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Case No COMP/M.4521 - LGI / TELENET

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 26/02/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.02.2007

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.4521 – LGI/Telenet
Notification of 22.01.2007 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 22/01/2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking Liberty Global Europe ("LGE", the Netherlands, belonging to the group Liberty Global Inc "LGI", USA) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Telenet (Belgium) by way of purchase of shares.

I. THE PARTIES

2. LGE is the European holding of the LGI group, which is an international provider of television, telephone and internet access services through cable networks to residential and business subscribers in 17 countries; these countries include the Netherlands (through its subsidiary UPC Netherlands) and, prior to the "Telenet transaction" (see further) also included Belgium (through its subsidiary UPC Belgium).

3. UPC Netherlands operates the second largest cable network in the Netherlands with 2,235,000 subscribers. UPC Belgium operates a cable network with approximately 131,800 cable TV subscribers in the area of Leuven and Brussels. UPC Belgium also

1 OJ L 24, 29.1.2004 p. 1.

provides internet broadband services to 40,600 customers, but does not provide telephony services.

4. Telenet is a cable network operator in Belgium. It provides television, telephone and internet access services to residential customers essentially in Flanders. It operates the largest cable network in Belgium with 1,598,000 cable TV subscribers. Telenet covers approximately two third of the territory of Flanders. Telenet also offers its internet and telephony services through the cable network of another operator in Flanders (Interkabel), therefore covering almost entirely Flanders.

II. THE OPERATION

5. The concentration is based on two distinct operations.

6. The "Telenet transaction", i.e. the purchase of UPC Belgium by Telenet. As mentioned before, UPC Belgium was a subsidiary of LGE. On 29 December 2006, LGE sold 100% of the shares in UPC Belgium to Telenet. This transaction did not meet any relevant notification thresholds (neither the community nor the Belgian ones) and therefore has been consummated by the parties on 31 December 2006.

7. The "LGE transaction", i.e. the acquisition of sole control of Telenet (including UPC Belgium) by LGE. On 10 November 2006, LGE, who already owned 21,37% of Telenet shares, exercised call options to purchase additional shares of Telenet[2]. These shares were acquired from various mixed intercommunales (also shareholders of Telenet) between **[...]** November 2006 and **[...]** January 2007. As a result, LGE increased its shareholding from 21,37% to 29,18% of the outstanding shares of Telenet. LGE is member of a syndicate that collectively holds 55,17% of the outstanding Telenet shares. According to the shareholders' agreement, by having more than half of the shares owned by the syndicate, LGE can appoint the majority of the members in the Board of Telenet and is in sole control of the company, since a simple-majority rule is applicable to all of the strategic decisions of Telenet (budget, business plan etc.).

8. The parties submit that these two transactions are unrelated, notably because the transactions had been envisaged since several years. LGE exercised call options pursuant to the Amended and Restated 2002-2003 Option Agreement dated September 2005, whereas Telenet and UPC N.V. (LGE) entered into a non-disclosure agreement with respect to the sale of UPC Belgium on 30 August 2004. In addition, they state that the respective rationale is completely different, and that the two operations are not conditional one upon the other.

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2 LGI held since September 2005 (i.e. since the time when Telenet launched an IPO, Initial Public Offering for its own shares on the Euronext stockmarket) an option for the purchase of a number of shares of Telenet at 20€ per share (around 6,75 million shares). **[...]**

Interdependence of the two transactions

9. Two or more transactions may, under certain circumstances, constitute a single concentration in the sense of Article 3 of the ECMR. In order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other[3].

10. The parties affirm that that the two operations are not conditional on one another. While legal interconditionality is a particularly relevant factor, it can not be excluded that two or more transactions are unitary in nature even without express legal interconditionality. In the present case, the two transactions in question are decided and carried out simultaneously. The fact that the "Telenet transaction" formally precedes the LGE transaction appears to be essentially due to **[...]** reasons. In the following paragraphs, the Commission examines whether the two transactions are interdependent in such a way that one transaction would not have been carried out without the other. On LGI' side, it can in particular be concluded that the sale of UPC Belgium to Telenet would not have been considered without the acquisition of control of Telenet.

i) Minutes of LGI Board of Directors and Executive Committee

11. From internal documents submitted by LGI/LGE in response to a Commission's request for information, it is evident that the acquisition of Telenet was envisaged by LGI since at least September 2005 (prior to the Telenet's IPO, i.e. Initial Public Offering). The Board of Directors of LGI discussed the acquisition of Telenet in May 2006. In particular, at the meeting on May 3, 2006, the Board discussed the merits of the acquisition of Telenet, compared to other possible acquisition targets, including the regulatory environment and actions which this acquisition could have entailed[4].

