EN

Case No COMP/M.7307 - ELECTRICITY SUPPLY BOARD/ VODAFONE IRELAND/ JV

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 24/10/2014

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Brussels, 24.10.2014
C(2014) 8058 final

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties

Dear Sir/Madam,

Subject: **Case M.7307 – Electricity Supply Board/ Vodafone Ireland/ JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1]

(1) On 26 September 2014, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings the Electricity Supply Board ("ESB") and Vodafone Ireland Limited ("Vodafone", together with ESB, the "Parties") acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of a newly created joint venture company (the "JV") by way of purchase of shares.

1. THE PARTIES

(2) **ESB** is an electricity utility, principally active in the transmission, distribution, generation and supply of electricity. ESB is 95% owned by the Irish State.[2] ESB is

1 OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). 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 The remaining 5% of the issued capital stock of ESB are held by an Employee Share Ownership Trust.

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the licensed owner of Ireland's electricity transmission and distribution systems. ESB also has a telecoms subsidiary called ESB Telecoms Limited ("ESBT"). It does not provide retail mobile telecommunications services but sells trunk fibre services to other communication operators and retail end-to-end business connectivity services. It also leases space, mainly on towers, to mobile communications operators.

(3) **Vodafone** is a wholly-owned subsidiary of Vodafone Group plc, a global communications company. In Ireland, Vodafone is active in several wholesale and retail markets for mobile and non-mobile telecommunications. In particular, Vodafone provides retail mobile telecommunications services, retail fixed telephony and internet services, multiple-play services,[3] wholesale mobile services, wholesale leased lines and wholesale fixed internet connectivity.

2. THE JOINT VENTURE

(4) In 2012, ESB initiated an open procurement process to select a joint venture partner with whom it would build a fibre network that would be rolled out along ESB's electricity distribution network. Ultimately, Vodafone was selected as partner for the joint venture. Vodafone and ESB concluded the Joint Venture Agreement ("JVA") establishing the JV on 2 July 2014.

(5) Pursuant to the JVA, the Parties will jointly control the JV. ESB and Vodafone will each hold 50% of the JV's share capital and 50% of the voting rights in the JV. Representation on the board will be equal.[4] The chairmanship will rotate between ESB and Vodafone appointees, but the chairman will not carry a casting vote.

(6) The JV has been created to build and operate a high capacity fibre-to-the-building ("FTTB") network to homes and businesses in certain parts of Ireland. The FTTB network does not currently exist in Ireland. The fibre will be deployed on ESB's existing overhead and underground infrastructure. For this purpose, ESB will grant the JV rights of access to its electricity distribution system in return for a fee.

(7) The FTTB network is planned to cover [400 000-500 000] premises[5] in 50 towns of moderate size (i.e. towns with more than 4 000 inhabitants) in Ireland in the first five years of the JV's operation ("Phase One"). The FTTB network is expected to offer speeds from 200 Mbps to 1 000 Mbps (1 Gb).

(8) The Commission has assessed whether the creation of the JV constitutes a concentration within the meaning of the Merger Regulation. In accordance with Article 3, paragraph 4 of the Merger Regulation, this is the case if the JV will perform on a lasting basis all the functions of an autonomous economic entity.

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3 In Ireland Vodafone's multi-play offer at present comprises retail fixed telephony, residential mobile and broadband internet services but no television services.

4 […]. According to the Parties, these provisions serve in particular to ensure that the JV sells its products on an open and non-discriminatory basis (see paragraphs (11) and (69)).

5 […]. The press release issued by ESB at the time the JV was announced states that the JV's network will pass 500 000 premises.

(9) The JV will have a management team dedicated to its day-to-day operations and will have access to sufficient resources including finance, staff, and assets in order to conduct its business activities on a lasting basis. In particular, the JV will have […] direct employees and […] employees seconded from ESB.[6] The Parties have also committed to provide sufficient funding until the JV becomes self-funding. In particular, in the JVA, Vodafone has committed to invest approximately EUR […] in the JV by way of a share subscription.

(10) Moreover, the JV's activities will extend beyond any one specific function within the parent companies' business activities. The JV will be involved in the planning, design, procurement, deployment, operation and, ultimately, the commercial performance of a fixed fibre access network. Neither ESB nor Vodafone are engaged in those activities.

(11) In addition, the Parties intention is that the JV will play an active role on the market. In particular, the Parties submit that the JV will offer wholesale access to the FTTB network on a commercial, open and non-discriminatory basis. While the majority of the JV's sales are expected to be made to Vodafone, these sales will be concluded at arm's length. To ensure this is the case, […].[7] The JV will also actively seek third party wholesale customers. In line with this, the JV is projected to make […]% of its sales to third parties in year two and approximately […]% in years three, four and five. The Commission has tested whether these projections are realistic by contacting the third parties that the Parties had listed as potential customers. Based on the feedback of these third parties, the Commission considers that the JV's projections relating to third party sales are reasonable.

