, for purposes of this Decision, the relevant geographic market is the footprint of Telenet's cable network.⁶⁹

⁶³ Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 39; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 41; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 98.

⁶⁴ Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 86–88; Commission decisions of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 41.

⁶⁵ Commission decision of 20 September 1995 in case M.553 *RTL/Veronica/Endemol*, recitals 25–26.

⁶⁶ Decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 31 January 2008 in case 2008-C/C-05, recital 220; decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 29 November 2010 in case 2010-C/C-48, recital 91.

⁶⁷ Replies to Questionnaire Q3 to TV distributors of 19 August 2014, question 26, [ID 290], [ID 296], [ID 355], [ID 378], [ID 403], [ID 505].

⁶⁸ Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 21, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], [ID 809].

⁶⁹ The Commission notes that this Transaction involves the acquisition of TV channels by a cable operator with a specific footprint. It therefore raises vertical issues, the effects of which are likely to affect competition in the cable operator's specific footprint. The Transaction does not entail a horizontal concentration between two undertakings, in which case the Commission would need to assess whether they are competing at the local or national level.

4.4. Retail provision of TV services to end users

4.4.1. Product market

4.4.1.1. Previous decisions of the Commission, the BCA and the Belgian regulators

- (109) In its previous decisions the Commission considered whether the retail provision of FTA TV services is a separate market from that for the provision of pay TV services, but ultimately left open the product market definition.⁷⁰
- (110) In *News Corp/Premiere*, the Commission noted that there is a difference in the type of financing of pay TV as opposed to FTA TV. Pay TV establishes a commercial relationship between the TV distributor and the viewer, whereas FTA TV only establishes a relationship between the TV distributor and the advertisers. Secondly, a distinction can be drawn based on whether the TV service offering is received for no specified cost or is the result of a subscription allowing access to certain programmes not otherwise available. Third, from a viewer's perspective, the programmes and the contents exclusively distributed via pay TV are often not substitutable with programmes and contents available on FTA TV.⁷¹ In *NewsCorp/BSkyB*, the Commission also considered that the types of content and the programme schedules offered by pay TV are different from those available on FTA TV, as the latter in many instances are first broadcast via pay TV before becoming available on FTA TV.⁷²
- (111) In the three decisions concerning wholesale access to Telenet's cable network of 1 July 2011, the Belgian sector regulators concluded that FTA TV services and pay TV services belong to distinct product markets.⁷³ They noted that the content offered by FTA TV is very different from the content offered by pay TV services, since FTA TV in Belgium only offers the channels of the public broadcasters (via terrestrial TV, meaning via an antenna) or foreign channels (via satellite). In addition, FTA TV services can only be received via satellite, terrestrial TV or the Internet, not via cable and IPTV, the two most popular transmission technologies in Belgium. Based on those elements, the Belgian sector regulators concluded that there was no demand-side substitution between FTA TV and pay TV. The sector regulators also concluded that there was no supply-side substitution between FTA TV and pay TV, given the different economic models underlying those services.⁷⁴
- (112) TV distributors offer both linear and non-linear services. In *NewsCorp/BSkyB*⁷⁵, the Commission considered that linear and non-linear TV services belonged to separate

⁷⁰ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recitals 15 and 21; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 108.

⁷¹ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 15.

⁷² Commission decision of 21 December 2010 in case M.5932 *NewsCorp/BskyB*, recitals 106–107.

⁷³ Belgian Conference of Electronic Communications Sector Regulators ('CRC'), Decisions of 1 July 2011. The CRC took four decisions on 1 July 2011, relating to the Dutch-speaking part of Belgium, the French-speaking part of Belgium, the bilingual Brussels Capital Region and the German-speaking part of Belgium. Those decisions were taken based on draft decisions submitted by BIPT, which is the regulator of the Federal State, the Conseil Supérieur de l'Audiovisuel (CSA, which is the regulator of the French Community), VRM (the regulator of the Flemish Community) and the Medienrat (the regulator of the German-speaking Community). Only the three decisions relating to the Dutch-speaking part of Belgium, the French-speaking part of Belgium and the bilingual Brussels Capital Region concern wholesale access to Telenet's cable network, as Telenet's cable network does not cover any part of the German-speaking part of Belgium.

⁷⁴ See the CRC's decisions of 1 July 2011.

⁷⁵ Commission decision of 21 December 2010 in case M.5932 *NewsCorp/BskyB*, recitals 106–107.

product markets at that point in time, while in a number of other decisions it left the exact product market definition open.⁷⁶

- (113) In *Liberty Global/Ziggo*, the Commission considered again whether a distinction should be drawn between linear and non-linear pay TV services. The Commission noted that linear pay TV services and non-linear pay TV services have a different content offering, different exhibition windows and different pricing, and that from a demand-side perspective the different types of retail content distribution services, such as linear pay TV and non-linear VOD are not necessarily substitutable with one another. The Commission, however, ultimately left the market definition open⁷⁷
- (114) The Commission also considered whether different distribution technologies for the provision of retail TV services such as cable, satellite, terrestrial TV and IPTV may constitute separate product markets, but it ultimately concluded that different distribution modes are part of the same product market for the retail distribution of content to consumers.⁷⁸ In *Liberty Global/Ziggo*, the Commission found that retail pay TV services provided through the different distribution technologies such as cable, IPTV and possibly satellite belong to the same market.⁷⁹
- (115) The BCA has in a previous decision considered that cable, IPTV and satellite belonged to the same market for the retail provision of TV services.⁸⁰ The Belgian sector regulators have in decisions of 1 July 2011 concerning wholesale access to Telenet's cable network concluded that the market for the retail provision of TV services includes cable and IPTV platforms, but not satellite or terrestrial TV.⁸¹

4.4.1.2. Notifying Parties' view

- (116) According to the Notifying Parties, the market for the provision of retail TV services involves the provision to end users of (i) packages of linear TV channels and (ii) non-linear VOD services. The Notifying Parties are of the opinion that at least the retail provision of pay TV services and the retail provision of VOD services could be considered to belong to the same product market, but that this question and also whether it is necessary to make a distinction between FTA and pay TV services can be left open.

4.4.1.3. The Commission's assessment

- (117) As the respondents to the Phase I market investigation pointed out, in Belgium, almost all householders subscribe to a basic pay TV package of a TV distributor, for which they pay a monthly fee. Very few households have chosen to receive only the FTA channels of the public broadcaster. According to estimates made by the Belgian sector regulators in their 2011 analysis, the number of users receiving FTA is

⁷⁶ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 21.

⁷⁷ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 109–110.

⁷⁸ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 22; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 105.

⁷⁹ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 113.

⁸⁰ See the decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 29 November 2010 in case 2010-C/C-48, recital 87.

⁸¹ See the CRC's decisions of 1 July 2011. Telenet contested the product market definition used by the Belgian sector regulators and brought an action for the annulment of those decisions but the Brussels Court of Appeals confirmed the decisions of the regulator on that point. See the judgment of the Brussels Court of Appeals of 12 November 2014, case nos. 2011/AR/2289, 2011/AR/2290, 2011/AR/2291, 2011/AR/2415, and 2011/AR/2418, paragraphs 65–73.

between 0.5 % and 1.5 % of the total number of users (FTA + pay TV).⁸² Because basic pay TV is so widespread in Belgium, many market participants refer to the channels that are included in the basic package of TV distributors as ‘free-to-air’ channels. In this Decision, however, the Commission uses the term ‘basic pay TV channel’ for the channels that are included in the basic package offered by TV distributors.

- (118) As explained in recital (87), pay TV channels comprise two types of channels: basic pay TV channels and premium pay TV channels. The results of the Phase I market investigation suggest that these two categories may constitute two separate product markets at the retail level. Respondents argue that there are differences both in prices and types of content between the different types of TV channels: premium pay TV typically offers more exclusive content for which TV distributors can charge a higher price. Furthermore, the general interest channels are typically part of a basic pay TV package, while premium pay TV channels are dedicated to sports or films and are sold on top of the basic package. Another difference is that, in Flanders, the FTA and basic pay TV channels are broadcast via all TV distributors’ networks, while the major premium pay TV channels are owned by the TV distributors themselves (Telenet and Belgacom) and not available on the competing TV distributor’s network.⁸³
- (119) Taking into account the responses from the Phase I market investigation, the Commission considers that a distinction can be drawn between the retail provision of basic pay TV on the one hand and the retail provision of premium pay TV on the other. However, the question whether these types of pay TV services constitute separate product markets can ultimately be left open, as this does not change the competitive assessment in this case. Given that in Belgium retail subscriptions for premium pay TV and viewer shares for such channels are low and that no competition concerns arise in relation to the retail provision of premium pay TV services, the question whether there is a separate retail market for such services as opposed to the provision of basic pay TV services can be left open.
- (120) As regards FTA channels, since only a very small share of all households that watch TV do so through the freely available FTA services, whereas most customers receive FTA channels as part of a basic pay TV service subscription, the competitive assessment does not change depending on whether the retail provision of FTA services is considered as a separate market or as part of a broader market together with basic pay TV services. Therefore, for the purpose of this Decision the Commission considers retail FTA services together with retail pay TV services, as there is no need to distinguish a separate product market.
- (121) TV distributors responding to the Phase I market investigation also considered that a distinction could be made between linear and non-linear TV services, pointing out that they serve different customer needs and there are, at least for some TV

⁸² See, for example, the CRC’s decision of 1 July 2011 relating to analysis of the market for TV broadcasting in the Dutch-speaking area, recital 172.

⁸³ Replies to Questionnaire Q3 to TV distributors of 19 August 2014, questions 14-18, [ID 290], [ID 296], [ID 355], [ID378], [ID 403], [ID 505].

broadcasters, also differences in the type of content offered with linear and non-linear services.⁸⁴

- (122) As in *Liberty/Ziggo*, the Commission notes that linear and non-linear pay TV services differ in terms of content offering, exhibition windows and pricing, and are not necessarily substitutable with one another from a demand-side perspective. However, the Commission also notes that non-linear services have gradually been integrated in linear TV channels to complement TV broadcasters' and TV distributors' offering and enhance the viewer experience of a traditional linear channel, as explained above in recitals (35) (36) and (37).
- (123) Customers increasingly expect to be able to 'interact' with linear channels and benefit from built-in non-linear services, such as catch-up and PVR, as part of their standard viewing experience. Accordingly, insofar as these non-linear services relate to the content offered by the linear channel, and enable it to be viewed in additional non-linear ways, the Commission considers that such non-linear offerings integrated upon linear channels should be considered as part of the linear viewer experience and included within the overall category of linear channels.
- (124) In any case, the question of whether non-linear channel services, such as those discussed in *Liberty/Ziggo*, should be distinguished from linear channels can be left open, as this does not change the competitive assessment for the purpose of this case. As for content platform operators, which provide TV content to end users on a non-linear basis, the question whether such operators should be included in the same market as TV distributors can be left open, as it would not change the competitive assessment in this case. These providers of purely non-linear services have limited market shares in Belgium and Flanders and, hence, their inclusion in the market would not change the Commission's finding that Telenet is dominant on the market for the retail provision of TV services.
- (125) With regard to whether the market for the retail provision of TV services could be further distinguished according to the type of distribution technology, a number of respondents to the market investigation pointed out that satellite distribution is not a substitute, as it does not provide the same possibilities for interactive services as cable and IPTV and also because Telenet and Belgacom have their own content not available through other operators. As for terrestrial TV, only the public broadcasters' channels are available on this platform.⁸⁵
- (126) The Commission considers that at least retail TV services offered over cable and over IPTV (which account for [80-90]* % of the subscribers in both Flanders and Belgium⁸⁶) form part of the same relevant product market.
- (127) In any event, for reasons similar to those discussed in recitals (98) to (100), the Commission considers that for the purpose of the competitive assessment in this case, the question whether the market for the retail provision of TV services should be further distinguished on the basis of the relevant distribution technology can be left open.

⁸⁴ Replies to Questionnaire Q3 to TV distributors of 19 August 2014, questions 27–32, [ID 290], [ID 296], [ID 355], [ID378], [ID 403], and [ID505]. Replies to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 35, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], and [ID 809].

⁸⁵ VRT in the Flemish Community and RTBF in the French Community.

⁸⁶ Form CO, table 25.

- (128) Telenet's dominance is established, both on the market for retail TV services and the market for retail FTA/basic pay TV services, and regardless of whether the market is further segmented on the basis of distribution infrastructures (see section 5.4.1.4 and 5.4.2.2). If platforms based on infrastructures such as satellite or even the internet were included in the same product market as that of Telenet's cable TV, they would exert some competitive constraint on Telenet, but the latter would still be dominant (see sections 5.4.1.4 and 5.4.2.2). If, on the other hand, one were to distinguish separate markets on the basis of distribution technology, Telenet's dominance would be even more apparent.⁸⁷
- (129) In light of the above, the Commission concludes that the market for the retail provision of FTA/basic pay TV services and the market for the retail provision of premium pay TV services may constitute separate markets, but the question can be left open, as this does not change the competitive assessment in this case. For the same reason, the question whether a further segmentation of TV retail services based on the type of services or the distribution platform can also be left open.
- (130) Finally, the Commission notes that in Belgium retail TV services can be offered and are increasingly offered in combination with other retail services, such as fixed-line telephony, fixed-line internet and mobile telecommunications services. These combined offerings are referred to as multiple play offerings and comprise a bundle of two, three or four of the aforementioned retail services (dual, triple or quadruple play).
- (131) The Commission has to date left open the question whether there exists a separate market for such multiple play offerings, distinct from the markets for each of the components of the package.⁸⁸
- (132) For the purpose of this Decision, taking into account that De Vijver Media only offers TV channels and TV content, and does not offer any other service usually included in multiple play offerings, it can be left open whether a distinct market for multiple play services exists. The Commission considers that the Transaction raises concerns because of the combination of the Parties' TV activities at the wholesale level for the supply of TV channels and at the retail level for the provision of retail TV services to end users, regardless of whether Telenet's other individual retail services (telephone and internet) and multiple play offerings are taken into account.

4.4.2. *Geographic market*

4.4.2.1. Previous decisions of the Commission, the BCA and the Belgian regulators

- (133) In previous decisions, the Commission has considered that the geographic scope of the market for the retail provision of TV services could be either national since TV

⁸⁷ Only the FTA public service channels are broadcast by means of terrestrial TV in Flanders, and only a limited number of the households rely on that technology to receive TV signals. Hence such technology need not be considered in this case.

⁸⁸ Commission decision of 25 January 2010 in case M.5734 *Liberty Global Europe/Unitymedia*, recitals 43–48; Commission decision of 16 June 2011 in case M.5900, recitals 183–186; Commission decision of 20 September 2013 in case M.6990 *Vodafone/Kabel Deutschland*, recital 261; Commission decision of 3 July 2012 in case M.6584 *Vodafone/Cable&Wireless*, recitals 102–104; Commission decision of 2 July 2014 in case M.7018 *Telefónica Deutschland/E-Plus*, recital 59; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 149.

distributors compete on a nationwide basis,⁸⁹ or limited to the coverage area of each cable operator.⁹⁰

- (134) The BCA has concluded that the geographic scope of TV broadcasting is limited to the area of each cable operator's footprint, as have the Belgian sector regulators.⁹¹

4.4.2.2. Notifying Parties' view

- (135) The Notifying Parties submit that the starting point for a geographical market analysis is that the markets for retail TV services are national as offers tend to differ significantly from country to country, but claim that the precise delineation of the geographic market can be left open in this case.

4.4.2.3. The Commission's assessment

- (136) The Telenet cable network covers the Flemish Region,⁹² parts of the Brussels Capital Region and one municipality in the Walloon Region. Telenet does not offer retail TV services in other parts of Belgium. The other cable operators that are active in Belgium have networks that cover Wallonia and parts of Brussels but not the area where Telenet is present. Providers of IPTV services, as well as satellite and OTT providers, are present in the whole of Belgium. Hence, on the market for retail provision of TV services Telenet only meets competition from these providers, but not from other cable operators.

- (137) In 2011, the Belgian sector regulators analysed the retail TV services market in Belgium and concluded that the relevant geographic market was limited to the footprint of each cable operator in Belgium.⁹³ They based that finding on the fact that there is no demand- or supply-side substitution between the offers of different cable operators. Demand-side substitution is lacking because the footprints of the cable operators in Belgium do not overlap. As a result, an end-user can only choose the cable operator active in its own area. Supply-side substitution is lacking because entry into the footprint of another cable operator would entail very high network construction costs. The Belgian sector regulators also concluded that there was no demonstrable chain-of-substitution effect between the cable networks.⁹⁴ In addition, they found differences in the respective cable footprints with regard to (a) market shares and technological characteristics, (b) consumer preferences and the channels and services offered, (c) prices and (d) regulation.

- (138) In the Commission's Phase II market investigation, half of the respondents answered that the geographic market for retail TV services corresponds to the cable footprint of

⁸⁹ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recital 24; Commission decision of 25 January 2010 in case M.5734 *Liberty Global Europe/Unitymedia*, recitals 40 and 43; Commission decision of 21 December 2010 in case M.5932 *NewsCorp/BskyB*, recital 109; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 42; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 54; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 118.

⁹⁰ Commission decision of 26 February 2007 in case M.4521 *LGI/Telenet*, recital 25.

⁹¹ Decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 29 November 2010 in case 2010-C/C-48 (affirmed on this point on appeal; see Judgment of the Brussels Court of Appeals, 17 May 2011, in case no. 2011/MR/1, paragraphs 23, 25–27); CRC's decisions of 1 July 2011.

⁹² Except some of the territory of the municipalities of Voeren, Wemmel and Drogenbos.

⁹³ CRC's decisions of 1 July 2011.

⁹⁴ See, for example, CRC's decision of 1 July 2011 relating to analysis of the market for TV broadcasting in the Dutch-speaking area, recital 295–312.

each operator.⁹⁵ One respondent considered that the market should correspond to the different language areas of Belgium.⁹⁶ One respondent replied that the geographic scope of the market should be national.⁹⁷

- (139) On the basis of the results of the Phase II market investigation, the Commission considers that the relevant geographic market is the footprint of Telenet's cable network.⁹⁸ This finding is further supported by the decisions of the Belgian sector regulators.

4.5. Sale of advertising space on TV channels

4.5.1. Product market

4.5.1.1. Previous decisions of the Commission and the BCA

- (140) The Commission previously considered that the sale of advertising space on TV is part of a separate product market, and not substitutable with the sale of advertising in other forms of media.⁹⁹

- (141) In a decision concerning De Vijver Media, the BCA identified a separate market for the sale of advertising space on national television in the Flemish Community, which did not include the sale of advertising space in newspapers or on the internet.¹⁰⁰

4.5.1.2. Notifying Parties' view

- (142) The Notifying Parties consider that the precise product market definition for the sale of advertising space on TV can be left open.

4.5.1.3. The Commission's assessment

- (143) The results of the market investigation did not provide reasons to depart from the Commission's previous approach in this case. While some respondents to the market investigation indicated that there are other means of advertising that could be equally efficient as TV advertising in reaching customers (such as online promotion, radio and printed advertisements) that they would possibly consider as alternatives, several respondents also highlighted the specific features of TV advertising, which distinguish it from other forms of advertising.¹⁰¹ Therefore, it is likely that the sale of advertising space on TV channels constitutes a separate product market distinct from other forms of advertising.

- (144) In any event, the question whether TV advertising constitutes a distinct market from other forms of advertising can be left open, as the Transaction does not give rise to

⁹⁵ Replies of TV distributors to the Commission's Request for Information ('RFI') of 29 October 2014.

⁹⁶ Reply of [...] to the Commission RFI of 29 October 2014 [ID 970].

⁹⁷ Reply of [...] to the Commission RFI of 29 October 2014 [ID 978].

⁹⁸ The Commission notes that this Transaction involves the acquisition of TV channels by a cable operator with a specific footprint. It therefore raises vertical issues, the effects of which are likely to affect competition in the cable operator's specific footprint. The Transaction does not entail a horizontal concentration between two undertakings, in which case the Commission would need to assess whether they are competing at the local or national level.

⁹⁹ Commission decision of 21 December 2010 in case M.5932 *NewsCorp/BSkyB*, recital 262; Commission decision of 14 June 2013 in case M. 6866 *Time Warner/CME*, recital 62.

¹⁰⁰ Decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 7 September 2011 in case 2011-C/C-24, recital 30.

¹⁰¹ Replies to Questionnaire Q3 to TV advertisers of 19 August 2014, questions 1 and 4; replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 47 and 49; and replies to Questionnaire Q2 to TV distributors of 9 October 2014, questions 39 and 40.

competition concerns with regard to the sale of TV advertising space even if it were to be considered as a separate relevant product market.

4.5.2. *Geographic market*

4.5.2.1. Previous Commission decisions

(145) The Commission previously considered the geographic market for the sale of advertising space on TV to be national in scope.¹⁰² Specifically with regard to TV advertising in the Netherlands and the Flemish Region of Belgium, the Commission has held that there is a separate geographic market for TV advertising directed towards Dutch consumers, which has to be distinguished from the TV advertising market in Belgium.¹⁰³

4.5.2.2. Notifying Parties' view

(146) The Notifying Parties consider that the precise geographic market definition for the sale of advertising space on TV can be left open.

4.5.2.3. The Commission's assessment

(147) The results of the market investigation did not provide reasons to depart from the Commission's previous approach in this case. The Commission considers that the geographic market for the sale of advertising space on TV is likely limited to the Flemish Region, the Flemish Region together with the Brussels Capital Region, or is at the most national in scope.

(148) In any event, the precise geographic market can be left open, as the Transaction does not give rise to competition concerns with regard to TV advertising under any alternative geographic market definition.

4.6. **Conclusion on market definition**

(149) In light of the elements referred to in sections 4.2 to 4.5, the Commission finds that the relevant markets can be defined as follows.

(150) With regard to the production and licensing of TV content, the production of TV content belongs to a market separate from that of the licensing of the rights for the broadcasting of TV content. Moreover, within the market for the production of TV content and the market for the licensing of broadcasting rights, there are indications that separate segments exist depending on the exhibition window and the type of content. However, the question whether these segments constitute separate product markets can be left open, as the Transaction raises no competition concerns under any alternative market definition. The geographic market is likely to be limited to the Flemish Region or national at most, but for the same reason the question of the precise geographic scope of the market can be left open.

(151) With regard to the wholesale supply of TV channels, there are two separate product markets, one for the wholesale supply of FTA and basic pay TV channels and one for the wholesale supply of premium pay TV channels, without the need to draw further distinctions according to the genre or the distribution platform of the channels. For the purposes of the assessment of the Transaction, the geographic scope of these two markets corresponds to the Telenet footprint.

¹⁰² Commission decision of 14 June 2013 in case M. 6866 *Time Warner/CME*, recitals 64 and 68.

¹⁰³ Commission decision of 20 September 1995 in case IV/M.553 *RTL/Veronica/Endemol*, recital 27.

- (152) With regard to the retail provision of TV services, there are indications that the retail provision of FTA/basic pay TV services and the retail provision of premium pay TV services constitute two distinct product markets, but the product market definition can be left open, as this does not change the competitive assessment in this case. The question whether further distinctions can be drawn on the basis of the type of service or distribution platform can also be left open. For the purposes of the assessment of the Transaction, the geographic market corresponds to the cable network of each operator.
- (153) With regard to the sale of advertising space on TV channels, there are indications that TV advertising belongs to a separate market as opposed to other forms of advertising, but the precise product market definition can be left open, given that the Transaction does not raise concerns with regard to TV advertising under any alternative product market definition. For the same reason, the scope of the geographic market can also be left open.

5. COMPETITIVE ASSESSMENT

- (154) The Transaction gives rise to horizontal overlaps and several vertical relationships between the Parties' activities on the various markets of the TV value chain. In the following recitals, the Commission identifies these overlaps and vertical links, and determines which markets are horizontally or vertically affected by the Transaction for the purpose of the competitive assessment.
- (155) With regard to horizontal overlaps, as explained in sections 4.1.1 and 4.1.2, De Vijver Media and Liberty Global are both active in the the market for the production of TV content. They are also both active in the market for the licensing of broadcasting rights for TV content, as regards both the supply and demand side of these markets.¹⁰⁴
- (156) However, the market for the production of TV content is not horizontally affected, as the Parties' combined market share is below 20 %, both on the supply side¹⁰⁵ and the demand side.¹⁰⁶ The market for the licensing of broadcasting rights relating to TV content is also not horizontally affected with regard to the supply side, as the Parties' combined market share is below 20 %.¹⁰⁷

¹⁰⁴ By contrast, the Parties' activities do not overlap in the following markets: (a) the market for the wholesale supply of FTA/basic pay TV channels (De Vijver Media offers Vier and Vijf, which are two basic pay TV channels, whereas Telenet offers premium pay TV channels, which belong to a separate market, as explained in section 4.3.1 above); (b) the market for the wholesale supply of premium pay TV channels (only Telenet offers premium pay TV channels); (c) the market for the retail provision of TV services to end users (where only Telenet is active); and (d) the market for the sale of advertising space on TV channels (where only De Vijver Media is active).

¹⁰⁵ In the Form CO, paragraph 303, the Notifying Parties estimate that, on the supply side, De Vijver Media has an estimated share of [5-10]* % of the market for the production of TV content in Flanders. Telenet does not, itself, produce TV content (Table 16). All3Media is also not active in the production of TV programmes in Belgium.

¹⁰⁶ In 2013, Telenet's total spend on TV production amounted to [5-10]* % of the total market value in Flanders, whereas De Vijver Media's total spend on external TV production amounted to [5-10]* % in Flanders. See Form CO, paragraph 300.

¹⁰⁷ In paragraphs 319–320 and Table 27 of the Form CO, the Notifying Parties estimate that with regard to the market for the licensing of individual TV content, Telenet had a share of less than [0-5]* % in 2013 in Flanders, in terms of revenue, whereas De Vijver Media had a share of [0-5]* % in terms of revenue. Furthermore, following the expiry of the broadcasting rights obtained in 2011, Telenet will not be active as a licensor of individual TV content. All3Media's revenue generated from licensing TV content in

- (157) On the other hand, the Transaction gives rise to a horizontally affected market on the demand side of the market for the licensing of broadcasting rights for TV content in Flanders, since the market shares of Telenet and De Vijver Media in the acquisition of such rights calculated in expenditure in 2013 are [30-40]*% and [10-20]*% respectively.¹⁰⁸
- (158) With regard to vertical relationships between the markets of the TV value chain, the Commission notes the following.
- (159) The market for the production of TV content and the market for the licensing of the broadcasting rights for TV content can be considered to be upstream to the market for the wholesale supply of FTA/basic pay TV channels, the market for the wholesale supply of premium pay TV channels and the market for the retail provision of TV services to end users, as TV content is an input for both TV broadcasters and TV distributors. In addition to producing TV content internally, TV broadcasters can commission its production or acquire the relevant licensing rights for it, to show it on their channels. TV distributors can also commission the production of TV content or acquire a licence for individual TV content, which they then offer to their subscribers, for instance as part of a VOD catalogue.
- (160) The markets for the production of TV content and the market for the licensing of the broadcasting rights for TV content on the one hand and the market for the retail provision of TV services to end users on the other hand are vertically affected by the Transaction, given that Telenet holds a market share in excess of 30 % in the market for the retail provision of TV services under any possible market definition.¹⁰⁹ On the other hand, the Commission notes that, given De Vijver Media's low market shares on the market for the production of TV content and on the market for the licensing of the broadcasting rights for TV content,¹¹⁰ these markets and the markets for the wholesale supply of TV channels are not vertically affected by the Transaction. However, given that concerns were raised by third parties with regard to the provision of TV content to TV broadcasters, the Commission will also assess the effect the Transaction may have in this respect.
- (161) The market for the sale of TV advertising space on TV channels is also vertically linked to the market for the retail provision of TV services to end users, since TV advertising space can be viewed as an input for TV distributors, which purchase advertising space in order to promote and market their products and services. Since De Vijver Media is active in the sale of advertising space on TV channels (where its market share in 2013 was [20-30]*% in Flanders and [10-20]*% in Belgium¹¹¹) and Telenet's market share in the retail provision of TV services is above 30 %, these markets are also vertically affected by the Transaction.
- (162) Finally, the market for the wholesale supply of FTA/basic pay TV channels and the market for the wholesale supply of premium pay TV channels are vertically related to the market for the retail provision of TV services to end users, as TV broadcasters license their channels (and attached non-linear services) as an input to TV distributors, which then include the channels in their retail offer. Given that De

Belgium is very limited. See Commission decision of 16 September 2014 in case M.7282 *Liberty Global/Discovery/All3Media*, recital 76.

¹⁰⁸ See Form CO, Tables 20 and 27.

¹⁰⁹ See sections 5.4.1.4 and 5.4.2.2.

¹¹⁰ See footnote 107 above.

¹¹¹ Form CO, paragraph 406.

Vijver Media is active in the wholesale supply of FTA/basic pay TV channels (where it offers Vier and Vijf to TV distributors) and that Telenet has a market share in excess of 30 % in the market for the retail provision of TV services, the markets for the wholesale supply of FTA/basic pay TV channels and for the retail provision of TV services to end users are vertically affected by the Transaction. On the other hand, the market for the wholesale supply of premium pay TV channels is not vertically affected by the Transaction, since De Vijver Media is not active in that market.¹¹²

- (163) In light of the above, in the following sections the Commission will carry out its competitive assessment with regard to: (a) the horizontally affected market for the licensing of broadcasting rights for TV content on the demand side; (b) several vertically affected markets relating to individual TV content (that is to say, the market for the production of TV content and the market for the licensing of TV content on the one hand and on the other hand the markets to which they are vertically linked, namely the market for the retail provision of TV services to end users, the market for the wholesale supply of FTA/basic pay TV channels and the market for premium pay TV channels); (c) the vertically affected markets for the sale of TV advertising space on TV channels and for the retail provision of TV services to end users; and (d) the vertically affected markets for the wholesale supply of FTA/basic pay TV channels and for the retail provision of TV services to end users.

5.1. The market for the licensing of broadcasting rights for TV content (demand side)

- (164) Liberty Global acquires individual content mostly for its VOD offer and its premium pay TV channels. It acquires mostly sports content and films and series in the TVOD, 1st pay TV and 2nd pay TV window. Moreover, [...] of Telenet's expenditure on individual content in 2013 was for the broadcasting rights of the Jupiler Pro League.
- (165) By contrast, De Vijver Media licenses mostly films in the FTA window and very little sport rights.¹¹³ Hence, there is little or no overlap between the licensing activities of Liberty Global and De Vijver Media.
- (166) Even if one were to regard all types of content and all exhibition windows as being part of the same market, the overlap between De Vijver Media and Liberty Global would not raise competition concerns. As explained in recital (157), Telenet's market share on the demand side of the market for the licensing of broadcasting rights for TV content in Flanders is [30-40]* % and de Vijver Media's is [10-20]* %. The merged entity would thus have a combined market share of [40-50]* %.
- (167) According to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Horizontal Merger Guidelines'), a merger resulting in firms holding market shares between 40 % and 50 % may significantly impede effective competition.¹¹⁴ However, the Commission considers that the overlap between the activities of Telenet and De Vijver Media on the demand side of licensing TV content does not give rise to concerns for the following reasons.
- (168) First, Telenet's [30-40]* % market share is to some extent a consequence of the high cost for the acquisition of exclusive rights to the Jupiler Pro League. From the season

¹¹² See section 4.1.3.

¹¹³ Form CO, Table 20.

¹¹⁴ See, Horizontal Merger Guidelines, OJ C 31, 5.02.2004, paragraph 17.

2014/2015, the amount spent by Telenet on the acquisition of these broadcasting rights (and hence its market share) will decrease, as it will no longer have exclusive broadcasting rights to this event.

- (169) Second, the Parties' activities on the demand side of this market are to a large extent complementary. Telenet focuses on the acquisition of broadcasting rights to sports events and films in the premium licensing window for its premium pay TV channels, whereas De Vijver Media's focus is on films and series in the free-to-air window for its FTA/basic pay TV channels. In fact, these rights present a low level of substitution, since broadcasting rights for each exhibition window are typically licensed separately,¹¹⁵ which limits the possibility of an increase of bargaining power of the merged entity vis-à-vis the holders of content rights.
- (170) Third, the results of the market investigation were not conclusive as to whether an entity that negotiates rights for premium films for different exhibition windows would have an increased bargaining power vis-à-vis competing purchasers. However, the majority of the respondents did not expect that the possibility for Telenet and De Vijver Media post-Transaction to negotiate licensing agreements for VOD, pay TV and FTA windows together would affect the ability of competing TV broadcasters or TV distributors to acquire content licences in the market.¹¹⁶ Moreover, content rights holders did not indicate any concern about possible negative effects of the Transaction on their businesses.¹¹⁷
- (171) Fourth, there are other strong and important buyers in the market, such as VRT, Medialaan and Belgacom. OTT players such Netflix are also active on this market. These players will continue to buy content for their respective services.
- (172) Fifth, many licensors of TV content have strong bargaining power themselves. This is particularly the case for premium sports and film content. For the major Hollywood studios, for example, the Belgian or Flemish market represents only a tiny fraction of their licensing revenues
- (173) In light of the above, the Commission concludes that the Transaction does not raise competition concerns as regards the licensing of broadcasting rights for TV content on the demand side.

5.2. Input foreclosure of individual TV content towards TV broadcasters and TV distributors

- (174) As illustrated in sections 4.1.1 and 4.1.2, De Vijver Media produces TV content through its production house Woestijnvis, mainly for use on its own channels Vier and Vijf. De Vijver Media also licenses the broadcasting rights for some of its productions to third parties, including TV broadcasters and TV distributors.
- (175) As explained in recital (159) the production and the licensing of TV content are vertically linked to the wholesale supply of TV channels and to the retail provision of TV services to end users, given that TV content is an input for TV broadcasters and for TV distributors, which can commission its production or obtain a licence to offer it as part of their channel or within their retail offer (for instance, for their TVOD and SVOD services).

¹¹⁵ Replies to Questionnaire Q4 to content owners of 9 October 2014, question 2.

¹¹⁶ Replies to Questionnaire Q4 to content owners of 9 October 2014, questions 4 and 5.

¹¹⁷ Replies to Questionnaire Q1 to TV production companies and other TV content suppliers of 13 August 2014, questions 49 and 50.

- (176) During the proceedings, market participants raised the concern that post-Transaction, Telenet would have the ability and incentive to withhold the TV content produced and licensed by De Vijver Media from competing TV broadcasters and TV distributors.¹¹⁸ In the following sections, the Commission will assess whether the Transaction could lead to non-coordinated anticompetitive effects, as defined under the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the ‘Non-Horizontal Merger Guidelines’),¹¹⁹ with regard to the production and licensing of TV content. In particular, the Commission will consider whether the Transaction could lead to input foreclosure of De Vijver Media’s TV content towards TV broadcasters and TV distributors.
- (177) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs where a merger is likely to raise the costs of downstream rivals by restricting their access to an important input.¹²⁰ In the present case, a possible form of input foreclosure would be that, following the Transaction, De Vijver Media would deprive TV broadcasters or TV distributors of individual TV content, foreclosing them on their respective markets (for TV broadcasters, on the market for the wholesale supply of FTA/basic TV channels or on the market for the wholesale supply of premium pay TV channels; for TV distributors, on the market for the retail provision of TV services). The Commission will consider first the concern of input foreclosure towards TV broadcasters, then that of input foreclosure towards TV distributors.
- 5.2.1. Input foreclosure of individual TV content towards TV broadcasters*
- (178) Under the Non-Horizontal Merger Guidelines, input foreclosure may lead to competition problems if the upstream input is important for the downstream product.¹²¹
- (179) An input may be deemed important when it represents a significant cost factor relative to the price of the downstream product or when it constitutes a critical component, without which the downstream product could not be manufactured or effectively sold on the market. An input may also be important when it represents a significant source of product differentiation, or when switching costs to alternative inputs are relatively high.¹²² For input foreclosure to be a concern, a vertically integrated merged entity must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.¹²³
- (180) De Vijver Media has very low market shares in the market for the production of TV content and on the market for the licensing of TV content, as most of De Vijver Media’s content production through Woestijnvis is not provided to TV broadcasters, but used internally on Vier and Vijf.

¹¹⁸ The Commission notes that such concerns relate to the production and licensing of content by De Vijver Media, as any foreclosure by Telenet of the licensing of its own content would not be merger specific, given that Telenet could engage in such behaviour already pre-Transaction.

¹¹⁹ OJ C 265, 18 October 2008, p. 6.

¹²⁰ See Non-Horizontal Merger Guidelines, paragraph 30.

¹²¹ See Non-Horizontal Merger Guidelines, paragraph 34.

¹²² See Non-Horizontal Merger Guidelines, paragraph 34.

¹²³ See Non-Horizontal Merger Guidelines, paragraph 35.

- (181) On the supply side of the market for the production of TV content,¹²⁴ the Notifying Parties estimate that in 2013 De Vijver Media had a share of [5-10]* % in Flanders.¹²⁵ With regard to the market for the licensing of individual TV content, the Notifying Parties estimate that in 2013 De Vijver Media had a share of [0-5]* % in terms of revenue in Flanders.¹²⁶
- (182) Therefore, in light of De Vijver Media's limited shares on both the market for the production of TV content and the market for the licensing of the broadcasting rights for TV content, and of the fact that on the market for the wholesale supply of FTA/basic pay TV channels De Vijver Media's shares are below 30 %, ¹²⁷ these markets would not be vertically affected by the Transaction.
- (183) Furthermore, the Commission notes that such possible foreclosure by De Vijver Media of TV content to TV broadcasters of FTA/basic pay TV channels would not be merger-specific, as De Vijver Media could already engage in such conduct against those competing channels pre-Transaction. Therefore, such concerns would fall outside the scope of the Commission's merger review.
- (184) With regard to the separate market for the wholesale supply of premium pay TV channels, pre-Transaction De Vijver Media would produce or license content to TV broadcasters of premium pay TV channels competing with those of Telenet, whereas it is possible that post-Transaction De Vijver Media would refuse to supply content to those premium pay TV channels.
- (185) However, with regard to such possible concerns of input foreclosure of TV content against premium pay TV channels raised during the proceedings, the Commission notes the following.
- (186) First, De Vijver Media's low shares in the market for the production of TV content and the market for the licensing of the broadcasting rights for TV content suggest that it likely lacks market power. None or very little of De Vijver Media's content is licensed to premium pay TV channels. Therefore, even if De Vijver Media were to have the ability and incentive to refuse to supply its TV content to premium pay TV channels, such behaviour would have limited effects on those channels.
- (187) Second, there is no indication that Woestijnvis' content is essential for TV broadcasters in general or premium pay TV broadcasters specifically. TV

¹²⁴ In its previous decisions, the Commission found the product market for the production of TV content to be limited to non-captive TV production, thereby excluding captive TV production. See Commission decision of 3 August 1999 in case M.1574 *Kirch/Mediaset*, recital 14; Commission decision of 11 July 2000 in case M.1943 *Telefónica/Endemol*, recital 8; Commission decision of 29 June 2000 in case M.1958 *Bertelsmann/GBL/Pearson TV*, recitals 11–12; Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, recitals 11–12; and Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 36. Therefore, De Vijver Media's market share with regard to market for the production of TV content consists only of the TV content produced for external purposes, whereas content produced by Woestijnvis internally for Vier and Vijf is not included in the market for the production of TV content.

¹²⁵ Form CO, paragraph 303. Telenet does not, itself, produce TV content (Table 16 of the Form CO).

