EN

Case No COMP/M.5734 - LIBERTY GLOBAL EUROPE/ UNITYMEDIA

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 25/01/2010

In electronic form on the EUR-Lex website under document number 32010M5734

Office for Publications of the European Union
L-2985 Luxembourg

EUROPEAN COMMISSION

Brussels, 25/01/2010

SG-Greffe(2010) D/517
C(2010) 503

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5734 –LIBERTY GLOBAL EUROPE/ UNITYMEDIA Notification of 10 December 2009 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 10/12/2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "EC Merger Regulation") by which Liberty Global Europe N.V. ("LGE", Netherlands) belonging to Liberty Global Inc. ("LGI", USA) acquires within the meaning of Article 3(1)(b) of the EC Merger Regulation control of the whole of Unitymedia GmbH ("Unitymedia", Germany) by way of purchase of shares. LGE and Unitymedia are together referred to below as "the parties".

I. THE PARTIES

2. **LGI** is an international cable operator offering advanced video, telephone, and broadband internet services. LGI's operations are principally located in Europe, Japan, Chile, and Australia. These operations include media and programming businesses such as Chellomedia in Europe, as well as interests in content businesses. **LGE**, a subsidiary of LGI operates cable networks in 9 EU member states. It has no cable network activities in Germany. Through its Chellomedia division LGI distributes 30 thematic channels in Europe, almost exclusively outside of Germany. In Germany Chellomedia provides the Extreme Sports Channel and two English language pay TV channels: Zone Club and Zone Reality.

[1] OJ L 24, 29.1.2004, p. 1.

3. The largest shareholder of LGI is John Malone, a US citizen who also holds significant shareholdings in Liberty Media Corporation ("LMC", USA) and Discovery Communications, Inc. ("Discovery", USA). LMC operates QVC TV channel, a "home shopping" channel distributed on all TV platforms in Germany. Discovery, a company in which John Malone is a large shareholder , is active in Germany through its subsidiary DMAX TV GmbH Co. KG. DMAX TV has broadcasting licenses for a number of pay TV and free TV channels carried in Germany.

4. John Malone, who is a large shareholder in LGI, LMC and Discovery, holds also the positions of the Chairman of the Board of LGI and LMC and is a member of an executive committee in LGI, LMC and Discovery. The issue whether John Malone controls LGI, LMC or Discovery can however be left open for the purposes of this investigation, because, as described below, the transaction is unlikely to raise any competition concerns even under the assumption that Mr Malone controls all three companies.

5. **Unitymedia** is a regional broadband cable network operator in the German federal states of North Rhine-Westphalia (NRW) and Hesse. It provides cable television services, internet access and telephony services. In addition, Unitymedia's subsidiary arenaSAT provides pay TV services.

II. THE CONCENTRATION

6. LGE intends to purchase the entire registered share capital of Unitymedia from the holding company Unitymedia S.C.A. Through the transaction LGE will acquire sole control of Unitymedia. The operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation.

III. COMMUNITY DIMENSION

7. The concentration has a Community dimension within the meaning of Article 1(2) of the EC Merger Regulation[2].

IV. RELEVANT MARKETS

8. The Transaction concerns TV-related markets on which the parties are active. In addition, a potential vertical relationships exist between LGE and Unitymedia in the markets related to voice telephony, broadband internet access and the hypothetical market for triple play.

9. According to the parties and Commission precedents, TV-related markets can be divided in three categories: content markets, infrastructure markets and retail pay TV markets.

TV content markets

2 Combined aggregate worldwide turnover exceeding € 5 000 million (LGE […] million, Unitymedia […] million); each of LGE and Unitymedia achieved a Community-wide turnover exceeding € 250 million (LGE […] million, Unitymedia […] million). None of the companies achieves more than two thirds of its Community-wide turnover in one and the same Member State

10. LGE, LMC (through QVC), Discovery and Unitymedia are active in TV content markets. In relation to TV content markets, the Commission has in the past defined two separate relevant markets:

    a) market for the licensing of broadcasting rights[3], and

    b) market for the licensing of entire pay TV channels[4].