(12) Furthermore, several additional elements indicate that the JV is likely to play an active role on the market. First, the JV has been conceived from the start as an entity that will sell wholesale access to its network to several market players rather than one. This is evident from, among other things, the procurement notice by which ESB sought a partner for the JV and which mentions an "open access model". It is also confirmed by the fact that Parties have publicly announced that the JV will give access to its network on an open, non-discriminatory basis to all parties. The JVA moreover specifies that the business of the JV will be to develop a wholesale market and sell services to both the JV's shareholders and third party customers. Second, the FTTB network of the JV is likely to have sufficient extra capacity to serve both Vodafone and third parties. Third, the JV will offer a valuable product, namely a network with speeds of up to 1 Gb, which is likely to be attractive to third parties.

(13) Based on the above, the Commission concludes that the JV will perform on a lasting basis all the functions of an autonomous economic entity and is therefore considered a concentration.

6 ESB explained that the reason these employees will be seconded from ESB is to […].

7 […].

3. UNION DIMENSION

(14) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million[8] (ESB: EUR 3 540 million; Vodafone: EUR 51 904 million). Each of them has an EU-wide turnover in excess of EUR 250 million (ESB: EUR […] million; Vodafone: EUR […] million). ESB achieves more than two-thirds of its EU-wide turnover in Ireland but Vodafone does not. The notified operation therefore has a Union dimension.

4. RELEVANT MARKETS

(15) The JV will engage in two types of activities:

a. The JV's **primary activity** will be to provide wholesale local network infrastructure access services to telecommunications operators. This will allow telecommunications operators to provide retail services including data, content and voice to householders and businesses. The primary activity consists of two elements.

i. The provision of wholesale local network infrastructure access services by means of wholesale virtual unbundled local access ("VULA") products carried over its FTTB network, which in turn will support retail services to be offered by the JV's wholesale customers to end users. The JV itself will not operate at the retail level.

ii. The provision of wholesale local access through a higher quality, point-to-point dedicated bandwidth with higher levels of customer care and speed.[9] The second element will include the so-called "Sites Business": providing mobile operators with connections via the FTTB network from sites, that is to say sites housing their mobile communications equipment, to their backhaul networks. Fibre connection will improve the quality and capacity of their respective mobile networks.

The difference between the first and the second element of the JV's primary activity is that, for the second element, the JV will provide dedicated bandwidth with higher levels of customer care and speed, which is necessary for the provision of services to larger corporations and sites.

b. The JV's **secondary activity** will consist of the provision of wholesale end-to-end connectivity solutions to communications operators. It is envisaged that the JV's secondary activity will only be offered to smaller communications operators which require wholesale local access but do not themselves have trunk capacity.[10] To provide this service, the JV will acquire trunk segments of leased lines from providers to be re-sold to those communications operators as part of a package, together with access to the FTTB network. The secondary activity will only be

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8 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p. 1).

9 For example, a communications operator might seek access to such wholesale local access services in order to provide its customer with business-to-business connectivity.

10 This wholesale end-to-end connectivity service will be used in turn by the communications operators to provide retail services to their customers.

offered in conjunction with the primary activity (the provision of wholesale local network infrastructure access services via the FTTB network) and will be a relatively minor part of the JV's activity. It is described by the Parties as an enhancement of the primary activity of the JV.

(16) Based on the JV's activities and those of the Parties, the following markets are relevant markets for the assessment of this transaction.

4.1. Wholesale network access provided at a fixed location

4.1.1. Relevant product market

(17) Wholesale network access includes different types of access that allow telecommunications providers to offer services to end customers. It comprises notably physical access at a fixed location such as local loop unbundling and non-physical or virtual network access such as bitstream access at a fixed location.

(18) The Parties submit that, in addition to providing their own end-to-end infrastructure,[11] internet service providers offering retail broadband internet access have two options to reach their retail customers: (i) building their network to the incumbent’s local exchanges from where they rent passive copper local loops (local loop unbundling ("LLU")), and (ii) procurement of wholesale input in the form of "bitstream".

(19) As a result, according to the Parties, there are two related wholesale markets, namely, the market for wholesale local network infrastructure access at a fixed location and the market for wholesale bitstream access. The Parties submit that the wholesale VULA products to be provided by the JV fall within the first market. Therefore, in the Parties' view, only the market for wholesale local network infrastructure access at a fixed location is the relevant market for the purpose of the transaction.

(20) The Commission Recommendation on relevant markets,[12] which defines markets for the purpose of *ex ante* regulatory intervention, defines distinct markets for wholesale local access at a fixed location, which includes LLU as well as virtual products that exhibit functionalities equivalent or comparable to key features of physical unbundling, and for wholesale central access at a fixed location, which includes bitstream products with certain characteristics (respectively markets 3(a) and 3(b) of the Recommendation).