12. On May 25, 2006, the Executive Committee (formed by the chairman of the Board and the CEO of LGI) discussed at length various scenarios through which the acquisition of sole control over Telenet could have bee carried out[5]. One important factor in the evaluation of the potential synergies arising from the acquisition of Telenet was, for the Executive Committee, the key assumption that additional synergies would arise with UPC Belgium, "*assuming we merge Telenet&UPC Belgium*"[6].

13. Later, on September 8, 2006, the Executive committee of the LGI's Board of Directors approved the acquisition of a stake of Telenet's shares from a minority shareholder and the exercise of the call option LGI held. As it results from the document in question, LGI was

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3 Judgment of the CFI of 23 February 2006, Case T-282/02, *Cementbouw v. Commission,* paragraph 107.

4 See Excerpt of the Board Minute of May 3, 2006, Annex 1.1 to LGI response sent February 13, 2007 9:59 AM to a Commission's request for information.

5 See Annex 2.4 to LGI response sent February 13, 2007 9:59 AM to a Commission's request for information, Presentation to the Executive Committee on May 25, 2006. **[Different scenario's of partial and full ownership were discussed]**

6 See Annex 2.4 mentioned before, page 17, 18 and page 24 of the Discussion Material of the Executive Committee, May 24, 2006. This consideration of the synergies between Telenet and UPC Broadband was also mentioned in the Presentation at the LGI Board meeting of May 3, 2006, Annex 2.3 to LGI response.

perfectly aware that the exercise of the option could have given LGI control of Telenet and **[...]**[7]. It is worth recalling that - at the time - UPC Belgium was a subsidiary of LGI and, therefore, an acquisition of Telenet by LGI would have given rise to a horizontal overlap in the relevant markets in Belgium.

14. At the LGI Board of Directors' meeting of November 1, 2006, the Board was informed of the possibility to avoid the launch of a mandatory bid over the entire share capital of Telenet and **[...]**. At this Board meeting, the Board was also informed about the development of discussions with Telenet's management for the sale of UPC Belgium to Telenet. At this meeting, the LGI Board authorised unanimously and simultaneously both the exercise of the call option in Telenet and the sale of its subsidiary UPC Belgium to Telenet[8].

15. It is worth noting that the presentation made at this Board meeting of November 1, 2006 is in itself particularly indicative as regards the interdependence of the two transactions for LGI. This presentation clearly envisages, among the options indicated as available to LGI, the two transactions (i.e. the acquisition of control of Telenet (LGE transaction) and the sale of UPC Belgium (Telenet transaction)) together. The sale of UPC Belgium is notably envisaged in parallel with the purchase of Telenet shares, irrespective whether the "LGE transaction" (acquisition of control by LGI over Telenet) were to be achieved through the exercise of the call option, or through a full bid[9]. In particular, while various options were considered as possible alternatives for LGI as regards the "LGE transaction", the sale of UPC Belgium to Telenet was part of the picture in that it would have allowed LGI to **[...]** if completed before 2006[10].

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7 See Excerpt of the Executive Committee meeting of September 8, 2006: the Committee unanimously approved the acquisition of **[...]** % offered shares from a minority shareholder at **[...]** € par share and, "*as soon as practicable after October 15, 2006, the exercise in full of the €20 call options* **[...]** ".

8 See Annex 14 to FORM CO, This is the only "Section of 5.4" document provided by LGE/LGI to the Commission in the context of the FORM CO. The minute states: "*With respect to Telenet, management explained to the Board the current mandatory takeover law in Belgium and the new law, currently in draft form, scheduled to take effect in January 2007. The Board was advised that in light of Telenet's recent share prices there is currently a window of opportunity for the Corporation to increase its stake in Telenet to in excess of 30%, through the exercise of the €20 call options* **[...]**, *and market purchases, without triggering the requirement to make a mandatory bid under current Belgian takeover law. As currently drafted, the new takeover legislation would grandfather shareholders with a greater than 30% ownership interest in a company at the time of enactment from the requirement to make a mandatory bid. The Board was also advised of discussions [...] with Telenet management for the sale of the Corporation's subsidiary, UPC Belgium, to Telenet.*

Following discussion, the motion was introduced, seconded and unanimously passed, authorizing (i) the exercise of the €20 call options **[...]**, *(ii) management to make such arrangements as it deems appropriate to provide the minority shareholder with the fair value of its share of the €20 call options if it chooses not to participate in the funding, whether by taking the option value into account in the dilution formula, by purchasing the minority shareholder's share of such options or otherwise, and (iii) the sale of UPC Belgium to Telenet, provided that the purchase price is based on* **[a certain formula]**. ".