11. On the first market for the licensing of broadcasting rights individual content is licensed by companies which use this content to create TV channels. On the second market TV platform operators license rights for the broadcasting of entire channels.

Broadcasting rights – product market definition

12. The market for the licensing of broadcasting rights brings together production companies and free TV or pay TV broadcasters. Broadcasting content, such as films, TV shows or sports programmes, is produced either by separate production companies, or by broadcasters in-house. TV broadcasters use the content acquired on this market to assemble their TV channels. The Commission has in previous decisions considered but did not conclude on further sub-segmentation of this market according to content type and delivery method[5].

13. As the transaction does not raise competition concerns regardless of the exact product market definition, the issue of further sub-segmentation can be left open.

Broadcasting rights – scope of geographic market

14. With regard to the geographic scope, the market for licensing of broadcasting rights could be either national or encompass a potentially broader linguistically related area, the German-speaking countries for the purposes of this transaction. According to the parties, broadcasting licences are sold on a country-by-country basis and the market is therefore national. 14 out of 20 respondents to the market investigation confirmed that the market for broadcasting rights is national in scope.[6] In general rights are licensed on a national level because this allows licensors to segment the markets and recoup the production costs more effectively.

15. However, one triple play operator argued for a narrower geographic market because, in his view, broadcasting rights are being negotiated based on the scope of a certain infrastructure (i.e. geographic reach of specific cable network, or the technical reach of certain IPTV network). Therefore, the scope of the geographic market should be significantly narrower than “national” in Germany.

16. On the other hand, one broadcaster argued for a wider geographic market for broadcasting rights pointing out that with respect to German speaking territories

3 Commission decision COMP/M.5121 of 25 June 2008– *News Corp/Premiere*

4 Commission decision COMP/M.4504 of 18 July 2007– *SFR/Tele 2*

5 Commission decision COMP/M.2876 of 2 April 2003– *Newscorp/Telepiu*

6 Question: "Which is in your opinion the relevant geographic market for the following product markets? Licensing of broadcasting rights." Question 9 of the Questionnaire to broadcasters.

(Germany, Austria, Switzerland, Liechtenstein, Alto Adige, Luxembourg), rights to TV content are frequently licensed for all of these territories. Also pay TV offers frequently are offered across borders in case two countries share the same language.

Licensing of pay TV channels – product market definition

17. With regard to the market for the licensing of entire pay TV channels, past Commission decisions have drawn a distinction, due to differences in business models, between advertising-financed free TV channels and pay TV channels financed through subscriber fees.[7] The Commission also considered but did not conclude on a sub-segmentation of pay TV channels according to their themes or genres.[8]

18. In the decisions *Cinven-Warburg Pincus/Casema-Multikabel*, concerning the TV markets in the Netherlands, and *LGI/Telenet*, concerning the Belgian TV markets, the Commission took the view that in these countries, the licensing of distribution rights for TV channels (including Pay-TV channels) does not constitute a separate market, but falls into the overall market for wholesale signal transmission (see below).

19. According to the parties, at least with respect to the German market, the licensing of Pay TV channels does not form part of the signal transmission wholesale market. This view is supported by other precedents of the Commission, such as the decision in *SFR/Tele2 France*, where the Commission defined a separate market for the licensing of Pay TV channels. [9]

20. The results of the market investigation are mixed with regard to the issue of whether the licensing of pay TV channels is a separate relevant market or is part of the market for wholesale signal transmission. A slight majority of respondents who answered this question (11 of 21) did not agree with the view of the parties.[10]

21. Two broadcasters pointed out that the distinction in the business models between pay TV and free TV is becoming increasingly blurred, as pay TV channels often carry advertising and channels which were formerly known as free TV are starting to introduce subscription fees (e.g. HD +). Both types of channels are currently competing for access to viewers and subscribers. Both pay and free TV channels have to negotiate carriage/distribution agreements with infrastructure providers which are also bundling content offers under their own name instead of licensing pay TV channels.