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11 In Ireland, Eircom and UPC own copper and cable networks respectively.

12 European Commission's Recommendation on relevant product market and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2000/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 9 October 2014, OJ L 295, 11 October 2014, p. 79 – 84 (hereinafter the "Recommendation"). The previous Recommendation of 17 December 2007 (hereinafter the "2007 Recommendation") categorized in its annex Market 4 as "*Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location*" and Market 5 as "*Wholesale broadband access*". Under the revised Recommendation, the Commission categorized under Market 3, two sub-types: (a) "*Wholesale local access provided at a fixed location*" and (b) "*Wholesale central access provided at a fixed location for mass-market products*".

(21) The Irish Commission for Communications Regulation ("ComReg") stated, in its 2012 consultation on the Next Generation Access ("NGA") remedies,[13] that "*for the initial roll out phase of NGA investment, VUA [virtual unbundled access] is akin to WBA [wholesale bitstream access] and should be mandated in Market 5, however this will be kept under review* (…). *Furthermore, it could be envisaged that as NGA roll out is realised, technology improvements augment and demand for VUA materialises; the dynamic of demand and supply side substitution will become clearer*". In its 2013 NGA Decision, ComReg maintained its position that wholesale virtual unbundled access products belong to the same market as wholesale bitstream access products.[14] According to the Parties, this assessment was primarily based on the deployment of fibre-to-the-cabinet ("FTTC").

(22) In *Carphone Warehouse/Tiscali UK,*[15] the Commission considered whether the broadband access market should be split between wholesale local access and wholesale bitstream access. The Commission stated that the market investigation confirmed that there are significant differences in characteristics, price, performance and service between these different types of access products. Ultimately, however, the market definition was left open.

(23) For the purposes of the present decision, the Commission concludes that the exact product market definition for the wholesale network access provided at a fixed location can be left open as the proposed transaction does not raise serious doubts, regardless of the product market definition.

4.1.2. Relevant geographic market

(24) The Parties submit that, in line with the analysis of ComReg, the geographic scope of the market for wholesale network access at a fixed location should is national. In its Market Review Decision on Wholesale (Physical) Network Infrastructure Access ("WPNIA"),[16] ComReg considered that there was insufficient evidence to justify delineation of sub-national markets, taking into account competition within the WPNIA market across Ireland. The Parties also point out that wholesale services will be uniformly priced on a national basis, and not on a local or regional basis.

(25) In previous cases,[17] the Commission considered whether the market for wholesale provision of broadband internet access is national in scope or whether it should be defined narrower, in particular taking into account the existing regulatory conditions in the telecommunications sector. In the end, the market definition was left open.

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13 ComReg Consultation on Proposed Remedies for NGA Markets, document no. 12/27, 4 April 2012, paragraphs 6.33 and 6.34.

14 ComReg Decision D03/13 on Remedies for Next Generation Access Markets, Document 13/11, 31 January 2014.

15 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 33.

16 ComReg Market Review Decision no. D05/10 on Wholesale (Physical) Network Infrastructure, document no. 10/39, 20 May 2010, paragraph 4.123.

17 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 49.

(26) The Commission considers that, in the present case, the exact definition of the geographic market can be left open, as the proposed transaction does not raise serious doubts, regardless of the geographic market definition.

4.2. Retail mobile telecommunications services market

4.2.1. Relevant product market

(27) The retail mobile telecommunications market is the market on which mobile network operators and mobile virtual network operators sell voice and data services to end customers via a mobile network.[18] Mobile telecommunications services to end customers include services for national and international voice calls, SMS (including MMS and other messages), mobile internet data services and retail international roaming services.

(28) The Parties submit that there is an overall product market which is not further subdivided by type of customer or by technology or service. Hence, it is not appropriate to distinguish services type of customer, type of service or type of network technology.

(29) In *Hutchison 3G Austria / Orange Austria*,[19] the Commission considered the aforementioned segmentations, but eventually concluded that there is a single market for the provision of mobile telecommunications services to end customers. More recently, in *Hutchison 3G UK / Telefónica Ireland*,[20] the Commission also concluded that there is a single market for the provision of mobile telecommunications services to end customers and that there are no separate markets by types of customers (such as business and residential), by technology (such as 2G, 3G and 4G), by types of service (i.e. voice, mobile broadband and machine to machine), by types of contracts (such as pre-paid and post-paid). [21]

(30) For the purpose of the present decision, the Commission concludes that the market for the provision of mobile telecommunications services to end customers constitutes the relevant product market.

4.2.2. Relevant geographic market

(31) The Parties consider that the market for the provision of mobile telecommunications services to end customers should be considered as national in scope.

(32) The Irish telecommunications regulator, ComReg, grants licenses for the territory of Ireland. Mobile operators sell, market and price their services on a national level.

