EUROPEAN COMMISSION

DG Competition

Case M.7978 – Vodafone / Liberty Global / JV

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 9(3) Regulation (EC) No 139/2004

Date: 03/08/2016

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN
COMMISSION

Brussels, 3.8.2016
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Public Version

COMMISSION DECISION

of 3.8.2016

**relating to Article 9 of Regulation (EC) No 139/2004
referring to case M.7978 – Vodafone / Liberty Global / JV**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")[1],

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings[2] (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Vodafone Group plc and Liberty Global Europe Holding B.V. on 14 June 2016, pursuant to article 4 of the said Regulation,

Having regard to the request of the Netherlands, via the Netherlands Autoriteit Consument en Markt (Authority for Consumers and Markets – the ACM) of 5 July 2016 for a full referral of the proposed concentration,

Having informed Vodafone Group plc and Liberty Global Europe Holding B.V. of the referral request on 12 July 2016,

Having given Vodafone Group plc and Liberty Global Europe Holding B.V. the opportunity to make known their views on the request of the Netherlands of 5 July 2016 and having regard to Vodafone Group plc's and Liberty Global Europe Holding B.V.'s observations of 19 July 2016,

Whereas:

(1) On 14 June 2016 the Commission received notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ("the Merger Regulation") by which Vodafone Group plc ("Vodafone", United Kingdom) and Liberty Global Europe Holding B.V., belonging to the Group of Liberty Global plc ("Liberty Global", United Kingdom), acquire within the meaning of Article 3(1)(b) of the Merger Regulation, joint control of a newly created company constituting a joint venture ("the JV", the Netherlands) by way of contribution to the JV of their respective business activities in the Netherlands (the "proposed transaction" or the "Transaction"). Liberty Global and Vodafone are collectively refered to in this Decision as the "the Notifying Parties".

(2) The Netherlands received a copy of the notification, via the ACM, on 15 June 2016.

[1] OJ C115, 9.8.2008, P.47.

[2] 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.

(3) By letter dated 5 July 2016 and received on the same day, the Netherlands via the ACM requested the referral of the proposed transaction to its competition authority with a view to the application of the competition law of the Netherlands, pursuant to article 9(2)(a) of the Merger Regulation ("the Referral Request").

1. THE PARTIES

(4) In the Netherlands, Liberty Global is an established retail fixed market player, offering TV, broadband Internet and fixed telephony services (under the name Ziggo) through its nationwide cable network.[3] Liberty Global is not under any regulated access obligations, nor does it grant access to its cable network on a commercial basis. Liberty Global has a minimal presence in the mobile services market as a Mobile Virtual Network Operator ("MVNO") operating via Vodafone's network. It offers mobile services to its fixed customers only. It also offers fixed-mobile multiple play bundles. Liberty Global also holds the exclusive broadcasting rights to sports events and broadcasts two sports channels. Liberty Global also indirectly owns […]% of HBO Nederland Coöperatief U.A., which supplies 3 HBO-branded Pay-TV and related video-on-demand channels to Dutch customers.

(5) In the Netherlands, Vodafone is an established retail mobile market player as a mobile network operator ("MNO"). Vodafone has a minimal presence in retail fixed telephony, broadband Internet and TV services markets, which it entered in 2014 through a combination of regulated and commercial access on the incumbent's, KPN's, copper and fibre networks. Vodafone has recently started offering fixed-mobile multiple play bundles.

2. THE OPERATION AND THE CONCENTRATION

(6) On 15 February 2016, Liberty Global and Vodafone concluded a "Signing Protocol" which will lead to the execution of a definitive JV agreement. The following tangible and intangible assets will be transferred to the JV:

(i) Vodafone Group will contribute all shares of Vodafone Libertel B.V., Vodafone Group's operating company in the Netherlands;

(ii) Liberty Global will contribute all shares of Ziggo Group Holding B.V..[4]

(7) After the Transaction, Vodafone and Liberty Global will each hold 50% of the shares in the JV, will have equal voting rights in the JV and equal rights to appoint directors to the JV's Supervisory Board. Accordingly, following the Transaction, each of Vodafone and Liberty Global will exercise joint control over the JV.

(8) The Transaction consists in the acquisition of joint control by Vodafone and Liberty Global over the JV to which each of the Parties contribute their respective businesses with an established market presence and, therefore, constitutes a concentration within the meaning of 3(1)(b) of the Merger Regulation.

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[3] The acquisition by Liberty Global (which owned/operated the UPC cable network in the Netherlands) of rival Dutch cable operator Ziggo, was reviewed and cleared by the Commission subject to commitments on 10 October 2014 (M.7000 - Liberty Global/Ziggo).

[4] Certain IP assets of Vodafone and Liberty Global will be excluded prior to the transfer of shares, as set out in detail in […].

3. EU DIMENSION

(9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[5] (Liberty Global: EUR 16 476 million; Vodafone: EUR 53 776 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Liberty Global: EUR […]; Vodafone: EUR […]), and neither of them achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. ASSESSEMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

4.1. Introduction

(10) Pursuant to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that Member State's competition law, if the conditions laid down in Article 9(2)(a) of the Merger Regulation are met, that is to say, if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.