22. According to some respondents, for the provision of signal transmission services it is increasingly irrelevant, which business model (free TV or Pay TV) is pursued by the

7 Commission decision COMP/M.4504 of 18 July 2007– *SFR/Tele 2*

8 Commission decision COMP/M.2876 of 2 April 2003– *Newscorp/Telepiu*

9 Commission decision COMP/M.4505 of 18.07.2007 – *SFR/Tele 2*.

10 Question: "According to the Parties, the licensing of pay TV channels does not form part of the wholesale signal transmission market for two reasons: (i)broadcasters of pay TV channels negotiate with pay TV platform operators rather than infrastructure operators; (ii)broadcasters of pay TV channels such as Chellomedia or Discovery provide a service to pay TV platform operators who often own their own infrastructure. In contrast, free TV broadcasters are customers of infrastructure operators who agree to transmit their signal. Do you agree that the licensing of pay TV channels should be excluded from the wholesale transmission market?", question 8 (a) of the Questionnaire to broadcasters.

broadcaster. In all cases, the broadcaster is seeking to expand technical reach and signal transmission of its offerings.

23. Ultimately, the issue of whether the licensing of pay TV channels is a separate relevant market or is part of the market for wholesale signal transmission can be left open, as the transaction does not raise competition concerns regardless of the exact market definition.

Licensing of pay TV channels – scope of geographic market

24. The Commission has previously found that the geographic scope of the market is national due to national characteristics and the fact, that negotiations are usually conducted on a national basis irrespective of where the channels are produced.[11]

25. As the transaction does not raise competition concerns regardless of the exact geographic market definition, the market definition can be left open.

Infrastructure markets

26. Unitymedia is active in infrastructure markets in Germany. The infrastructure markets cover the activities of infrastructure providers (cable, satellite etc.) who transmit the signal (corresponding to the content or channels) to the end customer. In relation to the German market, for historical reasons, there are some characteristics that led the Commission and the German Federal cartel Office ("FCO"), in general terms, to draw a distinction between the following vertically related markets: (i) market for wholesale signal transmission, (ii) intermediary market for signal delivery, (iii) market for the retail supply of signal transmission.

Market for wholesale signal transmission

Product market

27. The first product market concerned is the market for wholesale signal transmission, on which the pay TV platform operators/free TV broadcasters and the infrastructure operators negotiate the terms and conditions of the transmission of the signals.

28. According to the parties, as to the product scope of the wholesale market, all types of TV (and radio) signals as well as the transmission of the signals as such including the granting of the general transmission right in all technical transmission modes (in particular cable, satellite, DTT and IPTV over DSL) belong to this wholesale market. The Commission, in recent decisions regarding the German cable sector, has left open whether additional transmission modes must also be included in this market.[12]

Geographic market

---

11 Commission decision COMP/M.4505 of 18.07.2007 – *SFR/Tele 2*.

12 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom*, paragraph 10; decision COMP/M.3674 of 14.2.2005 – *Iesy Repository/Ish*, paragraph 18.

29. If the wholesale transmission market is considered to be limited to cable infrastructure, its geographic scope is limited to the coverage area of the cable network concerned (in this case, NRW and Hesse). If other transmission modes available on a Germany-wide basis, such as satellite, DTT or IPTV, are included in the product market, its geographic scope is national.[13]

30. In any event, for the present purposes it is not necessary to decide on the exact product and geographic market definition, as the Transaction will not significantly impede effective competition irrespective of market definition.

Intermediary market for signal delivery

Product market

31. Given the particularities of the German situation the second market concerned is the intermediary market for signal delivery, which covers the geographic area of the relevant regional level 3 network. The level 3 network runs from the cable-head end at which the TV signals are fed into the network to the boundary of a given real estate property.