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18 Case M.6992 Hutchison 3G UK / Telefonica Ireland, 28 May 2014, paragraph 141; Case M.7109 Deutsche Telekom / GTS, 15 April 2014, paragraph 43.

19 Case M.6497 Hutchison 3G Austria / Orange Austria, 12 December 2012, paragraph 58.

20 Case M.6992 Hutchison 3G UK / Telefonica Ireland, 28 May 2014, paragraph 141 onwards.

21 Case M.7231 Vodafone / ONO, 2 July 2014, paragraph 38.

(33) In line with previous decisions,[22] the Commission concludes that the relevant geographic market corresponds to the territory of Ireland.

4.3. Retail supply of fixed voice services

4.3.1. Relevant product market

(34) Fixed line telephony retail services comprise the provision of connection services or access (at a fixed location or address) to the public telephone network for the purpose of making and receiving calls and related services.[23]

(35) The Parties submits that there is a single market for the provision of fixed voice services. According to the Parties, there is no reason to differentiate between business and residential customers, because most operators provide services to each of these types of customer and types of call by means of a single suite of fixed line telephony services without additional investments. The Parties do not consider, however, fixed voice services to be substitutable with mobile voice services. Moreover, the Parties submit that managed VoIP services may be substitutable with fixed-line telephony services. However, according to the Parties, the exact definition of the relevant product market for retail fixed-line telephony services can be left open as the Transaction does not raise any competition concerns under any of the alternative product market definitions.

(36) In *Carphone Warehouse / Tiscali UK*, the Commission considered that a distinction between local / national and international calls as well as between residential and business customers may not be relevant.[24] In *Vodafone / Kabel Deutschland*, the Commission did not take a definitive view with regard to these possible further segmentations of the retail fixed voice services market. The Commission concluded however that traditional fixed voice services and managed VoIP services are interchangeable within a single market for the retail supply of fixed voice services.[25]

(37) In *Vodafone / ONO*,[26] the Commission found indications that VoIP services and fixed voice services provided through fixed lines are interchangeable, and also found indications that there is a distinction between residential and business customers. Ultimately, the market definition was left open.

(38) For the purpose of the present decision, the exact product market definition can be left open as the proposed transaction does not raise competition concerns under any possible market definition

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22 Case M.6992 Hutchison 3G UK / Telefonica Ireland, 28 May 2014, paragraph 164; Case M.7109 Deutsche Telekom / GTS, 15 April 2014, paragraph 49; Case M.7231 Vodafone / ONO, 2 July 2014, paragraph 42.

23 Case M.7109 Deutsche Telekom / GTS, 15 April 2014, paragraph 34; Case M.6584 Vodafone / Cable&Wireless, 3 July 2012, paragraph 11.

24 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 37.

25 Case M.6990 Vodafone / Kabel Deutschland, 20 September 2013, paragraphs 130 – 131.

26 Case M.7231 Vodafone / ONO, 2 July 2014, paragraphs 26 – 28.

4.3.2. Relevant geographic market

(39) The Parties submit that the market for the provision of fixed voice services to end customers is national in scope.

(40) In past decisions, the Commission considered that the retail market for the supply of fixed voice services was national in scope.[27]

(41) The Commission considers that a national market definition is also appropriate in this case.

4.4. Retail supply of fixed internet access services

4.4.1. Relevant product market

(42) Fixed internet access services consist of the provision of a fixed telecommunications link enabling customers to access the internet via narrowband ("dial-up") services or broadband services.

(43) The Parties recognize that the market for the retail supply of fixed internet access services may be segmented by bandwidth (broadband/narrowband), by technology (DSL/cable/fibre/mobile broadband) and by customer types (residential and small businesses/large businesses).

(44) The Parties submit that given the high degree of demand side substitutability, local access through copper, DSL, cable or fibre are part of the same product market. Mobile broadband, by contrast, is part of a separate market for mobile communication services to end customers.

(45) In previous decisions, the Commission concluded that narrowband and broadband internet services belong to separate markets.[28] Mobile broadband was also considered to belong to a separate market, as it is more expensive and slower.[29] Furthermore, in *Carphone Warehouse / Tiscali UK* the Commission distinguished between (i) residential and small customers, and (ii) large business customers based on their needs for internet services.

(46) For the purposes of the present case, the exact definition of the relevant product market for retail fixed internet access services can be left open as the proposed transaction does not raise serious doubts regardless of the product market definition.

4.4.2. Relevant geographic market

(47) The Parties consider the market for retail supply of fixed internet access services to be national in scope.

27 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 56; Case M.6990 Vodafone / Kabel Deutschland, 20 September 2013, paragraph 137; Case M.7231 Vodafone / ONO, 2 July 2014, paragraph 31.

28 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 10.

29 Case M.5532 Carphone Warehouse/Tiscali UK, 26 June 2009, paragraph 20; Case M.7231 Vodafone / ONO, 2 July 2014, paragraph 17.