(11) Moreover, pursuant to Article 9(3) of the Merger Regulation, the Commission has to analyse whether it is appropriate to refer a given case to a national competition authority. The Commission therefore retains a margin of discretion in deciding whether to refer a case or not.[6] In exercising such discretion the Commission will take into account the need to ensure effective protection of competition in all markets affected by the Transaction. [7] The Commission exercises that discretion taking into account the criteria set out in the case law and the Referral Notice.[8]

(12) In the following sections, the Commission considers whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled (section 4.2) and then it assesses whether it is appropriate to refer the present case to the Netherlands (section 4.3).

(13) In its assessment of the Referral Request, the Commission takes into account all the arguments it received from the ACM and the Notifying Parties.

4.2. The criteria of Article 9(2)(a) of the Merger Regulation

(14) In order for a referral request to be issued by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation.

(15) As to the procedural condition, the referral request must be made within 15 working days from the date on which the notification of a concentration before the Commission is received by that Member State. In this regard, the Commission notes that the Netherlands, via the ACM, received a copy of the notification of the Transaction on 15 June 2016 and that the Referral Request was submitted to the Commission on 5 July 2016. Therefore, the Referral Request was made within 15 working days following the receipt by the Netherlands of the notification of the

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5 Turnover calculated in accordance with Article 5 of the Merger Regulation.

6 Joined cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraphs 173-175. See also Commission Notice on Case Referral in respect of concentrations (hereafter, the "Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

7 Referral Notice, paragraph 8.

8 Referral Notice, paragraphs 5, 7-9.

Transaction and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.

(16) As to the substantive conditions, first, in assessing a referral request made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is required to determine whether there is a market within the Member State concerned which is affected by the notified concentration and presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case law of the General Court,[9] the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the Transaction threatens to significantly affect competition in that market. Each of these conditions are assessed in turn in the following sections.

4.2.1. Markets within the Netherlands which present all the characteristics of a distinct market

(17) As regards the criteria set out at Article 9(2)(a), paragraph 36 of the Referral Notice explains that the Member State is required to show that the geographic markets in which the Transaction threatens to affect competition are national or narrower than national in scope.

4.2.1.1. ACM's submission

(18) In the Referral Request the Netherlands identifies the following markets that it considers to be affected by the proposed transaction and which have a geographic scope that does not exceed the territory of the Netherlands: (i) the retail market for mobile telecommunications, (ii) the retail market for fixed-telephony services, (iii) the retail market for internet access, (iv) the retail market for TV services to end-consumers, (v) the retail market for multiple play services (vi) the retail market for business communications and (vii) the wholesale market for supply and acquisition of Pay TV channels.

(19) Moreover, the ACM submits that the proposed transaction will have a direct effect on the current access regulatory framework in the Netherlands. In this regard, the ACM notes that, currently, access regulation in the Netherlands is based on the analysis that KPN has single significant market power on wholesale local access. The ACM believes that there are strong indications that, after the concentration, there will be collective joint dominance of KPN and the JV. The ACM further submits that, post-transaction, the market circumstances on retail level will change, therefore, rendering unclear whether the assessment of a collective joint dominance in a new market review by the ACM will lead to the same kind of access regulation. Therefore, the ACM considers that the current access regulation in the Netherlands cannot be taken into consideration as a sufficiently certain future market condition in the assessment of the concentration.

4.2.1.2. Notifying Parties' view

(20) The Notifying Parties submit that, in previous Commission decisions, a number of markets under scrutiny as part of the transaction were considered as potentially wider than national in geographic scope. Therefore, it remains an open question for the Parties whether all of the markets in question satisfy the requirements for a referral.

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9 Joined Cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraph 105.

(21) In particular, the Notifying Parties note that in previous cases the Commission has found that the following markets are either national or potentially wider than national in terms of geographic scope: (i) retail business communications services, (ii) acquisition of broadcasting rights for TV content, (iii) international carrier services, (iv) internet hosting and (v) wholesale internet connectivity.

(22) The Notifying Parties submit, however, that this question can remain open for the purposes of the Commission's decision on referral because, even if all relevant markets under consideration as part of the Transaction were deemed to present the characteristics of a national market, the Parties consider that the Commission is in any event the more appropriate authority to review the transaction.

4.2.1.3. Commission's assessment

(23) On the basis of the information gathered during the market investigation and in light of its previous decision-making practice, the Commission concludes that the relevant product markets for the assessment of the effects of the Transaction are the markets identified by the ACM, namely the (i) the retail market for mobile telecommunications, (ii) the retail market for fixed-telephony services, (iii) the retail market for internet access, (iv) the retail market for TV services to end-consumers, (v) the retail market for multiple play services (vi) the retail market for business communications and (vii) the wholesale market for supply and acquisition of Pay TV channels, as well as the wholesale markets for the provision of (viii) call termination on mobile networks, (ix) call termination on fixed networks, (x) internet connectivity, (xi) internet hosting services, (xii) international carrier services, (xiii) supply of leased lines, (xiv) domestic transit services on fixed networks, (xv) termination and hosting of calls to non-geographic numbers, (xvi) acquisition of broadcasting rights for individual audio-visual/TV content, (xvii) access and call origination on mobile networks and (xviii) international roaming services.

(24) The Table 1 below illustrates the retail markets in the Netherlands that are horizontally affected as a result of the proposed transaction. All horizontally affected markets are national in scope.

Table 1: List of markets horizontally affected by the proposed transaction (market shares for 2015 by number of subscribers).