32. The professional suppliers of signal transmission services to the end-customers at level 4 (Level 4 Operators) need to connect to a level 3 network in order to receive signals. The market on which the negotiations between the Level 4 Operators and the operators of the Level 3 network (Level 3 Operators) on the supply of the signals takes place is referred to as the intermediary signal delivery market.[14]

Geographic market

33. According to Commission precedents, the intermediary signal delivery market covers the geographic area of the relevant regional level 3 network[15], i.e. the territories of Hesse and NRW in the present case.

34. The question of exact product and geographic market definition can be left open as the Transaction will have no effect on the intermediary signal delivery market(s).

Retail supply of signal transmission

Product market

35. As described by the Commission in *Apollo/JP Morgan/PrimaCom*[16], Level 4 Operators (including Level 3 Operators acting as integrated Level 3/Level 4 Operators) deliver signals from the termination point of the level 3 network to their customers, who can be individual customers or housing associations acting for their tenants. Whether the German signal transmission retail market needs to be sub-divided into the various modes

---

13 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom*, paragraph 10.

14 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom*

15 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom*,

16 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom*.

of transmission (cable, satellite, other) has previously been left open by the Commission.[17]

36. According to the parties, the German market for the retail transmission of television signals encompasses at least cable and IPTV over DSL, if not also satellite and DTT.

37. As regards geographic scope, the market for the retail supply of signal transmission, which may be regional or national.

38. For the purposes of the present transaction, however, the question of exact product and geographic market definition can be left open, given that the transaction will have no relevant effects on the signal transmission retail market irrespective of the precise market definition.

Infrastructure markets - conclusion

39. With regard to infrastructure markets, irrespective of the precise market definition, there are neither horizontal overlaps nor vertical links between the parties' activities. Therefore, as the transaction does not raise competition concerns regardless of the exact market definition, the market definition can be left open.

Retail Pay TV services

40. Unitymedia is active in the market for pay TV services in Germany. LGE, through its subsidiaries, is active in pay TV services in several neighbouring countries, but not in Germany. In relation to pay TV services, the Commission has in the past identified a market for the retail distribution of pay TV, which is distinct from the market for free TV. Specifically regarding Germany and Austria, the Commission took a view that pay TV is complementary to free TV.[18] Since pay TV operators offer pay TV services on a national basis, the geographic scope of the pay TV retail market is national.[19]

Voice telephony

41. The parties provide voice telephony services in the countries where they operate. According to the parties there are two distinct markets for (i) national and (ii) international fixed telephony services which could be further subdivided according to the type of customers into (i) residential and (ii) non-residential markets. In addition, there are separate product markets for call termination services. In these markets the operator of a network where a call originates transacts with the operator of a different network where the call terminates. Each individual network is by definition a separate market where the operator has a 100% market share. The proposed market definitions are consistent with the Commission's recommendation on the relevant product and service markets within the electronic communications sector.[20]

---

17 Commission, decision COMP/M.3355 of 15.6.2004 – *Apollo/JP Morgan/PrimaCom,*

18 Commission decision COMP/M.5121 of 25 June 2008– *News Corp/Premiere.*

19 Commission decision COMP/M.4504 of 18.7.2007– *SFR/Télé 2 France and* COMP/M.5121 of 25 June 2008– *News Corp/Premiere.*

20 Commission recommendation on relevant product and service markets of 17 December 2007.

Retail market for broadband Internet access

42. According to the parties, the relevant product market is the provision of internet connectivity to the users. This is consistent with Commission precedents.[21] The geographic market is considered national in scope due to regulatory barriers.[22]

Retail Triple-play services

43. The parties offer triple-play offers that may comprise TV, Internet and voice telephony to subscribers in those countries where they are active. In previous decisions, the Commission has considered whether it would be appropriate to define a separate market for multiple-play services but ultimately left the question open.[23]

44. According to the results of the market investigation, there are arguments in favour of concluding that there is a separate relevant market for triple-play services. 8 out of 10 companies which responded to this question stated that there is a separate relevant market for triple-play services.[24] Respondents have pointed out that TV, Internet and telephony services are all affected by a general long term market trend for digitalization and standardization of transport by use of the IP-protocol. VoIP (Telephony) and DVB-IPI (Digital Video Broadcast over IP) are the most recent of these developments.

45. This leads to a natural bundling of services and a market consolidation among market players who are able to combine these elements. Market participants who do not offer all three services may face a certain disadvantage.

46. Even if the three markets are basically different, covering different needs of the customers, from a technological point of view, triple-play service providers are delivering the services using the same infrastructure, where activations costs happen only one time and customers pay only one bill.

47. However, some infrastructure operators pointed out that all major platform operators offer TV, internet and telephone on a stand alone basis or as different bundles like telephone and internet or telephone and TV and argue therefore that triple-play is not a separate relevant market.

48. Ultimately, the issue of whether triple-play is a separate relevant market can be left open, as the transaction does not raise competition concerns regardless of the exact market definition.

---

21 Commission, decision COMP/M.4947 of 27 November 2007 – *Vodafone/Tele2 Italy/Tele2 Spain*

22 Commission, decision COMP/M.4521 of 26 February 2007 – *LGI/Telenet.*

23 Commission, decision COMP/M.4338 of 6 September 2006 – *Cinven-Warburg Pincus/Casema-Multikabel*

24 Question: " Do you think that there is a separate relevant market for Triple-Play offers rather than three different markets for each of its constituents (TV, telephone, Internet)? Please substantiate your view." Question 7 of the Questionnaire to TV platform operators.

V. COMPETITIVE ASSESSMENT

A. HORIZONTAL ISSUES

Licensing of broadcasting rights in the German-speaking countries

49. On the national markets for the licensing of broadcasting rights there is no horizontal overlap between the Parties' activities. However, a recent decision of the German Federal Cartel Office includes the possibility of the market for the licensing of broadcasting rights covering the entire German linguistic area.[25]

50. On this hypothetical geographic market, there would be an overlap on the demand side, given that both Parties license broadcasting rights within the German linguistic area (Unitymedia in Germany and LGE in Austria and Switzerland).

51. In value terms, the combination of Unitymedia's position in Germany and LGE's activities in Austria and Switzerland, would give rise to a [20-30]% share in the market for licensing of TV broadcasting rights in 2009.

52. According to the parties, this market share is due to exceptional circumstances related to the purchase by Unitymedia of Bundesliga broadcasting rights in 2005. They were purchased from the German Football League in order to produce a new pay TV channel operated by Arena Sport, a subsidiary of Unitymedia. Unitymedia packaged these rights into its own channel only for a limited period between the beginning of 2006 and mid-2007. Due to insufficient viewership, Unitymedia decided to close its channel and sub-license the Bundesliga rights to Premiere (today Sky) for the remainder of the contractual period, i.e. until June 2009. The agreement related to Bundesliga rights expired in June 2009 and was not prolonged. Therefore, Unitymedia's market share in Germany will fall significantly in 2010.

53. Based on a conservative estimate of the total market volume of €250 million for 2008, Unitymedia's 2008 market share would have amounted to approximately [30-40]%. However, this share takes into account the Bundesliga channel, which represented [20-30]% of Unitymedia (including arenaSAT's) market share. As for Unitymedia's competitors, the FCO estimated their market shares to amount to 15-30% for KDG and 40-60% for Premiere (now Sky).[26] Following the discontinuation of the agreement related to the Bundesliga rights in June 2009, the market share of Unitymedia fell to [10-20]%.

54. Following the transaction, in 2010 Unitymedia's overall market share will be just approx. [10-20]%. This demonstrates that the market shares in the market for broadcasting rights tend to be very volatile.

55. At the same time, new competitors such as the IPTV providers (T-Home, Alice, Vodafone) are aggressively buying to establish their pay TV platforms, so Unitymedia's market share may be even lower.

---

[25] FCO, decision B7-200/07 of 3 April 2008 – KDG/Orion

[26] In the FCO's *KDG/Orion* decision, Unitymedia accounted for 15-30% of the market.