(48) In previous decisions,[30] the Commission decided that the scope of this market is national.

(49) The Commission considers that a national market definition is also appropriate in the present case.

5. COMPETITIVE ASSESSMENT

5.1. Current network infrastructure in Ireland

(50) Currently there are two broadband or so-called "next generation access" ("NGA") networks in Ireland, one operated by Eircom, the Irish telecoms incumbent, and the other by UPC Ireland ("UPC"), a cable company. These networks have different characteristics compared to the planned JV's FTTB network in terms of their footprint and technology.

(51) Eircom is currently in the process of expanding the footprint of its fibre network to cover 1.6 million homes and businesses across Ireland by 2016. According to Eircom, this will represent around 70% of addresses in Ireland. Eircom has committed to invest EUR 400 million for this project. Eircom's network is a FTTC network, where the connection from the cabinet to the building (the so-called "last mile") is copper-based. The network will be offering speeds of up to 100 Mbps.[31] Eircom has regulatory obligations to provide wholesale access to its network based on the finding by ComReg that Eircom has significant market power.[32]

(52) Regarding the overlap with the FTTB network of the JV, following the announcement of the transaction, Eircom confirmed that all 50 towns to be served by the JV would also be covered by its fibre network.[33] The Parties expect that, although the majority of these areas can avail themselves of both networks, there will be some areas within those towns where only one of the networks will be available.[34] According to the Parties, the exact areas and subsequent overlap will not be known until the detailed design work of the FTTB business has been completed, and until Eircom has fully rolled out its network.

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30 Case M.7109 Deutsche Telekom / GTS, 15 April 2014, paragraph 57; Case M.7231 Vodafone / ONO, 2 July 2014, paragraph 22.

31 Eircom's press release "eircom Passes One Million Premises Milestone" (8 September 2014), available at: http://pressroom.eircom net/press_releases/article/eircom_Passes_One_Million_Premises_Milestone/.

32 ComReg Decision No. D05/105 (20 May 2010) and ComReg Decision No. D06/116 (8 July 2011).

33 Eircom's press release "eircom Statement on ESB/Vodafone Joint Venture" (2 July 2014), available at: http://pressroom.eircom.net/press_releases/archive/2014/07/.

34 Parties' response of 11 September 2014 to the Commission RFI of 23 August 2014.

(53) The second NGA network in Ireland is operated by UPC. UPC has a cable network[35] in urban areas of Ireland. UPC's cable network passes approximately 860 000 homes. UPC is not active in the wholesale provision of network access and does not grant access to its infrastructure to third parties. UPC uses its cable network to itself provide fixed phone, high-speed broadband and television services at the retail level. Its network offers speeds ranging from 120 Mbps to 500 Mbps.[36]

(54) The overlap between the FTTB network of the JV and the cable network of UPC is likely to be limited. This is because the Parties decided not to include areas covered by the UPC cable network.

5.2. General impact of the transaction

(55) The Commission notes that the transaction will result in the roll-out of a new fibre broadband network covering parts of Ireland. A new entity – the JV – will offer wholesale network access, in addition to Eircom, the existing provider of wholesale network access. In the areas not served by Eircom's FTTC network or UPC's cable network, the roll-out of the JV's FTTB network will make high-speed fixed broadband available where it was previously not. In the areas where the JV's FTTB network overlaps with Eircom's FTTC network, the JV will result in the presence of an alternative network, providing increased choice for telecommunications operators looking to use that infrastructure to provide retail services. The FTTB network will be capable of providing significantly higher speeds (from 200 Mbps to 1 000 Mbps) than currently available on the market.[37]

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35 UPC's network is based on hybrid fibre co-axial technology, which combines optical fiber and co-axial cable.

36 UPC's press release "UPC demonstrates leadership through Internet speed jump – Fastest home broadband provider in Ireland launches Horizon 120 Mb service as new entry level", 14 October 2013, available at: http://www.upc.ie/pdf/UPCInternetspeed.pdf; UPC's press release "UPC Business answers need for speed with launch of 250 Mb service", 15 January 2014, available at: http://www.upc.ie/pdf/pressrelease/250Mb-service.pdf; UPC's press release "An Taoiseach launches New UPC 500 Mb Broadband for Businesses", 30 January 2014, available at: http://www.upc.ie/pdf/pressrelease/500mb.pdf.

37 The current ComReg data shows that most business users subscribe to broadband internet services with download speeds of between 2 Mbps – 10 Mbps while most residential users subscribe to broadband services with speeds >=30 Mbps, delivering average speeds of <50 Mbps (Source: ComReg Quarterly Key Data Report for Q2 2014).