RETAIL	Vodafone	Ziggo	**Combined**	Horizontally Affected
Fixed telephony	[0-5]%	[40-50]%	[40-50]**%**	☑
Fixed internet access	[0-5]%	[40-50]%	[40-50]**%**	☑
TV services	[0-5]%	[40-50]%	[40-50]**%**	☑
Fixed dual play bundles*	>[0-5]%	[40-50]%	[40-50]**%**	☑
Fixed triple play bundles*	[0-5]%	[60-70]%	[60-70]**%**	☑
Fixed-mobile 4P bundles*	[0-5]%	[10-20]%	[10-20]**%**	☑
Mobile services	[20-30]%	[0-5]%	[20-30]**%**	☑
Business connectivity	[10-20]%	[0-5]%	[10-20]**%**	☑
WHOLESALE				
Supply and acquisition of TV channels (demand-side)	[0-5]%	[40-50]%	[40-50]**%**	☑

***market shares based on Commission's market reconstruction data**

(25) The Table 2 below illustrates the markets that are vertically affected as a result of the proposed transaction. From the listed markets, only the markets for the wholesale provision of (i) internet connectivity, (ii) internet hosting and (iii) international carrier services, were in the past considered by the Commission to be wider than national in scope.

Table 2: List of markets vertically affected by the proposed transaction (market shares for 2015 by number of subscribers).

Upstream market	Downstream market	Vertically Affected
Wholesale access and call origination on mobile networks Vodafone: [5-10]%, Ziggo: not active	**Retail mobile telecommunications services** Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
Wholesale international roaming Vodafone: [20-30]% , Ziggo: not active		☑
Wholesale market for call termination on fixed networks Vodafone: [90-100]% Ziggo: [90-100]%	**Retail fixed telephony services** Vodafone: [0-5]%- Ziggo: [40-50]% **Combined**: **[40-50]%**	☑
	Retail mobile telecommunications services Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
Wholesale market for call termination on mobile networks Vodafone: [90-100]% Ziggo: [90-100]%	**Retail fixed telephony services** Vodafone: [0-5]%- Ziggo: [40-50]% **Combined**: **[40-50]%**	☑
	Retail mobile telecommunications services Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
Wholesale termination and hosting of calls to non-geographic numbers	**Retail fixed telephony services** Vodafone: [0-5]%- Ziggo: [40-50]%	☑

Vodafone: not active Ziggo: [20-30]%	**Combined**: **[40-50]%**	
	Retail mobile telecommunications services Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
Wholesale provision of domestic call transit services on fixed networks Vodafone: not active Ziggo: [5-10]%	**Retail fixed telephony services** Vodafone: [0-5]%- Ziggo: [40-50]% **Combined**: **[40-50]%**	☑
	Wholesale international carrier services Vodafone: [0-5]%; Ziggo: [0-5]% **Combined: <10%**	☐
Wholesale international carrier services Vodafone: [0-5]%; - Ziggo: [0-5]% **Combined**: <10%	**Retail mobile telecommunications services** Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
	Retail business connectivity services Vodafone: [20-30]% - Ziggo: [0-5%]% **Combined**: **[20-30]%**	☐
Wholesale leased lines Vodafone: not active Ziggo: 0-5% **Combined**: **0-5%**	**Retail mobile telecommunications services** Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☑
	Retail fixed telephony services Vodafone: [0-5]%- Ziggo: [40-50]%	☑

	Combined: **[40-50]%**	
	Retail business connectivity services Vodafone: [20-30]% - Ziggo: [0-5]% **Combined**: **[20-30]%**	☐
Acquisition of broadcasting rights for individual audiovisual/TV content Vodafone: non active; Ziggo: [30-40]% on the demand side	**Wholesale supply and acquisition of Pay TV channels** (demand side) Vodafone: [0-5]%; Ziggo: >40% under all possible segmentations **Combined: >40%** (supply side) Vodafone: non active; Ziggo: <30% under all possible segmentations **Combined: <30%**	☑
	Retail TV services Vodafone: [0-5]%; Ziggo: [40-50]% **Combined: [40-50]%**	☑
Wholesale supply and acquisition of Pay TV channels (demand side) Vodafone: [0-5]%; Ziggo: >40% under all possible segmentation **Combined: >40%** (supply side) Vodafone: non active; Ziggo: <30% under all possible segmentations **Combined: <30%**	**Retail TV services** Vodafone: [0-5]%; Ziggo: [40-50]% **Combined: [40-50]%**	☑
Wholesale internet connectivity **Combined: [0-5]%**	**Retail business connectivity services** Vodafone: [20-30]% - Ziggo: [0-5]%	☐

	Combined: **[20-30]%**	
	Retail fixed internet services Vodafone: [0-5]% - Ziggo: [40-50]% **Combined**: **[40-50]%**	☑
	Wholesale leased lines Vodafone: -, Ziggo: 0-5% **Combined**: **0-5%**	☐

***market shares based on Commission's market reconstruction data, Parties' estimates and Telecompaper data**

(26) In light of the above, the Commission considers that the ACM has shown that the markets identified at the Referral Request present the characteristics of distinct markets in the Netherlands as required under Article 9(2)(a) of the Merger Regulation.

4.2.2. Markets within the Netherlands in which the Transaction threatens to significantly affect competition

(27) According to paragraph 35 of the Referral Notice, to meet the criteria for referral under Article 9(2)(a) of the Merger Regulation, the Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

4.2.2.1. ACM's submission

(28) The ACM considers *prima facie* that the proposed transaction threatens to affect significantly competition on each of the affected markets identified in recital 20, that it considers to constitute distinct markets within the Netherlands as referred to in Article 9(2)(a) of the Merger Regulation.