9 See Annex 2.5 to LGI response sent February 13, 2007 9:59 AM to a Commission's request for information, page 9 of the Board Meeting on November 1, 2006

10 See Annex 2.6 to LGI response sent February 13, 2007 9:59 AM to a Commission's request for information, page 1, with handwritten title: "Discussed with LGI CEO on 28/11/2006"

16. Ultimately, the presentation made at the Board meeting of December 19, 2006 confirms the above. Again the two transactions are seen and presented together. According to LGI Board, after the exercise of the options (at the price of 20€ per share) on November 12, 2006 LGI has already gained control of the Shareholder Syndicate controlling approximately 54%. "*As a result LGI is now the controlling shareholder of Telenet and has to consolidate Telenet*". As regards the sale of UPC Belgium to Telenet, the presentation makes it plain that **[it was particularly advantageous]** if completed before the end of 2006[11].

17. Based on the available evidence, it is evident that, only as from the moment in which LGI/LGE concretely considered the acquisition of sole control of Telenet, LGE was determined to also trigger the "Telenet transaction" (in particular it was also in control of the timing of the "Telenet transaction"). The two transactions are consistent with a common goal evoked by LGE, i.e. the acquisition of control of Telenet and the achievement of additional synergies arising from merging both UPC Belgium and Telenet. In this context, the sale of UPC Belgium to Telenet was completed before the end of the year (and happens to be consummated before the "LGE transaction") manly for **[...]** reasons. Therefore, it can be concluded that LGI/LGE would not have decided the sale of UPC Belgium to Telenet without concomitantly acquiring control over Telenet.

ii) Minutes of Telenet Board of Directors

18. The minutes of the Board of Directors of Telenet confirm the above picture. Telenet (which had an interest in acquiring UPC Belgium or another cable operator in Belgium since some time[12]) decided, at the meeting dated 25 April 2006 to abandon the projected acquisition of UPC Belgium due to the fact that **[the consideration requested by LGI and the modality of payment were deemed unattractive]**[13]. Contrary to this resolution, the Board of Telenet re-launched the proposed acquisition of UPC Belgium at the meeting of 28 November 2006 (a date much closer to the period when it became clear that LGI intended to acquire control of Telenet **[...]**). This meeting shows that, when discussing about the "Telenet transaction" (acquisition of UPC Belgium), Telenet's Board was also aware and took due consideration of the implications for LGI as regards the converse LGI's proposed acquisition of shares of Telenet (i.e. the "LGE transaction"). In particular, the Board of Telenet was also aware

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11 See Annex 2.7 to LGI response February 13, 2007 9:59 AM to a Commission's request for information, , Board Meeting of December 19, 2006, page 74 of the presentation. See also Annex 1. 4 and 1.5 to LGI response February 13, 2007 9:59 AM to a Commission's request for information, Excerpts of the Minutes of the Board of Directors of LGI. Although at the meeting of March 8, 2006, the LGI Board considered the Telenet offer to be too low, LGI ultimately resolved itself to accept to price proposed by Telenet and to sell UPC Belgium to Telenet at the meeting of December 19, 2006, even if the price was to be reduced compared to a previous price, indicated at the Board Meeting of November 1, 2006. Nevertheless the new price was "still higher than previously approved by the Board". At the same meeting, the Board of Director also approved the purchase of an additional **[...]** % of outstanding Telenet shares in addition to the purchases previously authorized.

12 See Annex 1.7 to the Telenet' response sent Wednesday 14/02/2007 11:12 AM to a Commission's request for information, Board minute of meeting held on 24 February, 2005.

13 See Annex 1.11 to the Telenet' response sent Wednesday 14/02/2007 11:12 AM to a Commission's request for information, Board minute of meeting held on 25 April 2006.

that LGI wanted to achieve **[...]** through the sale of UPC Belgium to Telenet[14]. Therefore considering the economic reality underlying the transaction it is clear that the transactions were interdependent, in such a way that one would not have been carried out without the other.

iii) Other considerations

19. In addition, the following should also been considered: LGI/LGE has already acquired since November 2006 (through the exercise of the call option) the shares which would entitle it to have sole control over Telenet, but due to the standstill provision contained in the Merger Regulation, it cannot exercise the voting rights attached to those shares prior to any regulatory clearance of the proposed merger. Conversely, the "Telenet transaction", when viewed in isolation, was not subject to any regulatory clearance and could be completed beforehand. Therefore, in view of the foregoing, it would be artificial to consider that, since the "Telenet transaction" (when viewed in isolation) is closed before the "LGI transaction", there would be no horizontal overlap between the merging parties in the context of the "LGE transaction".