¹²⁶ Form CO, paragraphs 319–320 and Table 27. Telenet had a share of less than [0-5]* % in Flanders in terms of revenue in 2013. Following the expiry of the broadcasting rights obtained in 2011, Telenet will not be active as a licensor of individual TV content.

¹²⁷ In 2013, De Vijver Media generated net revenues, meaning revenues received from TV distributors minus the carriage/distribution fees paid to TV distributors and minus the amounts due to collecting societies, of EUR [...] million from the distribution of Vier and Vijf (Form CO, paragraph 383). The Notifying Parties estimate that the total market volume in 2013 amounted to EUR [...] million in Flanders and EUR [...] million in Belgium (Form CO, paragraph 377).

broadcasters other than Vier and Vijf broadcast little or none of Woestijnvis' content at present, but nonetheless face no difficulty in competing with other broadcasters. Premium pay TV broadcasters typically offer subscribers exclusive sports and film content, which is not the type of content Woestijnvis predominantly produces. Moreover, although some Woestijnvis content is popular, there is a multitude of equally popular or more popular TV content available on the market. In that respect, the Commission notes that, of the 100 most popular programmes in 2013, only four were produced by Woestijnvis.¹²⁸ Therefore, it is unlikely that individual TV content produced by Woestijnvis could qualify as an important input without which a TV channel could not effectively operate on the market.

- (188) Third, a very wide offer of TV content is available for TV broadcasters and the content produced by Woestijnvis only constitutes a small part of that offer, which makes that content not essential for TV broadcasters. Woestijnvis is only one of many TV content production houses. If De Vijver Media were to refuse to produce or license some of Woestijnvis' content to other TV channels, competing TV broadcasters could turn to one of the other several strong production houses for content. These include deMENSEN NV (Wauters vs Waes¹²⁹, Tomteterom, Blokken, Hotel M, Het Perfecte Koppel, Sportweekend), which recently took over Skyline Entertainment NV (Albert II, Aspe, Salamander), as well as Eyeworks Belgium NV (De Ridder, Café Corsari, Eigen Kweek, De Pfaffs), De Chinezen NV (Iedereen Beroemd), Endemol België NV (The Voice van Vlaanderen), Koeken Troef! BVBA (De Biker Boys, Twee tot de Zesde Macht), Kanakna Productions NV (Rijker dan je denkt, So you think you can dance, De buurtpolitie), De Filistijnen BVBA (Beste Vrienden, De Premiejagers) and Menuet BVBA (In Vlaamse velden).
- (189) Finally, the main TV broadcasters all have significant internal production capacities. VRT and Medialaan each have their own internal production house and produce much of their TV content in-house.
- (190) The Commission therefore concludes that the Transaction does not raise concerns that post-Transaction De Vijver Media could engage in input foreclosure by withholding TV content from TV broadcasters on either the market for the wholesale supply of FTA/basic pay TV channels or on the market for the wholesale supply of premium pay TV channels.

5.2.2. *Input foreclosure of individual TV content towards TV distributors*

- (191) Given that TV content is an input for TV distributors and that Telenet's market share on the market for the retail provision of TV services to end users is above 30%,¹³⁰ these markets are vertically affected by the Transaction.
- (192) With regard to the concern that post-Transaction De Vijver Media would engage in input foreclosure by withholding De Vijver Media's content from competing TV distributors for their retail services such as of TVOD and SVOD, the Commission considers that the TV content of De Vijver Media does not qualify as an important input for TV distributors for a similar set of reasons as those identified in section 5.2.1 for TV broadcasters.

¹²⁸ VRM, Mediaconcentratie in Vlaanderen – rapport 2014 [Media concentration in Flanders – 2014 report] p. 155 (Table 68).

¹²⁹ This particular programme was made together with Medialaan's internal production house.

¹³⁰ See sections 5.4.1.4 and 5.4.2.2.

- (193) As mentioned in recital (181), De Vijver Media's shares on the supply side of both the market for the production of TV content and the market for the licensing of broadcasting rights for TV content are low. These shares suggest that De Vijver Media likely lacks market power.
- (194) The Commission also notes that although some programmes of Woestijnvis are popular with viewers, they are unlikely to be essential for TV distributors. In fact, at present, De Vijver Media does not license any of its content as a standalone product to third party TV distributors for their retail TV services.¹³¹ Woestijnvis' content is offered by TV broadcasters of FTA/basic pay TV channels such as Vier or Vijf and, for older Woestijnvis content created prior to the acquisition of the channels Vier and Vijf by De Vijver Media, the channels of the public broadcaster VRT.
- (195) Moreover, although some of Woestijnvis' content is popular, there is a multitude of equally popular or more popular TV content available on the market. As mentioned in recital (187), only four programmes of Woestijnvis were in the top 100 list of most viewed programmes in Flanders in 2013. In addition, as explained in recital (188), if De Vijver Media were to refuse to license some of Woestijnvis' content to TV distributors, those TV distributors could turn to one of several other strong production houses for content.
- (196) Therefore, it is unlikely that any individual TV content produced by Woestijnvis could qualify as an important input without which a TV distributor could not effectively operate on the market for the retail provision of TV services.
- (197) As regards De Vijver Media's internal content production for the channels Vier and Vijf, which is not licensed as a stand-alone product to TV distributors, in the Phase II market investigation TV distributors agreed that TV content generally broadcast on Vier and Vijf is of relevance for viewers in Flanders and that if such content were not available, it would be difficult to replace.¹³²
- (198) However, while it may be the case that content broadcast on Vier and Vijf is important to viewers as part of the overall channel experience (and thus also potentially for TV distributors), such content is not licensed separately by De Vijver Media to the TV distributors, but is part of its own channels. In its previous decisions, the Commission found the product market for the production of TV content to be limited to non-captive TV production, thereby excluding captive TV production, such as that of Woestijnvis for Vier and Vijf, as this TV content is not offered on the market.¹³³
- (199) Therefore, the internally produced content of Vier and Vijf is not truly available on the markets for the production of TV content and the licensing of content, and cannot be considered as an essential input for TV distributors. In any event, while the channels Vier and Vijf are of importance for TV distributors for their retail offering (see section 5.4.1.1), it is unlikely that this would be the case for any individual content of De Vijver Media on those channels for the reasons outlined in recitals (194), (195) and (196).

¹³¹ See reply of De Vijver Media to Commission RFI of 16 January 2015.

¹³² See replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 15.

¹³³ Commission decision of 3 August 1999 in case M.1574 *Kirch/Mediaset*, recital 14; Commission decision of 11 July 2000 in case M.1943 *Telefónica/Endemol*, recital 8; Commission decision of 29 June 2000 in case M.1958 *Bertelsmann/GBL/Pearson TV*, recitals 11–12; and Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, recitals 11–12; Commission decision of 9 October 2014 in case M.7360 *21st Century Fox/Apollo/JV*, recital 36.

(200) For these reasons, the Commission considers that the Transaction does not raise concerns that post-Transaction Telenet could engage in input foreclosure of TV content of De Vijver Media towards TV distributors.

5.2.3. *Conclusion on input foreclosure of TV content towards TV broadcasters and TV distributors*

(201) In light of the above, the Commission considers that the Transaction does not raise concerns of input foreclosure of individual TV content towards TV broadcasters and TV distributors, which would lead to a significant impediment to effective competition, given that the TV content produced or licensed by the Parties does not constitute an important input for TV broadcasters and TV distributors.

5.3. The markets for the sale of TV advertising space on TV channels and for the retail provision of TV services to end users

(202) As explained in recital (161) above, TV advertising may be considered as an input for TV distributors, which rely on advertising space on TV channels to promote their offering to end users in the market for the retail provision of TV services. In light of Telenet's market share in the latter,¹³⁴ the markets for the sale of TV advertising space on TV channels and for the retail provision of TV services are vertically affected by the Transaction.

(203) In the following recitals, the Commission considers whether the Transaction may have non-coordinated anticompetitive effects as defined under the Non-Horizontal Merger Guidelines with regard to these two vertically affected markets.

(204) In particular, the Commission considers whether the Transaction could lead to input foreclosure of advertising space on the TV channels managed by De Vijver Media to the detriment of TV distributors competing downstream with Telenet.

(205) As explained above in section 4.1.5, De Vijver Media sells, via its subsidiary SBS Sales Belgium NV, advertising space on Vier and Vijf, and acts as an intermediary for the sale of advertising space on third party TV channels.¹³⁵ That advertising space can be considered as an upstream input for TV distributors operating on the downstream market for the retail provision of TV services to end users, given that TV distributors rely among others on TV advertising to promote their products to customers.

(206) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs where a merger is likely to raise the costs of downstream rivals by restricting their access to an important input.¹³⁶ In the present case, a possible form of input foreclosure would be that, following the Transaction, De Vijver Media would deprive competing TV distributors in the market for the retail provision of TV services of the advertising space offered by De Vijver Media on Vier, Vijf and on other third party TV channels through SBS Sales Belgium NV. Such a foreclosure strategy could occur either by denying the advertising space to TV distributors (total foreclosure) or by increasing the price for such advertising space, which would increase the costs of Telenet's downstream competitors (partial foreclosure).

(207) At the outset, the Commission notes that, according to the Non-Horizontal Merger Guidelines, input foreclosure may lead to competition problems if the upstream input

¹³⁴ See sections 5.4.1.4 and 5.4.2.2.

¹³⁵ Nick Jr, Nickelodeon, TMF, MTV, Discovery Channel and Libelle TV.

¹³⁶ See Non-Horizontal Merger Guidelines, paragraph 30.

is important for the downstream product.¹³⁷ An input may be deemed important when it represents a significant cost factor relative to the price of the downstream product or when it constitutes a critical component, without which the downstream product could not be manufactured or effectively sold on the market. An input may also be important when it represents a significant source of product differentiation, or when switching costs to alternative inputs are relatively high.¹³⁸ For input foreclosure to be a concern, a vertically integrated merged entity must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.¹³⁹

- (208) Against this background, the Commission considered whether the TV advertising space available specifically on Vier and Vijf and on the other TV channels managed by SBS Sales Belgium NV may qualify as an important input for the purpose of the downstream activities of TV distributors. In this respect, the Commission notes the following.
- (209) First, while TV distributors highlighted the importance of advertising space on TV channels and the distinctive features that make it an efficient means of promotion towards consumers,¹⁴⁰ the advertising space available on De Vijver Media's channels and through SBS Sales Belgium NV is unlikely to qualify in itself as an indispensable critical component under the definition of the Non-Horizontal Merger Guidelines referred to in recital (207).
- (210) While TV advertising is an efficient means for TV distributors to promote their offer of retail TV services, the absence of such advertising space on De Vijver Media's channels alone is unlikely to make the production of retail TV services impossible, or the sale of such products to end users ineffective. Should De Vijver Media deny to TV distributors advertising space on Vier, Vijf and/or on the other third party channels managed by De Vijver Media, or raise the price of such advertising space, the production and distribution of the downstream product of retail TV services would remain possible, and alternative sources of TV advertising space would be available, as further explained in recital (212).
- (211) Second, while TV advertising as such constitutes an important instrument and investment for TV distributors, the results of the Phase II market investigation did not indicate that TV distributors purchase advertising space from De Vijver Media's channels in a significant or exclusive manner, which particularly distinguished them from other TV channels or means of advertising. As the results of the Phase II market investigation indicated, TV distributors appear to invest in advertising in several media¹⁴¹ and, with regard to advertising space on TV channels, they purchase from several TV channels, including, but not only, from De Vijver Media, in order to reach

¹³⁷ See Non-Horizontal Merger Guidelines, paragraph 34.

¹³⁸ See Non-Horizontal Merger Guidelines, paragraph 34.

¹³⁹ See Non-Horizontal Merger Guidelines, paragraph 35.

¹⁴⁰ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, questions 39 and 40.

¹⁴¹ In that respect, a submission by Telenet further noted that the expenditure for TV advertising of TV distributors Belgacom and Mobistar in 2014 amounted to [...] respectively, which indicates that TV distributors do not rely exclusively on TV advertising. 'Virginia – Assessment of input foreclosure concerns on the market for the sale of advertising space', RBB Economics, submission of 31 October 2014 [ID 962], pages 12–13 and figure 2.

as many viewers as possible.¹⁴² Therefore, the advertising space available through De Vijver Media does not appear to have a specific added value that qualifies it as a critical input distinct from other advertising possibilities offered by other TV channels or other advertising venues.

- (212) Third, alternative sources of TV advertising are available on other channels. These include the channels of Medialaan and VRT, both of which have more viewers than the channels of De Vijver Media, which make them attractive to TV advertisers.¹⁴³ Transfer Regie is another commercial saleshouse of TV advertising space, which represents channels such as Acht, National Geographic and Njam!. Thus, TV distributors are able to reach consumers through the advertising space offered by other TV broadcasters, without depending exclusively on De Vijver Media. In that respect, it is noted that De Vijver Media's share in the market for the sale of advertising space on TV in 2013 was [20-30]* % in Flanders and [10-20]* % in the whole of Belgium.¹⁴⁴ Other TV broadcasters, such as Medialaan, have significant shares on the market for the sale of TV advertising space¹⁴⁵ and also enjoy high viewer shares in Flanders. These TV broadcasters can offer alternative advertising space to TV distributors on channels that also reach a significant number of viewers.¹⁴⁶ Therefore, the TV advertising space offered by De Vijver Media is unlikely to be an important or critical input, which TV advertisers would be unable to replace, or only replace at a high cost.
- (213) Fourth, the presence of strong alternatives for TV advertising space such as Medialaan and VRT also suggests that it is unlikely that De Vijver Media has market power with regard to the advertising space on TV channels.
- (214) Fifth, the responses of TV advertisers in the Phase II market investigation did not clearly indicate that the advertising space on De Vijver Media's channels is of crucial importance for advertisers, as it does not constitute a significant part of their business.¹⁴⁷ Additionally, the Notifying Parties submitted that TV advertisers are more likely to consider Medialaan for advertising, as is indicated by the fact that [...]*.¹⁴⁸ TV advertisers also pointed to the fact that the offer for advertising space on Vier and Vijf usually exceeds the demand.¹⁴⁹ That fact also suggests that the advertising space on the two channels is not of such nature as to constitute an important component whose removal could lead to input foreclosure.¹⁵⁰
- (215) In light of the above, the Commission considers that the advertising space available on Vier and Vijf, together with the advertising space managed by SBS Sales Belgium NV,

¹⁴² Replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 42.

¹⁴³ Although VRT is not authorised to broadcast TV advertising, it is authorised to broadcast commercial communication, including sponsoring, and companies frequently use sponsoring to introduce their products or services to VRT viewers.

¹⁴⁴ Form CO, Table 27.

¹⁴⁵ In the Form CO, paragraph 406, the Notifying Parties estimate that Medialaan has a share of 60 % in Flanders in the market for the sale of TV advertising space.

¹⁴⁶ In that respect, Telenet argued that the channels of Medialaan reach a significantly higher number of unique viewers than Vier and Vijf, which makes them more important for the purpose of the advertising campaigns of players such as Mobistar and Belgacom, which aim to reach the largest viewer base possible. 'Virginia – Assessment of input foreclosure concerns on the market for the sale of advertising space', RBB Economics, submission of 31 October 2014 [ID 962], page 6 and table 1.

¹⁴⁷ Replies to Questionnaire Q3 to TV advertisers of 9 October 2014, question 5.

¹⁴⁸ 'Virginia – Assessment of input foreclosure concerns on the market for the sale of advertising space', RBB Economics, submission of 31 October 2014 [ID 962], page 8 and table 3

¹⁴⁹ Replies to Questionnaire Q3 to TV advertisers of 9 October 2014, question 7.

¹⁵⁰ In that respect, it should be noted that Belgacom, which is one of the main potential targets of a possible input foreclosure of advertising space on Vier and Vijf [...]*.

does not constitute an important input in the sense outlined by the Non-Horizontal Merger Guidelines. Therefore, it is unlikely that post-Transaction Telenet or De Vijver Media could engage in input foreclosure against rival TV distributors by depriving them of advertising space on those channels.

- (216) Additionally, with regard as to whether Telenet or De Vijver Media would have the ability to refuse advertising space on TV channels or increase prices for such space, the Commission notes that the responses of TV advertisers and TV distributors to the Phase II market investigation did not clearly indicate that Telenet or De Vijver Media would have such ability.
- (217) Several TV advertisers indicated that this strategy would appear unlikely and if implemented could favor rival TV broadcasters offering advertising space.¹⁵¹ TV distributors noted that such strategy would be possible in principle, but suggested that the likelihood of such strategy actually being implemented would also depend on the potential losses in advertising revenues for De Vijver Media.¹⁵² Given that Vier and Vijf are channels whose business model relies on the income from the sale of TV advertising space, any foreclosure strategy would entail the risk of significant losses, should the advertising space foreclosed to TV distributors not be sold to other advertisers.
- (218) In light of the above, the Commission considers that the Transaction does not raise concerns of input foreclosure with regard to the markets for the sale of TV advertising space on TV channels and for the retail provision of TV services to end users, given that the advertising space on the TV channels of De Vijver Media does not constitute an important input for the downstream market of the retail provision of TV services to end users.

5.4. The markets for the wholesale supply of FTA/basic pay TV channels and for the retail provision of TV services to end users

- (219) As mentioned in recital (162), the market for the wholesale supply of FTA/basic pay TV channels is upstream to the market for the retail provision of TV services to end users. TV broadcasters license their TV channels as an input to TV distributors, who then include them as part of their retail offer to end users.
- (220) Telenet is active in the downstream market for the retail provision of TV services to end users. De Vijver Media is active in the upstream market for the wholesale supply of TV channels, where it licenses Vier and Vijf to downstream TV distributors, including Telenet. Given Telenet's market share in the retail provision of TV services to end users, these markets are vertically affected by the Transaction.
- (221) Following the Transaction, Telenet will acquire joint control of De Vijver Media, including Vier and Vijf, and will thus be active both in the wholesale supply of FTA/basic pay TV channels and in the retail provision of TV services to end users. In light of the vertical relationship between these markets, it is necessary to assess whether the Transaction would lead to non-coordinated anticompetitive effects as defined under the Non-Horizontal Merger Guidelines.
- (222) According to the Non-Horizontal Merger Guidelines, non-horizontal mergers may significantly impede effective competition through non-coordinated effects, which may principally arise when the merger gives rise to foreclosure. Foreclosure occurs

¹⁵¹ Replies to Questionnaire Q3 to TV advertisers of 9 October 2014, question 6.

¹⁵² Replies to Questionnaire Q3 to TV advertisers of 9 October 2014, questions 47 and 48.

where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing their ability and/or incentive to compete.¹⁵³ Such foreclosure may also discourage market entry or expansion of rivals or encourage their exit.¹⁵⁴

- (223) The Non-Horizontal Merger Guidelines distinguish between two forms of foreclosure. Input foreclosure occurs where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input. Customer foreclosure occurs where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.¹⁵⁵
- (224) The Non-Horizontal Merger Guidelines also state that a vertically integrated entity may gain access to commercially sensitive information on the activities of its upstream or downstream rivals, which would give it a competitive advantage to the detriment of consumers. For instance, a vertically integrated entity which is also the supplier of a downstream competitor may obtain critical information regarding the latter.¹⁵⁶
- (225) In the following sections, the Commission will analyse whether the Transaction is likely to produce anti-competitive effects as a result of input foreclosure, customer foreclosure or other non-coordinated effects related to access to commercially sensitive information.
- (226) First, with regard to input foreclosure, the Commission will consider whether De Vijver Media or Telenet would have the ability and incentive to totally or partially foreclose TV distributors that compete with Telenet from the channels Vier and Vijf. This would make it more difficult for Telenet's rivals to attract and retain subscribers and therefore reduce competition in the downstream market for the retail provision of TV services (section 5.4.1).
- (227) Second, with regard to customer foreclosure, the Commission will consider whether Telenet would have the ability and the incentive to totally or partially foreclose De Vijver Media's rival TV broadcasters from Telenet's downstream cable platform. This would weaken competition in the wholesale market for TV broadcasting and lead to consumer harm (section 5.4.2).
- (228) Third, with regard to other non-coordinated effects, the Commission will consider (a) whether post-Transaction Telenet would have access to commercially sensitive information of TV broadcasters and would have the ability and incentive to use such information for the benefit of De Vijver Media's channels, thus significantly impeding competition in the market for the wholesale supply of TV channels; and (b) whether the vertical integration of Telenet with De Vijver Media could limit the development of new forms of technology, in particular targeted advertising (section 5.4.3).

5.4.1. *Input foreclosure (restricting access to De Vijver Media's TV channels)*

- (229) As a result of a vertical merger, the upstream division of the merged entity may deny access to its input to one or more targeted non-merging firms. This strategy is referred to as total or complete input foreclosure.

¹⁵³ See Non-Horizontal Merger Guidelines, paragraphs 17 -18.

¹⁵⁴ See Non-Horizontal Merger Guidelines, paragraph 29.

¹⁵⁵ See Non-Horizontal Merger Guidelines, paragraph 30.

¹⁵⁶ See Non-Horizontal Merger Guidelines, paragraph 78.

- (230) As a result of a vertical merger, the upstream division of the merged entity may also discriminate against one or more targeted non-merging firms by raising the price charged for the input. This strategy is referred to as partial input foreclosure.
- (231) The analysis of input foreclosure proceeds by studying (a) the importance of the upstream input (in the present case, Vier and Vijf), (b) the ability of Telenet or De Vijver Media to engage in input foreclosure, (c) the incentives to engage in such strategy and (d) the effects on competition. These elements are analysed in the following sections.

5.4.1.1. Market power and importance of Vier and Vijf

- (232) According to the Non-Horizontal Merger Guidelines, input foreclosure may only give rise to competition problems if the upstream input is important for the downstream product.¹⁵⁷ For input foreclosure to be a concern, a vertically integrated merged entity must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.¹⁵⁸
- (233) In this section, the Commission discusses whether the channels Vier and Vijf can be considered an important input within the meaning of the Non-Horizontal Merger Guidelines for TV distributors to be able to compete in the downstream market for the provision of TV retail services within the Telenet footprint.

The Commission's Article 6(1)(c) Decision and the Notifying Parties' Reply

- (234) In the Phase I market investigation, participants were asked which TV channels could, in their opinion, be categorised as a 'must have' for a TV distributor in the Dutch-speaking part of Belgium. All TV distributors included Vier and Vijf in the list of 'must have' TV channels.¹⁵⁹ One respondent to the Phase I market investigation specified that viewers are used to these TV channels being broadcast by the incumbent or dominant player and that viewers are generally very loyal towards these TV channels. Therefore, any competitor has to at least be able to match this offer to meaningfully compete with Telenet.¹⁶⁰
- (235) On the basis of those responses, the Commission concluded in the Article 6(1)(c) Decision that Vier and Vijf have a significant importance for any retail TV service provider active in the Flemish Community.¹⁶¹
- (236) In their response to the Article 6(1)(c) Decision, the Notifying Parties argued that the two channels do not enjoy a 'must have' status, given that they have limited combined viewing shares of 11 % (16.6 % in the group of users aged 18 to 54 years), as compared to other channels, such as those of VRT and Medialaan. The Notifying Parties also highlighted the absence of Vier and Vijf programmes from the top 20 list of viewed programmes for Flanders in the first half of 2014.¹⁶² The Notifying Parties also argued that the fact that Vier and Vijf broadcast local content is not a unique characteristic of these channels, since other broadcasters also offer local content and

¹⁵⁷ See Non-Horizontal Merger Guidelines, paragraph 34.

¹⁵⁸ See Non-Horizontal Merger Guidelines, paragraph 35.

¹⁵⁹ See reply to Questionnaire Q3 to TV distributors of 19 August 2014, question 8

¹⁶⁰ See reply to Questionnaire Q3 to TV distributors of 19 August 2014, question 8 [ID 290], [ID 296], [ID 355], [ID378], [ID 403], and [ID 505].

¹⁶¹ Article 6(1)(c) Decision, recital 120.

¹⁶² Reply of Liberty Global to the Article 6(1)(c) Decision, section 2.1.1.

local content features prominently on competing channels such as those of Medialaan.¹⁶³

- (237) The Notifying Parties therefore concluded that De Vijver Media's channels do not qualify as an important input for TV distributors.

¹⁶³ Reply of Corelio and W&W to the Article 6(1)(c) Decision, paragraphs 4.2–4.3.

The Commission's assessment

- (238) In the course of the Phase II proceeding, the Commission further investigated whether Vier and Vijf constitute important inputs that could be used for a possible input foreclosure strategy.
- (239) First, the Commission refined the assessment of the viewer shares of Vier and Vijf based on additional viewing information from the Notifying Parties. Second, the Commission supplemented its market investigation by further asking TV distributors and broadcasters whether it is important for a TV distributor to have Vier and Vijf among the channels offered to TV viewers in Flanders.
- (240) On the basis of its findings, which are set out below, the Commission concludes that Vier and Vijf constitute an important input within the meaning of the Non-Horizontal Guidelines for the provision distribution of retail TV services within the Telenet footprint.

Refinements to the viewer share methodology

- (241) First, with regard to the Notifying Parties' argument that De Vijver Media's channels have low viewer shares, the Commission notes that, in the case of TV channels, viewer shares alone are unlikely to be conclusive for the assessment of market power or to confirm whether a channel can be qualified as an important input for a TV distributor.
- (242) In Belgium, viewership data are collected by the Centrum voor Informatie over de Media/Centre d'Information sur les Médias ('CIM'), a non-profit organisation whose data are widely used by TV broadcasters and advertisers. According to the CIM's 2013 annual report, Vier and Vijf together had a combined viewer share in Flanders in 2013 of 11 % (Vier 7.4 %, Vijf 3.6 %).¹⁶⁴ The viewer share of Vier and Vijf in the first half of 2014 was also approximately 11 %.¹⁶⁵ With a viewer share of approximately 7.5 % in the first half of 2014, Vier is the fourth most watched channel in Flanders. The three channels with the largest viewer share in Flanders are Eén, with a viewer share of over 30 %, VTM, with a viewer share of approximately 19.5 %, and Canvas, with a viewer share of approximately 8 %. With a viewer share of approximately 3.5 %, Vijf is the seventh largest TV channel in Flanders.¹⁶⁶
- (243) Within the commercially relevant group of viewers aged 18 to 54 years between 5 pm and 12 pm, the joint viewer share of Vier and Vijf amounted to more than 16.5 % in 2013 and to approximately 15.5 % in the first part of 2014.¹⁶⁷
- (244) However, the importance of Vier and Vijf may only be partially understood from their viewer shares. The Commission notes that the CIM's viewer shares are calculated as the average number of viewers of a particular channel over the average

¹⁶⁴ See the Report by CIM, CIM TV Marktaandeelen 2013, p. 3–4, [ID 1153]. The CIM's shares are based on a sample audience which CIM calls 'Belgium North' and which consists of viewers in the Flemish Region and the Brussels Capital Region who speak Dutch. The viewer shares based on this sample are a close proxy for viewer shares in Flanders.

¹⁶⁵ Annex 6(2)(f) to the Form CO.

¹⁶⁶ The CIM measures viewer shares in the geographic region of 'Belgium North' corresponding to the Flemish Region and the Brussels Capital Region, which can be considered as a reasonably good proxy for the viewer share within the Telenet footprint. The CIM measures viewer shares of all channels, including premium pay TV. Therefore, these shares are likely to slightly understate the viewer share of Vier and Vijf in the wholesale of FTA/basic pay TV channels.

¹⁶⁷ Table 9 to the Form CO.

number of viewers of all channels during a specific time period.¹⁶⁸ A viewer share of 11 % or approximately 16 % in the relevant target audience does not necessarily mean that 11 % or 16 % of the Flemish population or a commercially relevant subgroup of the Flemish population regard these TV channels as important. A much higher percentage of consumers may be watching these TV channels and, based on that experience, may regard these channels as important.

- (245) In that respect, it should be noted that the viewer shares reported by the CIM in its annual reports are calculated on the basis of a time period of 24 hours, meaning the entire day. They therefore do not take into account the fact that TV channels may have different broadcasting patterns (some TV channels are aired all day long, whereas others are only aired during prime time, some TV channels air loops of programmes). In addition, the CIM's viewer shares in its annual reports do not take into account the consecutive time spent by a consumer on the channel each time he or she watches the channel, nor the intensity with which the consumer watches a channel.
- (246) Internal documents from Telenet also show that [...] *¹⁶⁹[...] *¹⁷⁰[...] *¹⁷¹[...] *
- (247) Since traditional viewer shares appeared to not fully capture the importance of a channel, the Commission reviewed a set of more specific and refined parameters to assess viewing time.
- (248) For that purpose, the Commission asked the Notifying Parties to submit viewer data for the month of September 2014 of the 20 most popular channels offered on the Telenet platform based on certain specific parameters capturing the *total* viewing time of a channel and the *continuous* viewing time of a channel among Telenet subscribers.¹⁷² The Commission defined total viewing time as the total amount of time (in one month) that a channel is watched by a viewer.¹⁷³ Continuous viewing time was defined as the uninterrupted period of time during which a channel is watched by a viewer.¹⁷⁴

¹⁶⁸ CIM, CIM Television – Introduction of a new currency, Calculation and Reporting Rules – February 2011, p. 13 (under 2.1.5 - Market share calculation rules, stating that ‘market share is calculated by dividing the rating of a programme or time band by the rating of total channels in the relevant programme or time band’), [ID 1152]; Report by the CIM, CIM TV Marktaandeelen 2013 [CIM TV Market shares 2013], p. 2, [ID 1153] (stating that ‘Een marktaandeel geeft de verhouding weer tussen het gemiddeld aantal kijkers van een zender en het gemiddeld aantal kijkers van alle zenders, voor een bepaalde periode en wordt uitgedrukt als een percentage’ [‘A market share expresses the relation between the average number of viewers of a channel and the average number of viewers of all channels, for a specific period, and is expressed as a percentage’]).

¹⁶⁹ [...] * [Ref: DOC-000001673], [ID 717-1673].

¹⁷⁰ [...] * [Ref: DOC-000001342], [ID 607-1342].

¹⁷¹ [...] * [Ref: DOC-000001342], [ID 607-1342].

¹⁷² Commission RFI to Telenet of 31 October 2014. The assessment was to be refined on the basis of the following amounts of both total and continuous viewing time: (a) six minutes or more; (b) thirty minutes or more; (c) one hour or more; (d) three hours or more; (e) five hours or more; and (f) ten hours or more. With regard to total viewing time, Telenet was asked to measure for the top 20 channels how many of its viewers watched that channel for one of the relevant total viewing times, and to provide the percentage those viewers represented out of the total amount of its viewers. For instance, Telenet was asked to measure how many of its viewers watched Vier (or Vijf, or another channel) for the total viewing time of 1 hour or more, and to indicate what percentage those represented out of all Telenet viewers.

¹⁷⁴ With regard to continuous viewing time, Telenet was asked to measure for the top 20 channels how many of its viewers watched that channel once for one of the relevant continuous viewing times, and to provide the percentage those viewers represented out of the total amount of its viewers. For instance,

- (249) In response to the Commission’s request for information, Telenet provided data based on measurements by the CIM. These measurements did not provide the total and continuous viewing time for the entire month of September 2014, but the average total and continuous viewing time per day. In other words, the data provided indicated that x % of Telenet’s subscribers watched a specific channel for a total period of y minutes (total viewing time) and that x% of Telenet’s subscribers watched a specific channel for a continuous period of y minutes (continuous viewing time).¹⁷⁵ The data were calculated based on the sample audience ‘Belgium North’ (which consists of viewers in the Flemish Region and the Brussels Capital Region who speak Dutch) and only for Telenet subscribers. The Commission considers that these data submitted by Telenet prove the importance of Vier and Vijf for viewers in a more accurate and meaningful way as opposed to traditional viewer data.
- (250) On the basis of the CIM data, Telenet measured the number of viewers accounting for each requested total viewing time per day for the top 20 channels on Telenet, and provided the percentage those viewers represent out of the total number of Telenet viewers in the Flemish Region and the Dutch-speaking population of Brussels. The results for the total viewing times of six minutes or more, thirty minutes or more and one hour or more are summarised in Table 1 below, with reference to the top six channels.

Table 1– Total viewing time of TV channels based on CIM data

Channel	Percentage of viewers with a total viewing time of six minutes or more per day	Percentage of viewers with a total viewing time of thirty minutes or more per day	Percentage of viewers with total a viewing time of one hour or more per day
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*

Source: Annex 1 to Telenet’s Reply to the Commission RFI of 31 October 2014

- (251) The data set out in Table 1 shows that in terms of total viewing time Vier and Vijf rank [...]* and [...]*, and are watched by viewers significantly more as compared to what the customary viewer shares listed in the CIM’s annual reports would suggest.

Telenet was asked to measure how many of its viewers watched Vier (or Vijf, or another channel) for a continuous viewing time of one hour or more, and to indicate what percentage these represented out of all decoders. In terms of methodology for continuous viewing time, the Commission specified that if a viewer watched a channel more than once for a certain continuous viewing time, that viewer’s continuous viewing time was to be counted only once.

¹⁷⁵ Telenet replied to the Commission that it did not have the technical means to provide the specific detailed information requested by the RFI for the month of September 2014, but that it would request the CIM to share its data in order to carry out the requested measurements. The CIM provided its viewer measurements. However, given that the CIM’s software does not accumulate periods of viewing over different days, the CIM provided data for the average number of viewers on a daily basis.

The two channels' total viewing time is consistently high regardless of the total viewing time used as a reference, and is much closer to the first channels than what customary viewer shares would suggest.

- (252) Telenet also provided information for total viewing time of three hours or more, five hours or more and ten hours or more.¹⁷⁶ The Commission notes that with the increase of the total viewing time used as a reference, the percentages of all channels tend to decrease, given that the number of viewers watching channels for a higher amount of time diminishes.¹⁷⁷ Therefore, given the limited amount of viewers that watch channels for the higher amounts of total viewing time, the Commission considers that those measurements are less indicative of viewer behaviour. Nonetheless, the Commission notes that when considering total viewing times of three hours or more and five hours or more, Vier and Vijf still ranked [...]*
- (253) The aforementioned measurements of total viewing time indicate that Vier and Vijf reach a high proportion of all viewers in Flanders and Brussels and, hence, are important for viewers. Furthermore, the two channels' total viewing time is consistently high regardless of the total viewing time used as a reference, and is much closer to the first-ranking channels than what customary viewer shares suggest.
- (254) With regard to continuous viewing time, on the basis of CIM data, Telenet measured for each channel how many viewers watched once a channel for a relevant continuous viewing time (if a viewer watched the same channel more than once for the same continuous period, that viewer was counted only once for the purpose of the ranking), and provided the percentage those viewers represent out of total amount of Telenet viewers in Flanders and the Dutch-speaking population of Brussels.
- (255) The results of this exercise are presented in Table 2 below for the continuous viewing times of six minutes or more, thirty minutes or more and one hour or more, with reference to the top seven channels.

¹⁷⁶ Annex 1 to Telenet's Reply to the Commission RFI of 31 October 2014. With regard to total viewing time of three hours or more, Vier is [...] with [...]%, preceded by [...] ([...]*%), [...] ([...]*%) and [...] ([...]*%). [...] is seventh ([...]*%), preceded by the aforementioned channels [...] ([...]*%) and [...] ([...]*%). With regard to total viewing time of five hours or more, [...] ranked [...] with [...]%, preceded by [...] ([...]*%), [...] ([...]*%), [...] ([...]*%) and [...] ([...]*%). [...] was [...] ([...]*%), after the aforementioned channels and [...] ([...]*%), [...] ([...]*%), [...] ([...]*%) and [...] ([...]*%).

¹⁷⁷ For instance, with regard to total viewing time of ten hours or more, the Commission notes that the total viewing time of all channels diminished significantly (the highest ranking channel, [...]*, had [...]* viewers, amounting to [...]*% of all Telenet viewers).

Table 2 – Continuous viewing time of TV channels based on CIM data

Channel	Percentage of viewers with a continuous viewing time of six minutes or more	Channel	Percentage of viewers with a continuous viewing time of 30 minutes or more	Channel	Percentage of viewers with a continuous viewing time of one hour or more
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Annex 1 to Telenet’s Reply to the Commission RFI of 31 October 2014

- (256) The data set out in Table 2 confirm the importance of Vier and Vijf for viewers and their high reach, even when considering continuous viewing time. Vier and Vijf are [...]* and [...]* in ranking ([...]* and [...]* when considering continuous viewing time of one hour or more), and their viewing time is much higher than what the customary CIM viewer share data would indicate.
- (257) Telenet also provided information for continuous viewing time of three hours or more, five hours or more and ten hours or more.¹⁷⁸
- (258) When considering continuous viewing time of three hours or more, Vier is [...]* and Vijf is [...]*. Vier also remains the [...]* most relevant channel when considering continuous viewing time of five hours or more.¹⁷⁹ As mentioned in recital (252), the Commission notes that for continuous viewing times of five hours or more and ten hours or more the percentages tend to decrease and are thus less indicative of general viewing behaviour, given that fewer viewers tend to watch channels for such continued long periods.
- (259) The Commission also considered a narrower timeframe for total viewing time, to take into account the fact that channels exhibit different broadcasting patterns. For that reason, in its RFI of 31 October 2014, the Commission further requested Telenet to measure viewing time during prime time, between 20h and 22h (‘short prime time’) and between 18h and 23h (‘extended prime time’). The exercise was to be carried out for the same amounts of total viewing time referred to in footnote 172.
- (260) In this respect, Telenet’s reply to the Commission RFI of 31 October 2014, based on CIM data for the sample audience ‘Belgium North’,¹⁸⁰ and only on the Telenet

¹⁷⁸ Annex 1 to Telenet’s Reply to the Commission RFI of 31 October 2014.

¹⁷⁹ Annex 1 to Telenet’s Reply to the Commission RFI of 31 October 2014.

¹⁸⁰ As explained in footnote 175, Telenet did not have the data for viewers during the month of September 2014, and thus requested the CIM to provide its own data, which is based on the average number of viewers on a daily basis, for ‘Belgium North’ and only on Telenet subscribers.

subscribers, showed that Vier and Vijf maintain a high ranking (respectively [...] and [...]*) both in short and extended prime time under all amounts of total viewing time considered,¹⁸¹ and attract a significant percentage of viewers, higher than what the customary CIM viewer share data would suggest.¹⁸²

- (261) Such information indicates that Vier and Vijf have a significant importance for viewers, which is not fully reflected by the traditional viewer shares in the CIM annual report. More specific parameters of viewing behaviour, such as total and continuous viewing time, show that Vier and Vijf are significantly important for viewers in Flanders. They have a high reach and their reach is close to that of the two main TV channels in Flanders. This is even more evident in the narrower time frame of prime time.
- (262) The information provided by Telenet was further confirmed by Belgacom's reply to the Commission's market investigation. In order to show the importance of the two channels, Belgacom carried out a similar analysis with reference to its viewers in the area corresponding to the Telenet footprint. Belgacom measured the continuous and total viewing times of six minutes or more, 30 minutes or more, one hour or more, two hours or more, three hours or more and five hours or more during the month of September 2014. Belgacom also provided more specific measurements concerning prime time.¹⁸³ The results of this analysis are in line with the data submitted by Telenet and confirm the prominence of Vier and Vijf and their high ranking among viewers.
- (263) On the basis of the above, the Commission considers that Vier and Vijf are important for viewers and, by extension, for TV distributors.