(29) With regard to the <u>retail market for mobile telecommunications</u>, the ACM considers that as a result of the current trend for fixed-mobile convergence, which is expected to become more important in the next 3 to 5 years in the Netherlands, the proposed transaction could possibly lead to the creation of a duopoly of KPN and Vodafone/Ziggo and, thus, to competition concerns to the retail mobile telecommunications market due to the reduction of the competitive pressure from mobile-only players. Moreover, the ACM submits that the proposed joint venture will have the advantage over its competitor MNOs on the basis of a more timely introduction of the future 5G mobile network in the Netherlands. In this respect, the ACM refers to the combination of Ziggo's 2 x 20 MHz spectrum on the 2.6 GHz band which will be combined, post-transaction, with Vodafone's 2 x 10 MHz spectrum in the same band.

(30) With regard to the <u>retail markets for fixed-telephony services</u>, internet access and TV services, the ACM considers that the concentration will likely have significant

unilateral effects on competition due to the elimination of Vodafone as a recent entrant with the capacity to become an important competitive force in the retail fixed markets in the Netherlands. According to the ACM, Vodafone is currently the fastest growing challenger in the Dutch market and has already committed itself to remain in the fixed markets through significant investments in fixed fibre infrastructure.

(31) Besides the unilateral effects of this concentration, the ACM submits that there are strong indications that the concentration could possibly create a collective dominant position of KPN and Vodafone/Ziggo in the fixed markets. Therefore, the ACM considers that an assessment of possible coordinated effects on the fixed retail markets as well as on the retail market for multi-play services is necessary.

(32) With regard to the <u>retail market for multiple play services</u>, the ACM submits that, with the creation of the joint venture the Parties are capable of becoming a very strong second player on the multiple play market, next to KPN, while making it very difficult for the only remaining convergent player (namely, Tele2) to compete. In this respect, the ACM also notes that entry in fixed-mobile convergent markets is most unlikely in the near future by the current mobile-only players.

(33) With regard to the <u>retail market for business communications</u>, the ACM submits that if the joint venture decides to offer these services mainly via its coax (Ziggo's) network it could weaken the position of […]. The ACM thus considers that the business case for rolling out the fibre-network and connecting new business customers could diminish.

(34) With regard to the <u>wholesale market for supply and acquisition of Pay TV channels</u>, the ACM submits that Ziggo has already a large position in this market and is capable to reach better results in negotiations with content providers than smaller parties (namely T-Mobile and Tele2). According to the ACM, due to the removal of another small player (Vodafone) from the market via the concentration, content providers may have less incentive to offer smaller market participants reasonable prices for TV content.

(35) Lastly, the ACM also submits that market circumstances on retail level will change as a result of the JV. Whether the assessment of a collective dominant position in the next market review by the ACM will lead to the same kind of access regulation as that currently in place (on KPN) is unclear. Therefore, in light of this uncertainty, the current access regulation cannot be taken into account for the purposes of reviewing the transaction.

4.2.2.2. Notifying Parties' view

(36) The Notifying Parties do not address the remarks made by the ACM regarding competitive effects of the Transaction. In response they refer to the information that they provided to the Commission during its investigation of the proposed transaction.

4.2.2.3. Commission's assessment

(37) In the Commission's view, the Transaction threatens to significantly affect (i) the possible retail market for the provision of fixed multiple play bundles (dual play and triple play) and (ii) the possible retail market for the provision of fixed-mobile multiple play bundles (quadruple play and fixed-mobile dual play and triple play bundles) in the Netherlands, for the following reasons.

Retail market for provision of fixed multiple play bundles

(38) Vodafone has publicly stated[10] its intent to invest in and disrupt the Dutch fixed markets with the ambition to strengthen its position as a challenger and become a top 3 player in fixed. Market share projections […] 2015 reflect this ambition with forecasts for market share of **[5-10]% by 2020** and **[5-10]% until 2025**.[11]

(39) Vodafone introduced its fixed multiple play offering based on DSL in the Netherlands in 2014.

(40) In the course of less than two years Vodafone has managed to gain a nearly [0-5]% market share in fixed multiple play bundles. [12] The vast majority of Vodafone's sales in fixed are accounted for by fixed-only triple play bundles making around […]% of its fixed sales, which is also reflected in its current market shares in dual play and triple play.[13]

Table 3: Market shares by subscriber numbers on the possible retail markets for **dual play** and **triple play** for Q1 2016

	Dual play		**Triple play**	
	N° of subscribers	Market share	N° of subscribers	Market share
Ziggo		[40-50%]		[60-70%]
Vodafone		[0-5%]		[0-5%]
Combined		**[40-50%]**		**[60-70%]**
KPN	[CONFIDENTIAL]	[40-50%]	[CONFIDENTIAL]	[20-30%]
Tele2	[CONFIDENTIAL]	[5-10%]	[CONFIDENTIAL]	[0-5%]
Online.nl (M7)	[CONFIDENTIAL]		[CONFIDENTIAL]	[0-5%]
TOTAL	[CONFIDENTIAL]	100%	[CONFIDENTIAL]	100%

Source: Commission market reconstruction data

(41) While a market share of [0-5]% appears modest, especially compared to the market shares of the other established players in the market, it is important to note that Vodafone's current market share in fixed needs to be put into context: the fixed markets in the Netherlands appear to be rather mature, rapid shifts in market positions are not very likely and this market share was obtained over a relatively short period of time.