20. In light of the above, the Commission considers, due to the very specific features of this operation, the two transactions are to be considered as one concentration for the purpose of assessment of its effects under the Merger Regulation.

III. COMMUNITY DIMENSION

21. The combined aggregate worldwide turnover of the undertakings concerned is more than €5 billion (LGI € **[...]** billion, Telenet € **[...]** billion). The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 250 million (LGI € **[...]** billion, Telenet € **[...]** billion). LGI does not achieve more than two-thirds of its Community-wide turnover in 2005 in one Member State. The operation has therefore a Community dimension in the sense of Article 1(2) of Council Regulation (EC) No 139/2004.

IV. RELEVANT MARKETS

22. The business sectors concerned by the transaction are cable television and telecommunications services, in particular retail TV services, wholesale TV services and broadband internet access.

RETAIL MARKET FOR TV SERVICES

23. The retail market for TV services can be described as the market for the provision of TV programs and channels, principally through packaged offers, to the end-users, i.e. the viewers. The parties submit that the market encompasses the distribution of TV services over all categories of means of transmission or infrastructure (cable networks,

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[14] See Annex 1.12 to the Telenet' response sent Wednesday 14/02/2007 11:12 AM to a Commission's request for information, Board minute of meeting held on 28 November 2006. The minute in question refers to the possible **[...]** to LGI in the context of the sale of UPC Belgium to Telenet and mentions the fact that LGI would possibly avoid launching a mandatory bid on Telenet: "In light of the concern of some minority shareholders **[...]**, the board decides to pay the consideration **[...]** in cash".

satellite, xDSL). Following this definition, the relevant product market would notably include Belgacom TV, the TV offering over DSL from the incumbent telecom operator in Belgium and the DTH (satellite) TV offerings.

24. In recent cases the Commission left open the exact delineation of the market[15]. For the purpose of the present transaction, the exact product market definition can also be left open, since even on the basis of the narrowest possible market definition the concentration does not raise serious doubts. *A fortiori*, there are no competition issues on the basis of a broader market definition including the other transmission platforms.

GEOGRAPHIC SCOPE

25. The parties submit that the geographical market of the retail distribution of TV services is national in scope, notably because it should include infrastructures/ platforms (such DSL and DTH (satellite)) which are not restricted to certain territorial areas as is the case for cable networks of each operator. In its former decision practice the Commission considered that the geographical market could be either limited to the coverage area of each cable operator or national in case platforms other than cable are to be included in the picture. However the geographical scope was left open in *Cinven-Warburg Pincus/Casema*-Multikabel and Providence/Carlyle//UPC Sweden. The Commission also affirmed that, in relation to the retail market the geographic market may be limited to the area of each cable network. The Commission held in another recent decision[16] that if a separate market for the transmission via cable is distinguished, this market should be defined geographically in such a way that each cable network constitutes a separate geographic market, given that those customers who are connected to a specific network can only be reached through that network. In any event, similar to the previous cases, for the purpose of the present transaction, the exact geographical market definition can also be left open, since even on the basis of the narrowest possible market definition the concentration does not raise serious doubts.

WHOLESALE MARKET FOR TV SERVICES

26. The wholesale market for the distribution of TV services is the market where distributors and broadcasters negotiate the terms and conditions for the distribution of TV signals to end-users. Distributors provide carriage (or transmission) services for signals based on different infrastructures (i.e. cable networks, satellite, DSL networks). Broadcasters are the companies which package radio or TV content, either internally produced or bought from external suppliers, into channels. Whereas broadcasters need transmission services provided by the distributors to reach the end-users (i.e. the viewers), the distributors need the content packaged by the broadcasters to constitute the offer they deliver to their subscribers.

27. Even though it is conceptually possible to distinguish between the acquisition by the broadcasters of transmission services, on the one hand, and the acquisition of distribution rights over radio and TV channels by the distributors, on the other hand,

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15 Case No COMP/M.4338 – *Cinven-Warburg Pincus/Casema-Multikabel*; COMP/M. 4217 – *Providence/Carlyle//UPC Sweden*

16 Cf. Case No COMP/M.3355, Apollo/JPMorgan/Primacom, decision of 15 June 2004, paragraph 10.

there is in practice one single negotiation where both issues are jointly addressed. Depending on the respective bargaining positions of the broadcaster and the distributor concerned, the outcome of the negotiation will be that either the broadcaster will pay a fee for the transmission of the signal ("carriage fee") to the distributor, or alternatively the distributor will pay royalties (or license fees) to the broadcaster. Even when it is mutually agreed that the broadcaster pays a carriage fee and the distributor pays royalties for the distribution of a given channel, the respective levels of both are closely linked.