56. Following the transaction other significant competitors will remain active on the market including notably Sky with a share of 40%-60% in Germany alone (as estimated by the FCO in 2007) and a leading position (in excess of [70-80]%) in the German retail market for Pay-TV.

57. 9 out of 12 broadcasting companies which answered the question pointed out that the merged company might have in some respects a stronger bargaining position vis-à-vis the providers of content due to its activities in both Germany and Austria.[27]

58. However, as one of the respondents pointed out, the benefits of scale are likely to be limited due to the fact that many valuable content rights (for example football rights) are sold on a national basis. In fact, as noted in paragraph 13, a majority of respondents have indicated that content licensing happens on a national basis.

59. Even if the negotiating position of the merged company would increase due to its larger reach, it would continue to face competitors acquiring broadcasting rights and benefiting from the advantage of multi-national presence in Europe including Canal+, Sky and RTL-Group.

60. Therefore, it is unlikely that this hypothetical horizontal overlap will cause competition problems following the transaction.

B. NON-HORIZONTAL ISSUES

Vertical link between LGE's and Discovery's activities in content production and Unitymedia's pay TV platform business

61. There is a vertical link between the Parties' activities in the market for licensing of pay TV channels. LGE provides pay TV channels through its division Chellomedia, while Unitymedia is active as a licensee of pay TV channels for inclusion into its pay TV packages which it supplies to its customers on the downstream pay TV retail market. Furthermore, Discovery, a company where John Malone is the largest shareholder, is present on the supply side of this market as a pay TV broadcaster licensing entire pay TV channels to pay TV platform operators including Unitymedia.

62. According to the parties, Chellomedia's market position as a supplier in the overall market for the licensing of entire pay TV channels is insignificant. Currently, LGE's division Chellomedia holds only a very weak, niche position as a pay TV channel producer, distributing three channels in Germany, for a total revenue in 2008 of […]. The only channel which is available to a broader audience in Germany is ESC, Extreme Sports Channel, with a 2008 total German turnover of […]. ESC is a thematic channel focusing on action sports available through the pay TV packages of Unitymedia and KDG. The other two channels, Zone Reality and Zone Club are only available to a very limited audience and only generate a negligible turnover in Germany ([…] and […] in 2008, respectively). None of the channels carries content aimed specifically at Germany.

[27] Question: "LGE operates pay TV platforms in a number of European countries including Austria, Switzerland and, further to this transaction, Germany. Compared to a pay TV platform operator active in only one country, does an operator active in several countries – such as LGE/Unitymedia - have an increased buyer power in negotiations with content providers? Please substantiate your view.", Question 14 of the Questionnaire to triple-play providers and of the Questionnaire to broadcasters.

In its *KDG/Orion* decision, the German Federal Cartel Ofice estimated that the overall market volume amounted to at least €200 million in 2007.[28] The notifying party estimates current market size at around 250-300 million.

63. Discovery holds only a relatively small position in Germany, focusing on non-fiction, thematic channels. Only Discoverys' pay TV channels Animal Planet, The Discovery Channel and Discovery Channel HD are now carried as individual channels in Germany. According to the parties, Discovery's audience share in Germany does not exceed [0-5]%.

No risk of input foreclosure

64. All of these channels have local and international competitors. According to the parties, ESC competes as much with "classic" sports channels (such as Eurosport and ESPN) as with "general entertainment" channels (such as MTV, with programmes including "Jackass" and "Wildboyz", which feature extreme sports entertainment). Respondents to the market investigation indicated that ESC competes with the following channels in the German speaking area: DSF, Eurosport, Fuel, National Geographic Channel (carrying a block of programming focussed on extreme sports), and ESPN.[29]

65. Zone Club shows the genres style, health, home, travel, food and relationships. According to the market investigation, Zone Club competes with the following channels: RTL Living, Focus Gesundheit, The Travel Channel, Body in Balance, Fox Life, Sky Emotion, Romance TV, TV Gusto and sonnenklar TV[30].