(42) In this relation, the quarterly growth rates of Vodafone for both dual play and triple play are quite indicative: […].

[10] Integrated report Vodafone Netherlands 2012-2013, available at https://www.vodafone.nl/_assets/downloads/algemeen/vodafone_netherlands_integrated_report2012%20_2013.pdf

[11] […]

[12] Market shares on the basis of the Commission's reconstruction of market shares for the 2P, 3P and 4P bundles.

[13] Form CO, paragraph 6.85.

Table 4: Quarter-by-quarter dual play growth rates

Dual play	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015	Q1 2016
Vodafone	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Ziggo	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
KPN	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Tele2	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Online.nl (M7)	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

Table 5: Quarter-by-quarter triple play growth rates

Triple play	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015	Q1 2016
Vodafone	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Ziggo	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
KPN	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Tele2	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%
Online.nl (M7)	[...]%	[...]%	[...]%	[...]%	[...]%	[...]%

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

(43) […]

(44) A further crucial step towards the expansion of Vodafone's presence in fixed was the rolling out of its own network to ODF locations on the KPN/Reggefiber FttH footprint. Vodafone planned […].

(45) In relation to Vodafone's investment in ODF equipment rollout, Vodafone's internal documents suggest that the fixed targets for roll-out were […] households by 2015 (a target which was […]) and […]households by 2022. These targets which would require […].[14]

(46) While access to FttH via ODF unbundling is indeed regulated, the Commission notes that to date Vodafone is the only operator in the Netherlands that has invested in this type of wholesale access.

(47) The ODF unbundling was also perceived by Vodafone as […].

(48) From a comparative perspective, due to its fixed assets[15] Vodafone appears currently to be in a better position in fixed as an operator compared to other established or potential access seekers, especially in terms of differentiation and quality of services offered to its clients.

14 […].

15 Own ISP platform, backhaul infrastructure and unbundled ODF access.

(49) […]. This will translate into the elimination of an alternative operator who is in the position to play the role of challenger and disrupt the fixed multiple play markets moving forward.

(50) In light of the above, and in particular the indications provided in the market investigation, including from internal documents of the Parties, that Vodafone appears to have a greater influence on the competitive process in the concentrated fixed markets than its modest market share might suggest, the Commission considers that Vodafone has the ability and incentive to further develop its presence in fixed services at retail level into an important competitive force in the market. The Commission therefore concludes that the proposed transaction eliminates an important player in the concentrated fixed markets in the Netherlands and thus raises serious doubts as to its compatibility with the internal market as regards the possible retail market for provision of fixed multiple play bundles (dual play and triple play) in the Netherlands.

Retail market for provision of fixed-mobile multiple play bundles

(51) Vodafone has introduced fixed-mobile bundles in the Netherlands only very recently – in the last quarter of 2015. Over this extremely short period of time, it has gained a market share of [0-5]% in Q1 2016 for quadruple play bundles and appears to have been very successful in cross-selling fixed-mobile bundles to its customer base: around […]% of Vodafone's existing fixed customers are also Vodafone mobile subscribers.[16]

(52) In relation to the exact market share of Vodafone for fixed-mobile bundles (which would encompass all types of fixed-mobile bundles including fixed-mobile dual play and triple play) it should be noted that given that […]% of Vodafone's dual play subscribers have a dual play package that includes a mobile service and […]% of its triple play subscribers have a fixed-mobile triple play package, whereas the respective proportions of Ziggo's dual play and triple play subscribers that have a fixed-mobile package are […]% and […]% respectively, the Vodafone's actual market share in fixed-mobile bundles would probably be higher than [0-5]% and the combined market share of the merged entity in the possible market for fixed-mobile bundles would therefore be higher than its [10-20]% market share in quadruple play.

Table 6: Quadruple play market shares based on number of subscribers

	Q3 2015	Q2 2015	Q1 2016
Ziggo	[10-20]%	[10-20]%	[10-20]%
Vodafone	0%	[0-5]%	[0-5]%
Combined	**[10-20]%**	**[10-20]%**	**[10-20]%**
KPN	[80-90]%	[80-90]%	[80-90]%
TOTAL	100%	100%	100%

Source: Commission market reconstruction data

(53) Whereas the growth rates data available for Vodafone quadruple play is inevitably limited in light of its very recent launch of quadruple play bundles, Vodafone enjoys

16 Form CO, paragraph 6.86

the highest growth rate for quadruple play in the market – […]% for Q1 2016 compared to KPN with […]and Ziggo with […]for the same period.[17]

(54) Currently, there are only three retail operators in the Netherlands offering fixed-mobile multiple play bundles at national scale: KPN, Ziggo and Vodafone. The proposed transaction will lead to the reduction of the current number of players in the possible fixed-mobile multiple play market from three to two. Certain market participants (the complainants) consider also that the creation of the JV, in the absence of Vodafone as a challenger and new entrant, will accelerate significantly the transition of the retail telecommunications markets in the Netherlands to fixed-mobile bundles as the JV will actively push quadruple play bundles on the market.

(55) For the reasons explained in detail in the preceding section, the Commission considers that Vodafone is geared to become an important competitive force in the provision of fixed multiple play bundles. Vodafone's success in fixed bundles places it in a very good position to compete for the provision of fixed-mobile and quadruple play bundles in view also that it is active as an MNO in the provision of retail mobile services. In a forward-looking perspective Vodafone's presence and success in fixed are intrinsically linked to the competitive pressure it currently exerts and would have continued to exert in the possible fixed-mobile bundles market absent the transaction.

(56) As regards other fixed players with nationwide scope of their fixed offer that could potentially be considered as possible entrants in the provision of fixed-mobile bundles such operators would inevitably face higher wholesale costs (for access to both the fixed and the mobile component of the convergent bundles) than those faced not only by KPN and the JV but also compared to possible competitor that own a mobile network infrastructure. In light of these higher wholesale access costs it is therefore unclear whether entry in fixed-mobile would met the business case and whether such potential entrant could be in a position to offer competitively priced/sufficiently attractive in terms of additional benefits fixed-mobile bundles.

(57) In light of the above, and in particular the elimination of Vodafone as a provider of fixed-mobile bundles that has the potential to exert significant competitive pressure moving forward on the possible market for fixed-mobile bundles, the Commission considers that the proposed transaction raises serious doubts as to its compatibility with the internal market as regards the possible retail market for provision of fixed-mobile multiple play bundles (quadruple play and fixed-mobile dual play and triple play bundles) in the Netherlands.

Commission's assessment - Conclusion

(58) The Commission therefore concludes that the transaction threatens to affect significantly competition in the possible retail market for provision of fixed multiple play bundles (dual play and triple play) and in the possible retail market for provision of fixed-mobile multiple play bundles (quadruple play and fixed-mobile dual play and triple play bundles) in the Netherlands.

4.2.3. Conclusion on the criteria of Article 9(2)(a) of the Merger Regulation

(59) In light of the above, the Commission considers that the criteria for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Transaction.

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17 Telecompaper report, "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016.

4.3. The Commission's discretion in deciding whether to refer

(60) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) are fulfilled with regard to a proposed transaction, the Commission has discretion whether to refer a given case to a national competition authority.

(61) In the following, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.

4.3.1. ACM's submission

(62) According to the ACM, the Referral Request satisfies both the conditions in Article 9(2)(a) of the Merger Regulation and the criteria set out in the Referral Notice. The ACM notes that the proposed transaction has potentially significant effects on the competition landscape in various markets within the Netherlands, whereas the cross-border effects of the proposed transaction are preliminarily assessed as limited. The ACM considers that a decision of the Commission to refer the proposed transaction to the ACM would be consistent with the guiding principles of case referral. In particular, the ACM would in this case be the more appropriate authority to assess the proposed transaction, given that it has up-to-date, extensive and in depth knowledge and experience of the markets that are affected by the proposed transaction.

(63) The ACM highlights in this respect that, in its capacity as the Dutch telecom regulator, it holds up-to-date, extensive and in-depth knowledge and experience of the affected markets and of the regulatory framework in the Netherlands allowing it to assess the merger on its merits. In the past years, the ACM has dealt with several concentration and antitrust cases with regard to telecommunications markets and TV-related markets.[18] Important cases in this respect were the KPN-Reggefiber cases in 2008 and 2014.[19] The ACM submits that, in these cases, there was a strong coherence between the assessment of the concentration case and the possible future regulation. Furthermore, the ACM has investigated several telecommunications markets in preparation of market analysis decisions in 2015[20] and is in the process of preparing a market study regarding the effects of bundling in the Netherlands and their link with content markets.

(64) As regards the obligation of the Notifying Parties to renotify the transaction in the Netherlands and the delay that this would entail for the case at hand, the ACM submits that any potential delay may be overcome since the ACM has already formed a broad picture of the potential competition problems of the transaction from the date of filing to the Commission. The duration of the investigation and any further delays for the Parties can thus be kept to a minimum.

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[18] NMa decision of 13 August 2007 in case 6126/RTL NL — Radio 538; NMa decision of 22 July 2011 in case 7185/Sanoma — SBS; NMa decision of 29 November 2012 in case 7500/Fox Entertainment — Eredivisie; NMa decision of 19 December 2008 in case 6397/KPN — Reggefiber, ACM decision of 31 October 2014 in case 14.0672.24/KPN — Reggefiber and Court of Rotterdam decision of 10 May 2012 in case AWB 09/345 — Ziggo vs. NMa (appeal KPN-Reggefiber).

[19] NMa decision of 19 December 2008 in case 6397/KPN — *Reggefiber,* ACM decision of 31 October 2014 in case 14.0672.24/KPN — *Reggefiber* and Court of Rotterdam decision of 10 May 2012 in case AWB 09/345 — Ziggo vs. NMa (appeal KPN-Reggefiber).

[20] The markets analyzed by the ACM in its decision from December 2015 were the retail markets for Internet access, fixed-telephony and business connectivity services and the wholesale markets for local loop unbundling and fixed telephony.

(65) As regards legal certainty, the ACM submits that a full referral of the proposed transaction would give more legal certainty to other market players active in the Dutch telecommunications markets, because the concentration could be assessed in full coherence with current and future access regulation.

(66) In light of the above, the ACM submits that is considers itself to be the more appropriate authority to assess the transaction.

4.3.2. Notifying Parties' view

(67) The Notifying Parties consider that there are no compelling reasons that justify a referral of the Transaction to the Netherlands and that the Commission is better placed to review the Transaction for the reasons set out below.

(68) First, the Parties argue that the Commission is better placed to review the Transaction given the significant amount of expertise that it has developed as part of its review of telecommunications markets in recent years. In particular, the Parties note that the Commission has recently carried out merger reviews in (i) the mobile telecommunications sector,[21] (ii) the fixed telecommunications sector,[22] and (iii) the mobile and fixed telecommunications sectors.[23]

(69) Second, in its role within the regulatory framework for electronic communications, the Commission has supervised regulation of these markets across the European Union.

(70) Third, the Parties submit that the Commission has been actively collecting information on the Transaction since Febryaru 2016 when the pre-notification discussions began. Following the notification, the Commission has conducted a full market investigation involving other competitors, customers and other market participants of the Parties. The Commission has reviewed the Parties' responses to a number of requests for information, has collected a large number of internal documents relating to the Parties' activities on the relevant markets and has collected economic data both from the Parties and the Parties' competitors.

(71) Given the volume of information provided to the Commission during the course of its investigation to date, the Parties submit that a referral to the Netherlands would be inefficient and would impose a significant burden on the Parties and other third parties that have been involved in the Commission's investigation.

(72) Fourth, the Parties also note that the Commission is best placed to ensure consistency in the application of merger control rules in the telecommunications sector across the EEA. In this respect, the Parties note the importance of legal certainty for market participants in this dynamic and rapidly evolving sector.

(73) Fifth, the Parties submit that the Commission has a particular interest in ensuring the consistent application of uniform standards of competition law in the

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[21] M.7637 *Liberty Global / BASE Belgium,* OJ C141, 22.04.2016*; M.7612 Hutchison 3G UK / Telefonica UK; Case M.6992 Hutchison 3G UK / Telefonica Ireland,* OJ C264, 13.08.2014*; Case M.7018 Telefonica Deutschland / E-Plus,* OJ C86, 13.03.2015*; Case M.7419 Telia / Telenor / JV,* OJ C316, 24.09.2015.

[22] Case M.6880 *Liberty Global / Virgin Media,* OJ C162, 07.06.2013*; Case M.7000 Liberty Global / Ziggo,* OJ C147, 16.05.2014.

[23] Case M.6990 *Vodafone / Kabel Deutschland,* OJ C308, 23.10.2013*; Case M.7231 Vodafone / Ono,* 13.12.2014*; Case M.7421 Orange / Jazztel,* OJ C407, 08.12.2015.

telecommunications sector given the adoption of the Digital Single Market Agenda for Europe and the package on the Telecommunications Single Market.

(74) In light of the above considerations, the Parties consider that the Commission is the best placed authority to review the Transaction and that there are no compelling reasons to accede to the referral request. The Parties therefore submit that the ACM's referral request should be rejected by the Commission.

4.3.3. Commission's assessment

(75) As explained in recital 62 above, the Commission retains a margin of discretion in deciding whether to refer a case or not.

(76) As a general point, paragraph 5 of the Referral Notice states that *"[…] referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds*". Moreover, according to paragraph 8 of the Referral Notice, "[*d]ecisions taken with regard to the referral of cases should accordingly take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction*".

(77) According to paragraph 9 of the Referral Notice *"[…] jurisdiction should only be reattributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority*". In this regard, the Referral Notice clarifies that, in addition to the likely geographic localisation of the impact on competition of the merger, *"[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral*".

(78) Moreover, paragraph 13 of the Referral Notice clearly states that "*referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage*".

(79) Finally, the General Court has underlined that the "*referral conditions laid down in Article 9(2)(a) and (b) of Regulation 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional circumstances".*[24]

(80) In light of the above and in exercising its margin of discretion, the Commission considers that, in this case, there are no compelling reasons that justify a referral of the Transaction to the Netherlands.

(81) First, the Commission has a particular interest in ensuring that competition is preserved in sectors such as the mobile and fixed telecommunications services sectors that are of crucial importance for the economic development of the Union as shown by the adoption of the Digital Agenda for Europe in 2010[25], of the Digital

[24] Case T-119/02 *Royal Philips Electronics NV*, paragraph 354.

[25] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, 26 August 2010, COM(2010) 245. The Digital Agenda presented by the European Commission forms one of the seven pillars of the Europe 2020 Strategy which sets objectives for the growth of the European

Single Market Strategy for Europe[26] and of the Regulation on the Telecommunications Single Market in 2015.[27] The Commission also has a strong interest in ensuring consistency in the way the different mergers falling into its competence in this sector are assessed throughout the EU. In that regard, the Commission notes that the telecommunications markets in the EU are characterised by a steady increase in the degree of convergence of telecommunications services and the way in which these services are consumed and delivered[28], a development requiring the Commission to use its ability to conduct pan-European, holistic assessments of mergers occurring in these sectors.

(82) Second, the Commission is well placed to deal with the proposed transaction. The Commission has indeed developed significant expertise in analysing the mobile and fixed telecommunication and media markets over the recent years as it has assessed numerous proposed concentrations in several Member States – including cases where consolidation took place within one and the same Member State, such as the present case.[29] These cases have enabled the Commission to acquire an extensive, thorough and up-to-date knowledge of the sector and a sound understanding of the legal and economic issues raised by this type of cases. Moreover, even though every national market in the mobile and fixed telecommunications sectors in the EEA has different characteristics, the majority of the competition issues that arise in those cases present similarities across Member States. Finally, the Commission is itself active in the implementation of the EU telecoms regulations[30] and therefore has a sector-specific,

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Union (EU) by 2020. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies (ICTs) in order to foster innovation, economic growth and progress.

26 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, 6 May 2015, COM(2015) 192.

27 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 of the European parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.

28 See for example, http://ec.europa.eu/futurium/en/content/estimating-demand-fixed-mobile-bundles-andswitching- costs.

29 M.3245 – Vodafone/*Singlepoint*; OJ C242, 09.10.2003; M.3530 – *TeliaSonera/Orange*, OJ C263, 26.10.2004; M.3916 – *T-Mobile Austria/Tele.ring*, OJ L88, 29.03.2007; M.4521 – *LGI/Telenet*, OJ C99, 03.05.2007; M.4748 – *T-Mobile/Orange Netherlands*, OJ C243, 17.10.2007; M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, OJ C300, 12.12.2007; M.5650 – *T-Mobile/Orange*, OJ C108, 28.04.2010; M.5734 – *Liberty Global Europe/Unitymedia*, OJ C36, 13.02.2010; M.5779 – *Comcast / NBC Universal*, OJ C228, 25.08.2010; ; M.5932 – *News Corp / BskyB*, OJ C37, 05.02.2011; M.6369 – *HBO/Ziggo/HBO Nederland* OJ C72, 10.03.2011; M.6497 – *Hutchison 3G Austria/Orange Austria*; M.6880 – *Liberty Global/Virgin Media*; M.6990 – *Vodafone/Kabel Deutschland*, OJ C308, 23.10.2013; M.7000 – *Liberty Global/Ziggo*, OJ C147, 16.05.2014; M.7170 – *Discovery Communications/Eurosport*, OJ C144, 14.05.2014; M.6992 – *Hutchison 3G UK/Telefónica Ireland*, OJ C264, 13.08.2014; M.7018 – *Telefonica Deutschland/E-Plus*, OJ C86, 13.03.2015; *M.7231 – Vodafone/ONO*, OJ C447, 13.12.2014; *M.7421 - Orange / Jazztel*, OJ C407, 08.12.2015; *M.7499 – Altice/PT Portugal*, OJ C238, 21.07.2015;*M.7637 – Liberty Global/BASE Belgium*, OJ C141, 22.04.2016; *M.7612 – Hutchison 3G UK/Telefonika UK.*

30 For example, by carrying out consultation procedures. Article 7 and Article 7a of the Electronic Communications Framework Directive - 2002/21/EC) require national regulatory authorities to conduct national and EU consultations on draft regulatory measures they intend to take prior to their adoption. These consultations should comprise the definition and analysis of relevant markets, designation of operator(s) having significant market power and the proposed imposition or removal of regulatory remedies on providers of telecoms networks or services. For more information about implementation, please see http://ec.europa.eu/digital-agenda/en/implementation

thorough and up-to-date knowledge of the telecommunications and media markets in the Member States, both as a competition authority as well as an institution involved in the regulatory process in these markets.

(83) Third, the Commission has actively investigated the proposed transaction. The Commission agrees with the ACM that the proposed transaction could raise serious doubts as to its compatibility with the internal market as regards the possible retail market for provision of fixed multiple play bundles (dual play and triple play) and in the possible retail market for provision of fixed-mobile multiple play bundles (quadruple play and fixed-mobile dual play and triple play bundles) in the Netherlands but is of the view that the remedy package proposed by the Parties will alleviate any concerns arising from the transaction.

(84) Fourth, the Commission has conducted an extensive market investigation. involving competitors and customers of the Parties, has market tested and extensively discussed with the Notifying Parties the scope of the submitted commitments. Several requests for information have been sent to the Notifying Parties as well as to other market participants in order to thoroughly investigate the key competition issues raised by the proposed transaction (including – but not limited to – issues highlighted in the Referral Request). The Commission has also collected and reviewed a significant volume of internal documents and economic data of the Notifying Parties as well as a number of substantiated economic and other submissions from other market participants.

(85) Finally, the Commission notes that a referral of the proposed transaction would entail an additional, significant administrative effort for the Notifying Parties, due to the need to comply with the requirements of the new procedure before the ACM after having complied with the procedure under the Merger Regulation.

(86) This additional burden would be all the more unjustified in the case at hand given that the Notifying Parties have offered clear-cut remedies addressing the serious doubts raised by the transaction. The remedies offered by the Notifying Parties required limited fine-tuning and, thus, allow for the Commission to declare the concentration compatible with the internal market in the framework of a phase I investigation, which is in the best interest of the parties involved and of administrative efficiency.

(87) In light of the above, the Commission considers that there are no compelling reasons to refer the proposed transaction to the Netherlands and that it is the better placed authority to assess the transaction.

5. CONCLUSION

(88) In light of the above, while the conditions to request a referral under Article 9(2)(a) Merger Regulation are met, the Commission considers that there are no compelling reasons to refer the proposed transaction to the Netherlands and that it is the better placed authority to assess the transaction and therefore decides not to refer the case to the competition authority of the Netherlands.

HAS ADOPTED THIS DECISION:

Article 1

The proposed transaction shall not be referred to the competition authority of the Netherlands, pursuant to Article 9(3)(a) of the Merger Regulation.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 3.8.2016

For the Commission

(Signed)

Vera JOUROVÁ
Member of the Commission