Feedback of the Phase II market investigation

- (264) During the Phase I market investigation, the Commission asked TV distributors to indicate the channels that they considered 'must have' for providing TV retail services in the Dutch-speaking part of Belgium.¹⁸⁴ All respondents placed Vier and Vijf in the 'must have' category. During the Phase II market investigation, the Commission further investigated among market players to understand the significance of Vier and Vijf, and asked whether it is important for a TV distributor to have Vier and Vijf among the channels offered to TV viewers in Flanders.¹⁸⁵
- (265) Among TV distributors, all respondents to the Phase II market investigation answered that it is important for a TV distributor to have Vier and Vijf within the

¹⁸¹ Data was provided for total viewing times of six minutes or more, thirty minutes or more, and one hour or more during short and extended prime time. Data was not provided for total viewing times of five hours or more and ten hours or more.

¹⁸² Additionally, Telenet also provided viewer information for continuous viewing time during short and extended prime time. This information was provided for continuous viewing times of six minutes or more, thirty minutes or more and one hour or more. This information showed that even in this context Vier and Vijf have a high reach, both in short and extended prime time, and regardless of the amount of time considered, ranking [...] and [...] respectively for continuous viewing time during both short prime and extended prime time.

¹⁸³ Reply of Belgacom to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 819], and first complement to the Reply, question 1.1 [ID 906].

¹⁸⁴ Questionnaire Q3 to TV distributors of 19 August 2014, question 8, [ID 290], [ID 296], [ID 355], [ID 378], [ID 403], and [ID 505].

¹⁸⁵ Questionnaire Q2 to TV distributors of 9 October 2014, question 1, [ID 774], [ID 788], [ID 792], [ID801], [ID 819], and [ID922].

channel offering to viewers in Flanders.¹⁸⁶ M7, the operator of a satellite service in Flanders, replied that the possibility to distribute Vier and Vijf is ‘crucial to be able to compete in the market’.¹⁸⁷ Similarly, Mobistar commented that ‘not having these channels would make market entry impossible’.¹⁸⁸ Two respondents reiterated that Vier and Vijf are ‘must have’.¹⁸⁹

- (266) Furthermore, the answers of TV distributors showed that the importance of Vier and Vijf is amplified by the fact that these channels are offered by the dominant player in the market for retail TV services, namely Telenet. Consequently, they are perceived by viewers as being part of the necessary ‘basic offering’ of any retail TV package.
- (267) M7 illustrated that point by stating that ‘these channels are perceived by the customer as a part of the “standard offer” of TV. An offer without these channels will never be seen as complete by the end-consumer’.¹⁹⁰ Belgacom further explained that for a TV distributor to be competitive ‘it has no other choice but to ensure that its offer of “content” (at least) matches that of the incumbent/dominant player as the viewers are “used” to the offer of that player. Their offer will thus be assessed by the customers against that “dominant” offer’.¹⁹¹
- (268) The Notifying Parties also indirectly acknowledged that effect in their reply to the Article 6(1)(c) Decision, by stating that ‘retail TV service providers need a large and diverse portfolio of attractive channels for their channel bouquets’.¹⁹² Consequently, given that Vier and Vijf are perceived by viewers as part of the basic offering of any retail TV supplier, they constitute an important input for these suppliers and have to be part of their basic TV offering.
- (269) The importance of Vier and Vijf was also acknowledged by the Flemish media regulator VRM. In its Report on the impact of the Transaction, it found that the channels of De Vijver Media, together with those of Medialaan and VRT, are ‘must have’.¹⁹³
- (270) The essential nature of Vier and Vijf was further confirmed by the fact that all TV distributors replying to the Phase II market investigation stated that they would not be able to replace Vier and Vijf with other TV channels.¹⁹⁴ For example, SNOW

¹⁸⁶ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 1, [ID 774], [ID 788], [ID 792], [ID 801], [ID 819], and [ID 922].

¹⁸⁷ Reply of M7 Group S.A. to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 801].

¹⁸⁸ Reply of Mobistar to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 774].

¹⁸⁹ Replies of Mobistar and SNOW to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 774], [ID 922].

¹⁹⁰ Reply of M7 Group S.A. to Questionnaire Q2 to TV distributors of 9 October 2014, question 4, [ID 801].

¹⁹¹ Reply of Belgacom to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 819].

¹⁹² Reply of Liberty Global to the Article 6(1)(c) Decision, paragraph 100.

¹⁹³ VRM, Report ‘*Mogelijke gevolgen voor de concentraties binnen de Vlaamse mediasector van een eventuele participatie van Liberty Global in De Vijver Media*’ [Possible consequences of a possible stake by Liberty Global in De Vijver Media for concentration in the Flemish media sector], p.27. ‘*De kanalen van de VRT, de VMMA en SBS vormen samen de “must have’s” op televisiegebied.*’ English translation by the Commission: The channels of VRT, VMMA [now Medialaan] and SBS together constitute the ‘must have’s’ for TV.

¹⁹⁴ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 7, [ID 774], [ID 788], [ID 792], [ID 801], [ID 819], [ID 922].

explained that ‘no real measures could be taken to compensate for the impact of the loss of Vier and Vijf. Any such measure would be suboptimal’.¹⁹⁵

- (271) Vier and Vijf constitute an important input for existing retail TV suppliers, but they are also an important input for new entrants. Mobistar is an example of such a new entrant. It intends to enter the market for the retail provision of TV services in 2015 by means of wholesale access to the Telenet cable platform.
- (272) In its reply to the Phase II market investigation, Mobistar explained that ‘[g]iven the exceptional market share of Flemish Channels in Flanders (cf external reports) these channels are must have from the TV point of view’¹⁹⁶ and that ‘Not having these channels would make market entry impossible.’
- (273) Moreover, for companies such as Mobistar that use wholesale access to a cable operator’s network, it is technically impossible to enter the market without Vier and Vijf. This is because cable operators offer an analogue signal and they cannot filter out Vier and Vijf from that signal. Hence, Vier and Vijf are inevitably part of the package of channels offered to new entrants relying on wholesale access to Telenet’s cable network. This means that these new entrants must inevitably conclude an agreement to carry Vier and Vijf. Vier and Vijf therefore enjoy a de facto must carry status for a new entrant such as Mobistar. Without the rights for these channels, the cable operators would be able to stop the delivery of the TV signals to Mobistar or any beneficiary of the cable regulation.¹⁹⁷
- (274) In addition, Telenet’s internal documents also acknowledge the importance of Vier and Vijf. Telenet refers to these channels as ‘two strong FTA channels’, which have ‘access to personalities and stars’, strong local content and ‘tons of valuable expertise and experience in entertainment’.¹⁹⁸
- (275) An internal presentation of Liberty Global on the analysis of the Belgian TV Market also recognises that Vier and Vijf have a ‘focus on local content’ and that their ‘viewership has been increasing over the last years, while other channels have decreased their own views shares.’¹⁹⁹
- (276) Several TV broadcasters responding to the Commission’s Phase II market investigation also agreed that it is important for a TV distributor to have Vier and Vijf among the channels offered to viewers in Flanders.²⁰⁰ [One TV broadcaster]* stated that ‘a distributor would see its customer base diminished if VIER and VIJF are not included in the offer’,²⁰¹ whereas [another TV broadcaster]* mentioned that the two channels are ‘highly popular’ in Flanders²⁰² and that their presence ‘would be critical for any commercially successful service’.²⁰³

¹⁹⁵ Reply of SNOW to Questionnaire Q2 to TV distributors of 9 October 2014, question 4, [ID 922].

¹⁹⁶ Reply of Mobistar to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.1, [ID 774].

¹⁹⁷ Reply of Mobistar to Questionnaire Q2 to TV distributors of 9 October 2014, question 2, [ID 774]; Reply of BIPT to RFI of 20 October 2014 [ID 920] (explaining that, under the wholesale access obligation imposed on cable operators such as Telenet, new entrants must also offer analogue TV and, hence, reach an agreement with all broadcasters included in the analogue TV signal).

¹⁹⁸ Telenet – Entertainment Strategy, 16 June 2014, [Ref: 2014/102961], [ID 716-398]

¹⁹⁹ Liberty Global – De Vijver Media – SBS BE, November 2013, [Ref: 2014/099820], [ID 607-6484]

²⁰⁰ Replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34, [ID 785], [ID 858], [ID 899], [ID 891], and [ID 1035].

²⁰¹ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34.1, [ID 858].

²⁰² Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34.1, [ID 858].

²⁰³ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 35, [ID 858].

- (277) Additional explanations of the TV broadcasters also further illustrate the importance of these channels as being perceived as part of a ‘basic portfolio offering’ that makes them essential. For instance, [one TV broadcaster]* acknowledged ‘that [b]oth channels have strong audience share and are an important part of any package offered by broadcast platforms in Belgium’.²⁰⁴
- (278) [One TV broadcaster]* explained that ‘[s]ince Telenet is the most important content-distributor for Flanders, it can raise the bar for any other distributor. Any other successful offer will be measured against that of Telenet. Not providing Vier and Vijf would thus fall short of basic customer expectation and most likely not be able to compete successfully’.²⁰⁵ Similarly, [one TV broadcaster]* noted that ‘since these are FTA channels, a distributor that did not carry them may be perceived as not providing a complete offering to market’.²⁰⁶
- (279) TV broadcasters also acknowledged that Vier and Vijf are important for the purpose of entry into the market for the retail provision of TV services. [One TV broadcaster]* explained that ‘[g]iven the dominance of Telenet on the market for television distribution, an offer without Vier and Vijf would have no selling proposition to convince customers (often locked-in in triple or quadruple play packages) to switch from Telenet (or Belgacom)’.²⁰⁷
- (280) Accordingly, Vier and Vijf are considered as an important input both by actual and potential TV distributors, by TV broadcasters and by Telenet itself. As explained in recital (273), for Mobistar, it would even be technically impossible to enter the market without these channels. Therefore, the findings of the Phase I market investigation as to the nature of important input within the meaning of the Non-Horizontal Guidelines of these channels for any player willing to offer TV services within the Telenet footprint are confirmed.
- (281) In addition, the respondents to the Phase II market investigation all agreed that the specific content broadcast on Vier and Vijf is relevant for viewers in Flanders.²⁰⁸ Thus, the fact that Flemish content across different genres features prominently in the Vier and Vijf programme schedule (in the Form CO, the Notifying Parties listed 15 locally produced formats²⁰⁹ broadcast regularly on Vier as well as five examples of locally produced formats²¹⁰ broadcast regularly on Vijf) further suggests that these channels are an important input for retail TV suppliers in Flanders.
- (282) With regard to the point made by the Notifying Parties in their reply to the Article 6(1)(c) Decision that Vier and Vijf’s content is not as prominently viewed as that of other broadcasters, the Commission notes that the CIM top 100 list of programmes viewed in ‘Belgium North’ for 2013 is dominated by programmes broadcast by VRT.²¹¹ The programmes of Vier, Vijf and VTM figure to a much lesser extent.

²⁰⁴ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34.1, [ID 785].

²⁰⁵ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34.2, [ID 899].

²⁰⁶ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 34.2, [ID 891].

²⁰⁷ Reply of [...] to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 42.1, [ID 858].

²⁰⁸ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 15, [ID 774], [ID 788], [ID 792], [ID 801], [ID 819], and [ID 922].

²⁰⁹ Komen Eten, The Sky is the Limit, Topdokters, De Rechtbank, Kroost, Heylen en de Herkomst, Scheire & De Schepping, De Slimste Mens ter Wereld, Vermist, Geubels & De Belgen, Comedy Kings, De Ideale Wereld, Chez Piet, De Pappenheimers, De Val van 1 Miljoen.

²¹⁰ These include Zo Man Zo Vrouw, Astrid in Wonderland, De Huisdokter and Singl3s.

²¹¹ CIM TV – Top 100 programma’s Noord – 2013, [ID XXX].

- (283) However, the CIM's breakdown of the top 10 programmes per channel shows that Vier and Vijf's most viewed programmes reach a significant number of viewers, comparable to that of other channels with apparently high viewer shares.²¹² VRT's top 10 programmes are seen by between 1.8 million and 1.4 million viewers, Canvas' top 10 ranges between 1.3 million and 0.8 million, VTM's top 10 shifts between 1.3 million and 0.9 million, whereas Vier's top 10 programmes range between 1.4 million and 0.7 million. Similarly, Vijf's top 10 programmes range between 0.25 and 0.21 million viewers, which is close to the top 10 programmes of Vitaya (0.25–0.17 million viewers) and 2BE (0.65–0.51 million viewers).

Conclusion on the importance of Vier and Vijf

- (284) On the basis of (a) the refined measurements of total and continuous viewing time of viewers in Flanders and Brussels provided by the Notifying Parties; and (b) the feedback of the Phase II market investigation received from TV distributors and TV broadcasters, further supported by the views of the VRM and the BCA and the Parties' own internal documents, the Commission concludes that Vier and Vijf qualify as an important input within the meaning of the Non-Horizontal Merger Guidelines for TV distributors to be able to compete in the downstream market for the provision of TV retail services within the Telenet footprint.

5.4.1.2. Ability to engage in input foreclosure

The Commission's Article 6(1)(c) Decision and the Notifying Parties' Reply

- (285) In its Article 6(1)(c) Decision, the Commission found that Telenet would be able to engage in total input foreclosure of Vier and Vijf with or without the other shareholders of De Vijver Media. Total input foreclosure would entail not licensing Vier and Vijf at all. The Commission argued that [...]*, Telenet would be able to block the entering into a new carriage agreement as well as the extension of an existing carriage agreement. The Commission reasoned that the same holds true, albeit possibly to a lesser extent, for partial input foreclosure, as Telenet could block entering into any new carriage agreement or the extension of any existing carriage agreement that does not meet certain thresholds imposed by Telenet.
- (286) Furthermore, the Commission noted that Telenet could engage in partial or total input foreclosure together [...]*. These could be incentivised to pursue such strategy by an agreement with Telenet that compensates them for losses of De Vijver Media incurred due to the foreclosure strategy.
- (287) In their reply to the Commission's Article 6(1)(c) Decision, the Notifying Parties argue that the ownership structure of De Vijver Media precludes Telenet from pursuing an input foreclosure strategy because the other two shareholders, W&W and Corelio, do not have an interest in foregoing revenues from the distribution of Vier and Vijf on competing platforms. In this regard, the Notifying Parties refer to the Commission's decision in case M.6369 *HBO/Ziggo/HBO Nederland*.
- (288) The Notifying Parties point out that under the provisions of the Shareholder Agreement [...]*.
- (289) The Notifying Parties further state that Telenet's obligation under the Canal+ decision of the BCA of 12 November 2003 would prevent Telenet from entering into any compensation agreement with the other shareholders W&W and Corelio that would compensate these shareholders for the loss caused by exclusivity or similar

²¹² CIM TV – Top 10 programma's per zender Noord – 2013, [ID XXX].

restrictions to the benefit of Telenet. Under the decision of the BCA of 12 November 2003, Telenet is obliged not to: (a) conclude exclusive distribution agreements with regard to Vier and Vijf; or (b) conclude agreements with Vier and Vijf that would contain a certain disadvantage for those channels if they would also be distributed via a different infrastructure; or (c) conclude agreements with Vier and Vijf that oblige these channels to impose less advantageous conditions on alternative infrastructures compared to the conditions for the distribution on the cable network of Telenet. The Notifying Parties argue that any agreement with the other shareholders that offers a compensation for restricting access to or imposing unfavourable conditions on the distribution of Vier and Vijf would breach these obligations of Telenet.

- (290) Finally, according to the Notifying Parties Telenet does not have the ability to engage in input foreclosure on its own because Belgian corporate law requires directors to act in the interests of the company and not in the interests of an individual shareholder. They also point out that, in the past, several channels have continued to be carried on Telenet, in spite of the expiry of the respective carriage agreement. According to the Notifying Parties this shows that a positive decision is required to stop transmitting a channel.

The Commission's assessment

Telenet on its own has the ability to engage in total input foreclosure

- (291) Channels are licensed by TV broadcasters to TV distributors through carriage agreements. [...] * Telenet will have the power to veto both the renewal of existing carriage agreements and the conclusion of new carriage agreements. This means Telenet will be able to block the licensing of Vier and Vijf.
- (292) [Description of the corporate governance rules of the Shareholder Agreement] *.
[Description of the corporate governance rules of the Shareholder Agreement]^{213*}
- (293) [Description of the corporate governance rules of the Shareholder Agreement] *
- (294) [Description of the corporate governance rules of the Shareholder Agreement] *
- (295) It follows from those provisions of the Shareholder Agreement that Telenet [...] *. This gives Telenet the ability to block the licensing of Vier and Vijf to Telenet's downstream competitors and, hence, to engage in total input foreclosure.
- (296) Belgian corporate law does not remove Telenet's ability to engage in input foreclosure. It may be true that, under Belgian corporate law, board members have a duty of loyalty towards the company. However, the existence of that general duty is unlikely to prevent Telenet's directors from engaging in an input foreclosure strategy. Firstly, the existence of a duty of loyalty towards the company does not necessarily exclude the possibility that directors take into account the interests of a specific shareholder. In addition, any legal action for a breach of a board member's duty of loyalty towards the company would have to be initiated by the other shareholders, and not by the victim of input foreclosure. It seems unlikely that the other shareholders would take such drastic action. Furthermore, in many input foreclosure scenarios, it would be difficult to establish that input foreclosure is contrary to the interests of De Vijver Media. In the event of a total input foreclosure vis-à-vis new entrants, for instance, De Vijver Media's channels would not lose viewers and, hence, there would be no loss of advertising revenue. Even in the event of a total input foreclosure vis-à-vis TV distributors with a significant number of subscribers, it may

²¹³ [...] *

not be straightforward to establish that this would be contrary to the interests of De Vijver Media. A refusal to license Vier and Vijf to other TV distributors may, for instance, be accompanied by more intense cooperation between De Vijver Media and Telenet on other aspects. The Telenet directors might well argue that the advantages flowing from a privileged relationship with the most important TV platform in Flanders (Telenet) outweigh any disadvantages from not being carried on smaller TV platforms. To summarise, the rules of Belgian corporate law which require directors to act in the interests of the company are unlikely to prevent Telenet from engaging in input foreclosure.

- (297) The fact that the distribution of TV channels in Flanders has sometimes continued even after the expiry of a carriage agreement does not mean that this would also be the case for De Vijver Media's channels. Once a carriage agreement relating to Vier or Vijf approaches the end of its term, a new agreement would have to be concluded or the term of the existing agreement would have to be extended. Either decision entails the conclusion, extension or amendment of a carriage agreement and can be blocked by Telenet. It is not realistic to assume that the employees of De Vijver Media would continue to transmit the channels to a TV distributor without board approval. If Vier and Vijf continue to be transmitted to a TV distributor after the expiry of the carriage agreement, this would be regarded as a tacit renewal of the carriage agreement or the conclusion of a new, unwritten carriage agreement. In either case, this would amount to the conclusion, extension or amendment of a carriage agreement [...]*

Telenet on its own has the ability to engage in partial input foreclosure

- (298) Telenet's powers to block the conclusion of carriage agreements can also be used to engage in partial foreclosure. Although Telenet [...]*, it could block an extension of an existing carriage agreement or the conclusion of a new carriage agreement, [...]*.
- (299) Belgian corporate law does not prevent Telenet from engaging in partial input foreclosure for the same reasons it does not prevent Telenet from engaging in total input foreclosure. If anything, it would be even more difficult for the other shareholders to argue that a partial input foreclosure strategy goes against the corporate interests of De Vijver Media, since De Vijver Media would receive higher licence fees from TV distributors as a result of such a strategy.

De Vijver Media has the ability to engage in total and partial input foreclosure

- (300) If the three shareholders of De Vijver Media act together, De Vijver Media has the ability to engage in total or partial input foreclosure. Whether all three shareholders of De Vijver Media would act together in this way depends on whether all three of them would have the incentive to engage in input foreclosure. Since partial input foreclosure leads to higher licence fees for De Vijver Media, it is likely that all shareholders will have the incentive to engage in such type of foreclosure.
- (301) In the case of total foreclosure, at first sight, the incentives of Telenet and the other shareholders may not always be aligned. Telenet may have an incentive to engage in input foreclosure because it would lead to less competition in the downstream market for the retail provision of TV services and the corresponding gains could outweigh the losses deriving from its 50% stake in De Vijver Media. This is discussed in section 5.4.1.3, on the incentive to engage in input foreclosure. However, for the other shareholders, it may be disadvantageous if Vier and Vijf are not available on other TV distribution platforms. This would lead to fewer viewers for Vier and Vijf and, hence, less advertising income. It would also imply foregoing the licence fees for Vier and Vijf from the TV platforms that no longer carry Vier and Vijf. In

contrast to Telenet, which can compensate this loss by gains in the downstream market for the retail provision of TV services, the other shareholders do not have downstream activities through which the losses in advertising and licensing revenues could be compensated. The Commission nonetheless considers it likely that, in the unlikely hypothesis that Telenet is unable to engage in total input foreclosure on its own, it will be able to persuade [...]*

- (302) First, the Commission notes that [Assessment of the corporate governance rules of the Shareholder Agreement]*
- (303) Second, in the case of total input foreclosure vis-à-vis new entrants, the losses for the other shareholders would likely be small. First, with regard to the revenue from a new carriage agreement, W&W and Corelio would lose this income by not agreeing with a new entrant. However, the revenue deriving from such agreements would likely be low, given that a new entrant at the retail level would initially have very few subscribers. Additionally, given that the licence fee is often calculated based on the number of subscribers,²¹⁴ any additional subscriber for the new entrant would probably correspond to a loss of revenue on another carriage agreement of De Vijver Media with an existing TV distributor, which would lose a subscriber to the benefit of the new entrant. Hence, Corelio and W&W would not necessarily gain additional revenue with the new carriage agreement. Instead, the source of part of their revenues would shift from one TV distributor to another one. Second, concerning advertising revenues, these too would likely be low in relation to a new entrant's viewers. Furthermore, the key element that determines advertising revenues is the number of people watching a channel. Any viewers watching Vier and Vijf on the new entrant's platform would not be watching it on another TV platform. Hence, any gains for Corelio and W&W from advertising revenues related to the new entrant's platform would correspond to less advertising revenues from viewers on other TV platforms. Therefore, any losses in advertising revenue and licence fees coming from a potential new entrant would likely be negligible. This means that the incentives of Telenet and the two other shareholders could probably be aligned and all three could agree to engage in input foreclosure towards a new entrant.
- (304) Third, Telenet could easily compensate the other shareholders for any losses they would suffer as a result of input foreclosure. By compensating for these losses, Telenet could align the incentives of [...]* other shareholders with its own incentive to engage in input foreclosure.
- (305) Such compensation could take many forms. Telenet could make a straightforward side-payment to [...]* of the shareholders. Alternatively, Telenet could compensate the other shareholders by increasing the payments or services that flow from Telenet to the other shareholders under various agreements and arrangements.
- (306) For example, Telenet has, just as other TV distributors, entered into a carriage agreement with De Vijver Media. It could compensate the other shareholders by agreeing to pay higher licence fees to De Vijver Media under that carriage agreement. Telenet is also an important advertiser on the channels of De Vijver Media and it could increase its advertising spend to compensate the other shareholders for agreeing to an input foreclosure strategy. Moreover, Telenet [...]***²¹⁵[...]***.

²¹⁴ [...]*

²¹⁵ [...]***

- (307) Another way in which Telenet could compensate one of the shareholders is by agreeing to pay W&W [...] ²¹⁶ Telenet could compensate W&W for agreeing to an input foreclosure strategy by [...]*
- (308) Yet another way in which Telenet could compensate one of the shareholders is by increasing the payments it makes to Corelio for advertising in Corelio's newspapers, online publications or radio channels. Alternatively, Telenet could [...]*
- (309) This list of examples is not exhaustive. The shareholders are in a good position to determine which mechanism is best for Telenet to compensate the other shareholders and it is likely that they will find a way to do so.
- (310) According to the Notifying Parties, ²¹⁷ Telenet can already engage in input foreclosure by compensating De Vijver Media's shareholders. Hence, Telenet's ability to engage in input foreclosure is not merger specific. The Commission disagrees with this claim. The fact that the Transaction will give Telenet a 50 % stake in De Vijver Media makes it much easier for Telenet to engage in input foreclosure. Telenet is more likely to be able to agree with the other shareholders on a compensation mechanism as a shareholder than as a third party. This is demonstrated by [...]*. These relationships between shareholders make it easier for Telenet to compensate the other shareholders. In addition, the loss that Telenet would need to compensate is smaller, since Telenet itself would have a 50 % stake in De Vijver Media and therefore would bear 50 % of the upstream losses resulting from an input foreclosure strategy. Moreover, as explained in recitals (291) to (297), post-Transaction Telenet [...]*
- (311) The Notifying Parties argue that the Canal+ decision of the BCA of 12 November 2003 would prevent Telenet from entering into any agreement with the other shareholders that would compensate them. That claim seems to be contradicted by the Notifying Parties' own interpretation of the mentioned decision as set out in the Form CO. According to the Notifying Parties, '[t]he conditions of the Canal+ decision of the BCA only apply to Telenet. While Telenet is prohibited from requiring broadcasters to offer less favourable terms to competing platforms, nothing in the Canal+ decision prevents the channels from making their own business decisions in this regard', ²¹⁸ In other words, any decision by De Vijver Media not to license Vier and Vijf to specific TV distributors would not be caught by the mentioned decision because that decision would be taken by De Vijver Media, not Telenet. In addition, the mentioned decision prohibits Telenet from entering into exclusive agreements. To circumvent the obligations of the mentioned decision, it would seem to suffice for Telenet or De Vijver Media to allow a smaller TV distributor to continue to distribute Vier and Vijf. The Commission also notes that, in order to engage in input foreclosure, Telenet would not need to include any of the prohibited clauses mentioned in the decision of the BCA in its agreements for the distribution of Vier and Vijf. Such contractual safeguards are not necessary because Telenet, either on its own or together with the other shareholders, would simply be able to prevent the licensing of Vier and Vijf to other TV distributors.

²¹⁶ [...]*

²¹⁷ See 'M 7194_RBB_Response to 6(1)(c) Decision', submitted on 6/10/2014.

²¹⁸ Form CO, paragraph 253, footnote 18.

The existing agreements between De Vijver Media and TV distributors do not remove the ability to engage in input foreclosure

- (312) The Commission considers that the existing agreements between De Vijver Media and the various TV distributors do not remove Telenet's ability to engage in input foreclosure. Those agreements afford some protection to some TV distributors, but leave room for input foreclosure for at least three reasons.
- (313) First, new entrants do not have an agreement and are therefore not protected. Second, the agreements with existing TV distributors do not cover all rights linked with the broadcasting of De Vijver Media's TV channels. For instance, a TV distributor may have an agreement for the linear broadcasting of Vier and Vijf, but not for non-linear services linked to the channels, such as catch-up TV, VOD or multi-screen services. De Vijver Media or Telenet could therefore foreclose those TV distributors by refusing to license those non-linear services. Third, some of the agreements with existing TV distributors will expire in the near future. After their expiry, De Vijver Media or Telenet could engage in input foreclosure.
- (314) The following recitals discuss the situation for each of the existing TV distributors and Mobistar, which plans to enter the market. In each case, the agreements in place leave room for input foreclosure because they do not cover all rights or because they have a limited duration. During the proceedings, some of these agreements were amended or new agreements were entered into. These developments are described in section 6 of this Decision.
- (315) Prior to the developments described in section 6 of this Decision, there were [...] agreements in place between De Vijver Media and Belgacom. [Description of agreements between De Vijver Media and Belgacom]*²¹⁹[Description of agreements between De Vijver Media and Belgacom]*²²⁰[Description of agreements between De Vijver Media and Belgacom]*²²¹[Description of agreements between De Vijver Media and Belgacom]*.
- (316) Prior to the developments described in section 6 of this Decision, Mobistar had not concluded any agreement with De Vijver Media. [...] ²²² [...] ²²³ [...]*
- (317) The agreement between De Vijver Media and SNOW of [...] has [...] and does not provide for [...] ²²⁴ [Description of agreements between De Vijver Media and SNOW]*
- (318) The agreement between De Vijver Media and M7 of [...]*, which operates the satellite service TV Vlaanderen, [...] ²²⁵ It [Description of agreements between De Vijver Media and M7]*.
- (319) The agreement between De Vijver Media and Stievie of [...] has [...] ²²⁶ [...]*. However, [Description of agreements between De Vijver Media and Stievie]*.

219 [...] page 1 [...]*
220 [...] ²²¹ [...]*
221 [...] ²²² [...]*
222 [...] ²²³ [...]*
223 [...] ²²⁴ [...]*
224 [...] ²²⁵ [...]*
225 [...] ²²⁶ [...]*
226 [...]*

Conclusion on ability to engage in input foreclosure

- (320) [Description of corporate governance rules of the Shareholder Agreement]* Telenet will therefore be able to foreclose competing TV distributors from access to Vier and Vijf.
- (321) If Telenet would be unable to engage in input foreclosure on its own, it could make De Vijver Media engage in input foreclosure by persuading [...] of the other shareholders to agree to an input foreclosure strategy. The other shareholders have an incentive to seek higher licence fees and would therefore participate with Telenet in a partial foreclosure strategy. In the case of total foreclosure, they may suffer a loss because Vier and Vijf reach fewer viewers and, hence, would generate less advertising revenue. However, Telenet would have ample opportunity to compensate [...] of the other shareholders for such losses.
- (322) The Commission concludes that both Telenet and De Vijver Media have the ability to engage in input foreclosure as regards the channels Vier and Vijf. In this Decision, the Commission uses the expression ‘input foreclosure by De Vijver Media’ as an expression that includes both the scenario where Telenet has persuaded [...] shareholders of De Vijver Media to engage in input foreclosure and the scenario where Telenet on its own engages in input foreclosure, by blocking decisions by De Vijver Media.

5.4.1.3. Incentive to engage in input foreclosure

Total foreclosure

Introduction

- (323) Total input foreclosure means that one or more TV distributors that compete with Telenet are denied access to the channels Vier and Vijf. Hence, those channels would no longer be available to subscribers of the targeted rival TV distributors.
- (324) On the one hand, such a strategy would lead to De Vijver Media foregoing profits from advertising revenues. This is because the non-availability of Vier and Vijf on targeted rival platforms would reduce the number of viewers of those channels and therefore advertisers would be less willing to pay for advertisements on those channels. In addition, such a strategy would involve foregoing the licence fee that De Vijver Media receives from Telenet’s rivals.
- (325) On the other hand, since Vier and Vijf are important channels for TV distributors in the Telenet footprint, such a strategy would also lead to additional profits for Telenet as subscribers that place a high value on those channels may switch from those rival platforms to Telenet in order to be able to continue watching Vier and Vijf.
- (326) If the additional profits generated by Telenet at the distribution level outweigh the lost advertising profits by De Vijver Media, De Vijver Media would have an incentive to engage in a total input foreclosure strategy.

The Notifying Parties’ Reply to the Article 6(1)(c) Decision

- (327) In their Reply to the Article 6(1)(c) Decision, the Notifying Parties argue that De Vijver Media would not have the incentive to engage in total input foreclosure of

rival platforms. The Notifying Parties also submitted two economic reports²²⁷ in support of their arguments.

- (328) In one of the reports,²²⁸ the Notifying Parties claim that the input foreclosure theory of harm is unlikely to be merger specific, as even before the Transaction, Telenet could enter into an agreement with De Vijver Media whereby De Vijver Media would be required to license Vier and Vijf exclusively to Telenet and Telenet compensates De Vijver Media for the foregone revenue.
- (329) Furthermore, that report sets out calculations that show how in any event the total foreclosure of all existing rivals would not be profitable in a number of scenarios.²²⁹
- (330) Another report²³⁰ presents a similar analysis, where a hypothetical scenario is considered whereby De Vijver Media denies all Telenet's rivals access to Vier and Vijf. The results show that if it is assumed that all new Telenet subscribers take a triple-play bundle, [5-10]* % of all Telenet's rivals' subscribers base would have to switch to Telenet to make this strategy profitable. If new subscribers attracted by Telenet are assumed to take only a single-play TV package, a switching rate of between [10-20]* % to [20-30]* % of all Telenet's rivals' subscribers would be required.
- (331) The Notifying Parties claim that it is unlikely that Vier and Vijf are sufficiently attractive to trigger such a degree of switching on rival platforms. In support of that view, the Notifying Parties primarily point to a 'blackout event' in the United States of America (US) in 2013 where the US broadcaster CBS was not shown on the Time Warner Cable packages in a number of cities²³¹ for a period of approximately one month. Based on public sources and analyst reports, the Notifying Parties estimate that Time Warner Cable lost [0-5]* % to [5-10]* % of its customer base in affected areas as a result.²³² The Notifying Parties claim that not being able to carry Vier and Vijf would have an effect of a similar magnitude on rival distributors' subscriber numbers. The Notifying Parties claim that to their knowledge this case is the only instance where a main TV channel was removed from a major TV retail platform for a considerable amount of time.
- (332) As regards OTT players specifically, the Notifying Parties note that those players offer TV services only, which means that Telenet can only gain additional TV subscribers from foreclosing such rivals. Therefore, the amount of subscriber switching needed for an input foreclosure strategy to become profitable would be higher in the case of OTT players than for existing rivals offering multi-play bundles and where customers may switch for more products than just their TV subscription.
- (333) In addition, the Notifying Parties argue that OTT players are small players which do not compete directly with the established retail TV platforms, as these services are

²²⁷ The two reports are 'M 7194_Oxera_Response to 6(1)(c)' and 'M 7194_RBB_Response to 6(1)(c) decision', submitted on 6 October 2014.

²²⁸ See 'M 7194_RBB_Response to 6(1)(c) Decision', submitted on 6 October 2014.

²²⁹ The report considers the total input foreclosure case where the merged entity denies all Telenet's rivals access to Vier and Vijf. Four scenarios are considered depending on the assumptions regarding downstream switching (it is assumed that either [5-10]* % or [10-20]* % of Telenet's subscriber base would switch to Telenet due to foreclosure) and regarding distribution margins (it is assumed that new subscribers diverted to Telenet bring a margin that is either equal to the current Telenet blended margin or equal to the current Telenet single play margin).

²³⁰ See 'M 7194_Oxera_Response to 6(1)(c)'.

²³¹ The blackout event involved overall approximately one fourth of Time Warner Cable's subscribers.

²³² See 'Annex I.1.3. – Case study TWC vs CBS', submitted on 6 October 2014.

mostly regarded as a complement rather than a substitute to linear TV. As such, the Notifying Parties claim that Telenet would materially gain from foreclosing OTT players because the churn expected from foreclosing them would be small.

- (334) In the case of Stievie, the Notifying Parties further note that foreclosure of Stievie may lead to retaliation by Medialaan, which owns Stievie and could reply to a threat of foreclosure by not licensing VTM to Telenet. Moreover, the Notifying Parties note that Stievie's current agreement with De Vijver Media [...]*

The Commission's Assessment

- (335) The Commission has assessed the likely profitability of a number of total foreclosure scenarios following the Transaction. The assessment of incentives for total foreclosure is structured as follows. First, the Commission assesses the incentives to completely foreclose main existing rival TV distribution platforms. Next, the Commission assesses the likely incentives for complete foreclosure of Stievie, a small existing OTT platform, or of new entrants is discussed. Finally, the Commission assesses further arguments on total foreclosure incentives that were raised by the Notifying Parties and that are not addressed elsewhere.

Total input foreclosure of the main existing rival TV distributors (Belgacom, Snow and TV Vlaanderen)

- (336) In order to assess the incentive to foreclose existing TV distributors from access to Vier and Vijf, the Commission has assessed three possible scenarios. In the first scenario, the Commission has assessed whether the Notifying Parties would find it profitable to make Vier/Vijf available exclusively on Telenet, that is to say, to (jointly) foreclose all rival platforms from having access to these channels. Second, since Belgacom is by far the largest rival TV distributor, the Commission has assessed the scenario where only Belgacom, but not other rival TV distributors are foreclosed. Third, the Commission has also assessed the Notifying Parties' incentives to only foreclose smaller rival TV distributors (Snow and TV Vlaanderen) from access to Vier and Vijf.
- (337) The analysis in this section is based on a simple quantification of the combined entity's costs (in the form of foregone advertising revenues and licence fees by De Vijver Media) and benefits (in the form of Telenet's profits from subscriber switching from rival platforms to Telenet) of each total foreclosure scenario. As the analysis necessarily abstracts from certain aspects affecting incentives,²³³ it should not be interpreted as providing a precise quantification of the exact profitability of the respective total foreclosure scenario. However, the Commission considers that the standard foreclosure analysis described in this section below brings together the quantitative evidence on the most likely most important determinants of the costs and benefits of foreclosure strategies. As such, the analysis allows an assessment of whether incentives for total foreclosure are likely to exist and, if so, whether those incentives are likely to be strong.
- (338) A key question in each of the three total input foreclosure scenarios is whether the likely actual rate at which subscribers would switch away from rival platform(s) if Vier and Vijf were no longer available on these platforms exceeds the 'critical switching rate'. If the likely switching rate is higher than the critical switching rate, it would be more profitable to engage in total foreclosure strategy following the Transaction than keeping the status quo.
- (339) In the following recitals, the Commission therefore first discusses its assessment of the evidence on the likely subscriber switching that the non-availability of Vier and Vijf on a TV distribution platform would entail. The Commission then discusses its quantitative analysis and conclusion on each of the three total input foreclosure strategies of the existing main competing TV distributors.

Evidence of the likely switching resulting from total foreclosure strategies

- (340) The Commission has reviewed evidence regarding the likely actual rate of subscriber switching from Telenet's rivals if Vier and Vijf were no longer available on rival platforms.
- (341) First, the Commission has reviewed evidence submitted by the Notifying Parties regarding a blackout event in the United States during which CBS channels were not shown on parts of Time Warner's cable network for a period of one month following a dispute on licence fees. This evidence consists of an analysis of estimates from

²³³ For example, the analysis does not take into account the reputational effects or dynamic incentives the merged entity may have to exclude or raise barriers to smaller rivals in order to prevent them from posing a more significant competitive threat in the future.

publicly available analyst reports of the consequences of the blackout event on Time Warner Cable's subscriber numbers.

- (342) The Commission does not consider that the evidence regarding this episode allows reliable inferences to be drawn on the likely impact of input foreclosure strategies involving Vier and Vijf. Most importantly, the blackout in this case lasted for a very short period of time (one month) and the Commission considers that it is likely that a longer blackout (as would be the case for Vier and Vijf on Telenet's rivals) would likely have a significantly stronger effect on subscriber numbers than a blackout over a short period of time. Moreover, the viewer share (and therefore the importance) of CBS at the time of the blackout was lower than the current viewer share of Vier and Vijf on Telenet's main rival platforms.²³⁴
- (343) When the estimates for the blackout event are adjusted for the difference in viewer shares,²³⁵ the estimated switching figures for the CBS blackout would imply switching rates in the range of [0-5]* % to [10-20]* % for the case of a short blackout of Vier and Vijf on rival platforms. However, the Commission considers that this range, because of the short duration of the blackout, significantly understates the likely switching that a total foreclosure of rival platforms from access to Vier and Vijf would induce.
- (344) Second, the Commission has reviewed evidence on the impact of the 2014 blackout of the German language public broadcaster channels ARD and ZDF on Belgacom's subscriber numbers. That blackout lasted for a period of 11 months. While Belgacom conducted an impact assessment based on data for the initial weeks of the blackout, that historic exercise was stopped after a few weeks and the relevant underlying data from set-top boxes for the entire blackout period is no longer available. Moreover, the estimated impact of the ARD/ZDF blackout on Belgacom subscribers proved very sensitive to whether one used the limited historic data that was available for the weeks following the start of the blackout or whether one tried to infer the change in number of ARD/ZDF viewers relative to that of ARD/ZDF non-viewers between the period before the blackout and the period after the blackout. Hence, there was significant uncertainty and variation in the measurement of the impact of the ARD/ZDF blackout on Belgacom's subscriber base.
- (345) Moreover, while the ARD/ZDF blackout occurred recently on Belgacom's platform and had a significant duration, ARD/ZDF as German language channels are niche channels for Belgacom subscribers in that they reach a much smaller audience and they probably have a different importance for their relevant audience than the general interest channels Vier and Vijf have.
- (346) For these reasons the Commission considers that no reliable conclusions on the likely effect of switching in the total input foreclosure strategies considered here can be drawn from the evidence it has examined on the ARD/ZDF blackout.
- (347) Third, the Commission has considered results from a survey of TV customers' behaviour conducted by a survey company. The survey was commissioned by

²³⁴ It is also unclear how the analyst report (which forms the basis of the Notifying Parties' assessment of the CBS/Time Warner Cable blackout) has estimated the impact of the blackout on Time Warner's subscriber numbers or how the effect of the blackout on subscriber numbers was separated from any other effects potentially unrelated to the blackout. This raises further questions regarding the reliability of this estimate.