66. Zone Reality shows real life drama, crime, the bizarre and the unexplained. According to the market investigation Zone Reality competes with the following channels in the German speaking area: RTL Crime, Spiegel TV, Focus Gesundheit.[31] .

67. According to the market investigation the Discovery Channel and Animal Planet (both part of Discovery) compete with the following channels in the German speaking area: National Geographic Channel, Planet, Spiegel Geschichte, History Channel.[32]

68. QVC is a shopping channel. According to the market investigation QVC competes with the following channels in the German speaking area: HSE24, Jamba!, meinTVshop, Channel 21, 1-2-3.tv, RTL Shop, Best Direct.[33] .

---

28 FCO, decision B7-200/07 of 3.4.2008 – *KDG/Orion*, paragraph 195.

29 Question: " Please provide the names of the closest competitors of the following TV channels broadcast in Germany: Extreme Sports Channel.", Question 11 of the Questionnaire to broadcasters.

30 Question: " Please provide the names of the closest competitors of the following TV channels broadcast in Germany: Zone Club.", Question 11 of the Questionnaire to broadcasters.

31 Question: " Please provide the names of the closest competitors of the following TV channels broadcast in Germany: Zone Reality.", Question 11 of the Questionnaire to broadcasters.

32 Question: " Please provide the names of the closest competitors of the following TV channels broadcast in Germany: Discovery Channel.", Question 11 of the Questionnaire to broadcasters. Due to the fact that Animal Planet has a similar profile to Discovery, both channels have similar competitors.

69. Due to the presence of competitors, channels operated by Chellomedia, Discovery and QVC are not part of a "must have" offer required by pay TV platform operators. LGE, acting through Chellomedia would therefore have no ability to foreclose competitors of Unitymedia.

70. The market investigation confirmed that all channels belonging to LGE and Discovery face significant competition and that both companies do not own any "must have" channels. 6 broadcasters of 12 who answered the question confirmed this, 6 had no opinion and only one considered the Discovery Channel to be part of the "must have" offer.[34]

71. Based on the above considerations, it is therefore unlikely that there would be a risk of input foreclosure.

No risk of customer foreclosure

72. Even in the hypothetical and unlikely (see above) case that Unitymedia were to choose to license Chellomedia's channels rather than those of the competing channel producers, this would only concern those pay TV broadcasters in direct competition with the channels that Chellomedia offers, in particular ESC in Germany. Even for those pay TV broadcasters, such a hypothetical strategy would not lead to any appreciable customer foreclosure as Unitymedia's pay TV channel licensing demand share in Germany is estimated to be around [5-10]% in 2009. The market leader is Sky with a share of 40%-60% in Germany (as estimated by the FCO in 2007).

73. According to the market investigation most important "free TV" channels have must-carry status and would continue to be offered by Unitymedia. All respondents to the market investigation confirmed that Unitymedia would have to carry a number of other channels including Pro7, RTL, Sat1 in addition to the Chellomedia offering because its cable TV platform would not be competitive without them.[35] As regards direct competitors of Chellomedia's channels, they could continue broadcasting via alternative infrastructures (satellite, IP TV).

74. A risk of customer foreclosure is therefore unlikely.

QVC - no risk of input foreclosure

75. QVC, a "home shopping channel" operated by QVC Inc., a company where John Malone is the largest shareholder is not technically a pay TV channel. Nonetheless, even if QVC were to be considered in this context and assuming that QVC were part of the

---

[33] Question: " Please provide the names of the closest competitors of the following TV channels broadcast in Germany: QVC.", Question 11 of the Questionnaire to broadcasters.

34 Question: Does Chellomedia, DMAX TV (German subsidiary of Discovery) or QVC provide any "must have" channels in Germany which could be denied to pay TV platforms competing with LGE/Unitymedia making them less competitive? If YES, which? Question 21, 22, 23 of the Questionnaire to broadcasters.

35 Question: "Is it feasible that following the transaction LGE/Unitymedia would stop carrying free TV on its network? Would a cable offer without free TV remain competitive? Please substantiate your answer." Question 16 of the questionnaire to broadcasters.

LGE group of companies, post-merger the merged company would not gain market power on the supply side of the market.

76. QVC is one of many "home shopping" channels in Germany. Its competitors include HSE24, Jamba!, meinTVshop, Channel 21, 1-2-3.tv, RTL Shop and Best Direct. Its combined viewership is estimated by the parties at below [0-5]%. Even if access to QVC was denied by the merged company to other TV platforms, there would still remain a significant number of other shopiing channels they could carry.

77. It seems therefore that even if QVC was considered to belong to the LGE group of companies, there is no risk of customer foreclosure.

78. Any appreciable customer foreclosure for other shopping channels by the merged company is equally unlikely as Unitymedia's TV channel licensing demand share in Germany is estimated to be around [5-10]% in 2009. There would be other TV platforms to carry the remaining shopping channels.

79. 11 of 18 companies which answered this question confirmed that QVC, being a teleshopping channel, has a high incentive to increase the technical penetration of households and the merged company would have no incentives to remove it from the offer provided by competing infrastructure operators. 7 companies had no opinion and 1 pointed out that alternative cable operators could lose revenue if QVC stopped broadcasting on their networks. This respondent did not elaborate on the incentives of QVC to do so.[36]

Market for wholesale termination of calls on fixed networks

80. Following the transaction, there will be a technical vertical link between the Parties' respective activities in the voice telephony markets, i.e. between Unitymedia's activities in the German market for retail voice telephony and LGE's wholesale operations in the markets for call termination services in Austria, Belgium, Czech Republic, Hungary, Ireland, the Netherlands, Poland, Romania, Slovakia, and Switzerland.

81. As set out above, according to the Commission's decisional practice each one of LGE's individual networks in each Member State constitutes a separate market for call termination and LGE therefore has a 100% market share on each such market. As these markets are vertically related to the fixed retail telephony activities of Unitymedia in Germany, technically they are vertically affected markets.

82. According to the parties, LGE has no incentive in restricting termination of calls to its fixed line customers in any of the countries in which it operates a fixed network. Rather LGE's incentives lie in increasing the number of call terminations on its fixed networks in order to maximise profits.

83. In addition, any attempts to foreclose competitors of Unitymedia from the market of call termination on LGE's networks in other countries would not be successful due to the fact, that call termination services are regulated both at EU and Member State level. In

[36] Question: Does QVC provide any "must have" channels in Germany which could be denied to pay TV platforms competing with LGE/Unitymedia making them less competitive? If YES, which? Question 21, of the Questionnaire to broadcasters, TV platform operators and triple-play providers.

particular, for its fixed line telephony services in all eight Member States, LGE is deemed to have SMP and call termination pricing is consequently regulated. As a result of the Transaction, LGE will thus not be able to discriminate between Unitymedia and its competitors in granting access to its network to terminate calls.

84. 4 out of 5 triple-play providers who responded to the question related to telephony markets confirmed this assessment.[37] Market participants do not expect the merged company to engage in foreclosure on the market for the wholesale termination of calls on its networks.

85. Two respondents pointed out that Unitymedia will profit from much less communication/transmission and bandwidth cost (eg. international call volumes) as the bulk contracts can be signed on a higher corporate level to the benefit of each geographical entity. Despite this, those two respondents believe that the markets are already very competetive and the competition with DSL and phone companies such as Deutsche Telekom, Telefónica and Vodafone will prevent Unitymedia from engaging in foreclosure strategies with the aim to increase profitability.

VI. CONCLUSION

86. 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 EC Merger Regulation (EC) No 139/2004.

For the Commission
(Signed)
Neelie KROES
Member of the Commission

[37] Question: "Following the transaction, Unitymedia will become part of LGI which runs (i) retail telephony and broadband business in a number of EC countries, and (ii) a European backbone data transmission network. In light of this, does the transaction raise any competition issues in your view?", Question 25 of the Questionnaire to triple-play service providers.