28. The parties submit that the relevant wholesale market encompasses transmission modes involving all categories of infrastructures (i.e. cable networks, satellite, DSL networks). In *Cinven-Warburg Pincus/Casema-Multikabel* and *Providence/Carlyle/UPC Sweden,* the Commission concluded that the wholesale market for TV services through cable networks constituted a separate product market (compared to other transmission networks). This conclusion was based on the fact that in the concerned countries there was a very large penetration of cable (i.e. the majority of households were connected to a cable network) compared to other platforms and therefore other platforms were not substitutable from a TV content provider perspective. In Belgium, the cable penetration is very significant, while the satellite penetration is somewhat more limited. The xDSL platform is virtually accessible from all households. Belgacom TV is adopting a significant marketing campaign in this respect.

29. The market investigation provided indications that TV channel and content providers have an interest in reaching a maximum diffusion of their TV services to viewers across the available platforms, therefore they tend to consider cable, xDSL and DTH as complementary rather than substitutes. In any event, access to cable cannot be forgone by TV channel and program suppliers in favour of another mode of transmission in Belgium.

30. For the purpose of the present transaction, the exact product market definition can nevertheless be left open, since even on the basis of all alternative market definition the concentration does not raise serious doubts.

GEOGRAPHIC SCOPE

31. The parties submit that the geographical scope of the market of wholesale market for TV services is national in scope. In *Cinven-Warburg Pincus/Casema-Multikabel* and *Providence/Carlyle/UPC Sweden,* the Commission left the exact geographical market definition open. More generally, the geographic scope of the wholesale market in past decisions has always been defined by the Commission as national, limited to the area covered by a single cable network or along linguistic homogeneous areas.

32. If the relevant geographic market is along a linguistic homogeneous area, it would encompass in this case both Flanders and the Netherlands. In *RTL/Veronica/Endemol*[17], the Commission concluded that the differences in regulatory requirements, characteristics of the demand and viewers share were such that the Dutch and Flemish markets for TV services were geographically distinct.

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[17] IV/M.553 - *RTL/Veronica/Endemol*

33. In the course of the market investigation, a limited number of respondents (among cable competitors and TV broadcasters) affirmed that a cable operator controlling cable networks in the Netherlands and Flanders could theoretically conduct a negotiation encompassing both Dutch and Flemish areas. However TV broadcasters distributed on Flemish and Dutch cable TV networks (and enjoying a fairly significant viewer's shares in the respective countries) observe that this situation does not currently apply. Exceptions could be represented by international channels distributing a unique Dutch-language version that might negotiate a unique agreement centrally for both Belgium and the Netherlands.

34. In any event, the Flemish channels are not distributed in the Netherlands with the exception of two public Flemish channels, enjoying a "must-carry" status in the Netherlands and reaching limited viewer shares in the Netherlands[18]. Similarly, among the Dutch channels, only the three public channels are distributed in Belgium (including Flanders). They benefit from a "must-carry" status and reach limited viewer shares in Flanders[19].

35. For the purpose of the present transaction, the geographic market definition can therefore be either national or limited to the area covered by a single cable network or could be delineated along the language area encompassing Flanders and The Netherlands. However since even on the basis of all alternative possible geographic definition the concentration does not raise serious doubts, the exact geographic market definition can be left open

BROADBAND INTERNET ACCESS

36. The broadband internet access is the market where telecommunication operators commercialise internet high bandwidth services to residential and business customers. The parties submit that the market comprises access via DSL and cable. This option was taken by the Commission in *Cinven/UPC France*[20]. The parties submit that the market may have to be subdivided into submarkets for residential and commercial users. In this case it is not necessary to take a position on this point since the activities of UPC Belgium are limited to broadband access for residential customers.

37. For the purpose of the present transaction, it is not necessary to take a position on whether the internet access market should include access via DSL and cable or whether two distinct markets should be considered as even on the basis of all alternative market definition the concentration does not raise serious doubts.

[18] The market investigation confirmed that Eén and Canv/K enjoy a viewer share in the Netherlands about 1% each.

[19] The market investigation confirmed that NED1, NED2 and NED3 enjoy a viewer share in Belgium less than 1% each.

[20] COMP/M.4204 *Cinven/UPC France*

GEOGRAPHIC SCOPE

38. The broadband internet market has been defined in previous Commission decisions[21] as to be national in scope in particular taking into account the existing regulatory barriers in the telecommunications sector. . Conversely a local market could be defined alongside the area covered by a cable network. For the purpose of the present transaction the exact geographic scope of the market can be left open as even on the basis of all alternative market definition the concentration does not raise serious doubts.