(56) In submissions to the Commission, third parties have argued that the entry of the JV in the market for wholesale local network infrastructure access could lead to higher prices in the retail market because it would increase Eircom's costs and ultimately lead to an increase of the regulated wholesale access prices. The Commission does not consider such a scenario plausible. Irrespective of any potential impact on Eircom's costs and any subsequent potential impact on regulatory access prices, the Commission considers it likely that the transaction will result in pro-competitive effects, since it will create a new infrastructure that offers higher speeds and will lead to the entry of a new competitor, to the benefit of consumers. The Commission also does not consider it plausible that the creation of the JV would result in Eircom scaling back its roll-out plans. In fact, based on Eircom's press releases[38] and information from the Parties, Eircom decided to increase the footprint of its network after the JV was announced.

(57) In what follows, the Commission assesses whether the transaction may lead to anti-competitive effects and raise serious doubts as to the transaction's compatibility with the internal market.

5.3. Overview of horizontal and vertical relationships

(58) The transaction will not result in any affected markets due to **horizontal relationships** between the Parties and the JV. The JV's primary activity is the provision of wholesale local network infrastructure access services. Neither Vodafone nor ESB are active in this market. Hence, there is no horizontal overlap between the JV's primary activity and that of Vodafone or ESB.[39]

(59) Several **vertical relationships** exist between the Parties and the JV and some of these relationships result in affected markets. The relevant vertical relationships between the Parties and the JV are presented in the table below. The table also shows the market shares of the Parties and the JV in each market.

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38 Eircom's press releases "eircom Passes One Million Premises Milestone" (8 September 2014), available at: http://pressroom.eircom net/press_releases/article/eircom_Passes_One_Million_Premises_Milestone/ and "Eircom Statement on ESB/Vodafone Joint Venture" (2 July 2014), available at: http://pressroom.eircom net/press_releases/archive/2014/07/.

39 Horizontal overlaps between the Parties arise due to activities of both ESB and Vodafone in the following potential markets (i) wholesale leased lines, (ii) services relating to infrastructure used to support radio-based access for communications equipment, and (iii) retail provision of business connectivity services. Nevertheless, the transaction does not give rise to affected markets nor to the risk of coordination between the Parties because of these horizontal overlaps, in particular given the Parties' limited market shares (the Parties' market shares are the following: (i) wholesale leased lines: Vodafone: <1%; ESB: estimated at [0-5]% and, in any event, less than [10-20]%; (ii) services relating to infrastructure used to support radio-based access for communications equipment: Vodafone: [10-20]% (on a national basis), [0-5]% (in Phase One footprint); ESB: [5-10]% (on a national basis), [5-10]% (in Phase One footprint); (iii) retail provision of business connectivity services: Vodafone: [5-10]%, ESB <1%).

Table 1: Overview of vertical relationships between the JV and the Parties

<table>
<tr><th>JV's activities</th><th>Parties' activities</th></tr>
<tr><td rowspan="7">Wholesale local network infrastructure access

JV: not yet active; primary activity</td><td>Retail provision of fixed internet access

Vodafone: 16.3%; ESB: 0%</td></tr>
<tr><td>Retail supply of fixed voice services

Vodafone: 16% by revenue; 13.6% by subscribers; ESB: 0%</td></tr>
<tr><td>Retail mobile communication services to end customers

Vodafone: 44.2% by revenue; 38.9% by subscribers; ESB: 0%</td></tr>
<tr><td>Wholesale provision of call termination services on fixed Vodafone networks

Vodafone: 100% ; ESB: 0%</td></tr>
<tr><td>Wholesale provision of mobile call termination services on Vodafone network

Vodafone: 100% ; ESB: 0%</td></tr>
<tr><td>Pan-European mobile communications services to multi-national corporations

Vodafone: [30-40]%; ESB: 0%</td></tr>
<tr><td></td></tr>
<tr><td>Provision of wholesale end-to-end connectivity solutions

JV: not yet active; secondary activity</td><td>Wholesale leased lines

Vodafone: <1%; ESB: not more than [10-20]%</td></tr>
</table>

(60) These vertical relationships give rise to four affected markets. In particular, Vodafone has a market share above 30% in the following markets, which are downstream to the JV's primary activity: (i) retail mobile telecommunications market, where Vodafone has a market share of 44.2% by revenue and 38.9% by subscribers, (ii) wholesale provision of call termination services on fixed Vodafone networks, where Vodafone has a market share of 100%, (iii) wholesale provision of mobile call termination services on Vodafone network, where Vodafone has a market share of 100%, and (iv) the market for pan-European mobile communications services to multi-national corporations, where Vodafone's market share has been estimated at [30-40]%. The latter three markets are not examined further in this decision, given that call termination is subject to *ex ante* regulation in Ireland, there appear to be a sufficient number of competitors in the market for pan-European mobile communications services to multi-national corporations, and no concerns have been expressed in relation to these markets during the market investigation.

(61) Consequently, in the following sections, the Commission examines only the vertically affected markets for retail *mobile* telecommunications and the wholesale local network infrastructure. In addition, third parties expressed concerns about the transaction's impact on the markets for retail *fixed* telecommunications services (internet and voice). The Commission therefore also assessed the transaction's impact on those markets.