²³⁵ Using the assumption that the blackout of a channel induces a switching rate that is proportional to the channel's viewer share.

Belgacom during the proceedings. This survey specifically investigated TV subscribers' likely reactions to the hypothetical case where Vier and Vijf were no longer available on Belgacom's platform. Therefore, the survey directly addressed the questions needed to assess the likely switching from Telenet's rivals in event of a blackout of Vier and Vijf.

- (348) While the results of that survey are third party confidential information, the Commission considers that the responses of the survey provide the most reliable basis to assess the likely degree of switching that total input foreclosure strategies would induce.²³⁶ The survey was conducted by interviews via telephone of a representative sample of 1 000 customers of retail TV services. The Commission had access to the questionnaire and the raw data underlying the results of the survey and considered the results to be reliable.
- (349) In the analysis that follows, the Commission therefore uses the estimate of the likely switching rate based on the confidential Belgacom survey.

Joint total input foreclosure of Belgacom, Snow and TV Vlaanderen

- (350) A total input foreclosure strategy by De Vijver Media targeting all rival platforms (Belgacom, Snow and TV Vlaanderen) jointly will be profitable if the likely actual degree of switching exceeds the critical switching rate for this scenario. Deriving the latter requires estimates of the costs and benefits of the total foreclosure strategy.
- (351) The costs of the total foreclosure strategy consists in the loss of advertising revenues and licence fees that such a strategy would entail for De Vijver Media. Based on 2013 figures, advertising revenues on the main rival TV distributors are estimated to be around EUR [...] million while licence fees amounted to EUR [...] million.
- (352) It has been assumed that a reduction in advertising revenues leads to an equal reduction in De Vijver Media's profits, as De Vijver Media's costs primarily relate to content investment and are therefore unrelated to the number of TV distributors or the number of subscribers served.²³⁷ It has further been assumed that 100 % of the losses incurred by De Vijver Media are incurred by Telenet.²³⁸
- (353) The benefits from the total foreclosure strategy correspond to the additional profits Telenet would earn from new TV subscribers switching from the foreclosed rival TV distributors to Telenet. For the purposes of the analysis, the Commission has assumed that the average contribution margin earned by Telenet on each switching

²³⁶ The survey contains a number of questions that are very similar to questions in another survey of TV customers' behaviour previously commissioned by Telenet from the same survey company. The relevant responses to the survey question on whether subscribers would stay with their current TV provider if Vier and Vijf were no longer available on that platform consisted of five categories: 'definitely', 'probably', 'neutral', 'probably not', and 'definitely not'. To estimate the likely switching rate based on these responses, the Commission has followed an approach proposed by Telenet in another context and assigned a 65 % switching probability to respondents that indicated they would 'definitely not' stay with their current provider and a 35 % switching probability to respondents that indicated that they would 'probably not' stay with their current provider.

²³⁷ Overall, the Commission considers that this is a reasonable assumption. On the one hand, the assumption will lead to an overestimation of the loss to De Vijver Media if there are variable costs. On the other hand, the Parties claim that the advertising loss may be higher than the proportional reduction in viewers.

²³⁸ This corresponds to the case where Telenet has to fully compensate De Vijver Media for upstream losses. Alternative scenarios where some of the upstream costs are borne by De Vijver Media would give Telenet higher incentives to foreclose.

subscriber corresponds to Telenet's weighted average margin²³⁹ of existing TV subscribers of EUR [...] per month and per subscriber (which includes revenues from non-TV related products generated from existing TV subscribers). In other words, the Commission assumes for its baseline results that, on average, switching subscribers would take up the same product bundles and generate the revenues and costs per subscriber as Telenet's existing customer base of TV subscribers.²⁴⁰

- (354) As explained in Annex A, however, that baseline assumption on the additional contribution margin derived from switching subscribers may contain two biases because the distribution of Telenet's existing customers across product types may not match the distribution of customers on rival TV distributors across product types that would switch to Telenet. Moreover, switching customers may not switch the entire bundle of products with their current TV provider to an alternative provider. The Commission has therefore also calculated an alternative margin measure based on Belgacom's actual distribution of subscribers across product types and based on results from the survey conducted by Belgacom on whether switching subscribers were likely to switch all of their products or just their TV subscription. While this margin estimate contains third party confidential information and hence cannot be reported, the Commission's conclusions in the following recitals on the likely incentive to engage in each of the three foreclosure strategies does not change if this alternative margin estimate is used.
- (355) Based on these inputs, the Commission has then determined the 'critical switching rate' for the foreclosure strategy which is the minimum number of subscribers that would need to switch from rival TV distributors to Telenet for the strategy to be profitable, expressed as a fraction of these distributors' TV subscribers. In this calculation, the Commission has also accounted for the fact that advertising revenues on switching subscribers would not be lost by De Vijver Media, as these are recouped on the Telenet platform. Details on these calculations are set out in Annex A.
- (356) The 'critical switching rate' for a total input foreclosure of all major rival TV distributors is [5-10]* %. In other words, a total input foreclosure strategy of all rival TV distributors would be more profitable for Telenet and De Vijver Media than a distribution of Vier and Vijf to rival TV distributors under the conditions prior to the Transaction if [5-10]* % or more of subscribers on rival TV distributors would switch to Telenet as the result of the strategy.
- (357) The Commission's estimate of the likely actual switching rate based on the responses to the confidential Belgacom survey significantly exceeds this critical switching rate of [5-10]* %.²⁴¹ This implies that Telenet could likely substantially increase its profits relative to the status quo under the total input foreclosure scenario jointly targeting all rivals even if it has to compensate De Vijver Media for all lost profits.

²³⁹ Calculated as the difference between ARPU and the sum of (i) direct TV telephony costs, (ii) customers acquisition costs, as well as (iii) copyright costs relating to content.

²⁴⁰ Telenet considered that the average contribution margin on existing customers is a reasonable estimate for the margin on new subscribers in response to the Commission's data RFI of 19 September 2014. That assumption was also used in one of the scenarios in the Notifying Parties submissions. See 'M 7194_RBB_Response to 6(1)(c) Decision', submitted on 6 October 2014.

²⁴¹ It also significantly exceeds the critical switching rate under the alternative margin estimate.

- (358) The Commission therefore considers that post-Transaction De Vijver Media and Telenet are likely to have a strong incentive to engage in a total input foreclosure strategy targeting all main rival TV distribution platforms jointly.

Total input foreclosure of Belgacom individually

- (359) The Commission has also assessed the incentive for total input foreclosure of Belgacom individually. Belgacom is the closest competitor of Telenet for the provision of TV services in the Telenet footprint. This suggests that Belgacom would be one of the key targets of a potential total input foreclosure by De Vijver Media. If Belgacom alone is prevented from accessing Vier and Vijf, it can be expected that Telenet would attract most of the subscribers switching from Belgacom, although some subscribers might choose instead to switch to Snow and TV Vlaanderen.
- (360) At the same time, Belgacom is also the second most important source of licensing and advertising revenues for De Vijver Media (after Telenet). The trade-off between these two components determines whether a total foreclosure of Belgacom alone would be profitable.
- (361) The calculations carried out by the Commission and described in more detail in Annex A indicate that a total foreclosure strategy of Belgacom individually would be profitable if at least [5-10]* % of Belgacom's subscribers would switch away from Belgacom as a result of this strategy. That critical switching rate is derived using the same approach and assumptions as the calculation of critical switching rate for the joint foreclosure of all rival TV distributors. To account for switching to smaller rival TV distributors that would continue to carry Vier and Vijf, it is further assumed that subscribers switching away from Belgacom would choose alternative TV distribution platforms on which Vier and Vijf is still available proportionally to each alternative platform's existing subscriber base. Due to this adjustment, the critical switching rate for this scenario is slightly higher than that under scenario of total input foreclosure of all rival TV distributors.
- (362) The Commission's estimate of the likely actual switching rate based on the responses to the confidential Belgacom survey also significantly exceeds the critical switching rate of [5-10]* %.²⁴² This implies that Telenet could likely substantially increase its profits relative to the status quo under the total input foreclosure scenario targeting Belgacom individually even if it has to compensate De Vijver Media for all lost profits.
- (363) The Commission therefore considers that post-Transaction De Vijver Media and Telenet likely have a strong incentive to engage in a total input foreclosure strategy targeting Belgacom individually.

Total input foreclosure of Snow and TV Vlaanderen

- (364) To estimate the critical switching rate for a total input foreclosure strategy targeted at Snow and TV Vlaanderen, the Commission has again followed the same approach and assumptions set out in the previous section. Under such a foreclosure strategy, Snow and TV Vlaanderen's subscribers could still watch the channels Vier/Vijf if they switched to either Telenet or Belgacom. Assuming that Belgacom and Telenet capture a share of this churn which is proportional to their respective retail market shares, the critical switching rate is [5-10]* %.

²⁴² It also significantly exceeds the critical switching rate under the alternative margin estimate.

- (365) Again, the estimate of the likely actual switching rate based on the responses to the confidential Belgacom survey also significantly exceeds the critical switching rate of [5-10]*%.²⁴³ This implies that Telenet could likely substantially increase its profits relative to the status quo under the total input foreclosure scenario targeting Snow and TV Vlaanderen only, that is, even if it did not foreclose Belgacom and even if it has to compensate De Vijver Media for all lost profits.
- (366) The Commission therefore considers that post-Transaction De Vijver Media and Telenet likely have a strong incentive to engage in a total input foreclosure strategy targeting Snow and TV Vlaanderen individually.

Foreclosure of Stievie and potential new entrants (Mobistar or new OTTs)

- (367) While the Commission has not quantitatively assessed the impact of a total foreclosure of Stievie or potential new entrants such as Mobistar or new OTTs, it considers that De Vijver Media would also have an incentive to strategically withhold licencing of Vier and Vijf from these rivals.
- (368) As regards Stievie, an internal Telenet presentation dated 20 December 2013 and prepared for Telenet's Board of Directors in the context of 'Project Virginia', reports on page 5 that:
- [...] *²⁴⁴ [...] *²⁴⁵
- (369) The same presentation, on page 6, states that [...] *²⁴⁶. Furthermore, on page 8, [...] *²⁴⁷
- (370) The presentation clearly sets out [...] *
- (371) The Notifying Parties noted that any input foreclosure targeted at Stievie would provoke a retaliation by Medialaan via a threat not to license VTM to Telenet. The Commission considers that the losses to Medialaan from not licensing VTM to Telenet make this a non-credible threat. Telenet is the platform through which most viewers watch VTM and, hence, through which VTM derives most of its advertising revenues. Stievie has a customer base of only around 30 000 viewers.²⁴⁸ It seems unlikely that Medialaan would risk the much more substantial revenues that it derives from VTM for the very limited revenues generated by Stievie.
- (372) The Notifying Parties also noted that the contract between De Vijver Media and Stievie runs at least until [...] *. In that respect, the Commission notes that the contract protects Stievie from being denied access to Vier and Vijf until expiration of the contract, but that De Vijver Media could engage in input foreclosure after the contract has expired.
- (373) As regards potential OTT players, total input foreclosure is a likely profitable scenario for De Vijver Media.
- (374) First, while the Notifying Parties noted that that churn attracted from OTT services would only bring Telenet the TV margins, the loss to De Vijver Media is not

²⁴³ It also significantly exceeds the critical switching rate under the alternative margin estimate.

²⁴⁴ These refer to Medialaan (formerly VMMA), the public broadcaster in the Flemish Community (VRT), and the fully owned subsidiary of De Vijver Media which operates Vier and Vijf (SBS Belgium NV).

²⁴⁵ Annex 5.4a to Form CO, p. 301, emphasis in original.

²⁴⁶ Annex 5.4a to Form CO, p. 302.

²⁴⁷ Annex 5.4a to Form CO, p. 304.

²⁴⁸ Form CO, paragraph 541.

expected to be sizeable too, at least in the short term. Only the licence fees and potentially very limited advertising revenues would be foregone.

- (375) Second, a total foreclosure of potential OTT players would limit the new entrants' ability to launch a TV offer that could credibly compete with the established offer of Telenet. This would constitute a strong entry barrier which would allow Telenet to retain customers that would have instead switched to these alternative TV distributors absent the Transaction. The benefit of preventing or hampering the emergence of OTT players with new business models that challenge the business model of established TV distribution platforms is a likely further benefit of such foreclosure strategies.
- (376) Analogously to the OTT threat, the evidence collected suggests that after the Transaction, Telenet would be in a position to protect its dominance in the market for the retail provision of TV services by refusing to enter into a carriage agreement with Mobistar. Mobistar currently intends to enter the market for the retail provision of TV services in Telenet's footprint through a TV offering delivered via access to the Telenet cable network. However, without access to Vier and Vijf, Mobistar would not be able to launch its services at all. In order to be legally able to launch its offer, Mobistar needs to enter into a carriage agreement with, among others, De Vijver Media for the broadcasting of Vier and Vijf. By refusing to enter into such a carriage agreement, Telenet could effectively prevent Mobistar from entering the market and therefore protect its current position in the market for the retail provision of TV services in the Telenet footprint.²⁴⁹

Reply to the Notifying Parties' quantitative assessment of total input foreclosure presented in the reply to the Article 6(1)(c) Decision

- (377) As summarised above, one of the economic reports submitted by the Notifying Parties²⁵⁰ concludes that if it is assumed that all new Telenet subscribers take a triple-play bundle, [5-10]* % to [5-10]* % of all Telenet's rivals' subscribers would have to switch to Telenet to make total input foreclosure profitable. If instead new subscribers attracted by Telenet are assumed to take only a single-play TV package, a switching rate of between [10-20]* % to [20-30]* % of all Telenet's rivals' subscribers would be required.
- (378) First, as a preliminary remark, the Commission notes that the analysis conducted in this first economic study is based on inputs that are extracted from the Form CO relating to the year 2012. In contrast to the Commission's analysis, it is not based on the most updated and granular data available from the Notifying Parties.²⁵¹ This could in principle undermine the accuracy of the results.
- (379) Second, the scenarios considered in which all new subscribers joining Telenet bring only the single play margin²⁵² appear to be overly restrictive. In particular, amongst

²⁴⁹ The incentive by Telenet to foreclose Mobistar is further reinforced by the fact that as a consequence of a customer loss to Mobistar, Telenet could not only lose the single play TV margins, but also the entire triple and quadruple play margins.

²⁵⁰ See 'M 7194_Oxera_Response to 6(1)(c)'.

²⁵¹ In a number of RFIs addressed to Telenet and De Vijver Media, the Commission has asked the Parties to provide detailed data relating to 2013. This is the data used by the Commission in its assessment and by the Parties in their second economic report discussed below.

²⁵² The Commission notes that the single play margins attributed by Oxera to single play TV services are in fact calculated based on 'Single play (Internet) Revenue', as detailed in the file 'M 7194_Oxera_margins_analysis.xlsx' submitted to the Commission.

those subscribers that currently have a multiple play package, it is reasonable to believe that a significant portion of these customers would switch for all the services they subscribe to.²⁵³ This is also confirmed by the results of the confidential survey commissioned by Belgacom, which forms the basis of the Commission's sensitivity analysis of critical switching rates and which included data on whether consumers would switch only one or several services.

- (380) The scenarios considered by the Notifying Parties in which all new subscribers joining Telenet acquire a triple play package appear more in line with the Commission's findings. The economic report suggests that in order for total input foreclosure to be profitable, Telenet's rivals would have to lose at least [5-10]* % to [5-10]* % of their customer base.
- (381) As regards the second economic report submitted by the Notifying Parties²⁵⁴, the Commission first notes that the report itself acknowledges that 'Telenet has a high downstream market share on a market with high revenues, and DVM a relatively low market share on the upstream market with much lower revenues'. This appears to support the input foreclosure theory of harm.
- (382) Analogously to the Commission's analysis, one of the scenarios analysed in that second economic report considers the profitability of total input foreclosure assuming a [5-10]* % switching from Telenet's rivals and assuming that the margins brought by these customers to Telenet are the same as the average margin earned by Telenet's on its current customer base. The results of that analysis suggest that under this margins assumption, a level of switching just above [5-10]* % would make total input foreclosure profitable.

Partial foreclosure

Introduction

- (383) The Commission also assessed whether De Vijver Media could discriminate against one or more rival TV distributors by raising the licence fees it charges for Vier and Vijf. As Vier and Vijf would remain on rival TV distribution platforms, this strategy does not lead to a profit sacrifice for De Vijver Media in the form of lower advertising revenues. Instead, the strategy would lead to an increase in revenues for De Vijver Media (due to the higher negotiated licence fees). By weakening the competitive constraint of rival TV distributors, such a strategy could also benefit Telenet and increase Telenet's prices to and profits from subscribers, in particular if the increase in licence fees that rival TV distributors must pay results in higher retail prices for rival TV distributors' TV subscriptions. This section describes the Commission's assessment on whether De Vijver Media would have an incentive for such partial foreclosure.

The Notifying Parties' Reply to the Article 6(1)(c) Decision

- (384) In their reply to the Article 6(1)(c) Decision, the Notifying Parties raised two main arguments against partial input foreclosure based on an increase in the licence fee to Telenet's rivals.

²⁵³ A significant number of multiple play customers are likely to realise that by terminating their TV services only and keeping the other services they subscribe to, they lose the significant discount that is typically granted to customers purchasing a bundle of services.

²⁵⁴ See 'M 7194_RBB_Response to 6(1)(c) Decision', submitted on 6 October 2014.

- (385) First, according to the Notifying Parties, De Vijver Media is unlikely to have the ability to increase the licence fee charged to Telenet's competitors after the Transaction. The Notifying Parties claim that De Vijver Media already has an incentive to obtain the highest possible licence fee from Telenet's competitors and that De Vijver Media's bargaining position relative to these rivals would not be improved significantly following the Transaction. This argument rests on the assumption that total input foreclosure is not profitable according to the Notifying Parties' simulations and therefore it would not be credible for De Vijver Media to use the threat of total input foreclosure to extract higher licence fees from Telenet's rival TV distributors after the Transaction.
- (386) Second, another argument raised by the Notifying Parties relates to the question of whether the price increase negotiated by De Vijver Media with Telenet's rivals after the Transaction would be sufficient to induce an increase in the price of TV services. As the licence fees paid to De Vijver Media are likely to represent only a small fraction of Telenet's rivals' direct costs, an increase in such fees is unlikely to affect their costs in a significant way and would hence not affect their subscription fees or ability to compete on price.

The Commission's Assessment

- (387) In the Commission's assessment, the Transaction strengthens the vertically integrated entity's bargaining position in negotiations with rival TV distribution platforms over licence fees for De Vijver Media's channels compared to De Vijver Media's bargaining position in the absence of the Transaction.
- (388) If TV distributors fail to reach an agreement with De Vijver Media, De Vijver Media can threaten to withhold Vier and Vijf from these TV distributors. This threat will be significantly stronger after the Transaction as the combined entity would internalise the benefits that such a total input foreclosure would generate for Telenet in the form of subscribers switching to Telenet. Compared to the pre-Transaction situation, after the Transaction De Vijver Media will therefore have less to lose in the event of a failure to reach an agreement which would allow it to drive a harder bargain and obtain better licence fees.
- (389) First, the Commission has shown that De Vijver Media can use the threat of total foreclosure (which has been shown by the Commission to likely represent a profitable strategy) in its negotiations over the licence fees with the downstream rivals.
- (390) Second, even if total foreclosure were not a profitable strategy, the bargaining power of De Vijver Media is increased by the Transaction because a failure to reach agreement with a downstream TV distributor would harm De Vijver Media less than it did absent the Transaction. This is because after the Transaction De Vijver Media will internalise the profits of Telenet and these profits increase if Telenet's downstream rivals cannot access Vier and Vijf. This improved threat point for De Vijver Media allows the upstream division to negotiate a higher licence fee with downstream rivals.
- (391) Therefore, the Commission disagrees with the Notifying Parties' argument that the Transaction would not strengthen De Vijver Media's bargaining position.
- (392) The Commission further considers that a change in bargaining position would have a significant effect on the licence fees charged by De Vijver Media.
- (393) First, for the combined entity to accept a carriage agreement for Vier and Vijf with rival TV distributors, the terms of the agreement must result in profits for the

combined entity that are at least as high as its profits that can be achieved absent an agreement. The analysis of the profitability of total input foreclosure illustrated above indicates that the combined entity's profits under total foreclosure would be significantly higher than under the current agreements. The amount by which the sum of Telenet and De Vijver Media's profits from total input foreclosure exceed the profits in the situation prior to the Transaction provides hence a lower bound on the increase in licence fees which De Vijver Media would be able to obtain from Telenet's rivals after the Transaction.

- (394) Second, the increase in licence fees is likely to be higher than that lower bound, because the combined entity can guarantee itself the profits under total foreclosure even if it had no bargaining power in negotiations with platforms. However, it is likely that both TV broadcasters and TV distributors have some bargaining power in bilateral negotiations. As a result the Notifying Parties will typically reach an agreement in which each party obtains some share of the surplus generated by reaching an agreement compared to the situation where no agreement is reached. This is the case in the situation prior to the Transaction as De Vijver Media receives some licence fees from TV distributors which contribute to De Vijver Media's profits together with advertising revenues accruing to De Vijver Media as a result of being carried by the TV distributor. This implies that De Vijver Media already has some bargaining power in negotiations with TV broadcasters prior to the Transaction. This implies in turn that the increase in licence fees will likely be higher than the increase in profits under a total foreclosure.
- (395) Third, a conclusion that Telenet's rivals will face a very significant increase in licence fees after the Transaction is also plausible from the perspective of these rivals. The evidence on likely subscriber switching in the event the rivals do not carry Vier and Vijf indicates that rivals risk losing a significant part of their subscriber revenues and hence profits under a total foreclosure scenario. In order to avoid these significant losses under total foreclosure, rival TV distributors are likely to accept a substantial increase in the licence fees they pay to De Vijver Media if such an increase is necessary to make an agreement more profitable for the combined entity than total foreclosure.
- (396) The reasoning set out in the preceding recitals can be formalised in a simple economic bargaining framework which is presented in Annex A to this Decision. Such a framework was also used by the Federal Communications Commission ('FCC') in its 2011 investigation of the Comcast/NBCU merger and in its 2004 analysis of the partial acquisition of DirectTV by News Corporation.
- (397) While simple and relatively abstract, the bargaining framework in Annex A captures, in the Commission's view, the most important factors on how the Transaction will likely affect the bargaining outcome between the combined entity and Telenet's rivals.
- (398) The Commission has also used that bargaining framework to predict the size of the expected increase in the licence fee that Belgacom will pay to De Vijver Media. As this quantification relies on confidential third party data (in particular information about the likely actual switching based on Belgacom's survey as well as Belgacom's margins per subscriber and Belgacom's distribution of customers) detailed results cannot be reported here. However, the bargaining framework predicts licence fees to increase severalfold and by more than the increase in profits from the corresponding total foreclosure scenario.
- (399) The Commission considers that the quantification within that bargaining framework shows that the improvement in De Vijver Media's bargaining position resulting from

the Transaction is likely to lead to a substantial increase in licence fees charged by De Vijver Media to Belgacom.

- (400) As the same mechanism also applies to smaller actual competitors (such as Snow, TV Vlaanderen, Stievie), these conclusions also carry over to a corresponding analysis of expected changes in licence fees for smaller players under partial foreclosure scenarios.
- (401) Analogously to total input foreclosure, the Commission has not quantitatively assessed the impact of a partial foreclosure of potential new entrants, such as Mobistar or new OTTs. However, the Commission considers that partial foreclosure of smaller rivals (in the form of an increase in the licence fee required by De Vijver Media) would be a likely scenario after the Transaction.
- (402) In the case of a failure in the negotiations with potential entrants over the licence fee for Vier and Vijf, after the Transaction De Vijver Media would internalize the benefits that accrue to Telenet from facing potential rivals with a weaker TV offer (i.e. an offer that does not feature Vier and Vijf). Therefore, after the Transaction, the licence fee that potential entrants would need to offer to De Vijver Media in order to enter into an agreement for Vier and Vijf will likely be considerably higher than prior to the Transaction. This is because after the Transaction the licence fee would need to include an additional compensation for the fact that by licensing Vier and Vijf Telenet will face new rivals that are more competitive than in the case in which they cannot offer Vier and Vijf on their platforms.

5.4.1.4. Effects of input foreclosure

- (403) In general, input foreclosure will raise competition concerns when it leads to increased prices, reduced output, choice or quality of goods and services, or when it diminishes innovation or otherwise negatively influences parameters of competition in the downstream market.²⁵⁵
- (404) One way in which input foreclosure can lead to these effects is by raising barriers to entry to potential competitors.²⁵⁶ If the vertically integrated firm does not supply potential downstream entrants, or supplies them on less favourable terms than absent the merger, vertical integration may lead to foreclosure of potential competition in the downstream market. The mere increased likelihood that the vertically integrated entity would carry out a foreclosure strategy post-Transaction may already create a strong deterrent effect on potential entrants.²⁵⁷
- (405) A second way in which input foreclosure can lead to anticompetitive effects is by increasing the costs of existing downstream rivals, thereby leading to an upward pressure on their sales prices.²⁵⁸
- (406) In this case, input foreclosure by De Vijver Media would lead to both types of anticompetitive effects. It would indeed raise barriers to entry in the market for the provision of retail TV services within the Telenet footprint. This would strengthen the dominant position of Telenet in this market. It would also increase the costs of Telenet's downstream rivals, thereby reducing the competitive constraint exerted by these rivals on Telenet. This would also strengthen Telenet's dominant position.

²⁵⁵ See Non-Horizontal Merger Guidelines, paragraph 10, footnote 1, and paragraph 47.

²⁵⁶ See Non-Horizontal Merger Guidelines, paragraph 49.

²⁵⁷ See Non-Horizontal Merger Guidelines, paragraph 49.

²⁵⁸ See Non-Horizontal Merger Guidelines, paragraph 48

- (407) In the following recitals, the Commission will first establish that Telenet holds a dominant position on the market for the retail provision of TV services. Subsequently, it will consider whether the Transaction would strengthen Telenet's dominant position by raising barriers to entry or raising the costs of downstream rivals.

Telenet holds a dominant position within its footprint

- (408) A dominant position is 'a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant markets by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.'²⁵⁹
- (409) The Commission finds that Telenet holds such a dominant position on the market for the retail provision of TV services in its footprint. Telenet would also be dominant in case a narrower product market definition were to be used, namely the market for the retail provision of FTA/basic pay TV services.
- (410) That finding is based on Telenet's high market share and several other factors.
- (411) Telenet has a very high market share in the market for the retail provision of TV services. According to the Notifying Parties' estimates, Telenet held a [60-70]* % market share by subscribers²⁶⁰ and a [70-80]* % market share by revenue in 2013.²⁶¹
- (412) The Notifying Parties' estimate of Telenet's market share by subscribers likely underestimates its market share because of the way it has been calculated. More specifically, the Notifying Parties calculated Telenet's market share as a percentage of a group of subscribers that includes people who have 'Free Sat', meaning people who do not have any subscription with a satellite provider but simply use a satellite dish to receive the free-to-air channels broadcast via satellite. None of the Flemish channels are broadcast in this way and hence, 'Free Sat' is a service that is likely not a substitute for the services offered by Telenet or TV Vlaanderen, which offers satellite services against a subscription fee. If 'Free Sat' is excluded from the market, Telenet has a market share of [70-80]* % by subscribers. Based on the financial data provided by Telenet to investors, its market share by subscribers on the market for retail TV services is 71 %.²⁶²
- (413) Telenet's market share by subscribers on a more narrow market, namely the market for retail FTA/basic pay TV services (so excluding premium pay TV services), is similar to Telenet's market share by subscribers on the market for retail TV services. This is because subscribers purchase premium pay TV services on top of basic pay TV services. Hence, all subscribers to premium pay TV services also have a subscription to basic pay TV services. The number of subscribers to basic pay TV services is therefore similar to the number of subscribers that either have basic pay TV services or basic pay TV plus premium pay TV services.
- (414) Telenet has also consistently held a very high market share in the more narrow market for retail basic pay TV services (so excluding FTA and premium pay TV

²⁵⁹ Judgment of 14 February 1978, United Brands Company and United Brands Continental BV v Commission, C-27/76, ECLI:EU:C:1978:22, paragraph 65.

²⁶⁰ Reply of Liberty Global to the request for information of 19 November 2014, Table 4 (replacing table 4 in the Form CO).

²⁶¹ Reply of Liberty Global to the request for information of 19 November 2014, Table 5 (replacing table 5 in the Form CO).

²⁶² Telenet, Investor & Analyst Toolkit, Q3 2014, [ID 1030] (mentioning that Telenet's combined network passes 2 910 700 homes and that Telenet has 2 073 000 cable TV subscribers).

services). According to the Notifying Parties' estimates, Telenet held a market share of [70-80] % by subscribers on that market in 2013.²⁶³

- (415) As mentioned in recital (127) and (128), the Commission does not need to decide whether the relevant product market includes satellite and digital terrestrial television or not. The abovementioned figures on Telenet's market share on the market for the retail provision of TV services include satellite and digital terrestrial television. If those services were excluded, Telenet's market share would be even higher.
- (416) Regardless of the exact method of calculation and the exact product market definition, it is clear that Telenet has a very large market share. Very large market shares – in excess of 50 % – are considered in themselves, and but for exceptional circumstances, evidence of the existence of a dominant position.²⁶⁴
- (417) Apart from fact that Telenet currently holds a high market share, other factors also indicate that Telenet has a dominant position in the market for retail pay TV services in its footprint.
- (418) First, Telenet's high market share is relatively stable, indicating that its market power is durable. At present, Belgacom is Telenet's main competitor in its footprint. Since it started offering digital TV in 2005, Belgacom has gained market share from Telenet but this shift is gradual and Telenet's market share has remained high.

Table 3 – Market shares based on revenue for the retail provision of TV services within Telenet's footprint

Telenet footprint					
	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Telenet	[80-90]* %	[80-90]* %	[70-80]* %	[70-80]* %	[70-80]* %
Belgacom ²⁶⁵	[10-20]* %	[10-20]* %	[10-20]* %	[10-20]* %	[20-30]* %
SNOW	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %
TV Vlaanderen	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %	[5-10]* %

Source: Form CO, paragraph 71 (referring to Telenet and Dataxis as source of the data) and reply of 19 November 2014 from Liberty Global to a request for information, table 5

²⁶³ Reply of Liberty Global to the request for information of 19 November 2014, Table 6 (replacing table 6 in the Form CO).

²⁶⁴ Judgment of 3 July 1991, AKZO Chemie BV v Commission, C-62/86, ECLI:EU:C:1991:286, paragraph 60; and judgment of 7 October 1999, Irish Sugar plc v Commission, T-228/97 ECLI:EU:T:1999:246, paragraph 70.

²⁶⁵ Including the market share of Belgacom's subsidiary Scarlet.

Table 4 – Market shares based on subscribers for the retail provision of pay TV services within Telenet’s footprint

Telenet footprint					
	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Telenet	[80-90]* %	[80-90]* %	[70-80]* %	[70-80]* %	[70-80]* %
Belgacom	[10-20]* %	[10-20]* %	[10-20]* %	[10-20]* %	[20-30]* %
SNOW	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %
Scarlet	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %	[0-5]* %
TV Vlaanderen	[0-5]* %	[5-10]* %	[5-10]* %	[5-10]* %	[5-10]* %

Source: Form CO, paragraph 70 (referring to Telenet and Belgacom as source of the data) and reply of 19 November 2014 from Liberty Global to a request for information, table 6

- (419) Second, the durability of Telenet’s market power is also shown by its low churn rates. Churn rates are an indicator of the number of subscribers that leave Telenet and are expressed as a percentage of all Telenet subscribers. Telenet’s net churn rate takes into account both subscribers that leave Telenet and those that join. Hence, a net churn rate of 2 % means that Telenet’s total number of customers has declined by 2 %. Gross churn rates only measure the number of subscribers that leave Telenet, and disregard the incoming subscribers. Hence, a gross churn rate of 2 % means that Telenet lost 2 % of its subscribers, but it does not indicate anything about the number of subscribers that joined Telenet during that same period.
- (420) Telenet’s gross churn rates are low and show a downward trend. In other words, few subscribers leave Telenet and the proportion of subscribers that leave is decreasing.

Table 5 – Telenet’s gross churn rate between 2011 and 2014

	2011	2012	2013	2014*
Cable TV gross churn rate	9.3%	9.9%	8.0%	7.6%
	* data available until Q3 2014 ²⁶⁶			

Source: Telenet Investor & Analyst Toolkit of Q4 2011²⁶⁷ & Q3 2014²⁶⁸

- (421) Telenet’s net churn rates are also low and also show a downward trend. In other words, Telenet’s total number of subscribers does not change much and changes less and less.

Table 6- Telenet’s net churn rate by customers and percentage between 2011 and 2014

	2010	2011	2012	2013	2014*
Cable TV customers	2 274 400	2 198 500	2 122 700	2 092 500	2 073 800
Net churn rate (by customers)	-	75 900	75 800	30 200	18 700
(by percentage)	-	3.34%	3.45%	1.42%	0.89%

* data available until Q3 2014

Source: Telenet Investor & Analyst Toolkit of Q4 2011²⁶⁹ & Q3 2014²⁷⁰

- (422) The downward trend of Telenet’s churn rate is also confirmed by Telenet’s statements to investors. In 2013, for instance, Telenet’s CEO stated that churn levels reached their lowest levels since Belgacom launched digital TV in 2005: ‘We also continued to notice a sharp drop in our basic cable TV churn which reached its lowest level since the launch of digital TV by our competitors in 2005.’²⁷¹
- (423) One of the reasons for Telenet’s low churn rates is the fact that many Telenet subscribers purchase not only cable television from Telenet but also internet, fixed phone and mobile phone services. Consumers who purchase multiple products from Telenet are less likely to switch, since they have to find an alternative not just for their TV services, but also for other services such as internet, fixed phone and mobile phone. If they terminate their TV services only and keep the other services, they lose the significant discount that is typically granted to customers purchasing a bundle of services. Telenet itself acknowledges that these bundled offers, also known as ‘multiple-play’ products, reduce churn: ‘Telenet has derived, and believes it can continue to derive, substantial benefits from the trend towards bundled subscriptions, through which it is able to sell more products to individual subscribers, resulting in significantly higher ARPU and, in its experience, the reduction of customer

²⁶⁶ Telenet’s Investor & Analyst Toolkit gives annualised churn figures for each quarter. The figure for 2014 was calculated by taking the average of the annualised churn figures for the first three quarters of 2014.

²⁶⁷ Telenet Investor & Analyst Toolkit Q4 2011, Operating statistics, [ID 1117] (which contains data relating to 2011).

²⁶⁸ Telenet Investor & Analyst Toolkit Q3 2014, Operating statistics, [ID 1030] (which contains data relating to 2014, 2013 and 2012).

²⁶⁹ Telenet Investor & Analyst Toolkit Q4 2011, Operating statistics, [ID 1117].

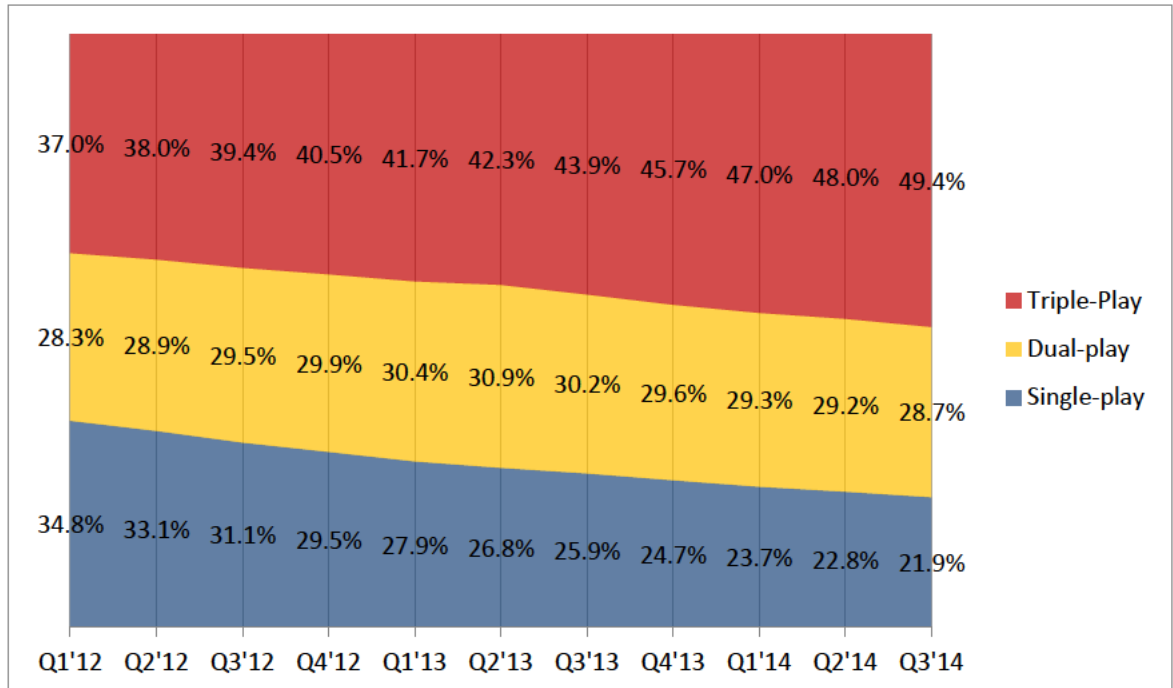
²⁷⁰ Telenet Investor & Analyst Toolkit Q3 2014, Operating statistics, [ID 1030].

²⁷¹ Full Year 2013 Telenet Group Holding NV Earnings Conference Call, 13 February 2014, p. 3 [ID 1031].

churn.²⁷² In 2014, Telenet confirmed that multiple play packages reduce churn: ‘a triple-play customer is churning 7.5 times less than a single-play customer and for quad play, customer churn is even below 1 % on an annualized level’.²⁷³

- (424) A very significant proportion of Telenet’s subscribers purchases multiple services from Telenet. According to Telenet’s most recent financial data, 49 % of all Telenet subscribers have a triple-play package (TV, internet and fixed phone services), while 29 % have purchased dual-play, meaning two of the three products.²⁷⁴ Only a minority of Telenet’s subscribers, namely 22 %, have purchased only one type of service.²⁷⁵ Moreover, the number of customers who purchase dual or triple play is increasing, while the number of customers who purchase single play is decreasing.