V. COMPETITIVE ASSESSMENT

39. As stated above, the parties contend that the Commission does not have jurisdiction on the "Telenet transaction", but only on the "LGE transaction", therefore the parties' activities would have no horizontal overlap in respect of any relevant market, since the activities of LGE and Telenet are located in different geographic areas (essentially The Netherlands for LGE and Belgium for Telenet); therefore the "LGE transaction would not raise any horizontal issue, and only imply a minimal vertical overlap. The Commission has instead reached the conclusion that both transactions are interdependent elements of one concentration; on this basis, there are three technically affected markets in Belgium (combined market shares of merging parties higher than 15%): (i) retail market for TV services, (ii) wholesale market for TV services, (iii) broadband internet access for residential customers.

STRUCTURE OF THE BELGIAN TV MARKET

40. The very large majority of Belgium households are connected to a cable network. Some households are not connected and receive analogue terrestrial TV signals. No fee is to be paid for this service and a few channels are available in analogue terrestrial mode (public channels, RTL channels). However analogue terrestrial mode is not comparable to the service provided by cable operators, satellite TV providers or DSL TV providers. These operators propose packages including 30-50 TV channels for a monthly fee of 10-12 €. The TV market to be assessed will therefore not include analogue terrestrial TV.

41. The parties submit that the markets for TV services (retail and wholesale) encompass transmission modes involving all categories of infrastructures (i.e. cable networks, satellite, DSL networks). Within this market definition, Telenet has a market share of 38,7%. The purchase of UPC Belgium increases LGI/Telenet's market share to 41,9%. The second and third operators are Interkabel and VOO with respectively 18,7% and 14,5%. These market shares are indicative of the position of the parties both at the retail and at the wholesale level.

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21 COMP/M.2803 – *Telia/Sonera* ; COMP/M.3914 *Tele2/Versatel*

TV service subscribers – all networks

Operator	**Number of subscribers**	**Market share (%)**
Telenet	*1.598.000*	*38,7%*
UPC Belgium	*131.800*	*3,2%*
Interkabel	772.054	18,7%
VOO	599.478	14,5%
Coditel	140.000	3,4%
INATEL	135.109	3,3%
Idea	133.020	3,2%
IGEHO	96.336	2,3%
Telelux	87.298	2,1%
Aiesh	15.562	0,4%
Other cable operators	304.085	7,4%
Belgacom TV (xDSL) – Sept 2006	102.971	2,5%
TV Vlaanderen (satellite)	10.000	0,2%
TOTAL	4.125.713	100,0%

Source: Form CO – data refer to different periods within 2005-2006

42. When looking at subscribers/households connected to cable networks only, the Telenet's market share is 39,8% pre-merger and 43,1% after the purchase of UPC Belgium.

TV service subscribers – cable networks only

Operator	Number of subscribers	Market share (%)
Telenet	*1.598.000*	*39,8%*
UPC Belgium	*131.800*	*3,3%*
Interkabel	772.054	19,2%
VOO	599.478	14,9%
Coditel	140.000	3,5%
INATEL	135.109	3,4%
Idea	133.020	3,3%
IGEHO	96.336	2,4%
Telelux	87.298	2,2%
Aiesh	15.562	0,4%
Other cable operators	304.085	7,6%
TOTAL	4.012.742	100,0%

Source: Form CO – data refer to different periods within 2005-2006

43. The Belgium TV market is split between the French-speaking and the Dutch-speaking areas. Flemish channels enjoy a limited viewer's share in the French-speaking area and conversely. Following the merger, Telenet will only be marginally active in Brussels (mostly French-speaking) as the city is divided into several sectors on which different cable operators distribute cable services.

EFFECTS ON THE RETAIL MARKET FOR TV SERVICES

All networks

44. As stated before, the transaction will increase the market share of the merged entity from 38,7% to 41,9% (+3,2%). The Leuven area is the only geographic area where Telenet and UPC Belgium networks overlap to a certain extent. Telenet and UPC Belgium cable networks overlap on approximately 25,000-30,000 households/subscribers. This area of previous competition between the two networks will probably disappear (as the double networks regime would most likely be discontinued). However this overlap is not deemed to raise serious competition concerns. Telenet and UPC Belgium respective tariffs are comparable on their entire network, notably where the networks do not overlap[22]. In addition, the offering of

[22] Telenet: 155,28€/year (www.telenet.be); UPC BE: 146,60€/year (www.upcbelgium.be)

Belgacom TV will most likely offer an alternative to retail customers compared to the offering of the merged entity.