5.4. Vertical assessment

5.4.1. Input foreclosure by restricting access to the JV's network for competing providers of retail fixed voice and internet services

(62) A vertical relationship exists between the upstream market on which the JV provides wholesale access to a local network infrastructure and the downstream markets on which Vodafone provides fixed internet and voice services to retail customers.[40] The JV's wholesale VULA products are intended to be used as an input for the fixed retail services (broadband internet and voice) offered by Vodafone and other operators.

(63) The above-mentioned vertical relationship does not give rise to any affected markets. In the upstream market, the JV currently has no market share, as it is a new entrant. On the downstream markets, Vodafone has a market share of around 16% in both the market for retail provision of fixed internet access and the market for retail supply of fixed voice services. However, during the market investigation third parties expressed concerns that the transaction would lead to input foreclosure since the JV may give access to retail competitors of Vodafone on unfavourable terms. In addition, if the market for the retail provision of fixed internet were to be divided by technology, Vodafone could have higher market shares in some markets and that market could therefore be an affected market.[41] The Commission therefore assessed whether the creation of the JV would lead to input foreclosure.

(64) The Commission considers that the transaction is unlikely to lead to input foreclosure for three reasons.

(65) First, the Commission notes that, in assessing the transaction's effects on competition, it has to compare the competitive conditions that would result from the transaction with the conditions that would have prevailed without the transaction. This means that the effects of the creation of the JV have to be compared to the present situation where no FTTB network exists. Absent the transaction, there would only be one network in Ireland that provides wholesale local network access products, namely Eircom's FTTC network (see sections 5.1

[40] As mentioned in footnote 3, Vodafone is not currently active in any television markets in Ireland. However, Vodafone may set up a television platform in Ireland in the future and could potentially utilise the JV's FTTB network for the purpose of providing television services (Form CO, paragraph 156).

[41] Vodafone's market share on the market for retail provision of fixed internet access is 16%. If this market were to be divided by technology, Vodafone's market share would be higher in the markets for the technology that it uses to offer retail broadband, namely DSL. However, even in that market, Vodafone's market share would not be so high as to change the competitive assessment. In the market for DSL broadband services, Eircom's market share is 53.7%. The remaining 46.3% of the market is held by several operators, including Vodafone. See ComReg, Quarterly Key Data Report, 14/97, 11 September 2014.

and 5.2).[42] The transaction will result in the creation of a second network, namely the JV's FTTB network, and the entry of a new provider of fibre-based fixed communications services at the wholesale level. Hence, the transaction is likely to introduce additional competition at the wholesale level.

(66) The Commission also considers it unlikely that the transaction will lead to anti-competitive effects at the retail level, meaning the retail markets for fixed internet and voice telephony. In the areas where only the FTTB network will be present, the transaction will introduce one or more new providers of fibre-based services. In the areas where the JV's FTTB network overlaps with the Eircom's FTTC network, the transaction will result in an additional fibre-based product offered to consumers by Vodafone and other operators purchasing wholesale access from the JV.[43]

(67) Second, the Commission is of the view that the JV seems unlikely to have the ability and incentive to engage in input foreclosure. The JV has been conceived from the start as an entity that will sell wholesale access on an open and non-discriminatory basis, and has confirmed this in various public statements. Moreover, for input foreclosure to be a concern, the vertically integrated firm resulting from the merger (in this case the JV) must have a significant degree of market power in the upstream market.[44] The JV is a new entrant and it is unlikely to have such degree of market power in the foreseeable future. At present, Eircom's fibre network has a coverage of 1 million premises[45] and it is scheduled to reach 1.6 million premises by the end of 2016. By contrast, the JV's network will only reach […] premises in 2016. In 2019, the fifth year of the JV's existence, its network will reach […] premises. This is still less than a third than the coverage of Eircom in 2016. In short, in the foreseeable future, Eircom's network will have a much wider coverage and will be rolled out ahead of the JV's network. This also means that Eircom can dedicate time and resources to improving the speed of its network, while the JV will still be rolling out its network. For these reasons, it is unlikely that the JV will have the requisite degree of market power to be able to foreclose rivals of Vodafone.

(68) As regards the incentive of the JV to engage in input foreclosure, the Commission notes that Vodafone holds a relatively low (around 16%) market share in both the market for retail provision of fixed internet access and the market for retail supply of fixed voice services. This makes it less likely that Vodafone expects to benefit from higher price levels downstream, since the base of sales on which it can enjoy increased margins is not that large.

42 While BT Ireland also provides wholesale access to downstream operators, it does so based on local loop unbundling, relying on the network of Eircom.

43 The advanced technology and higher speeds of the new FTTB network will also contribute to achieving the broadband targets set in the EU's Digital Agenda.

44 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6, paragraph 35.

45 Eircom's press release "eircom Passes One Million Premises Milestone" (8 September 2014), available at: http://pressroom.eircom net/press_releases/article/eircom_Passes_One_Million_Premises_Milestone/.

(69) Furthermore, ESB, as a JV partner not active on the retail telecommunications markets, is unlikely to have an incentive to limit wholesale sales to third parties and to favour Vodafone, given that this would limit the JV's profits.[46]

(70) Third, and in any event, any foreclosure strategy is unlikely to result in anti-competitive effects in the downstream market. Downstream providers of fixed internet and voice services are unlikely to be foreclosed. Eircom and UPC are vertically integrated and benefit from access to their own respective FTTC and cable network, both of which cover a large part of the Irish population. Without prejudice to the results of the next market review, other downstream operators are currently able to access the FTTC network of Eircom, which has an obligation to provide access under regulated terms throughout Ireland.[47]

(71) While there will be some areas in which only the JV's FTTB network will be available, these areas are likely to cover a small part of the Irish population. Therefore, it is unlikely that any potential input foreclosure by the JV in these areas would produce negative effects on the downstream retail fixed line markets (internet and voice), given their national scope.

(72) Based on the above, the Commission considers that the transaction will result in additional network competition in parts of Ireland and is unlikely to result in input foreclosure of downstream operators.

5.4.2. Input foreclosure by restricting mobile network operators' access to the JV's network

(73) There is only an indirect link between the market on which the JV will offer wholesale access to its network and the market for retail mobile telecommunications services. The link is as follows. The JV offers wholesale access to its FTTB network. The FTTB network can be used by mobile network operators to connect their mobile sites with their backhaul network. These connections are one of the elements making up the mobile networks of mobile network operators. These mobile networks are in turn used by mobile network operators to provide mobile telecommunications services to their customers.

(74) In their submissions to the Commission, third parties have argued that the JV could favour Vodafone when giving mobile network operators access to its FTTB network to connect mobile sites with their backhaul network. This would lead to a form of input foreclosure.

(75) The Commission considers that such input foreclosure is unlikely. The input – access to the JV's FTTB network to connect sites with a backhaul network – is only one of the elements making up the mobile network with which mobile network operators provide services to their customers. In addition, only a very limited part of all sites in Ireland will be able to rely on the JV's FTTB network. Of the more than […] sites in Ireland, only […] sites are located in the footprint of the FTTB network and of those […] sites only […] sites could, based on their location,

46 Under the JVA, […].

47 While the exact extent of the overlap between the networks of the JV and of Eircom is currently unknown (see paragraph (52)), it is likely to be substantial, given that Eircom intends to cover all 50 towns in the JV's Phase One footprint.

potentially use the FTTB network. Of these […] sites, Vodafone has equipment on […] sites. All of these […] sites are shared, meaning the sites carry equipment not only of Vodafone but also of another mobile network operator. If Vodafone obtains access to the FTTB network for one of its […] sites within the network's footprint, this will also benefit the other operator on the site.

(76) In view of this, the Commission considers that Vodafone could not successfully engage in input foreclosure by restricting mobile network operators' access to the JV's network.

5.5. Allegations of State aid

(77) In submissions to the Commission, third parties have suggested that the creation of the JV also raises State aid questions. More specifically, these third parties suggest that ESB, one of the parents of the JV, benefits from favourable financing conditions because it is a State-owned entity. In addition, they suggest that ESB's electricity network benefits from rights of way, permits and ducts which it will be contributing to the JV. These assets may not have been valued at market prices when they were contributed to the JV.

(78) These allegations regarding State aid do not change the Commission's assessment. The Commission is not required to conduct a State aid procedure in connection with every concentration procedure, which must be completed within strict time-limits.[48] At the same time, the Commission cannot ignore the consequences of possible State aid to undertakings on the maintenance of effective competition in the relevant market.[49] In this case, the Commission has assessed the JV's market power on the basis of all available facts, including the fact that the JV will benefit from assets that were contributed to it by ESB, such as the right to use ESB's electricity distribution network. The Commission does not take position on whether the contribution of these assets constitutes State aid, but it has taken the contribution of these assets into account when conducting its assessment. Therefore, without prejudice to the outcome of any potential State aid assessment, the question whether ESB or the JV benefitted from State aid does not change the Commission's assessment of the transaction.

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48 Judgment of 3 April 2003, *BaByliss SA v Commission*, T-114/02, EU:T:2003:100, paragraph 441.

49 Judgment of 31 January 2001, *RJB Mining plc v Commission*, T-156/98, EU:T:2001:29, paragraph 115.

6. CONCLUSION

(79) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement.[50] This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission
(Signed)
Joaquín ALMUNIA
Vice-President

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50 This decision is without prejudice to the obligation for the Parties to comply with the Cost Reduction Directive (Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014) once transposed and the obligations of the relevant authority to ensure compliance to this effect.