Figure 1 – Evolution of multiple-play subscribers



Source: Telenet Investor & Analyst Toolkit Q3 2014²⁷⁶

- (425) Because subscribers with multiple play packages are less likely to churn and because Telenet has more and more multiple play subscribers, its market share is likely to remain high in the coming years. This is also confirmed by the responses to the market investigation. Several respondents mentioned that the increase in multiple play packages results in a ‘lock’ on the retail market.²⁷⁷

²⁷² Telenet, Working on your future – Financial half year report 2014, [ID 1029], page 10.

²⁷³ Telenet, Edited transcript TNET.BR – Q1 2014 Telenet Group Holding NV Earnings Conference Call, [ID 1143].

²⁷⁴ Telenet Investor & Analyst Toolkit Q3 2014, Operating statistics, [ID 1030]

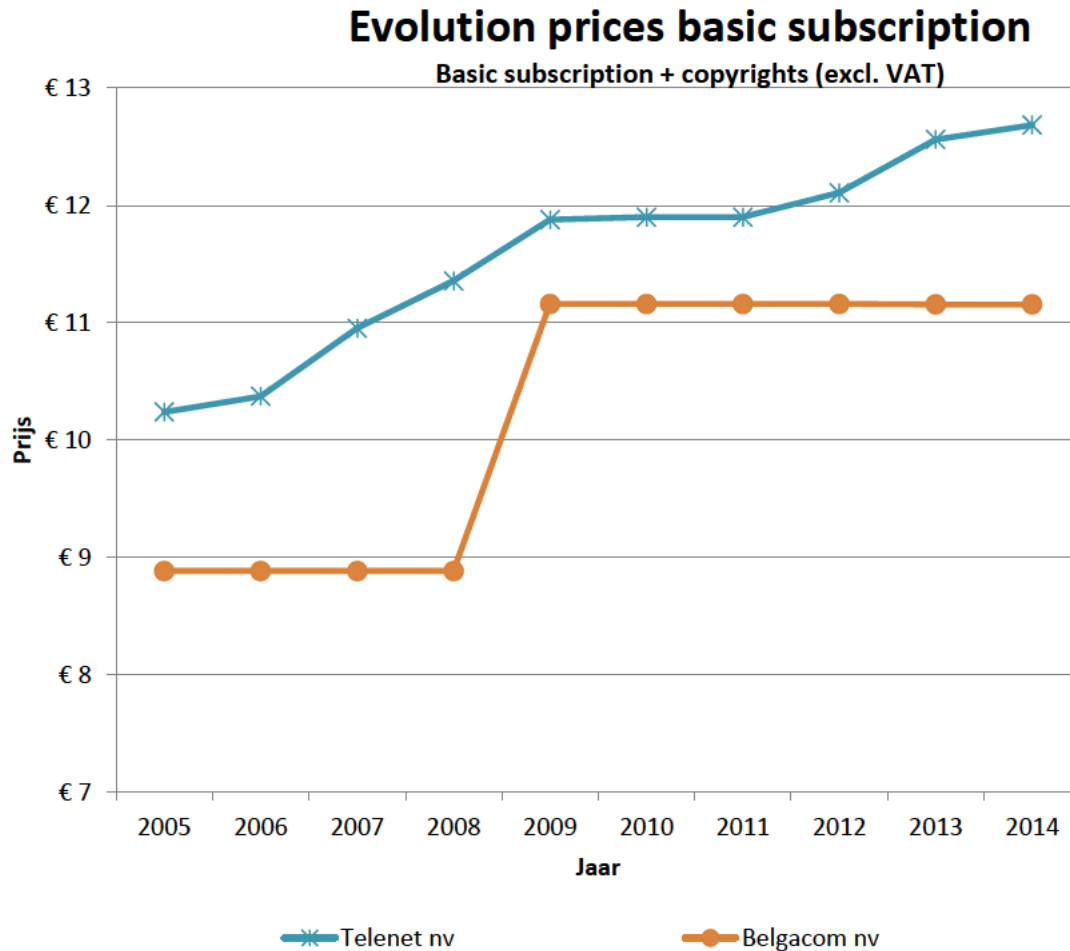
²⁷⁵ Telenet Investor & Analyst Toolkit Q3 2014, Operating statistics, [ID 1030].

²⁷⁶ Graph based on Telenet data: Telenet Investor & Analyst Toolkit Q3 2014, Operating statistics, [ID 1030].

²⁷⁷ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 42.1, [ID 858] (referring to customers who are ‘locked-in in triple or quadruple play packages’); VRT, Presentation of August 2014 – Telenet/De Vijver Media – Concerns of VRT August 2014, slide 4 (‘consumers are locked in’); reply of Snow to Questionnaire Q2 to TV distributors of 9 October 2014., question 31 (stating that ‘strong presence of multiplay (2P-3P-4P) offers at customers reducing the latter’s incentive to churn away to alternative offers’) and question 35.1 (explaining that ‘platforms such as Stieve today

- (426) A third element indicative of Telenet’s dominance is the fact that Telenet has the ability to increase prices without much impact on its churn. If an undertaking can raise prices without a significant loss of subscribers, this suggests that it has the ‘power to behave to an appreciable extent independently of its competitors and customers’ and therefore has a dominant position.

Figure 2 – Price of basic TV subscription with Telenet and Belgacom (excluding VAT)



Source: VRM, Mediaconcentratie in Vlaanderen – rapport 2014 [Media concentration in Flanders – 2014 report] p. 201 (data taken from Figure 82)

- (427) Figure 2 shows the evolution of Telenet prices for a basic TV subscription. Telenet has increased prices several times in the period between 2005 and 2013, in spite of Belgacom’s entry on the market in 2005.
- (428) Telenet’s ability to raise prices is also evidenced by Telenet’s own internal analysis. In a presentation prepared in 2014, Telenet reviewed the impact of historic price increases on its churn. [...] ²⁷⁸

cannot compete with TV distributors as a result of the increasing presence of Triple/Quadruple play offerings that are marketed by Telenet and Belgacom and whereby the TV-part of the offering is presented as (virtually) being free of charge’.

²⁷⁸ Telenet Internal Presentation, Selection of detailed insights from work sessions fact base, slide 61, [ID 716-4773].

- (429) Fourth, barriers to enter the market for the retail provision of TV services are high. Telenet owns the cable infrastructure in most of the Flemish Region and parts of the Brussels Capital Region. Belgacom owns the fibre and copper lines that are used for its IPTV network. Both infrastructures are difficult or impossible to duplicate. The Belgian regulators have imposed wholesale access obligations on Telenet and Belgacom but even for entrants purchasing wholesale access to these networks, entry is not easy, since it still entails very high costs. Apart from the technical costs that wholesale access entail, these include licence fees, marketing costs and the setting up of a distribution network.
- (430) Fifth, Telenet's cable network allows it to offer both digital and analogue cable TV. This allows subscribers of Telenet to watch TV on several screens without additional cost. Subscribers will normally receive digital TV on the main screen, which is connected to a decoder. Such a decoder is necessary to receive digital TV. However, other screens in the house can still be used to watch TV via Telenet's analogue signal. Other technologies for the provision of retail TV services do not have this advantage. Hence, subscribers of Belgacom would only be able to watch TV on one screen, unless they purchase or hire several decoders. This advantage, linked to the technology used by Telenet to transmit TV services, makes Telenet's market power more durable, since it makes it more difficult for subscribers to switch and more difficult for TV distributors to enter the market or expand. Both the Belgian sector regulators and the Belgian courts have found that this advantage strengthens Telenet's market power.²⁷⁹
- (431) Sixth, there are switching costs for subscribers wishing to switch from Telenet to another provider. In the case of a switch towards a different technology such as IPTV, this will normally require a visit by a technician and the purchase or hiring of a new decoder. In the case of subscribers with multiple screens, the switching cost from Telenet to IPTV or satellite is even greater, since they would need to purchase or hire several decoders. Finally, multiple-play packages increase the switching cost, since subscribers have to find an alternative not just for one but for several services.
- (432) Seventh, there is no countervailing buyer power. Telenet's customers are mostly individuals. The revenue generated by each individual constitutes a very small part of Telenet's turnover. This gives Telenet's customers very little or no countervailing buyer power.
- (433) Eighth, Telenet has also been found dominant by several Belgian regulators, the BCA and the Belgian courts. In 2011 the Belgian sector regulators conducted an extensive market analysis in the context of their powers to enact *ex ante* regulation for certain markets. They found Telenet dominant on the market for retail pay TV services (which included services transmitted via cable and IPTV) in its footprint.²⁸⁰ An appeal against those decisions by Telenet was dismissed and the regulators' finding that Telenet had a dominant position was upheld.²⁸¹ The BCA has also found that Telenet had a dominant position on several occasions. It did so in a decision of 2008 and a decision of 2010 relating to the conditions imposed on Telenet when it

²⁷⁹ See the CRC's decision of 1 July 2011 relating to analysis of the market for TV broadcasting in the Dutch-speaking area, recital 417-418; Decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 29 November 2010 in case 2010-C/C-48, recital 102.

²⁸⁰ CRC's decisions of 1 July 2011.

²⁸¹ Judgment of the Brussels Court of Appeals, 12 November 2014, case nos. 2011/AR/2289, 2011/AR/2290, 2011/AR/2291, 2011/AR/2415, 2011/AR/2418, paragraphs 109–117.

acquired the pay TV channel Canal+ in 2003.²⁸² In both of these decisions, it found Telenet dominant on the market for the retail provision of TV services. On appeal, the 2010 decision was upheld by the Brussels Court of Appeals, including the BCA's market definitions and the finding of dominance.²⁸³

Input foreclosure would raise barriers to entry and thereby strengthen Telenet's dominant position

- (434) Potential entrants are companies that could enter the market for the retail provision of TV services and compete with Telenet, by offering cheaper or more innovative TV services. Input foreclosure by De Vijver Media would deter these potential rivals from entering the market. If they enter the market in spite of the input foreclosure, their ability to compete would be hampered. They would either not have access to Vier and Vijf or would have access at less favourable terms than they would have had absent the Transaction.
- (435) One respondent to the market investigation described the effects of total input foreclosure as follows:
- ‘[a] platform without these two channels in Flanders will not attract any customers other than ‘expatriates’ or non-Flemish households. This would mean stopping the activities of the generalist TV distributor in Flanders. The effect on the market would be that any emergence of new TV players would be made impossible and that the level of competition between distributors in Flanders would remain low. The dominant position of Telenet in Flanders would be strengthened.’²⁸⁴
- (436) Another respondent held similar views, stating that entering the market without Vier and Vijf ‘is not an option’.²⁸⁵
- (437) In the case of new entrants using Telenet's cable infrastructure, the effects of total input foreclosure would be even more drastic, since a carriage agreement for Vier and Vijf is a necessary condition for such entrants to enter the market. This is because a new entrant using wholesale access to Telenet's cable network must at least have agreements with the channels that are transmitted via the analogue cable.²⁸⁶ Vier and Vijf are among those channels.
- (438) Therefore, the Commission considers that the input foreclosure of Vier and Vijf would raise barriers to entry and strengthen Telenet's dominant position in the market for the retail provision of TV services.

Input foreclosure would reduce consumer choice, soften downstream competition and result in higher prices

²⁸² Decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 25 March 2008 in case 2008-C/C-11; decision of the BCA's Raad voor de mededinging / Conseil de la concurrence [Competition Council] of 29 November 2010 in case 2010-C/C-48. The 2008 decision was annulled on appeal by the Brussels Court of Appeals but for reasons that were not related to the BCA's finding that Telenet had a dominant position. See Judgment of the Brussels Court of Appeals, 22 June 2009, case no. 2008/MR/7.

²⁸³ Judgment of the Brussels Court of Appeals, 17 May 2011, case no. 2011/MR/1.

²⁸⁴ Reply of Mobistar to Questionnaire Q2 to TV distributors of 9 October 2014, question 1.2.), [ID 774].

²⁸⁵ Reply of SNOW to Questionnaire Q2 to TV distributors of 9 October 2014, question 2, [ID 922].

²⁸⁶ Reply of BIPT, answer to question 1 (concluding that ‘to enter the market, a new entrant has to, at the least, conclude agreements with all analogue TV broadcasting channels on Telenet's cable’).

- (439) If De Vijver Media does not license Vier and Vijf to Telenet's downstream competitors or charges higher licence fees, this would result in less competition on the market for the retail provision of TV services.
- (440) In the case of total foreclosure, meaning when Vier and Vijf are not licensed to one or more of Telenet's rivals, foreclosed rivals would have to offer an inferior product compared to Telenet and consumer choice on these rival TV platforms would be reduced.
- (441) Total input foreclosure would also make competition from foreclosed rivals less effective. Due to their inferior product offering, subscribers would switch from these competitors to Telenet or fewer subscribers would switch away from Telenet than would have been the case without total input foreclosure. In either scenario, pricing pressure on Telenet would be reduced, giving it the ability to raise prices.
- (442) Partial input foreclosure in the form of increased licence fees for Vier and Vijf is also likely to weaken Telenet's competitors and make them less effective competitors.
- (443) As the analysis in the preceding recitals indicates that the effect on licence fees is likely to be very substantial, competitors may have in turn significantly increase their subscriber fees. In this case, the pricing pressure on Telenet would be reduced, giving Telenet an increased ability to raise prices.
- (444) [...] ²⁸⁷ [...] * A significant increase in licence fees is therefore also likely to reduce such rivals' incentives to acquire new customers and hence generate incentives for Telenet to increase subscriber prices. Moreover, after the Transaction, De Vijver Media could force Telenet's rivals to pay licence fees for Vier and Vijf [...] *. This would increase costs of rivals to acquire new customers [...] *. Such a weakening of competition for subscribers would benefit Telenet and harm consumers through higher prices.
- (445) The negative effects of input foreclosure on competition in the downstream market would further be aggravated by the effect of certain clauses in Telenet's carriage agreements with Medialaan and VRT. [...] ²⁸⁸ [...] ²⁸⁹ Telenet could already invoke these clauses before the Transaction, but the Transaction would give it an increased ability to enforce these clauses, [...] *. As a result of these clauses, Telenet's downstream competitors are likely to have difficulty obtaining channels from other broadcasters at advantageous conditions. This would further reduce their ability to compete and result in reduced competition on the downstream market for the retail provision of TV services.

5.4.1.5. Conclusion on input foreclosure

- (446) On the basis of the reasons set out above, the Commission concludes that the channels Vier and Vijf are important inputs for TV distributors and that Telenet's joint control over these inputs would give it the ability and incentive to foreclose its rivals from accessing these channels. This would result in anticompetitive effects on the market for the retail provision of TV services. Telenet has a dominant position on this market and input foreclosure would strengthen that position, therefore giving rise to competition concerns that the Transaction would lead to a significant impediment to effective competition.

²⁸⁷ See Telenet's answer to question 8 of the Commission's RFI of 19 September 2014.

²⁸⁸ [...] *

²⁸⁹ [...] *

5.4.2. *Customer foreclosure (restricting access to Telenet's cable network)*

5.4.2.1. Introduction

- (447) According to the Non-Horizontal Merger Guidelines, a vertical merger can lead to the merging downstream firm refusing to buy inputs from non-merging input suppliers. This strategy based on foreclosing access to customers downstream may occur when a supplier integrates with an important customer in the downstream market. Because of the downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete.²⁹⁰
- (448) In television markets, complete customer foreclosure occurs if a TV broadcaster is denied access to a TV distributor downstream. This results in blackouts during which subscribers are not able to watch the foreclosed channels. A more subtle form of foreclosure, partial customer foreclosure, occurs if distributors still carry a channel but degrade the quality of the viewer experience of the channel on their platform.
- (449) Customer foreclosure strategies harm rival channels in that they reduce their viewership which makes them less attractive for advertisers and in turn reduces their revenues. Rival channels that are put at a disadvantage as a result of such strategies may not be able to compete as aggressively as they would absent foreclosure
- (450) The Transaction will result in the vertical integration of Telenet, which is the largest TV distributor in Flanders, with the TV broadcaster De Vijver Media. The Commission has therefore examined whether the Transaction could give rise to competition concerns and assessed the risk of customer foreclosure as a result of the Transaction.
- (451) In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission has examined (a) whether Telenet would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals; (b) whether Telenet would have the incentive to reduce its purchases from its upstream rivals; and (c) whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.
- (452) In particular, the Commission has assessed whether Telenet would have the ability and incentive to foreclose or marginalise competing TV broadcasters by no longer granting them access to its cable TV platform (complete, or total, foreclosure) or by worsening their conditions of such access through price and non-price discrimination strategies (partial foreclosure). Both the TV broadcasters' linear TV channels and their non-linear services could be the target of a customer foreclosure strategy by Telenet.
- (453) In the following sections, the Commission has first assessed Telenet's market power downstream as a prerequisite for its ability to engage in customer foreclosure. Subsequently, the Commission has assessed Telenet's ability and incentive to engage in customer foreclosure. Finally, the effects of such foreclosure strategies on consumers are discussed.

5.4.2.2. Market power and the importance of Telenet's cable network

²⁹⁰ Non-Horizontal Merger Guidelines, paragraph 58.

The Notifying Parties' view

- (454) The Notifying Parties submit that the most important parameter for competition in the distribution of TV services is audio-visual content, including its range and diversity, and that TV distributors seek to carry the largest and most interesting bundle of TV channels. TV broadcasters therefore have a strong bargaining position vis-à-vis TV distributors, and the relationship between Telenet and TV-broadcasters is characterised by mutual dependency.
- (455) According to the Notifying Parties, this relationship can be illustrated by the evolution of the financial flows between Telenet and TV broadcasters during the last decade. [...] The net amounts paid by Telenet to the Flemish broadcasters have since then increased. This is a clear indication, according to the Notifying Parties, of the existence of strong bargaining power for TV broadcasters.
- (456) The Notifying Parties also point to the period from [...] to [...], when Telenet continued to carry all of Medialaan's channels even though no distribution agreement was in place. [...] Not carrying Medialaan's channels, also its smaller channels, was not an option for Telenet. Furthermore, the Notifying Parties argue that Medialaan [...].

The Commission's Assessment

- (457) When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output. For customer foreclosure to be a concern, it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market. If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground.²⁹¹
- (458) In section 5.4.1.4, the Commission concluded that Telenet has a dominant position on the market for the retail provision of TV services in its footprint. In this section, the Commission assesses the importance of access to Telenet's cable network also from TV broadcasters' point of view.
- (459) The Commission understands that TV channels competing with Vier and Vijf, such as Medialaan's TV channels, seek to attract a large number of viewers in order to earn high revenues from advertisers. According to the Notifying Parties, '[a]dvertisement revenues represent a highly significant proportion of a broadcaster's turnover...' and '[t]he advertisement revenue that a broadcaster earns is fundamentally determined by a channel's viewership ratings.'²⁹² If these TV channels cannot attract a large number of viewers, they are likely to earn lower revenues and profits from advertising, and as a result, find it more difficult to finance attractive programming.
- (460) TV channels generally incur fixed costs in developing or acquiring audio visual content and need to attract a sufficiently large number of viewers in order to earn sufficient advertising revenues to recover these costs. According to the Notifying Parties, a reduction in advertisement revenues would unlikely result in a decrease in

²⁹¹ Non-Horizontal Merger Guidelines, paragraph 61.

²⁹² Form CO, page 84.

costs.²⁹³ If the channels do not reach enough viewers, they will not be attractive to advertisers and will therefore not earn enough advertising revenue to justify investments in attractive content. Scale, in terms of the numbers of viewers a TV channel can reach, is therefore important for the viability of FTA and basic pay TV channels.

- (461) The Commission notes that Telenet is the largest distributor of TV services in Belgium and by far the largest in the area where it is active, that is to say the Flemish Region and certain parts of the Brussels Capital Region. The Notifying Parties estimate Telenet's market share based on subscribers for the retail provision of TV services in Belgium at [40-50]* % and within Telenet's footprint at [60-70]* %. Based on revenues, the Notifying parties estimate Telenet's market share at [50-60]* % in Belgium and [70-80]* % within Telenet's footprint.²⁹⁴ Hence, access to Telenet's platform is crucial for the commercial broadcasters' advertising revenues. Given the very high market shares of Telenet in Flanders, this is especially true for broadcasters of Dutch language channels such as Medialaan.
- (462) Respondents to the Commission's Phase II market investigation indicated that it is important for a TV broadcaster to have access to Telenet's cable platform, and referred to the significant share of viewers that watch TV via Telenet.²⁹⁵ Medialaan argues that the size of the Flemish market (approximately 2.7 million households) is too small to support a commercial broadcaster with local production without access to Telenet's subscribers. The cost of programmes could not be recouped via the platform of the second largest TV distributor, Belgacom.²⁹⁶
- (463) Medialaan also argues that the subscriber base of Belgacom is less valuable for a commercial broadcaster than the subscriber base of Telenet. This is because the subscribers of Belgacom are on average older than those of Telenet, and also because Belgacom's subscribers watch Medialaan's channels less than Telenet's subscribers.²⁹⁷
- (464) The ability to earn advertising revenues is not the only reason why it is important for broadcasters to be distributed via Telenet's platform. TV broadcasters also receive licence fees from TV distributors for their TV channels and non-linear services. According to Medialaan, the licence fees paid by Telenet represent 5–10 % of Medialaan's revenues out of its TV activities in 2014.²⁹⁸
- (465) Distribution via Telenet's cable network is also important for the public service broadcaster VRT. The linear channels of VRT have a must carry status under the Flemish Media Decree and therefore must be distributed on Telenet's network. However, that is not the case for VRT's non-linear services and, according to VRT, if these services would be denied access to Telenet's network, VRT would be unable to reach a large majority of Flemish households.²⁹⁹ Non-linear services from VRT are currently offered on Telenet's platform, including catch-up services and VOD

²⁹³ Form CO, page 85.

²⁹⁴ Reply of Liberty Global to the Commission RFI of 19 November 2014, tables 4 and 5 (replacing tables 4 and 5 in the Form CO).

²⁹⁵ Replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 1, [ID 785], [ID 858], [ID 899], [ID891], and [ID 1035].

²⁹⁶ Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 7, [ID 1035].

²⁹⁷ Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 1, [ID 1035].

²⁹⁸ Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 17, [ID 1035].

²⁹⁹ Reply of VRT to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 48, [ID 358].

services, and Telenet's platform represents more than 80 % of the distribution of VRT's non-linear services.³⁰⁰

- (466) Moreover, without access to Telenet's cable network for both its linear and non-linear services at fair and non-discriminatory conditions, VRT claims it would not be able to fulfil its public service remit. VRT emphasises that access alone is not sufficient, but also that the prominence of the services in the EPG is very important to ensure that viewers are able to find and view content of VRT.³⁰¹
- (467) According to a number of TV broadcasters who responded to the market investigation, there is currently no valid alternative way to distribute linear and non-linear services to the Flemish audience without access to the Telenet network, and a foreclosure of their TV channels would have such a significant, damaging effect on their business that it would likely mean the end of their business over time.³⁰² Because of the other TV distributors' limited market shares and coverage, they are not considered as viable and readily available alternatives in Flanders in the event a channel were to be removed from, or degraded on, Telenet's platform.³⁰³
- (468) Offering the channels over the internet (OTT) is currently not a substitute to Telenet according to both Medialaan and VRT. Medialaan owns the OTT service Stievie which allows its users to watch linear channels from VRT, Medialaan and De Vijver Media over the internet. However, according to Medialaan, OTT services are still in their infancy.³⁰⁴ Also according to VRT Stievie is not in a position to ensure real competition on the market. A standalone OTT service has, according to VRT, the disadvantage that the data volume will be counted in the data cap included in the end users' internet subscriptions, which is not the case for the traditional distribution over a cable network.³⁰⁵
- (469) As already described in section 5.4.1.4, the barriers to entry and expansion are high in the market for the retail provision of TV services, the churn rate of Telenet's subscriber base is low, and new entrants – with the exception of Belgacom, which controls an access network with nationwide coverage – have not managed to gain any significant market shares.³⁰⁶ This means that Telenet's position will remain strong, and that any sufficient economic alternatives for TV broadcasters are unlikely to enter the market in the near future.
- (470) Moreover, the difficulties of TV broadcasters to turn to other TV distributors are amplified by [...]*. Telenet's current carriage agreement with Medialaan includes a clause according to which: [...]*.³⁰⁷
- (471) Prior to the amendments agreed on [...]* (see section 6.2.1 of this Decision), the same type of clause was also included in the carriage agreement between Telenet and VRT.³⁰⁸[...]*

³⁰⁰ Presentation of VRT, November 2014, page 6, [ID 1062].

³⁰¹ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 1, [ID 858].

³⁰² Replies to Questionnaire – Q2 to TV broadcasters of 19 August 2014, question 48, [ID 334], [ID 355], [ID 358], [ID 362], [ID 385], and [ID 809].

³⁰³ Replies to Questionnaire – Q1 to TV broadcasters of 9 October 2014, question 7, [ID 785], [ID 858], [ID 899], [ID891], and [ID 1035].

³⁰⁴ Reply of Medialaan to Questionnaire – Q1 to TV broadcasters of 9 October 2014, questions 7 and 43, [ID 1035].

³⁰⁵ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 43, [ID 858].

³⁰⁶ See also replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 38–39, and replies to Questionnaire Q2 to TV distributors of 9 October 2014, questions 30–31.

³⁰⁷ [...]*

- (472) Therefore, in light of the important market share of Telenet on the retail provision of TV services and the results of the market investigation, the Commission considers that TV broadcasters have to be on Telenet's TV distribution platform in order to be able to operate in Flanders.

5.4.2.3. Ability to engage in customer foreclosure

The Notifying Parties' view

- (473) The Notifying Parties point at legal and contractual obligations which constrain their ability to engage in customer foreclosure. First, the Notifying Parties point out that Telenet is subject to a must carry obligation with respect to the Flemish public broadcaster VRT's channels Eén, Canvas and Ketnet/OP12; the regional broadcasting organizations, in their respective service areas; the TV channels of the French Community's public broadcasting organization RTBF; and the TV channels of the Dutch public broadcaster. These channels accounted for a combined viewer share in Flanders of approximately 44 % in 2013 and approximately 42 % in the first half of 2014.
- (474) The Notifying Parties also point out that the ability of Telenet to engage in total customer foreclosure of TV channels is constrained by existing distribution agreements. Telenet is under a contractual obligation until 31 December 2017 to carry [...] Medialaan linear TV channels. These channels accounted for approximately [20-30]* % of the viewer shares in Flanders in 2013 and [30-40]* % in the first half of 2014.
- (475) This implies, according to the Notifying Parties, that Telenet will have a contractual obligation, and for must carry channels a legal obligation, to carry TV channels which jointly accounted for approximately [80-90]* % of the viewer shares in Flanders in 2013 and the first half of 2014, and this will prevent Telenet from engaging in a total customer foreclosure of those channels.
- (476) The Notifying Parties also argue that should Telenet stop distributing one or several channels, merely because they might compete with Vier or Vijf, it would expose itself to regulatory intervention, including the extension of the existing must carry obligations in Flanders.
- (477) Regarding the ability to engage in customer foreclosure of non-linear services, the Notifying Parties submit that the constraints which prevent Telenet from engaging in total foreclosure of TV-channels similarly apply to non-linear services. Telenet not only needs to offer a broad and diverse range of attractive linear channels, it also needs to offer attractive non-linear content of these channels. Accordingly, the bargaining power of the TV broadcasters also extends to their non-linear content.
- (478) The Notifying Parties also argue that the ability of Telenet to foreclose non-linear services is constrained by existing agreements, referring to its distribution agreement with Medialaan which also covers Medialaan's TVOD service iWatch, and by TV broadcasters having alternative ways to reach Telenet-subscribers with their non-linear services. The Notifying Parties note that non-linear services are also offered via internet – for example on the websites www.meer.be (De Vijver Media), www.iwatch.be and www.vtm.be (Medialaan), and www.ketnet.be (VRT) – and submit that Telenet is not, in its capacity as an internet access provider, technically

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[...]*

able to block traffic from content platform operators that provides TV content over the internet.

- (479) Regarding the ability to engage in partial customer foreclosure with respect to EPG positions and TVOD library positions, the Notifying Parties submit that Telenet strives to arrange the positioning of channels in a way that is user friendly and reflects customer preferences. The EPG is organised in such a way that channels of the same type are positioned close to each other. For example general interest Flemish channels are in positions 1 to 14, documentary and lifestyle channels from position 15 onwards. Moving channels to a position that differs from their ‘natural’ position would give rise to customer dissatisfaction. In addition, the customer can alter the default EPG position on their set top box, and an analysis carried out in 2013 showed that [20-30]* % of Telenet’s digital TV subscribers use a channel positioning for numbers 1 to 5 that differs from Telenet’s standard positioning.
- (480) The Notifying Parties point out that Telenet’s distribution agreements with VRT and Medialaan [...]*. Moreover, in Telenet’s VOD library the positions of the TV channels’ non-linear services follow the logic of the EPG positions and according to the Notifying Parties the reasoning applying to the lack of ability to foreclose regarding EGP positions also applies for the TVOD positions.

The Commission’s assessment

- (481) For customer foreclosure to be a concern, the vertical merger must involve a company with a significant degree of market power in the downstream market. As was established in section 5.4.1.4, Telenet has a significant degree of market power in the market for the retail provision of TV content to end users. It is also vital for broadcasters to be distributed via Telenet’s cable network in order to reach their viewers and in order to attract advertisers (see section 5.4.2.2). This is the case both before and after the Transaction.
- (482) The Commission notes that already before the Transaction Telenet has the ability to exclude and/or restrict access to its cable platform. Telenet has control over what linear channels it carries (subject to contractual obligations and must carry obligations for public broadcasting channels) and can also decide what non-linear content TV broadcasters can make available on its platform and what product innovations TV broadcasters can introduce.
- (483) Telenet also controls the EPG, where the positions of the linear channels are defined, and can decide on the prominence of the content in VOD catalogues and the ‘suggested viewings’. VRT expects that recommendation engines will become more important to ensure that viewers can find linear and non-linear content in the abundance of content available.³⁰⁹
- (484) Moreover, Telenet can limit the functionality of VOD services. Such restrictions may include a limit on the storage capacity of VOD services (which would limit the number of titles a TV broadcaster can offer), a restriction on the type of content it would allow (not allowing genres which compete directly with De Vijver Media’s content) or the quality of the content (not allowing high definition versions).³¹⁰
- (485) Concerning the constraints on Telenet through contractual obligations, the Commission notes that Telenet’s carriage agreement with Medialaan can be

³⁰⁹ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 21 [ID 858].

³¹⁰ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 25 [ID 858].

terminated as early as [...]*)³¹¹ Prior to the amendments described in section 6.2.1 of this Decision, Telenet's carriage agreement with VRT would have expired [...]*)

- (486) The potential risk of a regulatory intervention following a customer foreclosure strategy by Telenet does not change the Commission's conclusion that Telenet has the ability to engage in partial customer foreclosure. If anything, such a risk could only influence Telenet's incentives to engage in a customer foreclosure strategy, depending on Telenet's assessment of what types of interventions there could be, when they would be implemented and the likelihood of such intervention.
- (487) Neither does the fact that individual subscribers have the possibility to change the position of channels in the EPG affect the Commission's conclusion that Telenet has the ability to engage in partial customer foreclosure. A large majority of subscribers do not seem to use the possibility of re-programming their EPG.³¹² Nor does Telenet's use of standard blocks of positions in the EPG, in which Telenet puts channels of the same genre, eliminate Telenet's ability to favour De Vijver Media's channels and non-linear services in the EPG, for example by putting De Vijver Media's content in more favourable positions within the standard blocks.
- (488) Based on the above, the Commission concludes that Telenet would have the ability to engage in customer foreclosure of competitors of De Vijver Media as regards their linear TV channels and non-linear audio visual content.

5.4.2.4. Incentive to engage in customer foreclosure

The Notifying Parties' view

- (489) As regards total customer foreclosure, the Notifying Parties submit that if Telenet's retail TV offer would not include the TV channels of De Vijver Media's competitors – in particular the TV channels of the public broadcaster VRT and the largest commercial TV broadcaster in the Flemish community, Medialaan, which jointly represent approximately 70 % of the viewer shares in the Flemish community – it would suffer a significant loss of subscribers and a related loss of revenue. Taking into account the high fixed costs of Telenet's cable network, there would be, according to the Notifying Parties, no certainty that this loss of subscribers would be sufficiently compensated by improved viewer ratings and advertising revenue from De Vijver Media's TV channels Vier and Vijf. The results of such an improved performance by Vier and Vijf would moreover have to be shared with the other shareholders of De Vijver Media.
- (490) Moreover, as regards partial customer foreclosure, the Notifying Parties submit that Telenet will not have the incentive to discriminate against TV broadcasters competing with Vier and Vijf with respect to either the EPG that Telenet offers to viewers, prices charged by Telenet to the TV broadcasters or the service quality offered to TV broadcasters. The Notifying Parties submit that such strategies would not be of material (financial) benefit to Telenet.
- (491) According to the Notifying Parties, any theory of harm based on Telenet seeking to degrade the quality of its offering to subscribers (whether service quality offered to broadcasters, EPG positioning or other quality aspects), would be counterintuitive. Telenet has an interest, in competing with other TV distribution platforms, to offer

³¹¹ [...]*)

³¹² See Comments on behalf of Liberty Global Plc regarding the Article 6(1)(c) Decision, 6 October 2014, paragraph 119 [ID 622].

the highest possible quality of service. It is clearly in Telenet's interest to offer all relevant Flemish TV channels, including Medialaan's channels at the highest quality possible. It is difficult to imagine therefore how Telenet could have an incentive to degrade the service quality to its own customers.

- (492) Also, as regards the licence fees, the Notifying Parties submit that it is difficult to see how the Transaction would result in an incentive to pay lower licence fees to competing TV broadcasters compared to a counterfactual without the Transaction. In essence, Telenet's market position as a buyer of content/provider of TV distribution services does not materially change as a result of the Transaction.
- (493) The Notifying Parties submit that they will not have the incentive to negatively impact the viewer experience with regards to content provided by Vier and Vijf's competitors by way of providing slower download or streaming speed on Telenet's internet network. Given that Belgacom enjoys significant market power on the market for the retail provision of internet services, Telenet will have no incentive to foreclose competitors on its internet network as there is a real chance that end users would migrate away from Telenet if they consider that their broadband subscription is not adequate in providing access to the content of their choice
- (494) The Notifying Parties also submitted two economic submissions in which the likelihood of full and partial customer foreclosure was assessed.³¹³ Both studies estimate advertising gains and subscriber losses resulting from the foreclosure of rival channels from Telenet's distribution platform and calculate the critical switching rates below which customer foreclosure would be profitable. One submission assesses the likelihood of total customer foreclosure for (a) all of Medialaan's channels and (b) all of Medialaan's channels plus the remainder of small commercial channels.³¹⁴ The other economic submission assumes a scenario in which all small channels are foreclosed.³¹⁵ The second scenario assumes that only Discovery Channel would be foreclosed from Telenet's platform. According to both of the Notifying Parties' studies, total customer foreclosure would be unlikely given that only a very small percentage of customers switching away from the foreclosing platform would be required in order to defeat the profitability of such a strategy.³¹⁶
- (495) Finally, the Notifying Parties argue that should Telenet stop distributing one or several channels, merely because they might compete with Vier or Vijf, it would expose itself to regulatory intervention, including the extension of the existing must carry obligations.

The Commission's Assessment

Introduction

- (496) Vertical integration may increase incentives to engage in customer foreclosure. In the present case, if Telenet decided to foreclose the access to its platform to De Vijver Media's rivals some of Telenet's subscribers may switch away to another distribution platform where these rivals are not foreclosed. This effect constitutes the cost of

³¹³ 'Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004', Oxera, submission of 6 October 2014 [ID 623] and 'Virginia – Response to the Commission's 6(1)(c) decision', RBB Economics, submission of 6 October 2014 [ID 624].

³¹⁴ This implies that the public broadcaster would not be the target of total customer foreclosure.

³¹⁵ This would mean that VRT's channels, all other must carry channels, Medialaan's channels, and Sporting Telenet and Prime of Telenet would not be the target of a total customer foreclosure.

³¹⁶ One study finds that the critical switching rate above which customer foreclosure would become unprofitable is below [0-5]*%. The other study finds a critical range of about [0-5]*% to [5-10]*%.

customer foreclosure to Telenet as it would lose downstream subscription revenues. At the same time, some consumers who do not value the foreclosed channels and non-linear services enough to switch, would remain customers of Telenet's platform and switch viewership to the channels and non-linear services of De Vijver Media. This increase in viewership would in turn increase revenues from advertising and from the consumption of non-linear services. Moreover, Telenet would save licence fees on the foreclosed channels. Those effects constitute the benefit of customer foreclosure to Telenet and De Vijver Media. In the context of this case, Telenet may therefore foreclose rivals that are competing with De Vijver Media in order to shift viewership from the rivals' channels and non-linear services to the channels and non-linear services of De Vijver Media.

- (497) The overall profitability of such a strategy for Telenet and De Vijver Media depends on the proportion of customers switching away from Telenet as a result of foreclosure. If customer switching is low, Telenet would not lose many subscribers on its platform and hence the costs of customer foreclosure would be limited. If customers however have a strong preference for the foreclosed channels and non-linear services and do not find a suitable substitute on Telenet's platform, they may consider switching to rival distributors that carry the foreclosed channels and non-linear services.
- (498) The existing empirical literature on the effects of vertical integration on the likelihood of customer foreclosure indicates that vertically integrated systems (that is to say, integration between television platforms and broadcasters) favour the channel programming of their upstream broadcast affiliate.³¹⁷
- (499) Such empirical research is a useful background for the Commission's assessment as it illustrates that total or partial customer foreclosure strategies of secondary channels of rivals are generally plausible in the TV industry. While the studies note that it is unclear whether the observed patterns are anti-competitive or whether they are the result of efficiency gains from vertical integration, the Notifying Parties have not made any claims that the Transaction would lead to vertical efficiencies.

Likely targets of customer foreclosure

- (500) The target of a customer foreclosure strategy by Telenet would most likely be TV channels and non-linear services that are close competitors to De Vijver Media's channels and non-linear services in terms of audience, content and advertisers. This is because the gains for De Vijver Media in increased number of viewers and from increased advertising revenues would likely be greater if a similar channel would no longer be available on Telenet's platform, than if a channel with a different profile and with another audience would be foreclosed. The closer competitor a channel is to De Vijver Media's channels, the more likely viewers are to shift to the latter channels, rather than switching to another TV distributor, in case of a blackout or a degradation of quality. Consequently, the closer competitor a channel is to De Vijver Media's channels, the more likely are advertisers to increase their spending on De Vijver Media's channels if a competing channel is foreclosed. Correspondingly, a similar reasoning also applies to the associated non-linear services, where not only advertising revenues but also subscription fees may be at stake.

³¹⁷ See Crawford, G., 'Cable Regulation in the Internet Era', Chapter 4 in Rose, N., ed, 'Economic Regulation and Its Reform: What Have We Learned?', forthcoming, University of Chicago Press.

- (501) As explained in the following recitals, the close competitors of De Vijver Media, and hence the likely targets of a customer foreclosure strategy, are Medialaan and VRT. These two TV broadcasters also voiced concerns over possible anti-competitive effects due to customer foreclosure following of the Transaction. Other TV broadcasters active in Belgium, which operate channels that are not close competitors to De Vijver Media, did not raise substantiated concerns over such possible anti-competitive effects.

Medialaan as a target of customer foreclosure

- (502) In competition with De Vijver Media, Medialaan supplies the linear TV channels VTM, 2BE, Vitaya, Jim and VTMKzoom, and also the non-linear service iWatch with content from Medialaan's channels.³¹⁸
- (503) The results of the market investigation show that, among the commercial channels, Medialaan's channels 2BE and Vitaya have profiles that are similar to De Vijver Media's channels Vier and Vijf, respectively, and also target similar audiences. As a general interest channel with a large number of viewers, Medialaan's main channel VTM also attracts similar audiences, and just as Vier it has a large share of locally produced content.
- (504) Audience data shows that the channels 2BE and Vier attract similar audiences: young middle class adults (aged 15 to 44 years) with a small predominance of male viewers. In the same way, the audience data shows that Vitaya attracts a similar audience as Vijf in terms of age and social class and also that both channels have a majority of female viewers.³¹⁹
- (505) There are also similarities in the programming of Medialaan's and De Vijver Media's channels. Both Vitaya and Vijf focus on reality shows and series, which make up a large share of the weekly schedule. Furthermore, both channels show films three nights per week, and they both have a relatively low share of locally produced content (Vitaya 14 % of the schedule between 17h and 24h, and Vijf 18 %).³²⁰
- (506) Regarding Vier, it has a broader scope of content than Vijf, and as a general interest channel with a large share of local content it competes not only with 2BE but also to some extent with VTM, Medialaan's main channel.³²¹ In its schedule from 6 pm to 11 pm, Vier shows local content 51 % of the time, while VTM shows local content 89 % of the time.³²² Especially when assessing the risk of foreclosure of non-linear services, such as catch-up or VOD, it should be taken into account that VTM's locally produced programmes of compete with Vier's content.
- (507) From the advertisers' point of view, channels can be seen as substitutes if they attract similar demographic groups. If, as a result of a customer foreclosure strategy, a channel were to lose its audience share, advertisers would have an incentive to shift their advertising to channels with a similar audience to be able to reach their target groups. According to Medialaan, the close competition between Medialaan's and De

³¹⁸ [...]*

³¹⁹ Audience data from CIM shows the profiles of the audience in Flanders of a number of TV channels based on sex, age and social class. See reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 13–15, [ID 1035] and Medialaan presentation of 14 October 2014, [ID 928].

³²⁰ Medialaan presentation 14 October 2014, page 29, [ID 928].

³²¹ Replies of Medialaan and VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 13, [ID 858], [ID 1035].

³²² Presentation by Compass Lexecon of 14 October 2014, [ID 927], page 14.

Vijver Media's channels is demonstrated by the fact that many of the main advertisers on Vijf are also those who spend the largest amount on advertising on Vitaya.³²³

- (508) In light of the above, the Commission considers that Medialaan's channels 2BE and Vitaya are likely targets of a customer foreclosure strategy by Telenet. As described in the following recitals, the Commission considers total customer foreclosure not likely in this case. However, partial foreclosure has similar benefits for Telenet and would be a less costly strategy than total foreclosure. For such a strategy, the Commission considers that Medialaan's channels 2BE and Vitaya and also the non-linear services of Medialaan are potential targets.

VRT as a target of customer foreclosure

- (509) In addition to Medialaan, the Commission also considers that the Flemish public broadcaster VRT could be a target of partial customer foreclosure, despite the must carry status that VRT's linear channels enjoy.
- (510) In competition with De Vijver Media, VRT supplies its linear channels Eén, Canvas, and Ketnet and also non-linear services with content from its channels.³²⁴
- (511) Telenet is subject to regulatory must carry obligations with respect to the channels of the Flemish public broadcaster VRT.³²⁵ A total foreclosure by Telenet of the linear transmission of these channels would be in breach of the must carry regulation. However, the must carry obligation does not direct the terms according to which the channels should be distributed by Telenet and does not cover non-linear services.
- (512) Audience data show that VRT's channel Canvas has an audience that is similar to Vier and 2BE. Although Canvas' audience tends to be slightly older, all three channels attract adults in the middle class and with a small predominance of male compared to female viewers.³²⁶ Furthermore, both Vier and Canvas have a relatively large share of local content, for Vier 51 % of the weekly schedule 6 pm to 11 pm, compared to 60 % for Canvas.³²⁷
- (513) According to VRT, essentially both Vier and Vijf target audiences that VRT targets as well, and especially Vier has a broader appeal and is as a general interest channel a direct competitor of VRT's main channel Eén.³²⁸
- (514) In light of the above, the Commission considers that VRT's channel Canvas, as well as VRT's non-linear services, could be a potential target of a partial customer foreclosure strategy by Telenet.

Incentives to engage in total customer foreclosure

³²³ Medialaan presentation 14 October 2014, page 30, [ID 928].

³²⁴ [...]*

³²⁵ For the Flemish Community, see Article 186 of the Decree on Radio and Television Broadcasting of 27 March 2009. For the bilingual Brussels Capital Region, the must carry obligations stem from Article 13 of the Act of 30 March 1995 on the electronic communication networks and services and the exercise of broadcasting activities in the bilingual region of Brussels. For the French Community similar must carry obligations follow from the Coordinated Decree of 26 March 2009 on audiovisual media services of the French Community, Article 83.

³²⁶ Audience data from CIM shows the profiles of the audience in Flanders of a number of TV channels based on sex, age and social class. See reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 13–15, [ID 1035] and Medialaan presentation of 14 October 2014, [ID 928].

³²⁷ Presentation by Compass Lexecon of 14 October 2014, [ID 927], page 14.

³²⁸ Replies of VRT and Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 13, [ID 858], [ID 1035].

- (515) The Commission has assessed the likelihood of total customer foreclosure. It has concluded that total customer foreclosure of Medialaan's or VRT's channels is not a likely scenario.
- (516) First, the Commission considers that a total foreclosure by Telenet of Medialaan's main channel VTM is not a likely scenario. Due to VTM's high viewing shares – it is the second most popular TV channel in Flanders with a share of viewers of 17.91 % in 2013 and 19.53 % in the first half of 2014³²⁹ – the Commission considers it unlikely that Telenet will have the incentive to stop offering VTM on its platform.
- (517) Second, the underlying data of a customer survey provided by Belgacom³³⁰ indicate that a full blackout of Medialaan's channels 2BE and Vitaya on Telenet's platform would lead to significant incremental churn of the existing Telenet subscriber base, that is to say, a substantial loss of subscribers. The Commission agrees with the Parties that the critical switching rate below which a total foreclosure of channels that are close substitutes to Vier and Vijf (individually or jointly) would be profitable is likely to be lower than the switching that is likely to be induced.
- (518) Finally, VRT's channels cannot be subject to total customer foreclosure due to their must carry status.
- (519) Therefore, the Commission considers that it is unlikely that customer switching would be low enough to make total customer foreclosure in the form of a full blackout of a channel a profitable strategy for Telenet. The following recitals therefore focus on partial customer foreclosure.

Incentives to engage in partial customer foreclosure

- (520) The Commission has also assessed the likelihood of different forms of partial foreclosure in the following sections. In particular, it has assessed the likelihood that following the Transaction Telenet would have an incentive to engage in partial customer foreclosure of Medialaan and VRT. Before the Transaction, Telenet is not vertically integrated and therefore does not take into account the impact of its decision making on the broadcasting business. After the Transaction however, Telenet would internalise any impact on De Vijver Media's profits of its own decision making which in turn changes Telenet's incentives to engage in customer foreclosure.
- (521) The changed incentives for customer foreclosure could lead Telenet to degrade the viewer experience of rival TV broadcasters' channels and services on the Telenet platform by making such channels and their content less easily accessible on their platform. Telenet might also use the threat of foreclosing rival channels or quality degradation to force rival TV broadcasters to accept lower licence fees for their channels and services. These two scenarios are both discussed, for Medialaan's channels and services in recitals (530) to (538) and for VRT's channels and services in recitals (539) to (547).
- (522) As regards partial customer foreclosure through quality degradation, Telenet may have an incentive to worsen the terms and conditions for rival's linear channels. One way to implement such a strategy is to degrade the viewer experience of rival channels on Telenet's platform relative to De Vijver Media channels. In particular, Telenet could position rival channels lower in the EPG guide, which would increase

³²⁹ Form CO, Annex 6.2.f.

³³⁰ 'Channel Research', customer survey presentation of 5 November 2014, [ID 1114].

the likelihood that viewers would watch Vier and Vijf. This in turn increases viewership of Vier and Vijf and increases the advertising revenues of De Vijver Media.

- (523) Degradation of quality could also encompass the discrimination of non-linear services. Such strategies could be implemented by removing or worsening the access terms for rival broadcasters on those non-linear services. This in turn could make it more difficult for subscribers to access the user interface for non-linear content of rival broadcasters.
- (524) In the case of quality degradation of linear services discussed in recital (522), the benefits of customer foreclosure to Telenet and De Vijver Media would stem from higher advertising revenues due to a shift in viewership towards De Vijver Media's channels. In case of quality degradation of non-linear services discussed in recital (523), the benefits of customer foreclosure to Telenet and De Vijver Media would stem from higher revenues due to an increase in advertising sales or higher sales of non-linear services to TV subscribers.
- (525) The factual evidence gathered during the market investigation points towards an impact of quality degradation on viewership. Concerns regarding partial customer foreclosure in the form of EPG degradation have also been raised in the market investigation. Several respondents to the Commission's Phase II market investigation voiced concerns that Telenet would have the incentive to give preferential treatment to Vier and Vijf by assigning them better positions in the EPG of Telenet. According to these respondents, this practice of allocating Vier and Vijf better positions in the EPG would render competing TV channels less effective and, in the long term, they would no longer be viable.³³¹
- (526) To show the impact of changes in the EPG position, one respondent to the market investigation gave the example of Telenet's decision to move certain regional TV channels to number 48 on the EPG, which led to an immediate and substantial loss of audience market share for these TV channels.³³² As another example, VRT estimates that a less advantageous EPG positioning for its children's channel Ketnet could result in a market share decline of around 5%.³³³
- (527) The effects of a lower EPG position on viewer shares have also been investigated in two studies of the British TV market, which indicate that if a major digital entertainment channel suffered a significant loss of EPG prominence on the major British distribution platforms, this could be associated with a considerable drop in audience shares.³³⁴
- (528) Also regarding the non-linear services, such as VOD services, respondents to the market investigation raised concerns that Telenet and De Vijver Media will have the incentive to discriminate against broadcasters that are competing with De Vijver

³³¹ Replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 21, [ID 785], [ID 858], [ID 899], [ID 891], and [ID 1035].

³³² Reply by Test Aankoop to Questionnaire – Q4 to consumer associations of 19 August 2014, question 7, [ID 277].

³³³ Reply by VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 21, [ID 858].

³³⁴ An Analysis of the Audience Impact of Page One EPG Prominence, A report for Ofcom by Dr Farid El-Husseini, 29 April 2013, [ID 1125], and Assessing the Impact of Sky EPG Positioning on Channel Performance, A Report for Discovery by Attentional Ltd, 7 November 2008, [ID 1126].

Media.³³⁵ They pointed out that the Transaction would change Telenet's incentives to grant access to non-linear content. Specifically, Telenet would have the incentive to restrict competing broadcasters from offering non-linear content that would be a competing offer with De Vijver Media's content. Medialaan pointed out that Telenet would have the incentive to prohibit Medialaan from offering specific content while allowing De Vijver Media to offer such content.³³⁶

- (529) Several respondents to the market investigation also expressed concerns that Telenet would favour De Vijver Media's content in the VOD catalogue and the start page of the VOD service by giving it more prominence.³³⁷

Incentive to engage in partial customer foreclosure of Medialaan

- (530) The Commission has investigated whether Telenet would have an incentive to engage in partial customer foreclosure of Medialaan. Medialaan's channels 2BE and Vitaya have a similar viewership compared to De Vijver Media's channels Vier and Vijf as discussed in recitals (502) to (508).
- (531) The evidence referred to in recitals (515) to (529) above indicates that quality degradation of rival broadcasting channels could shift viewers and revenues from these rival channels and services to De Vijver Media's offerings to the benefit of Telenet and De Vijver Media. The costs of such partial foreclosure strategies are likely to be limited. In particular, as partial foreclosure does not entail the blacking out of channels but is limited to a quality degradation of rival channels, both on the linear and non-linear platform, incremental consumer switching away from Telenet to rival distribution platforms is expected to be limited. Customers who do value 2BE and Vitaya would still be able to find the channel after the implementation of such foreclosure strategies. Moreover, those customers who do not value the partially foreclosed channels are likely to switch to some extent to Vier and Vijf as these channels are substitutable in terms of content and target audience. A similar reasoning applies to the non-linear services of Medialaan. While the cost of such foreclosure is likely to be limited, the gains stemming from such strategies could be substantial.
- (532) Any strategy that leads to partial foreclosure in the form of quality degradation relative to De Vijver Media's channels in terms of EPG position would likely lead to a shift of viewers from 2BE and Vitaya to Vier and Vijf given the substitutability of these channels. It is not possible to determine the optimal level of partial foreclosure by Telenet and hence by how much viewer shares would be shifted towards De Vijver Media as a result of engaging in such strategies. However, an increase in the combined viewer share of Vier and Vijf on the Telenet platform would likely lead to incremental advertising revenue by De Vijver Media of about EUR [...] per percentage point increase in the combined viewer share of Vier and Vijf.³³⁸ This indicates that there is a significant financial benefit for Telenet and De Vijver Media

³³⁵ See reply of VRT to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 54, and reply of Medialaan to Questionnaire Q2 to TV broadcasters of 19 August 2014, question 1, [ID 358], [ID 809].

³³⁶ Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 25, [ID 1035].

³³⁷ See replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 24–25, [ID 785], [ID 858], [ID 899], [ID 891], and [ID 1035].

³³⁸ The yearly advertising revenues of De Vijver Media on Telenet in 2013 were EUR [...] × 12 = EUR [...]*. Dividing this by the approximate combined viewer share of De Vijver Media channels of 11 %, yields advertising revenues on the Telenet platform of EUR [...] per percentage point of combined viewer share. An increase in viewer share by one percentage point corresponds to an increase in viewers by around 9 %.

to engage in such partial foreclosure strategies post-Transaction, even if such strategies would only lead to a relatively small shift of viewer share towards De Vijver Media's channels.

- (533) Empirical evidence on shifts of EPG positioning suggests that there could be a significant effect of changes in the EPG ranking of a channel on that channel's viewership.³³⁹ While the magnitude of the estimated effects varies within these studies, the results indicate that a substantial degree of viewership change cannot be excluded.
- (534) Given the potentially substantial increase in advertising revenues as a result of a shift in viewership at the margin, the Commission is of the view that there is an incentive for Telenet post Transaction to engage in partial customer foreclosure in the form of quality degradation.
- (535) As regards the effects on negotiated licence fees, Telenet could use partial customer foreclosure strategies as a threat in negotiations with rival TV broadcasters. As post-Transaction Telenet will internalise the positive effects on De Vijver Media's advertising revenues should negotiations with rival broadcasters such as Medialaan end in disagreement such threats would improve Telenet's bargaining position post-Transaction and allow Telenet to drive a harder bargain during the licence negotiations with rival broadcasters relative to the pre-merger situation. As a result of the Transaction, Telenet may therefore pay a lower licence fee to rival broadcasting channels.
- (536) In analogy with the discussion in recitals (393) to (395) above, for Telenet to prefer coming to an agreement over quality degradation, the reduction in licence fee would have to increase Telenet's profits by at least as much as the profit increase it would enjoy as a result of a quality degradation strategy. Similarly, rival broadcasters would prefer such an agreement if it makes them no worse off than under the quality degradation scenario.
- (537) The Notifying Parties submit that the Transaction will not change Telenet's bargaining position because non-carriage of Medialaan's channels is not a credible scenario in the case of a disagreement, because such a complete foreclosure strategy would not be profitable for Telenet and De Vijver Media.³⁴⁰ As discussed in recitals (515) to (519), the Commission agrees that total customer foreclosure is not a likely scenario. However, as discussed in recitals (535) and (536) the Commission considers that post-Transaction Telenet could use partial customer foreclosure as a credible threat in negotiations which would improve Telenet's bargaining position relative to Medialaan.
- (538) In light of the above, the Commission concludes that post-Transaction Telenet would have the incentive to engage in one or several of the aforementioned partial foreclosure strategies as regards to Medialaan's linear channel 2BE and Vitaya and Medialaan's non-linear services.

Incentive to engage in partial customer foreclosure of VRT

- (539) Telenet may have also an incentive to use partial foreclosure strategies to shift viewers from the public broadcaster VRT to De Vijver Media's channels thereby

³³⁹ See also recital (527).

³⁴⁰ See the Notifying Parties' submission 'The interdependent relationship and bargaining between channels and TV retailers, Oxera', [ID 963], and 'Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004, Oxera', [ID 623].

increasing De Vijver Media's profits. To do so, Telenet could degrade the quality of VRT's channels on Telenet's platform by changing their EPG position or by using other similar strategies as discussed in recitals (482) to (484). The agreement between VRT and Telenet protects VRT against some of these strategies, but not, for example, against [...]*

- (540) The most likely target of partial customer foreclosure among VRT's channels is Canvas. As described in recital (512), Canvas has an audience that is similar to Vier and both channels have a relatively large share of local content.
- (541) By degrading the viewer experience [...] of Canvas, or by removing or degrading non-linear services of VRT, Telenet and De Vijver Media could induce viewers to shift away from VRT's programmes or non-linear services towards programmes or non-linear service of the commercial broadcasters De Vijver Media or Medialaan, thereby creating additional advertising revenues available to those commercial broadcasters or increasing other revenues associated with their non-linear services.
- (542) In the event that Telenet would engage in this type of partial customer foreclosure strategies only for VRT, De Vijver Media would appropriate some of the benefits from having more viewers, while some of these benefits would also be appropriated by Medialaan, as it is the other commercial broadcaster.
- (543) Furthermore, if Telenet were to engage in such strategies vis-à-vis both VRT and Medialaan channels simultaneously, a larger share of the part of the increase in viewers and associated revenues for commercial channels would be appropriated by De Vijver Media rather than by Medialaan. This would further increase the benefit to Telenet and De Vijver Media of partial customer foreclosure.
- (544) As customer switching as a result of these more subtle forms of foreclosure is likely to be very limited given that the quality of the channel is merely degraded, the Commission concludes that partially foreclosing Canvas may be a profitable strategy for Telenet and De Vijver Media.
- (545) Independent of whether the partial foreclosure of rival TV broadcasters is implemented for VRT alone or for VRT and Medialaan simultaneously, the costs of such a strategy are likely to be limited given that foreclosure is implemented in the form of degrading the services of rival broadcasters rather than in the form of a full blackout. As a consequence, customer switching and hence the costs of such strategies are likely to be limited. The Commission is therefore of the view that partial foreclosure in the form of a degradation of non-linear services of VRT alone or VRT together with Medialaan may be a profitable strategy for Telenet and De Vijver Media.
- (546) Moreover, in analogy to the discussion relating to the increase in bargaining power in negotiations with Medialaan in recital (535), Telenet could also use the threat of such partial foreclosure strategies to reduce the licence fees it pays to VRT.
- (547) In light of the above, the Commission concludes that Telenet would post-Transaction have the incentive to engage in one or several partial foreclosure strategies as regards also VRT's linear channel Canvas and VRT's non-linear services.

5.4.2.5. Effects of partial customer foreclosure

- (548) As a result of the quality degradation strategies outlined in recitals (522) to (523), the quality of the viewer experience of rival channels on Telenet's platform would be reduced. This reduction in quality would either stem from the fact that channels valued by Telenet's subscribers would not be as easily accessible on the EPG as before the Transaction or because the quality of the non-linear offerings of rival

broadcasters would be reduced. If Telenet decided to drop competing non-linear services altogether from its platform, consumer choice would be reduced.

- (549) Moreover, competition in the upstream market for the wholesale supply of FTA/basic pay TV channels would be softened as broadcasters Medialaan and VRT could be weakened as competitors in that market.
- (550) In this regard, the Commission notes that Medialaan's channels have far more viewers than De Vijver Media's channels and that Medialaan is currently the largest seller of TV advertising space in Flanders. Several advertisers who responded to the market investigation pointed out that the Transaction, by strengthening De Vijver Media, could have a positive impact on competition in the market for the sale of advertising space on TV.³⁴¹
- (551) However, the Commission also notes that, following quality degradation strategies, Medialaan would likely receive lower advertising revenues as a result of lower viewer shares for their linear channels. As described in recital (532), a relatively small shift in viewership may have a significant effect on broadcasters' advertising revenues. Moreover, Medialaan's and VRT's revenues from non-linear content offerings would also likely be reduced. Similarly both entities' profits would decrease in case Telenet used its bargaining power to reduce licence fees for these channels. These types of revenue losses for TV broadcasters may in turn reduce their return on investment into content and may thereby lower their incentive to continue investing in attractive content in the future. For example, Medialaan noted that as a result of the Transaction licence fees paid by Telenet for Medialaan's channels would decrease. This in turn would reduce their investments into programme content.³⁴² Moreover, De Vijver Media itself noted that a loss in revenues would, in particular, negatively affect investments in local content.³⁴³ This would result in consumer harm since end users would be left with lower quality programming.
- (552) Customer foreclosure strategies could possibly also harm advertisers, who would lose attractive channels and may be confronted with higher advertising prices charged by De Vijver Media. As a result of the quality degradation of Medialaan's channels, consumers would watch these channels less. Medialaan would thus be a weaker player in the selling of advertising space post-Transaction. This in turn could increase the prices advertisers would have to pay for advertising impacts. By engaging in partial foreclosure, Telenet and De Vijver Media would therefore soften competition in the sale of advertising.
- (553) The Commission therefore considers that partial customer foreclosure strategies are likely to weaken competition in the upstream markets of TV broadcasting and harm consumers downstream through a reduced quality of the viewer experience of rival channels, reduced choice and fewer investments in content. The Commission is therefore of the view that these partial customer foreclosure strategies raise concerns that they could result in a significant impediment to effective competition in the upstream market for the wholesale supply of FTA/basic pay TV channels.

5.4.2.6. Input foreclosure and customer foreclosure are not conflicting theories of harm in this case

³⁴¹ Questionnaire Q5 to TV advertisers of 19 August 2014, question 12.

³⁴² Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 9 [ID 1035].

³⁴³ De Vijver Media's response to question 9 of the Commission's data RFI of 19 September 2014, [ID 588].

The Notifying Parties' view

- (554) In their reply to the Article 6(1)(c) Decision the Notifying Parties point out that they could not engage in an input foreclosure and a customer foreclosure strategy at the same time, as the potential benefits of the one strategy would be undermined by the other. This is because the vertical arithmetic in the two types of foreclosure strategies works in opposing directions.
- (555) With an input foreclosure strategy the position of rival TV distributors are weakened, while in the case of a customer foreclosure strategy Telenet's own platform would be weakened by not carrying content. In the extreme case, this would result in a market structure with two de facto vertically integrated platforms – on the one hand Telenet and De Vijver Media, and on the other hand Belgacom and Medialaan. According to the Notifying Parties, it is difficult to see how Telenet would be better off from pursuing a strategy with such end results.

The Commission's Assessment

- (556) The Commission has concluded that the Transaction, would give Telenet and De Vijver Media the ability and incentive to engage in input foreclosure. The Commission has identified a number of different ways in which such a strategy could be put into practice, for instance through total input foreclosure or through partial input foreclosure. Moreover, there are a number of different potential targets of an input foreclosure strategy.
- (557) The Commission has also concluded that the Transaction would give Telenet and De Vijver Media the ability and the incentive to engage in customer foreclosure. Just as for input foreclosure, the Commission has identified a number of different methods the Parties could use and several different targets for such a strategy.
- (558) The Transaction would thus give the Parties the ability and incentive to engage in conduct that would significantly impede effective competition. This conclusion is not conditional on an implementation of all the variants identified by the Commission, or that the Parties would implement them at the same time.
- (559) Furthermore, in this particular case the Commission does not exclude the possibility that the Parties could, post-Transaction, have the ability and incentive to engage in both input and customer foreclosure.
- (560) For example, the Commission considers that the Parties likely would find it profitable to combine input foreclosure strategies, foreclosing one or more of Telenet's rivals (or to use the threat of such strategies to extract higher licence fees from these rivals for De Vijver Media), in combination with partial customer foreclosure strategies on Telenet's platform to the benefit of De Vijver Media's channels by discriminating against rival channels, as discussed in recitals (520) to (529).
- (561) Similarly, an input foreclosure strategy whereby De Vijver Media would not license Vier and Vijf to a new entrant would be an effective barrier for new entrants that could be a threat to Telenet's business. At the same time, Telenet could engage in a partial customer foreclosure strategy, for example by degrading De Vijver Media's rivals in the EPG or in the 'suggested viewings', a strategy which would favour Vier and Vijf but not lead to any significant churn to rival platforms.
- (562) The Commission therefore considers that the input and customer foreclosure strategies discussed in sections 5.4.1 and 5.4.2 are not mutually exclusive.

5.4.3. *Other non-coordinated effects*

(563) In addition to input foreclosure and customer foreclosure, the Commission also considered whether the Transaction raised concerns with regard to the possible use Telenet could make, following the acquisition of De Vijver Media, of the different types of commercial information it would hold.

(564) First, the Commission assessed whether Telenet could use the commercially sensitive information of TV broadcasters it obtains as a TV distributor to the advantage of its own TV channels post-Transaction. Second, the Commission considered whether Telenet's vertical integration could hinder the development of new forms of TV advertising, in particular targeted advertising, for instance by withholding viewer data from competing TV broadcasters.

5.4.3.1. Access to commercially sensitive information

(565) The Non-Horizontal Merger Guidelines recognise that a vertically integrated entity may gain access to commercially sensitive information on the activities of its upstream or downstream rivals. This may give the vertically integrated entity a competitive advantage to the detriment of consumers. For instance, a vertically integrated entity which is also the supplier of a downstream competitor may obtain critical information regarding the latter's activities.³⁴⁴ And vice versa, a vertically integrated entity may obtain such information from its upstream competitors that rely on it downstream and then use that information against those competitors upstream.³⁴⁵

(566) In the following recitals, the Commission first illustrates the types of commercially sensitive information that TV broadcasters exchange with TV distributors for the purpose of their business. Subsequently, the Commission evaluates whether post-Transaction Telenet would have the incentive and ability to use such information to favour Vier and Vijf over competing TV channels and whether such behaviour would harm competition and innovation.

Types of information TV broadcasters provide to TV distributors, including Telenet

(567) In the context of the provision of TV retail services to end viewers, upstream TV broadcasters provide to TV distributors information concerning their channels and their services, for the purpose of enabling the effective broadcasting of the channels downstream on the TV distributor's platform.

(568) TV broadcasters responding to the Commission's Phase II market investigation indicated that they currently share commercially sensitive information with Telenet, as well as other TV distributors, concerning their future business activities.³⁴⁶ This reflects the fact that the development and the launch of a new TV channel or service offered by a TV broadcaster usually requires a certain degree of support and cooperation on the part of the TV distributor.

(569) Mediaaan indicated that the type of information that Telenet typically requires from a TV broadcaster for the launch of a new TV channel includes: a detailed programme description; the target group of the channel; a description of the specific added value of the channel to the Telenet offering to viewers; a detailed business plan (including

³⁴⁴ See Non-Horizontal Merger Guidelines, paragraph 78.

³⁴⁵ Commission decision of 16 May 200 in case M.3101 *Accor/Hilton/Six Continents/JV*, recitals 15–21.

³⁴⁶ Replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 30, [ID 785], [ID 858], [ID 899], [ID891], and [ID 1035].

marketing plan, operational plan, financial plan, profit and loss plan, forecasts, risk analysis); consumer research results, market research company documents (with methodology and samples), audience or uptake rates; programme schemes (including refresh rate, own vs acquired content); other added value for Telenet, described as, *inter alia* ‘advertising space for Telenet’s products and services’; and EPG data.³⁴⁷

- (570) VRT explained that for the launch of a non-linear service, for instance SVOD, it needs to provide Telenet with information on, among others, content, volume and pricing for that service.³⁴⁸
- (571) This information is provided in advance of the actual launch of the TV channel or service, usually between six or nine months for the launch of a new TV channel and between three and six months for a new service.³⁴⁹

Telenet’s incentive and ability to use TV broadcasters’ commercially sensitive information and possible effects on competition

- (572) The Commission notes that pre-Transaction, Telenet’s interests are aligned with those of TV broadcasters, insofar as Telenet seeks to carry TV channels as part of its retail offering to end users and the exchange of information is necessary for that purpose. Telenet would not have an interest to use the information of TV broadcasters to its own benefit on the market for the wholesale supply of FTA/basic pay TV channels, as it has no activities there.
- (573) Post-Transaction, Telenet will have joint control over a competitor in the upstream market for the wholesale supply of FTA/basic pay TV channels. At the same time, it will be active downstream as a TV distributor.
- (574) The Commission assessed whether Telenet would have the ability and incentive to favour its own channels Vier and Vijf against third party TV broadcasters by using the latter’s commercially sensitive information acquired in the course of negotiations with them to benefit Vier and Vijf and whether, if this were to occur, this would lead to anticompetitive effects. The Commission considers this is unlikely for the following reasons.
- (575) First, Telenet would be precluded from using commercially sensitive information to the benefit of De Vijver Media by its confidentiality obligations towards TV broadcasters. These obligations are laid down in the carriage agreements between Telenet and TV broadcasters. The Commission notes that, as described in section 6 of this Decision, Telenet has offered increased confidentiality protections to Medialaan and VRT, the two most important competitors of De Vijver Media.
- (576) Second, in those cases where it acquires commercially sensitive information from TV broadcasters, Telenet may not necessarily have the incentive to develop with De Vijver Media or by itself the same new service, channel or content. For instance, an innovation developed by a certain TV broadcaster may be less attractive for De Vijver Media for reasons of diverging scale, target audience, or business model between the two TV channels. This may lead De Vijver Media to decide not to launch the same innovation as a competitor. Additionally, Telenet may be unwilling to use the commercially sensitive information of TV broadcasters, if this would lead

³⁴⁷ Reply of Medialaan to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 30.1, [ID 1035]. See also Presentation by Medialaan of 2 October 2014, [ID 613], slide 15.

³⁴⁸ Reply of VRT to Questionnaire Q1 to TV broadcasters of 9 October 2014, question 30.1, [ID 858]. VRT highlighted that co-production of content will increase in importance in the future.

³⁴⁹ Presentation by Medialaan of 2 October 2014, [ID 613], slide 15.

to those TV broadcasters not sharing their innovations with Telenet and relying instead on other TV distributors. This would make Telenet fall behind its competitors in terms of new services in the long term.

- (577) Third, certain types of innovation may require specific inputs that De Vijver Media or Telenet may be lacking, such as content rights, creative talent or a specific relationship of the competing TV broadcaster with other market players. Therefore, the holding of the commercially sensitive information in itself would not be sufficient to enable Telenet to use that information for the benefit of its own channels and readily imitate the new services and products of competitors.
- (578) Fourth, the Commission notes that in recent years innovations requiring cooperation between TV broadcasters and Telenet have been few.³⁵⁰ Therefore, the scope of the commercially sensitive information that Telenet could acquire and use is likely to be limited.
- (579) Fifth, the scope of the commercially sensitive information acquired by Telenet from TV broadcasters is not such as to preclude the development of all types of innovation by the latter. While in some instances collaboration with TV distributors is necessary to a certain extent for the launch of a new channel or a non-linear service, in other instances a TV broadcaster does not need to share information or collaborate with a TV distributor to develop innovation. For instance, TV broadcasters have launched new services such as Stievie and www.iwatch.be (an online VOD service providing access to individual TV programmes broadcast on the channels of Medialaan) without needing any cooperation with Telenet. Thus, innovation often does not require information sharing with Telenet.
- (580) Sixth, the benefits from the use of competing TV broadcasters' commercially sensitive information to duplicate innovation are likely limited. In the case of technical innovations that benefit a TV broadcaster because it is the first to launch a service or channel ('first mover advantage'), the period of first mover advantage is limited in time and does not necessarily reap profit. Therefore, any use by Telenet of commercially sensitive information of competing TV broadcasters would only minimally reduce this first mover advantage, and would likely not harm TV broadcasters.
- (581) In the case of a new TV channel, Telenet illustrated that the launch of a new TV channel takes approximately a minimum of twelve months and that Telenet is typically informed of the plans for the new channel plans six to nine months beforehand, with high-level details of the proposal.
- (582) Without information sharing, De Vijver Media could imitate the new channel innovation from the time it goes public. It would likely also take De Vijver Media twelve months to launch a similar channel. If Telenet acquired commercially sensitive information on the channel earlier, this would usually be six to nine months before the launch. Should Telenet pass this information to De Vijver Media, the competing TV broadcaster's first mover advantage would be reduced from 12 months (De Vijver Media starts imitating the channel from the public launch) to

³⁵⁰ Telenet reports that no new channels were launched by local TV broadcasters in the last two years and that the last channel discussion between Telenet and Medialaan was in relation to [...]*. As for additional services, Telenet indicates no services were launched by Medialaan, and VRT only introduced the possibility of subtitles for the hearing impaired. 'Virginia – Foreclosure Effects of Information sharing?', RBB Economics and Oxera Consulting, submission of 26 November 2014 [ID 1246], page 7.

three to six months (De Vijver Media starts preparing a rival channel upon receipt of information from Telenet).³⁵¹

- (583) This potential three to six month reduction of the first mover advantage is unlikely to have a substantial bearing on the overall viability of the new TV channel. Given that the launch of a new channel involves a significant up-front investment in content, marketing, operations and staff, the first months of broadcast of a TV channel (which correspond to the first mover advantage) are usually at a loss. Therefore, any loss of the first mover advantage a TV broadcaster may suffer because of Telenet's use of commercially sensitive information is likely immaterial on a TV broadcaster, as it would only minimally reduce the time of the advantage, and it would be in any event a period in which the channel is operating at a loss. Additionally, because of the public nature of the TV market, any innovations can easily be observed and imitated, so the first-mover advantage is inherently limited.

Conclusion on access to commercially sensitive information

- (584) In light of the above, the Commission considers that in this case it is unlikely that post-Transaction Telenet could use TV broadcasters' commercially sensitive information to the benefit of De Vijver Media in a manner that would significantly impede effective competition by reducing innovation in the market.

5.4.3.2. Possible concerns on limiting future innovations (targeted advertising)

- (585) The Commission also considered whether the Transaction could discourage innovation by hindering the development of new technologies such as targeted advertising for TV broadcasting.
- (586) Targeted advertising consists of a new form of TV advertising by which a TV channel broadcasts advertisements distinctively and specifically aimed for each viewer (or ad hoc group of viewers) on the basis of their prior viewing behaviour, rather than the same TV advertisement to a general audience, which is the standard existing business model for TV advertising.
- (587) In particular, during the proceedings, some market players among TV broadcasters and TV distributors voiced the concern that, for the purpose of the development and deployment of targeted advertising, technical access to data held by TV distributors is necessary. In that respect, the Commission considered whether such data were a necessary input for targeted advertising and whether, post Transaction, Telenet would have the ability and incentive to refuse to share such data with other TV broadcasters to benefit its own vertically integrated TV channels to launch targeted advertising.
- (588) At the outset, the Commission notes that the market investigation was not conclusive on the feasibility, technical and commercial features of targeted advertising. In particular, the market participants did not express clear and univocal views on the timing of the development of targeted advertising, on its precise functioning and on how the industry would change its business model.
- (589) Though most TV advertisers declared they would be commercially interested in the use of targeted advertising,³⁵² no clear view was expressed on when this new

³⁵¹ 'Virginia – Foreclosure Effects of Information sharing?', RBB Economics and Oxera Consulting, submission of 26 November 2014 [ID 1246], page 10.

³⁵² Replies to Questionnaire Q5 to TV advertisers of 19 August 2014, question 3; replies to Q3 Questionnaire to TV advertisers of 9 October 2014, question 9.

technology would be launched in Belgium. The answers of the TV advertisers responding to the market investigation varied between a minimum of one and a maximum of five years.³⁵³ Similarly, TV distributors generally stated that they were considering engaging in targeted advertising, but none had yet set plans on when and how to do so.³⁵⁴

- (590) Similarly, when asked what would be the likely business model and the technical functioning underlying targeted advertising, the replies of TV advertisers³⁵⁵ and TV distributors³⁵⁶ were equally not conclusive and uncertain.
- (591) Finally, with regard to whether the vertical integration of a TV distributor with a TV broadcaster would foster or hinder technical innovation for the purpose of targeted advertising, respondents were divided. Whereas some respondents among TV advertisers, TV distributors and TV broadcasters expressed the view that such an entity might favour its own TV channels, other respondents indicated that such a scenario would be beneficial for the purpose of technological innovation.³⁵⁷
- (592) In light of the fact that the development of targeted advertising in the Belgian TV market is still at an early stage, that the timing of such a technical development is uncertain and that the market investigation did not provide conclusive information on how targeted advertising would work from a technical or commercial standpoint, the Commission considers that the Transaction would not have anticompetitive effects that would lead to a significant impediment of competition as regards the future development of targeted advertising.

6. DEVELOPMENTS AFTER NOTIFICATION OF THE TRANSACTION

- (593) De Vijver Media has licensed the channels Vier and Vijf to various TV distributors pursuant to several carriage agreements. These carriage agreements are relevant for the assessment of the risk of input foreclosure, as they may provide the TV distributors with some protection from input foreclosure. Likewise, Telenet's carriage agreements with Medialaan and VRT are relevant for the assessment of the risk of customer foreclosure, as they may provide Medialaan and VRT with some protection from customer foreclosure.
- (594) After the Transaction was notified, both the carriage agreements of De Vijver Media and those of Telenet were amended. This section discusses the carriage agreements, how they were amended, and to what extent these amended carriage agreements remove the Commission's concerns of input and customer foreclosure identified in sections 5.4.1 and 5.4.2 of this Decision.

³⁵³ Replies to Questionnaire Q5 to TV advertisers of 19 August 2014, question 4.

³⁵⁴ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, question 53.

³⁵⁵ Replies to Questionnaire Q5 to TV advertisers of 9 October 2014, questions 8 and 10.

³⁵⁶ Replies to Questionnaire Q2 to TV distributors of 9 October 2014, questions 51 and 52.

³⁵⁷ Replies to Questionnaire Q3 to TV advertisers of 9 October 2014, question 12; replies to Questionnaire Q2 to TV distributors of 9 October 2014, questions 50 and 55; replies to Questionnaire Q1 to TV broadcasters of 9 October 2014, questions 54 and 55.

6.1. Input foreclosure: carriage agreements between De Vijver Media and various TV distributors

- (595) The carriage agreement between De Vijver Media and Belgacom expired on [...]*. Negotiations concerning a new carriage agreement took place during the proceedings. On [...]*, De Vijver Media and Belgacom agreed on a new carriage agreement.³⁵⁸
- (596) The new carriage agreement between De Vijver Media and Belgacom has a term of [...]* years, which is [...]*. Under the agreement, De vijver Media licenses its channels Vier and Vijf for transmission on Belgacom's network. De Vijver Media also licenses the right to [...]*. The carriage agreement also fixes the fee that Belgacom will be required to pay to De Vijver Media. It also provides that [...]*
- (597) De Vijver Media and Mobistar [...]*. On [...]* De Vijver Media and Mobistar signed a carriage agreement. That carriage agreement is for a term of [...]*. Mobistar will therefore have access to the channels Vier and Vijf, even without having to rely on any commitments. Moreover, on [...]*, De Vijver Media made an offer to Mobistar to extend the duration of the carriage agreement that would be concluded by a further period of [...]*, which would bring the total term of the carriage agreement to [...]*. The offer was binding on De Vijver Media and irrevocable. Although the carriage agreement entitles Mobistar to offer the channels Vier and Vijf to its subscribers, it does not include [certain services linked to Vier and Vijf]*.
- (598) The carriage agreement between De Vijver Media and M7, which operates the satellite service TV Vlaanderen, was originally set to expire on [...]*. On [...]*, De Vijver Media offered to extend the duration of the term of the agreement to [...]*. That offer was binding on De Vijver Media and irrevocable. The carriage agreement allows M7 to distribute Vier and Vijf but the non-linear services linked to those channels are limited to [...]*.
- (599) The carriage agreement between De Vijver Media and SNOW, the TV retail service owned by KPN, was originally set to expire at the end of [...]*. On [...]* both parties signed a new carriage agreement, [...]*. On [...]*, De Vijver Media offered to extend the duration of the term of the carriage agreement by [...]*. That offer was binding on De Vijver Media and irrevocable. On 17 December 2014, SNOW announced that it would stop offering TV services in Belgium.
- (600) The Commission considers that the binding and irrevocable offers to TV distributors to extend the term of their carriage agreement and the new carriage agreements with Belgacom and Mobistar reduce the risk of input foreclosure. Those carriage agreements provide TV distributors with some degree of protection from input foreclosure. However, the carriage agreements do not entirely remove the Commission's input foreclosure concerns, since they do not cover all services which De Vijver Media could withhold from TV distributors as part of an input foreclosure strategy.

6.2. Customer foreclosure: carriage agreements between Telenet on the one hand and VRT and Medialaan on the other

6.2.1. Carriage agreement between Telenet and VRT

- (601) The original carriage agreement between Telenet and VRT, meaning the carriage agreement before it was amended, was entered into on [...]* for a period of [...]*.

³⁵⁸ [...]*

Hence, it was due to expire on [...]*. On [...]*, Telenet and VRT agreed to amend the carriage agreement, including extending its term until [...]*.

- (602) In addition, the amendments to the carriage agreement between Telenet and VRT included several new provisions aimed at protecting VRT from customer foreclosure.
- (603) The Commission considers that the existence of the carriage agreement between Telenet and VRT, which will not expire until [...]*, removes the possibility for Telenet to engage in partial customer foreclosure for the reasons set out in the following recitals.
- (604) The carriage agreement fixes the licence fees to be paid by Telenet to VRT. [...]*. Those provisions of the carriage agreement prevent Telenet from unilaterally reducing the fees it pays to VRT and, hence, protect VRT from that form of partial customer foreclosure.
- (605) The carriage agreement between Telenet and VRT also provides [...]*
- (606) The original carriage agreement dated [...]*. The amendments to the carriage agreement addressed those concerns.
- (607) Under the terms of the amended carriage agreement, Telenet guarantees that [...]*. Overall, those provisions of the amended carriage agreement prevent Telenet from disadvantaging VRT via the EPG and, hence, protect VRT from that form of partial customer foreclosure.
- (608) The amendments to the carriage agreement between Telenet and VRT also removed the clause that [...]*. In its competitive assessment, the Commission concluded that that clause exacerbated its input and customer foreclosure concerns and the removal of that clause therefore removed the Commission's input and customer foreclosure concerns stemming from it.
- (609) Finally, the amendment to the carriage agreement between Telenet and VRT also strengthened Telenet's obligations to keep the information it receives from VRT, for instance about planned innovation, confidential.

6.2.2. *Carriage agreement between Telenet and Medialaan*

- (610) The carriage agreement between Telenet and Medialaan was entered into on [...]* for a term of [...]*, starting on [...]*. Hence, it will expire on [...]*.
- (611) On [...]*, Telenet made a binding and irrevocable offer to Medialaan to amend the carriage agreement. Telenet offered to prolong the term of the carriage agreement until [...]* and [...]*. In addition, the offer included several amendments to the carriage agreement aimed at protecting Medialaan from customer foreclosure.
- (612) The Commission considers that the existence of the carriage agreement between Telenet and Medialaan, combined with the binding and irrevocable offer which, as will be explained in section 7 of this Decision, has also been included in the commitments, remove the possibility for Telenet to engage in partial customer foreclosure for the reasons set out in the following recitals.
- (613) The carriage agreement fixes the licence fees to be paid by Telenet to Medialaan. [...]*. Those provisions of the carriage agreement prevent Telenet from unilaterally reducing the fees it pays to Medialaan and, hence, protect Medialaan from that form of partial customer foreclosure.
- (614) The carriage agreement also provides [...]*.
- (615) Telenet's offer to amend the carriage agreement contains additional protections from EPG-related foreclosure. [...]*. Overall, those provisions prevent Telenet from

disadvantaging Medialaan via the EPG and, hence, protect Medialaan from this form of partial customer foreclosure.

- (616) Telenet's offer also included an amendment to the carriage agreement removing the clause that [...]*. In its competitive assessment, the Commission concluded that that clause exacerbated its input and customer foreclosure concerns and the removal of that clause therefore removed the Commission's input and customer foreclosure concerns stemming from it.
- (617) Finally, Telenet's offer also strengthened Telenet's obligations to keep the information it receives from Medialaan, for instance about planned innovation, confidential.

7. COMMITMENTS

7.1. Analytical framework

- (618) When a concentration raises competition concerns because it would significantly impede effective competition, the parties may seek to modify the concentration in order to resolve those competition concerns and thereby obtain clearance of the transaction.
- (619) The commitments must eliminate the competition concerns entirely and must be comprehensive and effective in all respects.³⁵⁹ The commitments should also be proportionate to the competition concerns identified.³⁶⁰ Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.³⁶¹
- (620) Under the Merger Regulation, the Commission must show that a concentration would significantly impede effective competition in the internal market or in a substantial part of it. By contrast, it is for the parties to the concentration to propose appropriate commitments. The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified.
- (621) Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in the decision initiating proceedings are removed as a result of commitments submitted by the parties. This rule applies to commitments proposed in second phase proceedings before the Commission has issued a statement of objections.³⁶²

7.2. Procedure

- (622) In order to address the competition concerns identified by the Commission, the Notifying Parties submitted commitments on 24 November 2014. The Commission

³⁵⁹ Merger Regulation, recital 30; See also paragraph 9 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267,22.10.2008,p. 1) (the 'Remedies Notice').

³⁶⁰ Merger Regulation, recital 30.

³⁶¹ Remedies Notice, paragraph 9.

³⁶² Remedies Notice, paragraph 18.

initiated a market test of those commitments on that same day, seeking responses from TV distributors, broadcasters and other market participants.

- (623) The Commission communicated the results of the market test and the Commission's assessment of the commitments of 24 November 2014 to the Notifying Parties on 2 December 2014. The Notifying Parties subsequently submitted an improved set of commitments on 9 December 2014 and on 12 December 2014. One element in the commitments of 12 December 2014 became irrelevant after Belgacom and De Vijver Media entered into a new carriage agreement in January 2015. On 9 February 2015, the Notifying Parties submitted revised and final commitments without this element.

7.3. Commitments of 24 November 2014

7.3.1. Description of the proposed commitments

- (624) The central element of the commitments submitted by the Notifying Parties on 24 November 2014 was the commitment to offer TV distributors access to the channels Vier and Vijf. More specifically, the Notifying Parties committed to ensure that the legal entity operating those channels would meet all reasonable requests from third party TV distributors to distribute the channels in Belgium on fair, reasonable and non-discriminatory terms.
- (625) To determine what constitutes fair, reasonable and non-discriminatory terms, the commitments specified that, among other things, such terms should be fair, reasonable and non-discriminatory in comparison to the terms in place between the channel operator and Telenet as well as other similar distributors for the carriage of the channels in terms of tariffs and quality of the signal.
- (626) The commitments allowed TV distributors to license the channels Vier and Vijf for the whole territory of Belgium, to the extent that the rights included in the channels extend to this whole territory. However, TV distributors whose retail TV service activities are exclusively located outside of the footprint of the Liberty Global cable TV network in Belgium were deemed to be located outside of the territory for which the channels can be licensed under the commitments.
- (627) The commitments provided for arbitration as a means of resolving possible disputes relating to the commitment to offer access to the channels Vier and Vijf. If a third party would claim that the channel operator was failing to comply with the commitment, it could submit its claim to fast-track arbitration, administered by the International Chamber of Commerce's International Court of Arbitration. The Commission and the BCA were both allowed and enabled to participate in all stages of the arbitration. In addition, the Notifying Parties would appoint a monitoring trustee, to be approved by the Commission, to ensure compliance with the commitments.
- (628) Any TV distributor would be able to rely on the commitments to obtain access to Vier and Vijf. TV distributors were defined as providers of TV distribution services via cable, satellite, IPTV, DTT, internet or other distribution platforms. The commitments explicitly included distributors wishing to distribute via an OTT service, which was defined as any service that includes access for consumers to linear TV channels over the internet (howsoever delivered) via one or more devices.
- (629) To ensure that TV distributors relying on the commitments would be able to offer the full channel experience to their customers, the commitments also required the channel operator to license the 'ancillary rights' linked to the channels. This would allow TV distributors to offer services such as Catch-Up TV or PVR. The commitments defined ancillary rights as the right to include programmes from a

channel in other services or functionalities linked to the linear transmission of such a channel. However, the scope of the ancillary rights was limited in two ways. First, the commitments included only those ancillary rights that are owned or controlled by the channel operator. Second, they were only included to the extent that the exercise of the rights takes place during the linear broadcast window of the programmes. The linear broadcast window of the programmes was in turn defined as the period running from seven days before to seven days after the first linear broadcast of a programme on one of the channels covered by the commitments, or any other period before or after such first linear broadcast that becomes the market standard in Belgium.

- (630) The commitments also contained three elements aimed at removing the Commission's concerns that the Notifying Parties could circumvent a commitment to license Vier and Vijf by moving attractive programmes and services that would normally be shown on Vier and Vijf to another basic pay TV channel, which would not be covered by the commitments.³⁶³ Such a new channel could nonetheless be an important input for TV distributors because it would be similar to what Vier or Vijf were before the circumvention took place.
- (631) First, the Notifying Parties committed to ensure that De Vijver Media would license not only the channels Vier and Vijf but all other linear basic pay TV channels controlled or jointly controlled by De Vijver Media. Moreover, when De Vijver Media launches a new channel, it is not allowed to discriminate between TV distributors as regards the date on which the channel is made available to them. Although the Commission's foreclosure concerns related to the channels Vier and Vijf as an input, the Notifying Parties included all other linear basic pay TV channels of De Vijver Media in the commitments because otherwise the commitments could be circumvented by 'hollowing out' the channels Vier or Vijf and creating a similar new channel that would not be covered by the commitments. This would result in the new channel becoming the important input that Vier and Vijf previously were.
- (632) Linear basic pay TV channels were defined in the commitments as any linear channel that belongs to either one of three categories. First, any channel included in Liberty Global's entry-level basic analogue and/or digital TV channel package(s) in Flanders would be considered a linear basic pay TV channel. Second, any channel included in any additional packages that can be purchased by consumers on top of Liberty Global's entry-level basic analogue and/or digital TV channel package(s) and which include the channels Vier and Vijf would also be a linear basic pay TV channel in the sense of the commitments. Finally, any linear channel that exceeds the audience share of either Vier or Vijf at any point in time and has an audience share of more than 3.5 % would also be a basic linear pay TV channel.
- (633) Second, the commitments applied not only to channels controlled or jointly controlled by De Vijver Media, but also to channels controlled or jointly controlled by Telenet, in which De Vijver Media or one or several of De Vijver Media's shareholders have a significant minority stake (above 10 %). Moreover, the commitments also included channels in which each of (a) Telenet and (b) De Vijver

³⁶³ In 2011, the French competition authority had to withdraw its approval decision, rendered in 2006, relating to the acquisition of TPS and CanalSatellite by Vivendi Universal and Groupe Canal Plus. One of the reasons for this withdrawal was the fact that the merged entity had degraded the quality of the TPS Star channel, which was subject to a commitment to offer it to third party distributors. Instead, the merged entity had favoured another channel, Canal+.

Media or one or several De Vijver Media shareholders have a significant minority stake (above 10 %).

- (634) Third, the Notifying Parties committed not to degrade the quality of the channels Vier and Vijf. The channels' quality would be assessed in the light of market developments in Belgium and the combination of several metrics: audience share, reach, advertising income and percentage of locally produced content.
- (635) The duration of the commitments was for a period of five years but new TV distributors, namely TV distributors that are not distributing the channels Vier and Vijf on the date of the adoption of the decision, would have the option to enter into a carriage agreement for a duration of up to five years from its date of execution, without however exceeding eight years as from the date of the decision.

7.3.2. *Commission's assessment*

- (636) The Commission initiated a market test of the commitments on 24 November 2014 and received responses from TV distributors, broadcasters and the Belgian consumer association Test Aankoop/Test-Achats.
- (637) Taking into account the responses from the market test, the Commission subsequently assessed the commitments and concluded that, although the commitments removed some of the Commission's competition concerns, they did not remove them entirely.

7.3.2.1. The commitments removed some of the Commission's competition concerns

- (638) The Commission's input foreclosure concerns were based on the importance of Vier and Vijf as an input for TV distributors to compete with Telenet. By committing to offer access to Vier and Vijf, the commitments sought to address this concern. In the Commission's view, this element of the commitments was adequate to ensure that TV distributors would have access to the linear broadcast of the channel, allowing them to distribute Vier and Vijf to their viewers in a purely linear fashion.
- (639) The Commission also considered that the definition of TV distributors was broad enough to ensure that any distributors that may compete with Telenet would be entitled to rely on the commitments, including OTT services such as Stievie.
- (640) In addition, the Commission considered that the commitments adequately addressed the concerns related to a possible circumvention of the commitments. The Commission considered that the commitments adequately prevented the Notifying Parties from moving attractive programmes and services that would normally be shown on Vier and Vijf to another basic pay TV channel that would not be covered by the commitments.
- (641) Such circumvention would violate section B(2) of the commitments – which prohibited the Notifying Parties from intentionally reducing the quality of the channels Vier and Vijf. In addition, it would be ineffective because the new channel created to circumvent the commitment would still be covered by the commitments. Indeed, if the new channel is part of the basic channel package which Telenet offers to its TV customers, it would be covered under point (i) of the commitments' definition of linear basic pay TV channels. Arguably, this anti-circumvention provision could in turn be circumvented by charging a very low price for the channels. As a result, the new channel would not be in Telenet's basic channel package and, if the price is low enough, it could have a sufficient number of

subscribers for De Vijver Media to retain its advertising income and to remain an important input, just as Vier and Vijf were.³⁶⁴ However, even in such a scenario, the new channel would still fall under the commitments because it would be covered under point (iii) of the commitments' definition of linear basic pay TV channels as soon as the new channel's audience share exceeds the audience share of either Vier or Vijf at any point in time and if it has an audience share of more than 3.5 %. This provision is an additional safeguard against circumvention because circumvention would lead to decreasing audience shares for Vier or Vijf (as most of the programmes and services are moved away from Vier or Vijf) and increasing shares for the new channel that was created in an attempt to circumvent the commitments. As soon as the new channel reaches a higher audience share than either Vier or Vijf, it would fall within the scope of the commitments and would have to be licensed, provided its audience share exceeds a minimum threshold of 3.5 %.

- (642) The Commission also considered whether the commitments could be circumvented if Telenet included Vier or Vijf in a new channel package which would be slightly more expensive than the basic package. In such a scenario, Vier and Vijf would no longer be considered basic pay TV channels in the sense of point (i) of the definition of linear basic pay TV channels. At the same time, if the channel package is only slightly more expensive than Telenet's basic channel package, the channels could possibly still have a sufficient number of subscribers to remain an important input, just as Vier and Vijf were when they were part of Telenet's basic channel package. The Commission considered that the commitments prevented such circumvention because point (ii) of the definition of linear basic pay TV channels includes all channels that are included in any additional packages that can be purchased by consumers on top of Liberty Global's entry-level basic analogue and/or digital TV channel packages and which include the channels Vier and/or Vijf.
- (643) The Commission also considered that the Notifying Parties could not circumvent the commitments by moving the more attractive programmes and services that would normally be shown on Vier and Vijf to a new channel that is not controlled by De Vijver Media. Such a channel would still fall under the commitment because the Notifying Parties committed to license not only Vier, Vijf and any other basic linear pay TV channel controlled by De Vijver Media, but also any linear basic pay TV channel controlled or jointly controlled by Telenet in which De Vijver Media or one or several of De Vijver Media's shareholders have a significant minority stake (above 10 %). The commitments also applied to any linear basic pay TV channel in which each of De Vijver Media or one or several of its shareholders and Telenet have a significant minority stake (above 10 %). The latter category would include, for instance, a channel neither controlled by De Vijver Media or Telenet but in which De Vijver Media has an 11 % stake and Telenet also an 11 % stake.
- (644) Several respondents expressed the view that the commitments could still be circumvented, for instance if De Vijver Media creates a new premium pay TV channel and the new channel's viewer share is lower than that of Vier or Vijf, or has an audience share of less than 3.5 %.³⁶⁵ The Commission did not share these concerns. This type of conduct would not amount to circumvention of the

³⁶⁴ Form CO, Annex 6.2, f, An overview of the viewer shares of TV channels in Flanders in 2013 and the first half of 2014. This overview shows that the premium pay TV channel with the highest viewer share in Flanders is Sporting Telenet 1, with a share of [0-5]* % in 2013. Telenet's second most viewed premium pay TV channel is Prime One with a [0-5]* % viewer share in 2013.

³⁶⁵ Replies to Questionnaire 'Market Test for Remedies', questions 9–12.

commitment to offer access to Vier and Vijf, the two channels which the Commission has shown to be important inputs for TV distributors. Instead, such conduct would consist in the creation of entirely new channels after the Transaction. These new channels may become important inputs over time. However, any input foreclosure concerns relating to these new channels created after the Transaction are not specific to the Transaction. The Commission therefore concluded that the commitments should not oblige De Vijver Media to license all new channels it launches, but only Vier, Vijf and the additional channels as defined in the commitments to prevent circumvention. Moreover, the Commission did not consider it likely that the Notifying Parties would use a true premium pay TV channel (as opposed to a premium pay TV channel for which a fee is charged that is so low that it actually attracts the large viewership of a basic pay TV channel) to circumvent the commitments. If Vier or Vijf were replaced by a true premium pay TV channel, that would entail a fundamental change in the business model of De Vijver Media and a significant loss in advertising revenue, as premium pay TV channels typically have much lower audience shares than basic pay TV channels.³⁶⁶ Since the rationale of Liberty Global's acquisition of a stake in De Vijver Media is to enter the basic pay TV market, such a strategy would run counter to the rationale of the Transaction.³⁶⁷ Hence, if De Vijver Media were to launch a premium pay TV channel, it would probably not replace Vier or Vijf but be offered as an additional new product.

7.3.2.2. The commitments had several shortcomings

- (645) The Commission identified the following shortcomings in the commitments.
- (646) First, the Commission considered that the scope of the ancillary rights included in the commitments was not appropriate. The commitments defined these ancillary rights as the right to include programmes from a channel in other services or functionalities linked to the linear transmission of such channel. These rights were limited in time to the rights that are exercised during the 'linear broadcast window of the programmes', which was in turn defined as a period running from seven days before to seven days after the first linear broadcast of a programme.
- (647) In response to the market test, several respondents indicated that ancillary rights are rapidly evolving and expressed the concern that the commitments would not cover ancillary services that broadcasters and TV distributors would develop in the future.³⁶⁸ In addition, they indicated that the seven-day period may not be the appropriate time period for all ancillary rights.³⁶⁹ PVR rights, for instance, allow a user to record a programme and subsequently watch it when the viewer wants to. The right to watch the recorded programme is normally not limited to seven days.
- (648) Moreover, the Commitments applied only to ancillary rights owned by or controlled by the channel operator. This would leave room for circumvention of the commitments as regards ancillary rights. Specifically, Woestijnvis, the TV production company controlled by De Vijver Media, could produce programmes for Vier or Vijf but, rather than licensing the ancillary rights to its parent company (De Vijver Media) or the channel operator, retain these rights and license them directly to

³⁶⁶ From CO, Annex 6.2.f) ('An overview of the viewer shares of TV channels in Flanders in 2013 and the first half of 2014') (showing a list with channels and their viewer shares; the highest ranked premium pay TV channel is Sporting Telenet 1, with a viewer share of [0-5]* % in 2013).

³⁶⁷ See Form CO, Annex 5.4.a), [...]*

³⁶⁸ Replies to Questionnaire 'Market Test for Remedies', question 3.

³⁶⁹ Replies to Questionnaire 'Market Test for Remedies', question 6.

Telenet. This would result in a situation in which, strictly speaking, the ancillary rights are not owned by or controlled by the channel operator, meaning the legal entity operating Vier or Vijf. As a result, these ancillary rights would not have to be licensed under the commitments of 24 November 2014, although Telenet viewers would nonetheless have the benefit of using these services or functionalities, since Woestijnvis would have licensed the rights for these services directly to Telenet.

- (649) Second, under the commitments submitted by the Notifying Parties, it was unclear whether TV distributors could rely on the commitments to obtain a licence for Vier or Vijf only, or whether it would have to license both Vier and Vijf. As indicated by most respondents in the market test, TV distributors should have the possibility to license only one of the channels or, in case new channels are launched that fall within the scope of the commitments, several but not all the channels.³⁷⁰
- (650) Third, as pointed out by several respondents to the market test, the five year duration of the commitments was not long enough.³⁷¹ Setting up and maintaining TV distribution services require a considerable investment and, hence, the commitments should be in place for a period that is sufficiently long to allow TV distributors to plan and make long-term investments.
- (651) Fourth, some respondents to the market test expressed the view that, given that disputes would relate to broadcasting in Belgium, the Belgian Centre for Arbitration and Mediation ('CEPANI') would be more appropriate as institution to administer any arbitration resulting from the commitments.
- (652) Some respondents to the market test considered that other aspects of the commitments were also inadequate. However, the Commission did not share the assessment of these respondents.
- (653) Some respondents suggested that the commitments should not only cover the channels Vier, Vijf and the other linear basic pay TV channels as defined in the commitments, but all possible channels controlled by De Vijver Media or Liberty Global. In addition, some respondents suggested that the commitments should cover all the individual programmes and content controlled by De Vijver Media or Liberty Global. The Commission did not share this assessment. At present, De Vijver Media only broadcasts the channels Vier and Vijf and the Commission has shown in its competitive analysis that these two channels are important inputs for TV distributors. Consequently, the commitments concern only Vier, Vijf and the channels defined in the commitments. However, the commitments do not need to cover all the channels the Notifying Parties or De Vijver Media may develop, insofar as these channels are in no way related to the Transaction, the concerns identified by the Commission in relation to the Transaction or the circumvention of the commitments proposed by the Notifying Parties.
- (654) The Commission has no input foreclosure concerns relating to the production and licensing of broadcasting rights for TV content (that is to say, individual programmes). Likewise, it has no merger-specific input foreclosure concerns relating to the channels broadcast by Liberty Global, since the supply of these channels is not affected by the Transaction. To the extent that Liberty Global has the ability and incentive to foreclose competitors from access to these channels, this ability and

³⁷⁰ Replies to Questionnaire 'Market Test for Remedies', question 13.

³⁷¹ Replies to Questionnaire 'Market Test for Remedies', question 20.

incentive exists regardless of the Transaction. Hence, it would not be appropriate for the commitments to include channels broadcast by Liberty Global.

- (655) Several respondents indicated that the commitments' reference to 'fair, reasonable and non-discriminatory terms', coupled with the reference to the terms in place between channel operators and Telenet as well as other similar distributors, was not sufficiently concrete to determine the conditions at which the channels covered by the commitments would have to be licensed.³⁷² Although the Commission acknowledges that this standard may appear abstract, it believes it is the most appropriate way to define the terms under which the channels should be licensed. The commitments may be relied upon by various TV distributors, using different technologies, with a different footprint, and offering different rights to their end users. Given this variety, the Commission does not consider it appropriate to specify in greater detail the conditions under which the channels should be licensed. The Commission also notes that the respondents to the market test themselves suggested very different benchmarks to determine the licensing terms.³⁷³ This illustrates that for different TV distributors, different elements will be relevant to determine the appropriate licensing terms. Therefore, the Commission considers that the reference to 'fair, reasonable and non-discriminatory terms' is the most appropriate benchmark to for the terms to which various types of TV distributors will be entitled under the commitments.
- (656) Finally, the Commission also considered that the commitments did not fully remove its competition concerns because they did not remove the Commission's customer foreclosure concerns. At the time the Notifying Parties submitted the commitments of 24 November 2014, the carriage agreement between Telenet and VRT had not been amended and Telenet had not made an offer to Medialaan to amend the carriage agreement with Medialaan. Without these amendments and without the offer, the Commission considered that VRT and Medialaan were not sufficiently protected from customer foreclosure by their carriage agreements with Telenet. Since the commitments of 24 November 2014 did not address these concerns, they did not fully remove the Commission's customer foreclosure concerns.

7.4. Final commitments of 9 February 2015

7.4.1. Description of the proposed commitments

- (657) The Notifying Parties submitted revised commitments on 9 December 2014, to address the shortcomings identified by the Commission subsequent to the market test of the commitments of 24 November 2014. The Notifying Parties subsequently added one element (the commitment relating to an agreement with Belgacom, as described in recital (666)) to the commitments of 9 December 2014 and submitted these revised commitments on 12 December 2014. In the course of January 2015, De Vijver Media and Belgacom entered into a new carriage agreement. The conclusion of a new carriage agreement removed the need for a commitment relating to an agreement with Belgacom and, on 9 February 2015, the Notifying Parties submitted revised and final commitments (the 'Final Commitments') without this element.
- (658) The main element of the Final Commitments is the commitment to grant access to Vier and Vijf. This was also the main element of the commitments of 24 November 2014. The Final Commitments also contain many other elements that were already

³⁷² Replies to Questionnaire 'Market Test for Remedies', question 17.

³⁷³ Replies to Questionnaire 'Market Test for Remedies', question 18.

present in the commitments of 24 November 2014, including the elements to prevent their circumvention (see recitals (630) to (634)).

- (659) The Final Commitments also contain several changes compared to the commitments of 24 November 2014, aimed at addressing the shortcomings identified by the Commission.
- (660) First, the definition of ancillary right was revised. In the Final Commitments, ancillary rights are defined as the right to include programmes from a linear basic pay TV channel as part of a linked service. A linked service is any existing or future service, functionality or feature (a) that is designed and offered as part of the broadcast experience of a linear channel, and (b) that is offered to end users simultaneously with the linear transmission of the channel, or shortly before or after the linear transmission of the channel for a period which is customary for such service. As examples of such ancillary rights, the Final Commitments list Catch-Up TV services, multiple device services and PVR services. The Final Commitments also specify that all such services, functionalities and features that are available to end users on the Telenet platform for Vier, Vijf and any new basic pay TV channels as defined in the commitments will be considered as a linked service that is covered by the commitments.
- (661) Moreover, in the commitments of 24 November 2014, ancillary rights were only covered to the extent that these rights are owned or controlled by the channel operator. In the Final Commitments, ancillary rights are covered to the extent that these rights are owned or controlled by one or more of the Notifying Parties, De Vijver Media and/or their affiliated undertakings.
- (662) Second, the Final Commitments make it clear that TV distributors do not have to request access to all channels in order to rely on the commitments. Instead, they can request to distribute 'one or more' of the channels. For instance, a TV distributor is allowed to license only Vier, and not Vijf, under the commitments.
- (663) Third, to address concerns expressed during the market test about the accessibility of the dispute resolution mechanism, the Notifying Parties changed the institute that would administer the arbitration in case of dispute between the channel operator and a third party. Whereas the commitments submitted on 24 November 2014 provided for arbitration administered by the International Chamber of Commerce, the Final Commitments provided for arbitration administered by the Belgian Centre for Arbitration and Mediation ('CEPANI').
- (664) Fourth, to address concerns about the duration of the commitments, the Notifying Parties extended the duration of the commitment from five to seven years from the date of the adoption of this Decision.
- (665) Fifth, the Final Commitments include a commitment that the binding offer to Medialaan to amend the carriage agreement between Telenet and Medialaan will remain valid for a period of six months as from the closing of the Transaction.
- (666) The commitments of 12 December 2014 included an element aimed at ensuring that Belgacom would have the possibility to enter into a new carriage agreement with De Vijver Media and, hence, have access to the channels Vier and Vijf. Since De Vijver Media and Belgacom entered into a new carriage agreement in the course of January 2015, this element in the commitments became irrelevant. The Notifying Parties therefore submitted the Final Commitments on 9 February 2015 without the element relating to the Belgacom agreement. Apart from the removal of this element, the Final Commitments submitted on 9 February 2015 were identical to the commitments of 12 December 2014.

7.4.2. *Commission's assessment*

- (667) The central element of the Final Commitments is the commitment to offer access to the channels Vier and Vijf. For the reasons explained in section 7.3.1.2 the Commission considers that this element of the commitment is adequate to ensure that TV distributors will have access to the linear broadcast of Vier and Vijf, allowing them to distribute these channels to their viewers in a purely linear fashion.
- (668) The Final Commitments also contain the anti-circumvention provisions that were present in the Commitments of 24 November 2014. The Commission considers that these are adequate to prevent circumvention of the commitment to license Vier and Vijf, for the reasons explained in section 7.3.2.1.
- (669) The revised definition of ancillary rights in the Final Commitments addresses the shortcomings identified by the Commission. The inclusion of ancillary rights ensures that TV distributors will not only be able to distribute Vier and Vijf in a purely linear fashion but offer their subscribers the full channel experience. This will allow them to compete with Telenet, which also offers ancillary services on top of the purely linear distribution of the channels Vier and Vijf.
- (670) The revised definition of ancillary rights explicitly includes future linked services. This ensures that the development of new linked services will not lead to a 'hollowing out' of the commitments, since new linked services will also be included. In addition, the revised definition no longer refers to rights that are exercised in a seven-day period before and after the linear broadcast but to services offered simultaneously, shortly before or shortly after the linear transmission of the channel for a period which is customary for such service. This definition, which allows for different periods for different services, is more appropriate.
- (671) The commitment to license ancillary rights applies to ancillary rights that are owned or controlled by one or more of the Notifying Parties, De Vijver Media and/or their affiliated undertakings. This also represents a change compared to the commitments of 24 November 2014, in which ancillary rights were only included to the extent that these rights were owned or controlled by the channel operator. By changing 'channel operator' to 'one or more of the Notifying Parties, De Vijver Media and/or their affiliated undertakings', the Final Commitments prevent that the commitments would not apply if Woestijnvis produces a programme, broadcast on one of De Vijver Media's channels, but without licensing the ancillary rights to De Vijver Media.
- (672) Overall, the commitment to offer access to the channels Vier and Vijf, together with the ancillary rights offered by these channels, removes the Commission's input foreclosure concerns. It removes the Commission's concerns of total input foreclosure because it ensures that TV distributors will have access to the channels Vier and Vijf. It also removes the Commission's partial input foreclosure concerns because it ensures that TV distributors will pay fees that are fair, reasonable and non-discriminatory for the distribution of Vier and Vijf.
- (673) The Commission considers that the revised duration of the Final Commitments, that is seven years, is sufficient to remove its competition concerns as regards input foreclosure. The TV market in Flanders and Belgium is an evolving market and it is difficult to predict the state of the market beyond seven years. Hence, the Commission did not consider it warranted to impose commitments beyond that time period.
- (674) The commitment to license Vier, Vijf and the other channels covered by the Final Commitments will become effective immediately after this Decision is adopted.

Hence, the Final Commitments are capable of being implemented effectively within a short period of time.

- (675) The Commission also considers that the Final Commitments, combined with the amendments made to the carriage agreement with VRT and Telenet's offer to amend the carriage agreement with Medialaan described in section 6, remove the Commission's customer foreclosure concerns. The commitment that the binding offer to Medialaan to amend the carriage agreement will remain valid for a period six months as from the closing of the Transaction ensures that Telenet will not withdraw the offer to Medialaan after this Decision is adopted. The commitment to keep the offer to Medialaan open will become effective immediately after this Decision is adopted and is therefore capable of being implemented effectively within a short period of time.
- (676) The Commission therefore concludes that the Final Commitments eliminate the Commission's competition concerns and are capable of being implemented effectively within a short period of time. Moreover, they are proportionate to the competition concerns identified by the Commission.

8. CONDITIONS AND OBLIGATIONS

- (677) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (678) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties.³⁷⁴ Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (679) In accordance with the basic distinction described in recital (678) as regards conditions and obligations, the commitments submitted by the Notifying Parties on 9 February 2015 should be considered as obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as Annex B to this Decision and forms an integral part thereof.

³⁷⁴ Remedies Notice, paragraph 19.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Liberty Global plc, along with Waterman & Waterman NV and Corelio Publishing NV, acquire joint control of De Vijver Media NV within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance by Liberty Global plc, Waterman & Waterman NV and Corelio Publishing NV with the obligations set out in the Annex B.

Article 3

This Decision is addressed to:

Liberty Global plc
38 Hans Crescent
SW1X 0LZ London
United Kingdom

and

Waterman & Waterman NV
Harensesteenweg 228
1800 Vilvoorde
Belgium

and

Corelio Publishing NV
Alfons Gossetlaan 30
1702 Groot-Bijgaarden
Belgium

Done at Brussels, 24.2.2015

(Signed)

For the Commission

Margrethe VESTAGER

Member of the Commission

ANNEX A: THE COMMISSION'S QUANTITATIVE ANALYSIS

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1. INTRODUCTION

- (1) This annex provides the details of the Commission's quantitative analysis of input foreclosure concerns.
- (2) Section 2 presents the details of the calculations of 'critical switching rates' that the Commission used in its assessment of the profitability of a number of total input foreclosure scenarios¹. The scenarios considered include (i) total foreclosure of all Telenet rivals, (ii) foreclosure of Belgacom only and (iii) foreclosure of smaller rivals (Snow and TV Vlaanderen) only.
- (3) The Commission concludes from this analysis that post-transaction there will likely be a strong incentive to engage in total input foreclosure of one or more distribution platforms.
- (4) Section 3 contains the details of the basic bargaining model that the Commission used to assess the changes induced by the transaction on the negotiations between De Vijver Media and Telenet's rivals over the carriage fee for Vier/Vijf².
- (5) The Commission concludes from this analysis that post-transaction there will likely be a strong incentive to engage in partial input foreclosure of one or more distribution platforms.

2. COMPLETE INPUT FORECLOSURE

- (6) The Commission has assessed the incentives for De Vijver Media and Telenet to engage into a number of input foreclosure scenarios involving the permanent withholding of Vier/Vijf from rivals of Telenet. The assessment is based on a comparison of the benefits to Telenet with the costs to De Vijver Media of each input foreclosure scenario. Section 2.1 sets out the modelling approach used and derives the relevant formulae. Section 2.2. then discusses quantification of the different elements entering the formulae and presents the results on the relevant critical switching rates for each total input foreclosure scenario.

2.1. The quantitative approach adopted by the Commission for the assessment of the incentives for complete input foreclosure

- (7) The cost of a total input foreclosure strategy to De Vijver Media consist of lost carriage fees from the foreclosed rival(s) plus losses in advertising revenues from a reduced viewer reach of these channel.
- (8) In the analysis below, De Vijver Media's advertising revenues on each platform (prior to the foreclosure) are assumed to be directly proportional to the subscriber share of the platform. The loss in advertising revenues resulting from input foreclosure then corresponds to these pre-transaction advertising revenues on the platform reduced by the fraction of subscribers on this platform that will switch to

¹ See section 5.4.1.3 of the Decision.

² See section 5.4.1.3 of the Decision.

Telenet or another non-foreclosed platforms in order to be able to continue to watch Vier/Vijf.³

- (9) The cost incurred by De Vijver Media from denying access of Vier/Vijf to the rival platform(s) in question can hence be written as:

$$\text{DVM costs} = F_{DVM} + A_{DVM} \times \frac{N_{Rival}(1-\delta)}{N} \quad (1)$$

- (10) In this formula, F_{DVM} denotes the carriage fee received by De Vijver Media from the foreclosed platforms absent foreclosure. A_{DVM} denotes total advertising revenues by De Vijver Media. The total number of TV subscribers in the Telenet footprint is denoted as N , while the total number of subscribers of the foreclosed Telenet rivals is denoted by N_{Rivals} . Finally, δ denotes the proportion of rivals' subscriber base that switches away from foreclosed platforms to an alternative TV distributor which continues to carry Vier/Vijf (the 'switching rate') in response to the foreclosure strategy. The term $A_{DVM}N_{Rival}/N$ corresponds to DVM's advertising revenues on the foreclosed platforms prior to foreclosure. This is multiplied by $(1-\delta)$ as a fraction δ of these revenues will not be lost due to subscribers switching to other platforms.

- (11) The gains to Telenet from total input foreclosure are the incremental profits enjoyed on the additional customers gained from the foreclosed rival platform(s). These can be denoted as:

$$\text{Telenet gain} = \delta \times a \times N_{Rivals} \times \Pi_T, \quad (2)$$

- (12) where a denotes the fraction of these switchers who join Telenet (as opposed to another TV distributor that carries Vier/Vijf) and Π_T denotes Telenet's incremental profit (or contribution margin) per subscriber switching to Telenet.

- (13) Denoting by s the share of De Vijver Media losses internalised by Telenet the increase in profit from the total input foreclosure strategy is:

$$\Delta\text{ProfitTF} = \delta \times a \times N_{Rivals} \times \Pi_T - s \left[F_{DVM} + A_{DVM} \times \frac{N_{Rival}(1-\delta)}{N} \right] \quad (3)$$

- (14) If this expression is positive, the total foreclosure strategy is likely to be profitable. The higher the increase in profits, the greater the incentives to engage in such a strategy post-transaction.

- (15) At the critical switching rate (or departure rate) δ^* the benefits from foreclosure will be equal to the costs, that is, the additional profits from foreclosure are equal to zero.

- (16) The critical switching rate is hence:

$$\delta^* = s \left(F_{DVM} + A_{DVM} \times \frac{N_{Rival}}{N} \right) \times \left[\frac{1}{a \times N_{Rival} \times \Pi_T + s \left(A_{DVM} \times \frac{N_{Rival}}{N} \right)} \right] \quad (4)$$

- (17) Total input foreclosure will be profitable for Telenet if the likely switching rate exceeds this critical value.

³ As is common in "vertical arithmetic" analysis of foreclosure incentives, it is implicitly assumed that "prices" do not change. In the case of advertising revenues this assumption translates into an assumption that advertising revenues per subscriber reached remain unaffected by the foreclosure strategy.

2.2. The total input foreclosure scenarios considered

- (18) Within the framework set out above, the Commission has assessed the profitability of the following input foreclosure scenarios involving the permanent withholding of Vier/Vijf from rivals of Telenet:
- (19) First, the Commission has assessed the scenario in which all of Telenet's major rival distribution platforms that carry Vier/Vijf are foreclosed jointly.
- (20) Second, the Commission has assessed the scenario where only Belgacom as Telenet's main rival is foreclosed.
- (21) Third, the Commission has assessed the scenario where the two smaller rivals Snow and TV Vlaanderen are foreclosed but not Belgacom.
- (22) For the purposes of this analysis, Free Sat and DTT have not been considered as rivals of Telenet, as these TV distributors do not currently offer Vier/Vijf on their platforms.
- (23) For its analysis, the Commission has used two estimates for the incremental profit Telenet would earn from a subscriber switching to Telenet. For the baseline case reported below, the Commission has assumed that subscribers switching to Telenet generate a margin equal to Telenet's average contribution margin per subscriber on its existing customer base.⁴ However, the Commission notes that this estimate may contain two biases. First, Telenet's average contribution margin includes margins on single play analogue TV customers which account for around [20-30]* % of Telenet TV subscribers and which generate [...]*. As rival platforms in the Telenet area offer digital TV services only, the Commission considers that such customers are unlikely to become single play analogue TV customers of Telenet. Second, switching subscribers may not switch all of the products to Telenet. For instance, despite the discounts that are typically offered on multi-play subscriptions, a Belgacom triple or quadruple play customer might decide to switch to a single play digital TV subscription with Telenet while remaining a customer of Belgacom's for internet and telephony services. As these two mechanisms would work in opposite directions it is not clear whether using Telenet's average contribution margins as a measure for the likely incremental profit for switching subscribers is significantly biased and, if so, in what direction this bias would go.
- (24) As a sensitivity check, the Commission therefore also calculated the incremental profit to Telenet by combining Telenet's contribution margin by type of product (single or multi-play) with confidential information from Belgacom on (i) Belgacom's actual distribution of subscribers across single and multi-play TV products; and (ii) responses from a survey conducted by Belgacom among TV subscribers who stated that they would switch TV platform if Vier/Vijf were no longer available on whether they would also switch other products included in the bundle with their current TV platform. The Commission considers that the margins computed this way likely provide a more accurate reflection of the incremental margin that would be generated from subscribers switching from Belgacom to Telenet. However, as it is based on confidential third party data from Belgacom, the

⁴ [...]*

margins and the resulting critical switching rates from this approach cannot be reported in detail here.⁵

- (25) The calculations also require estimates of De Vijver Media's losses from input foreclosure. As total input foreclosure of one or several platforms would lead to losses of advertising revenues by De Vijver Media on the foreclosed platforms, De Vijver Media's advertising revenues have to be split by platform.
- (26) As discussed above, the Commission has allocated advertising revenues proportionately to the subscriber numbers of each platform carrying Vier or Vijf in Flanders.⁶ The approach assumes that, on average, any differences in viewer behaviour or demographics are minor so that there is no significant difference in average advertising impacts per subscriber across platforms.
- (27) An alternative approach, which was proposed by De Vijver Media in its response to the Commission's data RFI of 19 September 2014, is to use CIM⁷ data on TV ratings by platform and by channel from the CIM North panel. In principle, an allocation by measured TV ratings could provide a more accurate allocation of advertising revenues across channels as it could account for differences in viewing patterns across platforms. However, the CIM data and, as a result, the allocation proposed by De Vijver Media in its response, has some significant shortcomings for the allocation of advertising revenues by platform. In particular:
 - (a) De Vijver Media's proposed approach based on CIM TV ratings implies that [30-40]* % of De Vijver Media's advertising revenues are generated on the Belgacom platform. However, Belgacom subscribers also account for [30-40]* % of the participants in the CIM North panel which is a significantly larger share than Belgacom's share of TV subscribers among platforms carrying De Vijver Media channels in Flanders of [20-30]* %. As the CIM data on TV ratings by platform does not apply a weighting to correct for this over-representation of Belgacom subscribers in its panel, an allocation of advertising revenues by TV ratings by platform generated by CIM will hence overstate the advertising revenues generated for Vier and Vijf on the Belgacom platform.
 - (b) De Vijver Media's allocation implies that viewing on the Telenet platform generates [50-60] % of De Vijver Media's advertising revenues and ratings. This figure is derived from digital subscriber to Telenet TV services which represent [50-60]* % of participants in the CIM panel. However, it is significantly lower than Telenet's subscriber share among platforms that carry De Vijver Media channels in Flanders of [70-80]* % which also includes analogue subscribers. The approach proposed by De Vijver Media hence significantly understates the percentage of its advertising revenues relating to Telenet.
 - (c) The approach proposed by De Vijver Media does not allow a clear identification of revenues generated by platforms other than Belgacom or Telenet. The relevant other platforms in the CIM North panel are TV Vlaanderen and Snow. However, these platforms are represented in the CIM North panel by jointly less than 20 panel

⁵ As the formula for the critical switching rate is relatively simple, the margins used could be easily inferred if the critical switching rates were reported.

⁶ This approach was also used in Telenet's economic submissions on foreclosure.

⁷ Centre d'Information sur les Médias.

participants (they account for [0-5]* % of the approximately 750 panel participants). Due to the small number of participants on these other platforms, the Commission considers that statistics on advertising ratings generated on these other platforms based on CIM data cannot be considered reliable and representative.

- (28) In light of the above, the Commission considers that the most reliable approach to allocate advertising revenues by platform is the use the first approach discussed above, that is to allocate advertising revenues in direct proportion to subscribers on platforms carrying Vier/Vijf in Flanders. The observation that De Vijver Media's proposed approach based on CIM North measured TV ratings leads to a proposed allocation which very closely matches the underlying number of panel participants ([30-40]* % De Vijver Media ratings generated by the [30-40]* % of panel participants that are Belgacom subscribers; [50-60]* % of De Vijver Media ratings are generated by the [50-60]* % of panel participants that are subscribers to a Telenet digital TV service) further indicates that a simple allocation of advertising revenues in proportion of subscriber numbers should be expected to lead to relatively accurate results.
- (29) De Vijver Media argued that the CIM data on rating points are the only reliable data measuring advertising impacts. CIM data is also used by media agencies and advertisers alike. Advertisers and media agencies would not use subscriber data as such data do not take account of the television viewing behaviour of the subscribers and for which there is no official source. Therefore the actual loss of advertising revenue to De Vijver Media of not supplying its channels to Belgacom would be correctly measured CIM.
- (30) The Commission does not agree with this argument. In the Commission's view, in the current situation in which the relevant channels are available on all major platforms, there is no need for the CIM panel to accurately reflect the distribution of subscribers across platforms as the identity of the platform on which advertising contacts are generated is of no or little interest to advertisers or media agencies. However, if De Vijver Media's channels or other channels that are important to advertisers were to become unavailable on some platforms, the issue that the CIM panel does not accurately reflect the distribution of subscribers across platforms would become apparent and very relevant for advertisers. The Commission considers that the approach for measuring ratings by CIM would then be quickly adjusted to accurately reflect this distribution.
- (31) For this reason the Commission considers an allocation of advertising revenues in direct proportion to platforms' subscriber numbers to be the best approach in the calculations below.
- (32) In the scenarios below, the Commission has further assumed that all De Vijver Media's losses are internalised by Telenet, which amounts to assuming that the value of s equals 1. This assumes that Telenet would compensate the other shareholders of De Vijver Media the costs of foreclosure.
- (33) Finally, all the scenarios below have been computed on the basis of figures for 2013.
- 2.2.1. *Simultaneous foreclosure of all Telenet rivals (Belgacom, Snow and TV Vlaanderen)*
- (34) In this scenario, the Commission considers the profitability of a simultaneous foreclosure of all Telenet's rivals from accessing Vier/Vijf.

- (35) In this scenario where all Telenet's rivals are foreclosed, all switching subscribers are assumed to join the Telenet platform, that is, the value of a is set equal to 1. This follows from the fact that Telenet will be the only platform offering Vier/Vijf and the assumption that customers leaving the foreclosed platforms do so to subscribe to a retail TV platform which continues to offer Vier/Vijf.
- (36) The results of this foreclosure scenario under the baseline assumption on incremental margins are presented in column 1 Table 1 below.
- (37) The first line of the table presents the number of TV subscribers collectively accounted for by the foreclosed rivals of Telenet [...]*.
- (38) Row two presents the advertising revenues that De Vijver Media would forego if Vier/Vijf are not licensed to Belgacom, Snow and TV Vlaanderen. This loss relates to the fact that not showing Vier/Vijf on Belgacom, Snow and TV Vlaanderen implies a loss of [...]* viewers. Using the approach to allocate advertising revenues in proportion to the number of viewers reached by Vier/Vijf, foregoing [...]* viewers is expected to decrease De Vijver Media's advertising revenues by EUR [...]* million.⁸
- (39) Another loss to De Vijver Media deriving from the withholding of Vier/Vijf from rivals is given by the carriage fees that De Vijver Media would no longer be collecting from Belgacom, Snow and TV Vlaanderen (EUR [...]* million).
- (40) Row four presents the baseline estimate for the incremental profit that Telenet gains on each new subscriber attracted from its rivals, as discussed above (EUR [...]* per subscriber per month).
- (41) Row five the fraction of switching subscribers that join Telenet (the parameter a). As Telenet is the only platform which continues to carry Vier/Vijf in this scenario, this fraction is 1.
- (42) Row six presents the critical departure rates calculated on the basis of equation (4) above. The critical departure rate is [5-10]* % in the baseline case. The total foreclosure strategy will be profitable if the actual switching induced from Telenet's rivals is higher than these critical departure rates.

⁸ As discussed above, the alternative allocation of advertising revenues proposed by De Vijver Media significantly understates the advertising revenues relating to ratings generated on the Telenet platform, as it does not include ratings from analogue Telenet subscribers. As ratings generated by analogue customers are lumped together with ratings by platforms other than Belgacom or Telenet's digital TV platform, the costs of a total foreclosure strategy foreclosing all rival platforms jointly cannot be assessed based on De Vijver Media's proposed allocation. This is true even if one were to consider the composition of the CIM North panel to correctly reflect the distribution of subscribers across platforms and even if the panel allowed reliable inferences on viewings on other platforms. which as discussed above the Commission considers not to be the case.

Table 1. Summary of the total input foreclosure calculations

	Foreclosure of all rival platforms (1)	Foreclosure of Belgacom only (2)	Foreclosure of Snow and TV Vlaanderen (3)
Total number of subscribers of the foreclosed TV platforms ⁹	[...]*	[...]*	[...]*
De Vijver Media advertising revenues on foreclosed platforms, per annum	EUR [...]* million	EUR [...]* million	EUR [...]* million
De Vijver Media carriage fees from foreclosed platforms, per annum	EUR [...]* million	EUR [...]* million	EUR [...]*
Expected Telenet margin per subscriber per month	EUR [...]*	EUR [...]*	EUR [...]*
Fraction of switching subscribers that switch to Telenet	1	[...]*	[...]*
Critical departure rate ¹⁰	[5-10]* %	[5-10]* %	[5-10]* %

Source European Commission. All figures are based on the full year 2013

2.2.2. Foreclosure of Belgacom only

- (43) The critical switching rate for the scenario in which Telenet and De Vijver Media deny access to Vier/Vijf to Belgacom only, while Snow and TV Vlaanderen continue to offer these channels is calculated using the same steps.
- (44) Given the assumption that all customers of foreclosed platforms continue to subscribe to a retail TV platform, in this scenario the subscribers leaving Belgacom due to foreclosure either join Telenet, Snow or TV Vlaanderen. The relative share of switchers captured by Telenet is assumed to be proportional to the relative share of Telenet, Snow and TV Vlaanderen. Since Telenet's subscriber share of platforms offering Vier/Vijf excluding Belgacom is [90-100]* %¹¹, the value of a is set to [...]* (see row 5 of Table 1).
- (45) The results of this foreclosure scenario are presented in column 2 of Table 1 above.

⁹ The total number of TV subscribers in the Telenet footprint in 2013 (including Telenet, Belgacom, Snow, TV Vlaanderen) is 2.7 million.

¹⁰ As a proportion of the rivals' subscriber base.

¹¹ According to subscriber information submitted by the Parties, the four TV platforms considered in this exercise had in 2013 an estimated number of subscriber equal to [...]* million (Telenet), [...]* (Belgacom), [...]* (TV Vlaanderen) and [...]* (Snow). If Belgacom is foreclosed (and consequently the switchers can either join Telenet, TV Vlaanderen or Snow), Telenet is assumed to capture [90-100]* % = [...]* million / ([...]* million + [...]* million + [...]* million) of these switchers.

(46) Using the approach to allocate advertising revenues in proportion to subscribers, the critical departure rate in this scenario is [5-10]* % using the baseline margin.¹²

2.2.3. *Foreclosure of smaller Telenet rivals (Snow and TV Vlaanderen)*

(47) The critical switching rate for the scenario in which Telenet and De Vijver Media deny access to Vier/Vijf to Snow and TV Vlaanderen but Belgacom continues to offer these channels is again calculated following the same approach.

(48) Given the assumption that all customers of foreclosed platforms continue to subscribe to a retail TV platform, in this scenario the subscribers leaving the Belgacom platform due to foreclosure either join Telenet or Belgacom. The relative share of switchers captured by Telenet is assumed to be proportional to the relative share of Telenet and Belgacom. Since Telenet's subscriber share of platforms offering Vier/Vijf excluding smaller rivals but not Belgacom is [70-80]* %¹³, the value of a is set to [...]*.

(49) The results of this foreclosure scenario are presented in column 3 Table 1 above.

(50) Using the approach to allocate advertising revenues in proportion to subscribers, the critical departure rate in this scenario is between [5-10]* % using the baseline margin estimate.¹⁴

2.2.4. *Incentives to foreclose*

(51) The Commission has compared these critical switching rates against the evidence of the likely degree of subscriber switching that a total foreclosure strategy that denies access to Vier and Vijf to one or more rival platforms would entail. As discussed in the main part of the Decision, the most reliable and direct piece of evidence on the likely degree of switching comes from a confidential survey by Belgacom which specifically addresses this question.

(52) The likely degree of switching indicated by the results of this survey significantly exceeds the critical switching rates above. This indicates that post-transaction, De Vijver Media and Telenet would be better off under each of the total foreclosure scenarios analysed than if they continued to provide Vier/Vijf to rival platforms under the conditions of carriage pre-transaction.

¹² Under the allocation of advertising revenues proposed by De Vijver Media, which, for the reasons discussed above, the Commission considers significantly overstates De Vijver Media's advertising revenues on the Belgacom platform, total foreclosure becomes significantly more costly. The critical switching rate using this advertising split for this scenario becomes [5-10]* % under the baseline margin estimate.

¹³ If TV Vlaanderen and Snow are foreclosed (and consequently the switchers can either join Telenet or Belgacom), Telenet is assumed to capture [70-80]* % = [...]* million / ([...]* million [...]*) of these switchers.

¹⁴ As discussed above, the alternative allocation of advertising revenues proposed by De Vijver Media significantly understates the advertising revenues relating to ratings generated the Telenet platform, as it does not include ratings from analogue Telenet subscribers. As ratings generated by analogue customers are lumped together with ratings by platforms other than Belgacom or Telenet's digital TV platform, the allocation proposed by De Vijver Media cannot provide a meaningful alternative quantification of the likely costs of a total foreclosure strategy of smaller rivals only, even if one were to ignore the problems that the CIM panel does not accurately reflect the distribution of subscribers across platforms and that the panel contains too few participants from other platforms to allow reliable inferences on ratings generated on these platforms.

- (53) Moreover, at the likely switching rate (based on the confidential survey evidence), the increase in profits that each total foreclosure strategy would entail is substantial.¹⁵ The incentive to engage in total foreclosure strategies post-transaction is hence likely to be strong.
- (54) Finally, the Commission has also computed critical switching rates and the predicted change in profits using the alternative confidential estimate for the incremental profits per subscriber switching to Telenet discussed above. This analysis also leads to the conclusion that there would be a strong incentive to engage in each of the three total foreclosure strategies.
- (55) Overall, the Commission therefore considers that the transaction is likely to lead to strong incentives for De Vijver Media and Telenet to engage in total input foreclosure of one or more rival TV distribution platforms.

3. PARTIAL INPUT FORECLOSURE

- (56) The transaction may also lead to partial foreclosure in the sense that post-transaction, De Vijver Media and Telenet may be able to extract higher carriage fees from rival platforms.
- (57) In the Commission's assessment, the transaction strengthens De Vijver Media's bargaining position in negotiations with Telenet's rival distribution platforms over the carriage fees for Vier/Vijf compared to De Vijver Media's bargaining position absent the transaction. This is because post-transaction a combined De Vijver Media / Telenet would internalise that failure to reach an agreement with rival distribution platforms and non-carriage of Vier and Vijf on rival platforms would lead to increased profits to Telenet as discussed in detail under the total foreclosure analysis above. This improves the post-transaction bargaining position of De Vijver Media and allows De Vijver Media to obtain higher carriage fees for Vier and Vijf for otherwise equal conditions of carriage.
- (58) The above reasoning can be formalised using the simple economic bargaining framework of (efficient) Nash bargaining.¹⁶ This framework shows formally that if De Vijver Media and Telenet refrain from pursuing the total input foreclosure strategy analysed in the previous section but instead use the threat of such a total foreclosure strategy in negotiations with rival platforms post-transaction, then the increase in negotiated license fee which De Vijver Media will be able to obtain in such negotiations will be at least as high as the increase in profits from total foreclosure relative to the pre-transaction situation. Moreover, if De Vijver Media and Telenet have at least some bargaining power vis-à-vis rival platforms, the increase in license fee will exceed the increase in profits in the corresponding total foreclosure scenario and likely substantially so.
- (59) The Nash bargaining framework is a well-established and often used framework for analysing bargaining outcomes. While it is derived using a series of axioms, it can

¹⁵ Using the confidential estimate on the likely switching rate, the profit increase can be calculated from equation (3) above.

¹⁶ Such a framework was also used by the FCC in its 2011 investigation of the Comcast/NBCU merger and in its 2004 analysis of the partial acquisition of DirectTV by News Corporation.

also be derived as the solution of more elaborate models of the actual bargaining process between parties.¹⁷ Moreover, when the parties to a bargain are firms, so that benefits, costs, and transfers can be measured in monetary terms, the efficient Nash bargaining solution takes the simple form discussed in the following.

- (60) The Nash bargaining framework assumes that parties to a negotiation maximise the surplus from reaching an agreement over the sum of profits that they can achieve without an agreement. The negotiating parties then share this surplus derived from the agreement according to their relative bargaining power. The party with higher bargaining power will accordingly obtain a greater share of the surplus generated by the agreement. The profits which each party can achieve in the absence of an agreement are called each party's 'threat point'. Under an agreement, each party must be at least as well off than in the absence of the agreement that is under its threat point. The higher a party's profit under its threat point, the less it has to lose from disagreement and hence the stronger its bargaining position.
- (61) This mechanism will be explained in detail and quantified in what follows, focussing for simplicity on negotiations between De Vijver Media/Telenet on the one hand and Belgacom on the other hand.

3.1. Bargaining before the transaction

- (62) Under an agreement, each of two negotiation parties must obtain a profit that is at least as high as the profit that it would obtain in case no agreement is reached. This follows directly from the fact that if this was not the case, a party would always be better-off by not agreeing to the outcome.
- (63) The negotiation between the parties will hence be over how the surplus from reaching an agreement should be split between them. The joint surplus from the agreement for an agreement between De Vijver Media and Belgacom pre-transaction (that is, the increase in joint profits under an agreement compared to the sum of profits absent an agreement) can be denoted by

$$S^{pre} = B - b + D - d, \quad (5)$$

- (64) where d and b respectively denote the profits that De Vijver Media and Belgacom respectively obtain in case an agreement is not reached and D and B respectively denote the corresponding profits when a carriage agreement is reached.
- (65) The greater one party's bargaining power relative to the other, the higher the share of the surplus it can obtain. The agreed license fee received by De Vijver Media under an agreement is therefore set such that each negotiating party obtains a profit under the agreement that is equal to the profit it would obtain absent an agreement (the 'threat point') plus a share of the surplus S from the agreement that reflects its bargaining power.

¹⁷ See e.g. Muthoo (2002) 'The Economics of Bargaining', in Knowledge for Sustainable Development: An Insight into the Encyclopedia of Life Support Systems, UNESCO and EOLSS: EOLSS Publishers Co. Ltd and the discussion therein on the Rubinstein's model leading to the Nash bargaining solution.

(66) This leads to the following equations for each party's profits under an agreement:

$$\text{De Vijver Media (pre-transaction): } D + F^{pre} = \mu S^{pre} + d \quad (6)$$

$$\text{Belgacom: } B - F^{pre} = (1 - \mu)S^{pre} + b \quad (7)$$

where F denotes the license fee paid by Belgacom to De Vijver Media. De Vijver Media's share of surplus is denoted by μ . Belgacom's share of surplus is correspondingly $(1-\mu)$. The parameter $0 \leq \mu \leq 1$ is the bargaining parameter which reflects the bargaining power of De Vijver Media relative to Belgacom. As is standard in the Nash bargaining framework, the bargaining parameter μ is assumed not to change as a result of the transaction.

(67) The pre-transaction license fee payment from Belgacom to De Vijver Media can be obtained by combining (5) and either of (6) or (7):

$$\text{License fee: } F^{pre} = \mu(B - b) - (1 - \mu)(D - d) \quad (8)$$

3.2. Bargaining after the transaction

(68) After the transaction De Vijver Media will internalise the effect that an agreement with Belgacom will have on Telenet. This changes the relevant profits of De Vijver Media/Telenet in the negotiations with Belgacom both under an agreement and under the threat point (that is in the absence of an agreement).

(69) Denoting Telenet's profits under an agreement as T and its profits absent an agreement as t , the joint net surplus from an agreement with Belgacom after the transaction is given by:

$$S^{post} = B - b + D - d + T - t \quad (9)$$

(70) The respective post-transaction profits under an agreement with a new carriage fee F^{post} become:

$$\text{De Vijver Media/Telenet: } D + T + F^{post} = \mu S^{post} + d + t \quad (10)$$

$$\text{Belgacom: } B - F^{post} = (1 - \mu)S^{post} + b \quad (11)$$

(71) The resulting license fee payment from Belgacom to De Vijver Media can be obtained by combining (5) and either of (6) or (7):

$$\text{License fee: } F^{post} = \mu(B - b) - (1 - \mu)(D - d + T - t) \quad (12)$$

3.3. The change in carriage fees

(72) Using the notation in this subsection and using total foreclosure as the outcome absent an agreement, the increase in De Vijver Media and Telenet's joint profits under a total foreclosure of Belgacom relative to the situation pre-transaction is:

$$\Delta ProfitTF = -(T - t) - (D - d) - F^{pre} \quad (13)$$

(73) This corresponds to equation (3) above with the parameter s set to unity. In this expression $-(T-t)$ are the incremental profits to Telenet from total foreclosure derived from the subscriber switching. $(D-d)$ are De Vijver Media's advertising profits from being carried by Belgacom (which would be lost under total foreclosure of Belgacom). F^{pre} is the pre-transaction license fee which would also be lost by De Vijver Media under total foreclosure of Belgacom.

(74) Using this equation and equation (10) above, the change in license fee can be rewritten as:

$$\Delta F = F^{post} - F^{pre} = \mu S^{post} + \Delta ProfitTF \quad (14)$$

(75) The bargaining parameter μ will be strictly above 0 as long as De Vijver Media has some bargaining power. Moreover, the surplus from the agreement will also be strictly positive. The equation hence implies that the change in license fee that can be expected is at least as high as the increase in profits resulting under the total foreclosure scenarios discussed in Section 2 above. Moreover, if the agreement generates a significant surplus and if De Vijver Media has at least some bargaining power (both of which are likely), the increase in license fee under a bargaining solution will significantly exceed the increase in profits under total foreclosure.

(76) Beyond this general conclusion, the equations above can also form the bases for a quantification of the expected negotiated license fee post-transaction (and hence of the expected transaction-induced change in license fee). This requires (i) estimates of the impact of reaching an agreement for each of Belgacom, De Vijver Media and Telenet (relative to the situation without an agreement) and (ii) an estimate of De Vijver Media's bargaining parameter μ .

(77) The Commission has performed such a quantification. However, as the quantification relies on third party confidential data it can only be described in general terms here. In particular. The information for calculating the profit impact of an agreement on De Vijver Media and Telenet is the same information used for the assessment of the total input foreclosure scenarios using equation (3) above (including the confidential estimate of likely switching). Estimating the profit impact on Belgacom of reaching an agreement (before carriage fees) further requires third party confidential data on Belgacom's contribution margin Belgacom would lose for each subscriber switching away in the absence of an agreement.

(78) With this confidential data, the bargaining parameter μ can either be derived from equation (8) above for the pre-transaction outcome, or it can be assumed or inferred from other sources. Absent any other information it is common to simply assume a bargaining parameter of 0.5 which implies that the negotiating parties split the surplus from the agreement equally between them ("50:50")¹. Analyses using similar bargaining approaches in recent US transactions have found bargaining in the range 0.5 to 0.67.² When assuming that total foreclosure is also the relevant threat point

¹ The "50:50" result can also be derived theoretically for parties as it coincides with the limit of a bargaining model developed by Rubinstein in case equal discount factors are assumed. See Rubinstein, A. (1982). 'Perfect Equilibrium in a Bargaining Model'. *Econometrica* **50** (1): 97–109.]

² See Appendix B to the Comcast/NBCU Memorandum Opinion and Order (20 January 2011). Available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf

pre-transaction³, the Commission also found (using confidential information noted above) that both De Vijver Media and Belgacom have significant bargaining power in their bilateral negotiations (i.e. that the parameter is neither close to 0 nor 1).

- (79) Moreover, the analysis based on confidential data also indicates that there is a substantial surplus from the agreement relative to the absence of an agreement.
- (80) Combining these different elements, the Commission's quantitative analysis within the bargaining framework confirms that the predicted change in license fee is substantial and higher than the change in profit for De Vijver Media and Telenet in the corresponding total foreclosure scenario.
- (81) Overall, the Commission therefore considers that post-transaction the new entity would have an improved bargaining position in negotiations with rival distribution platforms which would provide it with a strong incentive to engage in partial foreclosure strategies in the form of imposing substantial increases in carriage fees on distribution platforms.

³ As Belgacom recently decided to no longer carry the German channels ARD/ZDF until it could reach an agreement on new terms of carriage with the German public broadcaster, this assumption does not appear unreasonable. Nevertheless, it is not clear that this assumption accurately reflects the pre-transaction threat point.

ANNEX B: COMMITMENTS

Case COMP/M.7194

Liberty Global / Waterman&Waterman / Corelio Publishing / JV

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 as amended (the **Merger Regulation**), Liberty Global plc (**Liberty Global**) Corelio Publishing NV (**Corelio**) and Waterman & Waterman NV (**W&W**) (jointly the **Parties**) hereby enter into the following commitments (the **Commitments**) vis-à-vis the European Commission (the **Commission**) with a view to rendering the acquisition of joint control by Liberty Global of De Vijver Media NV (**DVM**) (the **Concentration**) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the **Decision**), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the **Remedies Notice**).

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Ancillary Rights: the right to include programmes from a Linear Basic Pay TV Channel as part of a Linked Service, to the extent these rights are owned or controlled by one or more of the Parties, DVM and/or their Affiliated Undertakings.

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the **Consolidated Jurisdictional Notice**).

Audience Share: metric describing the relative viewing of channels by subscribers to Liberty Global's cable TV network in Belgium, compared to other channels offered on this cable TV network. The metric will be calculated by a reputable audience measurement firm (for example: CIM) and measured per channel as an average over a period of 6 months for the age group 6+ and for viewing throughout the 24 hours of a day.

Catch-Up TV Service: a service where individual programmes exhibited on a linear channel are made available to view on-demand on a catch-up basis for a limited period of 7 days (or any other period which becomes the market standard in Belgium) following their first transmission on that channel, such service being offered only to subscribers to the underlying channel.

Channels: the Linear Basic Pay TV channels Vier and Vijf, and all other Linear Basic Pay TV Channels, including any Ancillary Rights offered by these channels, to the extent these channels are (i) controlled or jointly controlled by DVM, (ii) controlled or jointly controlled by Telenet, in which DVM and/or one or several DVM Shareholders have a significant minority stake (above 10%), and/or (iii) all channels in which each of (a) Telenet and (b) DVM and/or one or several DVM Shareholders, have a significant minority stake (above 10%).

Channel Operator: the legal entity operating one or several Channels.

Confidential Information: any business secret, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

Distributor: a provider of TV distribution services via cable, DTH, IPTV, DTT, internet or any other distribution platform.

DVM Shareholders: any shareholders of DVM other than Liberty Global and its Affiliated Undertakings, having a stake in DVM of 10% or more.

Entry-level TV channel package: the starting level package of channels offered by Liberty Global in digital and/or analogue format and which is received by the largest number of subscribers to the Liberty Global cable TV platform in the Territory.

Linear Basic Pay TV Channels: any linear channel that is either (i) included in Liberty Global's entry-level basic analogue and/or digital TV channel package(s) in Flanders or (ii) included in any additional packages that can be purchased by consumers on top of Liberty Global's entry-level basic analogue and/or digital TV channel package(s) and which include the DVM channels Vier and/or Vijf. In addition, it includes any linear channel (iii) that exceeds the Audience Share of either Vier or Vijf at any point in time and has an Audience Share of more than 3.5%.

Linked Service: any existing or future service, functionality or feature (i) that is designed and offered as part of the broadcast experience of a linear channel, and (ii) that is offered to end users simultaneously with the linear transmission of the channel, or shortly before or after the linear transmission of the channel for a period which is customary for such service, functionality or feature (for example, but not limited to, a Catch-Up TV Service, a Multiple Devices Service or a PVR service). All such services, functionalities and features that are available to end users on the Telenet platform shall be considered a Linked Service.

Medialaan: the NV Medialaan, with registered offices in Belgium, 1800 Vilvoorde, Medialaan 1, K.B.O. 432.306.234.

Medialaan Carriage Agreement: the carriage agreement between Telenet NV and Medialaan dated 19 March 2014.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

Multiple Devices Service: a service allowing a subscriber to a Linear Basic Pay TV Channel to watch that linear channel simultaneously on multiple devices, such as tablets and smartphones, in the Territory.

New Channel: a Channel commercially launched after the Effective Date.

New Distributor: a Distributor that is not distributing the Linear Basic Pay TV Channels Vier and Vijf on the Effective Date.

OTT Service: any service that includes access for consumers to linear TV channels over the internet (howsoever delivered) via one or more devices.

Parties: Liberty Global, W&W and Corelio.

PVR Service: A service operated or enabled by a Distributor allowing a user to select a program(s) on a Linear Basic Pay TV Channel they wish to record/view at a later date, and once recorded such program is made available to the user to view in the Territory on an on-demand basis for so long as they continue to be a subscriber to that channel (or as the rights position otherwise requires).

Territory: the whole territory of Belgium to the extent the rights included in the Channels extend to this whole territory. Distributors whose retail TV service provision activities are exclusively located outside of the footprint of the Liberty Global cable TV network in Belgium shall be deemed to be located outside of the Territory.

Section B. Commitment to offer access to the Channels

1. As of the Effective Date, the Parties will ensure that the Channel Operators:
 - a. shall meet all reasonable requests from third party Distributors, including Distributors wishing to distribute via an OTT Service, to distribute one or more of the Channels in the Territory on fair, reasonable and non-discriminatory terms. Among others, such terms shall be fair, reasonable and non-discriminatory in comparison to the terms in place between the Channel Operator and Telenet as well as other Distributors for the carriage of the Channels in terms of tariffs and quality of the signal; and
 - b. shall not discriminate between Distributors as regards the date on which any New Channel is made available to them, subject to successful negotiations regarding an agreement in line with the commitment described in section B.1.a..
2. As of the Effective Date, the Parties shall not intentionally do anything that has the effect of significantly reducing the quality of the channels Vier and Vijf. The quality of such channels should be assessed in light of market developments in Belgium and of the combination of the following metrics: audience share, reach, advertising income and percentage of locally produced content.

Section C. Commitment regarding the carriage agreement with Medialaan

3. Liberty Global commits that the binding offer to amend the Medialaan Carriage Agreement made by Telenet NV to Medialaan on 5 December 2014 and attached as **Annex A** to these Commitments, shall remain valid for a period of six (6) months as from the closing of the Concentration.

Section D. Monitoring Trustee

I. Appointment Procedure

4. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. The Parties commit not to close the concentration before the appointment of a Monitoring Trustee.
5. The Monitoring Trustee shall:
 - (i) at the time of appointment, be independent of the Parties and their Affiliated Undertakings;
 - (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient experience as a consultant or auditor; and
 - (iii) neither have nor become exposed to a Conflict of Interest.
6. The Monitoring Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Parties

7. No later than two (2) weeks after the Effective Date, the Parties shall submit a name or names of one or more natural or legal persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval.
8. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph 5 and shall include:
 - (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments;
 - (b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

9. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

10. If all the proposed Monitoring Trustees are rejected, the Parties shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 4 and 9.

Monitoring Trustee nominated by the Commission

11. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Monitoring Trustee

12. The Monitoring Trustee shall assume its specified duties in order to ensure compliance with the Commitment set out in Sections **B** and **C**. The Commission may, on its own initiative or at the request of the Monitoring Trustee or the Parties, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.
13. The Monitoring Trustee shall:
 - a. propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the Commitments;
 - b. monitor compliance of the terms of the carriage agreements between Channel Operators and Distributors with the requirements of Commitment set out in section **B.1**;
 - c. monitor compliance with the Commitment to maintain the quality of the channels Vier and Vijf set out in section **B.2**;
 - d. monitor compliance with the Commitment in section **C**.
 - e. act as a contact point for any requests by third parties in relation to the Commitments;
 - f. propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision;
 - g. provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within fifteen (15) days after the end of every quarter, regarding the compliance by the Parties with the Commitments;
 - h. promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with the Commitments.

III. Duties and obligations of the Parties

14. The Parties shall provide and shall cause their advisors to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of the Parties' or Channel Operators' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties and the Channel Operators shall provide the Monitoring Trustee upon request with copies of any document. The Parties and the Channel Operators shall make available to the Monitoring Trustee one or more offices on their premises and shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.
15. The Parties shall indemnify the Monitoring Trustee and its employees and agents (each an **Indemnified Party**) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
16. At the expense of the Parties, the Monitoring Trustee may appoint advisors (in particular for legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 15 shall apply *mutatis mutandis*.
17. The Parties agree that the Commission may share Confidential Information proprietary to the Parties with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*.
18. The Parties agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties of the identity and the tasks of the Monitoring Trustee.
19. For a period of ten (10) years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Monitoring Trustee

20. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
 - (a) the Commission may, after hearing the Monitoring Trustee, require the Parties to replace the Monitoring Trustee; or
 - (b) the Parties, with the prior approval of the Commission, may replace the Monitoring Trustee.

21. If the Monitoring Trustee is removed according to paragraph 20, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 4 to 11.
22. Besides the removal according to paragraph 20, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented and/or have expired in accordance with Section F below. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section E. Arbitration

23. The Parties will ensure that the Channel Operators shall abide by the terms of the fast track dispute resolution procedure as described herein.

Fast Track Dispute Resolution

24. In the event that a third party claims that any of the Parties, an Affiliated Undertaking or a Channel Operator is failing to comply with the requirements of the commitment described in Section B above vis-à-vis that third party, the fast track dispute resolution procedure as described herein shall apply.
25. Any third party who wishes to avail itself of the fast track dispute resolution procedure (a **Requesting Party**) shall send a written request to the Channel Operator concerned (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that the Channel Operator is failing to comply with the requirements of these Commitments. The Requesting Party and the Channel Operator will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen (15) working days after receipt of the request.
26. The Monitoring Trustee shall present its own proposal (the **Trustee Proposal**) for resolving the dispute within eight (8) working days, specifying in writing the action, if any, to be taken by the Channel Operator in order to ensure compliance with the Commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.
27. Should the Requesting Party and the Channel Operator (together the **Parties to the Arbitration**) fail to resolve their differences of opinion in the consultation phase, the Requesting Party shall serve a notice (the **Notice**), in the sense of a request for arbitration, to the Belgian Centre for Arbitration and Mediation - CEPANI (hereinafter the **Arbitral Institution**), with a copy of such Notice to the Channel Operator.
28. The Notice shall set out in detail the dispute, difference or claim (the **Dispute**) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the Channel Operator (including, if

appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

29. The Channel Operator shall, within one (1) month from receipt of the Notice, submit its answer (the **Answer**), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the Channel Operator proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

30. The Arbitral Tribunal shall consist of three (3) persons. The Requesting Party shall nominate its arbitrator in the Notice; the Channel Operator shall nominate its arbitrator in the Answer. The arbitrators nominated by the Requesting Party and by the Channel Operator shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three (3) arbitrators.
31. Should the Parties to the Arbitration fail to nominate an arbitrator, or if the two (2) arbitrators fail to agree on the chairman the default appointment(s) shall be made by the Arbitral Institution.
32. The three-person arbitral tribunal is herein referred to as the **Arbitral Tribunal**.

Arbitration Procedure

33. The Dispute shall be finally resolved by arbitration under the CEPANI Arbitration Rules, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the **Rules**). The arbitration shall be conducted in Brussels in the English language.
34. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.
35. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
36. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure.

37. The Arbitral Tribunal shall not disclose Confidential Information and apply the standards attributable to Confidential Information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to Confidential Information to the Arbitral Tribunal, the Monitoring Trustee and outside counsel and experts of the opposing party.
38. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless the Channel Operator can produce evidence to the contrary.

Involvement of the Commission and the Belgian Competition Authority (BCA)

39. The Commission and the BCA shall be allowed and enabled to participate in all stages of the procedure by:
- Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
 - Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of reference and procedural timetable);
 - Having the opportunity to file amicus curiae briefs; and
 - Being present at the hearing(s) and being allowed to ask questions to the Parties to the Arbitration, witnesses and experts.
40. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission and the BCA without delay.
41. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

42. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by these Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and the general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
43. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
44. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by the Channel Operator or an Affiliated Undertaking in order to comply with these Commitments vis-à-vis the Requesting Party (e.g. specify a

contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful Party to the Arbitration and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

45. The final award shall, as a rule, be rendered within six (6) months after the date of the terms of reference. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of these Commitments if asked by the Arbitral Tribunal.
46. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

Section F. Duration

47. The commitment described in Section **B** will expire seven (7) years from the Effective Date, unless in response to a request by the Parties in accordance with the Review Clause, the Commission decides to waive, modify or substitute these Commitments on grounds that the conditions of competition would no longer justify the undiminished continuation of these Commitments.
48. Without prejudice to paragraph 47, New Distributors taking advantage of the commitment described in section **B.1.** shall have the option to choose for a contract duration of up to five (5) years as from the date of execution of their carriage agreement, without however exceeding eight (8) years as from the Effective Date.

Section G. The Review Clause

49. The Commission may, in response to a reasoned request from the Parties, showing good cause waive, modify or substitute in exceptional circumstances one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall at the same time send a non-confidential copy of the report to the Parties. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section H. Entry into Force

50. The Commitments shall take effect upon the date of adoption of the Decision (the **Effective Date**).

Annexes

- Confidential Annex A: Binding offer to Medialaan dated 5 December 2014.

[Signed]

Duly authorised for and on behalf of Liberty Global plc

[Signed]

Duly authorised for and on behalf of Waterman & Waterman NV

[Signed]

Duly authorised for and on behalf of Corelio Publishing NV

Confidential Annex A – Binding offer to Mediaaan dated 5 December 2014

*[Business Secret]**