45. Belgacom TV (xDSL) entered the market in June 2005 both at retail and wholesale levels, and had a 2,5% market share in September 2006. Although it is still a newcomer, Belgacom TV is expected to grow its market position in the years to come. In contrast with the limited reach of cable operators, Belgacom TV is accessible to virtually all Belgium households. Belgacom's offering is not restricted to a specific territory as with cable networks. It is to be noted that Belgacom's marketing campaign target potential customers across the territory of Belgium, whereas advertisement by cable operators can only target the potential customers within the operator's network's reach.

Cable only

46. The parties' market share increment is limited (+ 3,3%) also when considering cable operators only and is unlikely to lead to any significant change in the structure of the market. In any event, the potential effects of the merger (i.e. the area where actual pre-merger competition could have existed) is confined to 25,000-30,000 customers in Leuven, where, in any event, LGI/Telenet will have no incentive to propose an offering different than the one it proposes in other areas of Belgium. Should these potential effects be considered relevant, the question should arise whether the very limited geographic area where they would take place represents or not a substantial part of the common market.

EFFECTS ON THE WHOLESALE MARKET FOR TV SERVICES

All networks

47. In the course of the market investigation provided indications that, given the fact that TV broadcasters cannot forgo cable networks, they are dependent on Telenet to distribute their programmes in Belgium Flanders, as Telenet is the leading player in Belgium and by far dominant in Flanders.

48. During the investigations the Commission received some critical remarks by a few third parties alleging that the Telenet might be able to gain market power over TV broadcasters and content suppliers and also competitors because of its integration in an international group such as LGI. LGI/Telenet could then negotiate better deals with TV channel suppliers and broadcasters and force exclusivity clauses to TV broadcasters to the detriment of non-cable competitors of the merged entity. In particular, LGI/Telenet would be a forced partner vis-à-vis broadcasters, could act as a "gatekeeper" as regards setting the standards TV broadcasting packages (especially in Flanders), and could cross-subsidize its digital TV offerings though its analogue ones.

49. Nevertheless, several other market actors (TV broadcasters and competitors) are rather neutral and/or acknowledge that the merger (in particular the purchase of UPC Belgium by Telenet) only gives rise to a limited increase for LGI/Telenet's cable network and will not significantly change the parties' overall market position in the market for wholesale TV services compared to the pre-merger situation. Therefore it is unlikely that the proposed concentration will result in a significant strengthening of the bargaining position of Telenet vis-à-vis the TV channel and content suppliers.

50. Indeed, even if TV channels and TV broadcasters cannot forego cable distribution, the emergence of xDSL TV (Belgacom TV) constitutes a new complementary platform for TV broadcasters. This has created a relatively new situation on the market of wholesale TV services, where broadcasters have at least two complementary outlets for each territory (Belgacom TV and/or cable network) compared to the past. This situation is not adversely affected to any significant extent by the merger.

51. In addition, as regards the remaining claims put forward by third parties, the market investigation provided no substantiated evidence that the merger could give rise to adverse effects or risks of foreclosure of alternative players directly stemming from this operation. While it is true that a non-cable competitor indicated to the Commission that an international channel signed a "cable only" clause, this situation is a one-off example which dates before the merger. In any event, viewer's share of this channel is rather limited. Nevertheless, other TV players have been able to build a package of channels as attractive as the packages proposed by the cable operators such as Telenet[23]. Against this background, the integration of Telenet in an international group such as LGI does not in itself give rise to adverse effects for competition in the Belgian wholesale market.

Cable only

52. Even when looking at the cable-only situation, the merger is unlikely to impact to any significant extent the competitive situation compared to the pre-merger scenario, because the parties addition of cable network is limited to the city of Leuven and to part of Brussels. TV broadcasters indicated that they already depend on Telenet and that the addition of a limited network should not impact the terms of their negotiation with Telenet. In particular, the merger is unlikely to negatively impact both on the current contracts, and on future contracts, which will be negotiated at natural expiry of the existing ones.

Dutch-Flemish linguistic area

53. The merged entity will be a major cable operator in both the Netherlands (31,2%, market share, player number 2) and in Belgium (43,1%, player number 1). The Netherlands and Flanders (in Belgium) represent the main outlet for Dutch speaking TV channels and for Dutch versions of international channels. In *RTL/Veronica/Endemol*[24], the Commission concluded that the differences in regulatory requirements, characteristics of the demand and viewers share were such that the Dutch and Flemish markets for TV services were geographically distinct.

54. The market investigation has provided a mixed picture as regards the question whether negotiation patterns for some TV channels along a common linguistic area encompass or not Flanders and The Netherlands in the wholesale TV services market. The public Dutch channels (NED1, NED2, NED3) are distributed in Belgium (and in the Flanders) by Belgian cable operators as they enjoy a legal "must-carry" status in Belgium. No other Dutch channels are distributed in Belgium. Similarly Dutch cable operators

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23 In particular, it appears that the xDSL operator (Belgacom TV) outbid the parties in the course of the auction for the rights of the Belgium football league for the seasons 2005-2006 to 2007-2008.

24 IV/M.553 - *RTL/Veronica/Endemol*

distribute the public Flemish channels (VRT Eén, and Ketnet/Canvas) on their networks as these channels enjoy a legal must-carry status in The Netherlands. No other Flemish channels are distributed in The Netherlands.

55. While it is true that the Flemish channels are not necessarily popular in The Netherlands and conversely, various Dutch TV operators have stated that the Flemish channels are important in order to offer a thorough package to their viewers and losing those would negatively impact the attractiveness of their offering. This is principally observed in the southern part of The Netherlands, and in the Belgium borders area. On the other hand several other successful Dutch or Flemish channels cannot be distributed outside their countries as rights for films or sport events are acquired only for their territory. Negotiations and contracts are concluded mostly on a national basis even for TV channels which are potentially of interest for viewers in both Flanders and The Netherlands.

56. Cross-border negotiations could happen for international TV broadcasters proposing a unique Dutch-language version of their channels. The market investigation brought about an example of an international channel which was distributed by UPC Netherlands and by Telenet in Belgium. After Telenet purchased UPC Belgium, this channel is also distributed by UPC Belgium under the conditions set up in the initial contract related to the broadcasting on Telenet network. However this channel reaches a limited viewer's share in the Netherlands (1-2%). Belgium penetration will be likely similar.

57. The merged entity could theoretically implement cross-border negotiations as regards the Dutch channels distributed in Belgium and the Flemish channels distributed in the Netherlands. However the TV channels for which this could be possible already benefit from a must carry status in the respective countries. In addition for these channels, the diffusion outside their home-country is of limited importance considering the viewer share they reach outside their home country. Given the above, the fact that LGE owns important cable networks in two linguistically related countries is unlikely to have any adverse effects on broadcasters and TV channel providers which need to reach viewers in both the Netherlands and Belgium (Flanders). On this basis, the merger is unlikely to adversely change the negotiating patterns to any significant extent compared to the pre-merger situation.

VERTICAL EFFECTS

58. To a limited extent, LGE develops, produces and sells broadcasting content in Europe. Its European activities in this respect are grouped under its division "Chellomedia", whose activities are mostly located outside Belgium. However, there is a vertical relationship between the activities of Chellomedia on the wholesale market in Belgium and Telenet's retail activities, insofar as Chellomedia acts as a supplier of thematic channels which are broadcasted in Belgium. Chellomedia provides three thematic channels, namely "Zone Reality", "Extreme Sports Channel" and "Zone Club". One of these channels is broadcasted by Telenet and all three by UPC Belgium. However, the total revenue generated by Chellomedia in Belgium is approximately € **[100,000-500,000]**

59. The three Chellomedia channels represent marginal part of the audience share in Flanders, with none of the three channels accounting for more than 1% of the audience in Flanders. Apart from the content included in these three channels, Chellomedia does

not own any rights to channels for broadcasting in Belgium. In addition, the combination of LGE's (i.e. Chellomedia's) channels with Telenet's cable activities in Belgium does not give Chellomedia the incentive to stop supplying its channels to other distributors in Belgium, given the interest to broaden the subscriber base of its channels: In addition, considering the fact that Chellomedia's channels actually reach minimal audiences, no foreclosure issue could arise for other TV operators or distributors, even if Chellomedia was to stop supplying its TV channels to those distributors.

EFFECTS ON THE BROADBAND ACCESS FOR RESIDENTIAL CUSTOMERS

60. With regard to broadband internet for residential customers, Belgacom is the incumbent operator in Belgium and enjoys a market share of 60,2% at the end of third quarter 2006. The merged entity LGE-UPC Belgium + Telenet will enjoy a market share of 31,3% (Telenet: 29,6%; UPC Belgium:1,7%).

61. Telenet market share increase is marginal and Telenet will remain behind Belgacom. As regards a possible cable-only market, the considerations made as regards retail cable TV (see above) apply also to broadband internet access. It is therefore not expected that the transaction will pose any competition problem in Belgium.

CONCLUSION ON COMPETITIVE ASSESSMENT

62. In the light of the above, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the common market.

VI. CONCLUSION

63. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission