EN

Case No COMP/M.6990 - VODAFONE/ KABEL DEUTSCHLAND

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 20/09/2013

In electronic form on the EUR-Lex website under document number 32013M6990

Office for Publications of the European Union
L-2985 Luxembourg

Brussels, 20.9.2013
C(2013) 6258 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.6990 – VODAFONE/ KABEL DEUTSCHLAND Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1]

1. On 16 August 2013, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Vodafone Group Plc. ("Vodafone", United Kingdom) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Kabel Deutschland Holding AG ("Kabel Deutschland", Germany) by way of purchase of shares. Vodafone is designated hereinafter as the "Notifying Party" and Vodafone and Kabel Deutschland as the "Parties" to the proposed transaction.

[1] OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

Table of Contents

1. THE PARTIES

2. **Vodafone** is the holding company of a group of companies that globally, including in Germany, operate mobile telecommunications services, including voice telephony, messaging, data and content services. In Germany, Vodafone also offers retail fixed line voice and Internet services and retail television signal transmission services (through IPTV technology)[2] notably by using Deutsche Telekom AG's ("DTAG") access network.

3. **Kabel Deutschland** is the holding company of a group of companies that operate cable networks in 13 out of the 16 German Federal States.[3] As the largest German cable operator with 7.6 million direct subscribers, it provides television and telecommunication services, such as analogue and digital cable TV, broadband Internet and fixed line voice services via cable, as well as mobile services as a Mobile Virtual Network Operator ("MVNO") on [information about Kabel Deutschland's contract partner] network in Germany.

2. THE OPERATION

4. On 30 July 2013, Vodafone made a public take-over bid for the entire issued and to be issued ordinary share capital of Kabel Deutschland. Upon implementation of the proposed transaction, Vodafone will own up to 100% of the share capital of Kabel Deutschland. Vodafone will thus acquire sole control over Kabel Deutschland and the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

5. According to Vodafone, the main commercial rationale for the proposed concentration consists of the significant network cost savings that will result from the complementarity of the Parties' assets. It submits that the integration of Kabel Deutschland's cable network and Vodafone's mobile infrastructure would enable the merged entity to offer a full range of fixed and mobile telecom, Internet and TV services throughout Germany on a more cost-efficient basis.

6. The proposed concentration would also satisfy, according to the Parties, an increasing customer demand for higher bandwidths to transport larger data volumes for streaming, cloud and video applications. Kabel Deutschland's cable infrastructure would provide higher capacity mobile backhauling, which will increase capacity on Vodafone's mobile network to provide Long Term Evolution (LTE) mobile communications.

3. EU DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[4] [Vodafone: EUR 54 507 million, Kabel Deutschland: EUR 1 829.9 million]. Each of them has an EU-wide turnover in excess of EUR 250 million

---

[2] IPTV means Internet Protocol Television and is a system through which television services are delivered using the Internet protocol over a packet-switched network such as the Internet, instead of being delivered through traditional terrestrial, satellite signal and cable television formats.

[3] Notably in Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Vorpommern, Lower Saxony, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia.

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

[Vodafone: EUR […], Kabel Deutschland: EUR […]], but Vodafone did not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

8. The proposed concentration therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

9. The proposed concentration gives rise to certain horizontal overlaps and non-horizontal relationships between the Parties' activities in a number of relevant markets along the value chain for the distribution of audio visual TV content and the provision of telecommunication services (fixed and mobile telephony and broadband Internet) in Germany.

10. In particular, the proposed concentration would combine the following assets and businesses of the Parties:

    - Kabel Deutschland's cable TV business (based on its own cable network) and Vodafone's IPTV business (based essentially on DTAG's DSL[5] access network);

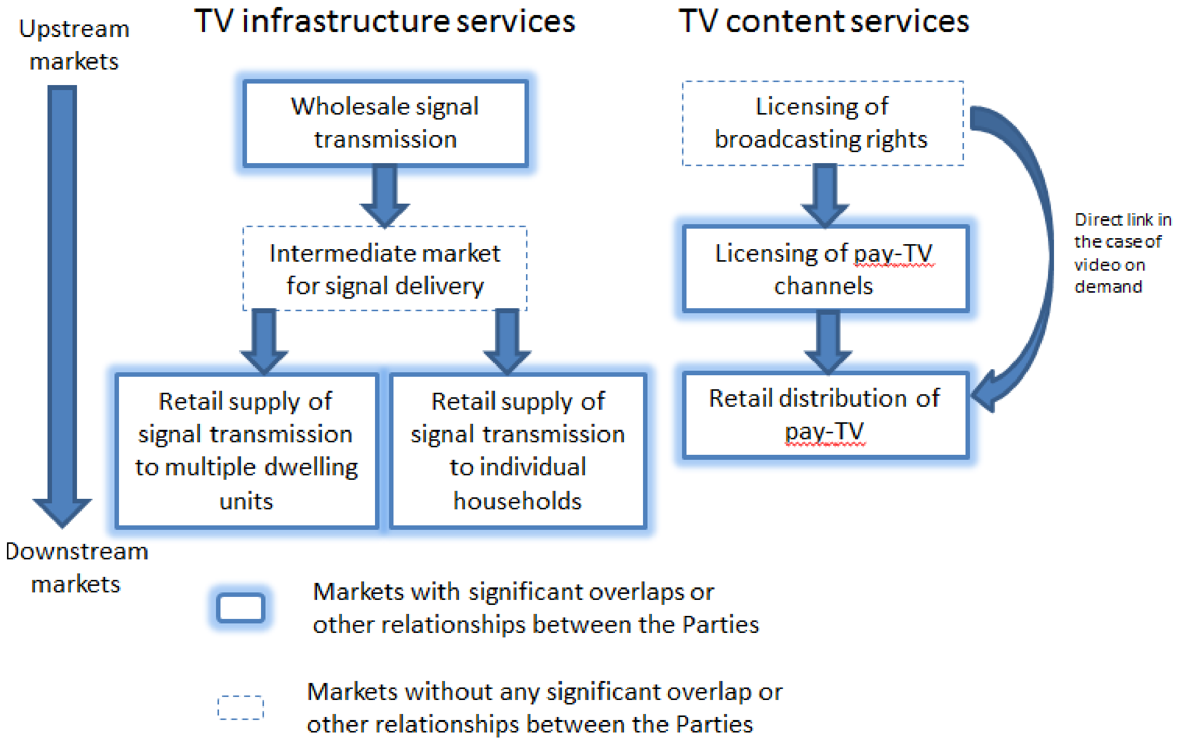
    - Kabel Deutschland's and Vodafone's fixed telephony and fixed broadband businesses (based respectively on its own cable network and essentially on DTAG's DSL access network);

    - Vodafone's mobile communications business (based on its own network and licences) and Kabel Deutschland's more limited activities as Mobile Virtual Network Operator ("MVNO") (based on [information about Kabel Deutschland's contract partner] network).

11. In the following sections, this decision addresses each of the relevant markets in turn.

5 Digital Subscriber Line is a family of technologies that provide broadband Internet access by transmitting digital data over the wires of local telephone networks.

4.1. Television services



12. As regards the TV-related markets, and with respect to the licensing and distribution of <u>content and channels</u>, the Commission has in previous decisions[6] made a distinction between the following market levels:

   – Licensing/acquisition of broadcasting rights for TV content;

   – Wholesale/acquisition of TV channels; and

   – Retail supply of TV services.

13. Moreover, with specific respect to the <u>infrastructure side</u> (as opposed to the content side) of the TV sector in Germany, the Commission has also identified the following market levels:[7]

   – Wholesale TV infrastructure services market;

   – Intermediary TV infrastructure services market; and

   – Retail TV infrastructure services markets.

14. This section first addresses the above identified three relevant content-related market levels, and then the three above identified relevant infrastructure-related market levels.

---

6 See for instance Commission decision of 15 April 2013 in case COMP/M.6880 *Liberty Global/ Virgin Media*, paragraphs 15 to 20, 28 to 37, and 43 to 50.

7 See for instance Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 18 et seq and Commission decision of 25 January 2010 in case COMP/M.5734 *Liberty Global Europe/Unitymedia*, paragraph 8 et seq.

4.1.1. Licensing/ acquisition of broadcasting rights for TV content

15. Audio visual TV content comprises "entertainment products" (films, sports, TV programmes, etc.) that can be broadcast via TV.[8] The broadcasting rights generally belong to the creators of the content. These rights holders (which constitute the supply side of this market) license them to: (1) broadcasters which then incorporate them into linear TV channels (where programmes are broadcast at scheduled times) or (2) content platform operators which retail the content to end users on a non-linear basis, that is to say Pay-Per-View ("PPV") or Video-On-Demand ("VOD") (which, together, comprise the demand side of this market).

16. Kabel Deutschland is active as purchaser of broadcasting rights to TV content for its VOD and PPV services over cable, and Vodafone as purchaser of broadcasting rights for its VOD and PPV services over IPTV.

4.1.1.1. Product market definition

View of the Notifying Party

17. The Notifying Party does not take a position on the exact delineation of the product market for the licensing/acquisition of broadcasting rights for TV content, and considers that for the purpose of the present decision, the precise market definition can be left open.

Commission's assessment

18. In previous cases, the Commission has first of all distinguished between separate markets for the licensing of broadcasting rights for pay TV and Free-To-Air ("FTA") individual audio visual TV content.[9]

19. The Commission has also previously sub-divided the market for the licensing of broadcasting rights for audio visual TV content into TV content for linear and non-linear broadcast.[10] In other cases, the Commission considered a more detailed breakdown based on the different exhibition windows, namely: (1) VOD; (2) PPV; (3) first pay TV window; (4) second pay TV window (where applicable); and (5) FTA TV.[11]

20. As regards content type, the Commission has previously defined different product markets for: (1) exclusive rights to premium films, (2) exclusive rights to football events that take place every year where national teams participate (for example national league, national cup, UEFA Cup and UEFA Champions League), and (3) exclusive rights to other sport events.[12] In *HBO/Ziggo/HBO Nederland*, the Commission assessed, but

---

8 Commission decision of 26 August 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 28.

9 Commission decision of 26 August 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 35.

10 Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 24-36.

11 Commission decision of 21 December 2011 in case COMP/M.6369 *HBO/Ziggo/HBO Nederland*, paragraph 18. Premium films are typically licensed by film studios under different categories of broadcasting rights, corresponding to an exhibition window. Generally, following the exhibition windows for cinematic release, for DVD retail/rental and for 'download to own' ('DTO'), films are made available for TV broadcast in the following sequential order: (i) Pay-Per-View (PPV)/Video On Demand (VOD); (ii) first and second pay TV windows; and (iii) free-to-air (FTA) window.

12 Commission decision of 2 April 2003 in case COMP/M.2876 *Newscorp/Telepiù*, paragraph 55.

ultimately left open whether the licensing of broadcasting rights for: (1) films, (2) sport events and (3) other TV content constitutes separate product markets.[13]

21. In this context, the Commission also notes that in *Liberty/ KBW*, the Federal Cartel Office (the National Competition Authority in Germany, "FCO") did not discuss in detail a division of the market for the licensing/ acquisition of broadcasting rights for TV content, as this market was not affected by that transaction. The FCO referred to the existence of a market for broadcasting rights for television programmes (including films and TV series) and for events (in particular sport events).[14] The FCO also explained that there are further distinctions by content (premium films, sport events, archive material or short-lived content), by platform (cable, satellite, DVB-T and IPTV) and by type of broadcast (linear or non-linear).[15] Moreover, in line with the Commission precedents, the FCO distinguished this market from the markets for the wholesale/acquisition of TV channels and for the retail provision of TV services.[16]

22. The results of the market investigation conducted for the purpose of the present transaction did not contradict the past findings of the Commission on the market for the licensing/ acquisition of broadcasting rights for TV content.

23. In any event, for the purposes of the present decision, it is not necessary to conclude on the exact product market definition as the proposed concentration does not raise any competition concerns under any alternative product market definition.

4.1.1.2. Geographic market definition

View of the Notifying Party

24. The Notifying Party does not take a position on the exact geographic delineation of the market for the licensing/acquisition of broadcasting rights for TV content, but notes that in *SFR/Télé 2 France,* the Commission found that this market was national in scope.[17]

Commission's assessment

25. The Commission has previously considered that the market for the licensing of broadcasting rights for audio visual TV content is either national in scope or potentially comprises a broader linguistically homogeneous area.[18]

26. In a similar way as the Commission, the FCO has regarded the markets relating to TV content as either national in scope or as comprising the German speaking area.[19]

---

13 Commission decision of 21 December 2011 in case COMP/M.6369 *HBO/Ziggo/HBO Nederland*, paragraphs 18-21.

14 FCO Case B7-66/11 *Liberty/KBW*, paragraph 262.

15 FCO Case B7-66/11 *Liberty/KBW*, paragraph 262, footnote 251.

16 FCO Case B7-66/11 *Liberty/KBW*, paragraph 262 et seq.; FCO Case B7-70/12 *Kabel Deutschland/TeleColumbus*, paragraph 266; left open by B7-200/07 *KDG/Orion*, paragraph 189 et seq.

17 Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 48.

18 Commission decision of 2 April 2003 in case COMP/M.2876 *Newscorp/Telepiù*, paragraph 62; Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraphs 73-75.

27. The results of the market investigation conducted for the purpose of the present transaction did not contradict the past findings of the Commission on the geographic scope of the market for the licensing/ acquisition of broadcasting rights to TV content.

28. In any event, for the purposes of the present decision, it is not necessary to conclude on the exact geographic market definition as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.1.3. Affected market

29. Based on the Notifying Party's estimates, the market share of the combined entity in the acquisition of broadcasting rights for TV content is below 5% on all possible market segments (including the narrowest market segments for the acquisition of broadcasting rights for each of films, sports and/or other TV content for VOD and/ or PPV services in Germany and/ or in the German-speaking area). Moreover, neither Party is active as a supplier in the downstream market for the wholesale of TV channels. As a result, this market (and/ or its possible segments) are not affected by the proposed concentration and will no longer be discussed in this decision.

4.1.2. *__Wholesale/ acquisition of TV channels__*

30. TV channel broadcasters acquire or produce individual audio visual content and package it into TV channels. These TV channels are then broadcast to end users via different distribution infrastructures (for example cable, satellite, internet, mobile, etc.) either on a FTA basis or on a pay TV basis (individually or as part of so-called "channel bouquets"). Hence, the supply side of this market comprises TV channel broadcasters and its demand side comprises TV retailers, which either limit themselves to "carrying" the TV channels and make them available to end users, or also act as channel aggregators (FTA or pay TV platforms), which also "package" TV channels and provide them to end users.

31. In the present case, both Vodafone and Kabel Deutschland are active as purchasers of (pay) TV channels for inclusion into their respective (pay) TV platforms. Indeed, in Germany, only pay TV channels (and not FTA channels, with the limited exception of some private broadcasters for their HD channels) charge retailers of TV services a license fee to broadcast their channels.

4.1.2.1. Product market definition

View of the Notifying Party

32. The Notifying Party does not take a position on the exact delineation of the product market for the wholesale/ acquisition of TV channels, and considers that for the purpose of the present decision, the precise market definition can be left open.

---

[19] FCO Case B7-66/11 *Liberty/KBW*, paragraph 268.

Commission's assessment

33. In previous decisions, as a starting point, the Commission identified a wholesale market for the supply of TV channels, in which TV channel broadcasters and retail TV suppliers negotiate the terms and conditions for the distribution of TV channels to end users.[20]

34. Within this market, the Commission further identified two separate product markets for FTA channels and for pay TV channels. This distinction was mainly justified based on the differences between the financial models of these channels: the FTA channels are chiefly financed by advertising revenues (public channels may also be financed by public funds) whereas pay TV channels are mainly financed by the fees paid by pay TV distributors and end users. [21] The difference in remuneration as regards pay TV channels and FTA channels have an impact on the wholesale negotiations between TV broadcasters on the supply side and the TV distributors on the demand side, as TV distributors have to bear a cost only for distribution of pay TV channels, since distribution of the free channels costs them nothing.[22]

35. Within the market for the wholesale supply of pay TV channels, the Commission has also previously indicated that there is a differentiation between "basic" and "premium" pay TV channels (for example premium sports and movies channels). However, it was left open whether these two categories of pay TV channels constitute separate product markets.[23]

36. In previous decisions, the Commission also examined, but ultimately left open, whether the market should be further segmented by genre or thematic content (such as films, sports, news, youth channels, etc.).[24]

37. Finally, the Commission has not further distinguished between the different means of infrastructure used for the delivery to the viewer (cable, satellite, DVB-T and IPTV).[25]

---

[20] Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraphs 76 and 85; Commission Decision of 21 December 2011 in case COMP/M.6369 *HBO/Ziggo/HBO Nederland*, paragraph 22.

[21] Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 37-40; Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraphs 80, 83 and 85; Commission decision of 21 December 2011 in case COMP/M.6369 *HBO/Ziggo/HBO Nederland*, paragraph 24.

[22] Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 38-40

[23] Commission decision of 2 April 2003 in case COMP/M.2876 Newscorp/*Telepiù*, paragraph 76; Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 41-42; Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraph 85; Commission decision of 21 December 2011 in case COMP/M.6369 *HBO/Ziggo/HBO Nederland*, paragraphs 24 and 27.

[24] Commission decision of 2 April 2003 in case COMP/M.2876 *Newscorp/Telepiù*, paragraph 76; Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 41-42; Commission decision of 26 August 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 35; Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraph 81.

[25] Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 41-44.

38. In this context, the Commission also notes that in *Liberty/ KBW*, the FCO held that the market for wholesale supply of pay TV channels encompasses all distribution infrastructures, but did not discuss a division of this market based on genre or content.[26]

39. A large majority of competitors and suppliers as well as the federal association of consumer organisations[27] agreed with the Commission's past finding that pay and FTA TV channels constitute two separate product markets, particularly in light of the fact that, with some limited exceptions, only pay TV channels charge TV retailers a licence fee to broadcast their programs.[28]

40. The results of the market investigation were mixed as regards the question whether a further distinction should be made between premium and basic pay TV channels and/ or on the basis of genre.

41. In light of the above and for the purposes of the present decision, the Commission considers that the wholesale supply of FTA and pay TV channels constitute separate product markets. However, the question whether these markets should be further segmented can be left open since the proposed concentration does not raise competition concerns under any alternative product market definition.

4.1.2.2. Geographic market definition

View of the Notifying Party

42. The Notifying Party does not take a position on the exact geographic delineation of the market for the wholesale/ acquisition of TV channels, and considers that for the purpose of the present decision, the precise geographic market definition can be left open.

Commission's assessment

43. With respect to the geographic market definition, previous Commission[29] decisions considered the market to encompass either the German-speaking area[30] or at least Germany. The Commission notes that in its decisions, the FCO adopted the same approach.[31]

44. In the present case, a majority of the respondents to the market investigation agreed with these previous findings as to the geographic scope of the market. They explain that

---

26 FCO Case B7-66/11 *Liberty/KBW*, paragraph 263 et. seq.

27 The federal association of consumer associations ("*Verbraucherzentrale Bundesverband*") represents 41 consumer associations in Germany.

28 See replies to questionnaire Q1 to competitors of 16 August 2013, question 11; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 11; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 5.

29 Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraphs 48; Commission decision of 21 December 2010 in case COMP/M.5932 *News Corp/BSkyB*, paragraph 88; Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 151.

30 Covering Germany, Austria, Switzerland, Liechtenstein, South Tirol.

31 FCO Case B7-66/11 *Liberty/KBW*, paragraph 268.

negotiations typically take place on a national basis and that agreements are concluded for the whole of Germany or even the entire German-speaking area.[32]

45. In any event, for the purposes of the present decision, it is not necessary to conclude on the exact geographic market definition as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.2.3. Affected market

46. The market for the wholesale/ acquisition of pay TV channels is an affected market and the impact of the proposed concentration on this market is assessed in paragraphs 270 to 280.

4.1.3. Retail supply of TV services

4.1.3.1. Product market definition

47. On the retail market for the supply of TV services, the suppliers of linear and non-linear TV services on the supply side, serve end-customers who wish to purchase such services on the demand side. Both Vodafone and Kabel Deutschland operate on this market as suppliers of linear and non-linear pay TV services.

View of the Notifying Party

48. The Notifying Party does not take a position on the exact delineation of the product market, and considers that for the purpose of the present decision, the precise market definition can be left open.

Commission's assessment

49. The Commission has in the past identified separate markets for the retail supply of FTA and of pay TV services.[33]

50. In its previous decisions, the Commission has not further segmented this market on the basis of the traditional technical means of delivery (cable, satellite, DVB-T or IPTV).[34] The Commission has, however, so far left open whether the emerging TV services via mobile telephony platforms form part of this overall market.[35] The Commission has also left open the question whether linear and non-linear services constitute separate product markets.[36]

51. In the light of the results of the market investigation[37], the Commission retains its previous finding, for the purposes of the present decision, that there is a separate market for the retail supply of pay TV services. As regards the retail provision of pay TV services, it is not

---

32 See replies to questionnaire Q1 to competitors of 16 August 2013, question 15; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 15.

33 Commission decision of 25 June 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 15.

34 Commission decision of 25 June 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 22 and Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraph 46.

35 Commission decision of 18 July 2007 in case COMP/M.4504 *SFR/Télé 2 France*, paragraph 47.

36 Commission decision of 25 June 2008 in case COMP/M.5121 *News Corp/Premiere*, paragraph 21.

37 See replies to questionnaire Q1 to competitors of 16 August 2013, question 16.

necessary to further conclude on the exact product market definition as the proposed concentration does not raise any competition concerns under any alternative product market definition.

4.1.3.2. Geographic market definition

View of the Notifying Party

52. The Notifying party considers that this market should at most be national in scope.

Commission's assessment

53. The Commission has in the past concluded that the geographic scope of the market for the retail supply of TV services is not broader than national since suppliers compete on a nationwide basis for the business of end-customers.[38]

54. Certain respondents to the market investigation indicated that the geographic scope of this market is regional and, in particular, limited to the geographic footprint of Kabel Deutschland's cable network.[39]

55. For the purposes of the present decision, it is not necessary to conclude on the exact geographic market definition as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.3.3. Affected market

56. The market for the retail supply of TV services is an affected market and the impact of the proposed concentration on this market is assessed in paragraphs 281 to 292.

4.1.4. *Wholesale TV signal transmission*

57. On the market for wholesale TV signal transmission ("*Einspeisemarkt*"), TV broadcasters, on the demand side, negotiate the terms and conditions of the transmission of the TV signal for their channels with the infrastructure operators (namely the cable, satellite, DVB-T and IPTV operators) on the supply side. In other words, the market players on this market are the same as on the market for the wholesale/acquisition of TV channels, but the demand and supply sides of the market are reversed compared to that market.

58. Kabel Deutschland is active in this market as a cable operator and Vodafone as an IPTV operator. On this market, each of them negotiates with TV broadcasters the terms and conditions for access to their networks.

---

38 Commission decision of 25 January 2010 in case COMP/M.5734 *Liberty Global Europe/Unitymedia*, paragraphs 40, 43.

39 See replies to questionnaire Q1 to competitors of 16 August 2013, question 18; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 18; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 4.

4.1.4.1. Product market definition

View of the Notifying Party

59. The Notifying Party does not take a position on the exact delineation of the product market for the wholesale transmission of TV signals, and considers that for the purpose of the present decision, the precise market definition can be left open.

Commission's assessment

60. While the Commission ultimately left the issue open, the results of the market investigation in *LGI/ KBW* highlighted that cable, satellite, IPTV and DVB-T are not substitutes, but rather complements from the point of view of TV broadcasters in Germany.[40]

61. In this context, the Commission also takes note that in assessing the market situation in Germany, the FCO found that, from a supply side perspective, the market comprises both the transmission of analogue and digital signals into the broadband cable network[41] and that no distinction needs to be made between the transmission of free-TV and transmission of pay TV.[42] From a demand side perspective, terrestrial and satellite transmission have been found not to belong to the wholesale signal transmission market.[43]

62. Furthermore, the Commission notes that with regards to IPTV in Germany, the FCO found in *Iesy/ Ish* and *Kabel Deutschland/ Orion* that this technology was also not part of the market.[44] In *Liberty/ KBW*, the FCO found that the wholesale signal transmission market does not include satellite, terrestrial transmission or IPTV, noting that these technologies are not substitutable with broadband cable from the TV channel operators' perspective, but are rather complementary to cable.[45] This view was again confirmed in the FCO's *Kabel Deutschland/ Tele Columbus* decision of 2013.[46]

63. The Commission assessed these distinctions based on its own market investigation in this case. In this case, it was called upon to assess whether the wholesale TV signal transmission via cable (where Kabel Deutschland is active) is in a separate market from the wholesale TV signal transmission via IPTV (where Vodafone is active).

---

40 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 116 and 118.

41 FCO case BT-22/05 *Iesy/Ish*, paragraph 37, FCO Case B7-38/05 *BC partners/Ish*, paragraph 28; FCO case B7-200/07 *Kabel Deutschland/Orion*, paragraph 36; FCO case B7-66/11 *Liberty/KBW*, paragraphs 182 and 197 et seq.; FCO case B7-70/12 *Kabel Deutschland/Tele Colombus*, paragraphs 196 et seq.

42 FCO case BT-22/05 *Iesy/Ish*, paragraphs 40 and 41; FCO case B7-66/11 *Liberty/KBW*, paragraph 184; FCO case B7-38/05 *BC partners/Ish*, paragraphs 31 et seq.; FCO case B7-200/07 *Kabel Deutschland/Orion*, paragraph 38 et seq.; FCO case B7-66/11 *Liberty/KBW*, paragraphs 184 et seq.; FCO case B7-70/12 – *Kabel Deutschland/Tele Colombus*, paragraph 200.

43 FCO case B7-66/11 *Liberty/KBW*, paragraph 187; FCO case BT-22/05 *Iesy/Ish*, paragraphs 42 et seq.; FCO case B7-38/05 *BC partners/Ish*, paragraphs 33 et seq.; FCO case B7-200/07 *Kabel Deutschland/Orion*, paragraph 43 et seq.; FCO case B7-66/11 *Liberty/KBW*, paragraph 187; FCO case B7-70/12 *Kabel Deutschland/Tele Colombus*, paragraph 201.

44 FCO case BT-22/05 *Iesy/Ish*, paragraphs 65 et seq.; FCO case B7-38/05 *BC partners/Ish*, paragraphs 56 et seq.

45 FCO case B7-66/11 *Liberty/KBW*, paragraph 187.

46 FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph 201.

64. The vast majority of respondents to the market investigation expressed the view that from the point of view of TV broadcasters, IPTV and cable are not substitutes, but rather complements.[47] This complementarity of different transmission modes stems from the fact that TV broadcasters need to reach a maximum number of viewers. For public broadcasters, this results from their statutory mission which is also reflected by respective must-carry status of their programs. Private free TV broadcasters likewise need to ensure that their channels can be received by a maximum number of viewers, given that their financing model is based on revenues from advertising. Moreover, pay TV broadcasters have the same incentives, as they need to recoup higher content costs for creating attractive pay TV content that viewers are willing to pay additional fees for.

65. Based on the above, the Commission considers that, from the perspective of TV broadcasters, cable and IPTV are complements rather than substitutes. Accordingly, and in line with its previous decisions, the Commission concludes that the wholesale signal transmission via cable (where Kabel Deutschland is active) constitutes a separate product market from, at least, the wholesale signal transmission via IPTV (where Vodafone is active).

4.1.4.2. Geographic market definition

View of the Notifying Party

66. The Notifying Party does not take a position on the exact geographic delineation of the market for the wholesale TV signal transmission and considers that for the purpose of the present decision, the precise market definition can be left open.

Commission's assessment

67. While ultimately leaving open the exact scope of the geographic market, previous Commission decisions considered that in case the product market is limited to cable infrastructure, the geographic scope is the coverage area of the cable network. The scope would be national if other transmission modes available on a Germany-wide basis (and in particular IPTV) would belong to the relevant product market.[48]

68. In this context, the Commission notes that the FCO's decisions, the scope of the geographic market has been found to be confined to the territory covered by each regional cable network.[49]

69. In the present case, a majority of suppliers responding to the market investigation expressed the view that the relevant geographic market is regional in scope if the product market is confined to cable and IPTV.[50]

---

47 See replies to questionnaire Q1 to competitors of 16 August 2013, question 3; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 3.

48 Commission decision of 25 January 2010 in case COMP/M.5734 *Liberty Global Europe/Unitymedia*, paragraph 29, and Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 119 et seq.

49 FCO case BT-168/01 *Liberty/Kabel Deutschland*, paragraph 87; FCO case BT-22/05 *Iesy/Ish*, paragraph 112, FCO case B7-38/05 *BC partners/Ish*, paragraphs 103 et seq.; FCO case B7-200/07 *Kabel Deutschland/Orion*, paragraph 88; FCO case B7-66/11 *Liberty/KBW*, paragraph 205.

50 See replies to questionnaire Q2 to suppliers of 16 August 2013, question 6.

70. In any event, it is not necessary to conclude on the exact scope of the geographic market in this case as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.4.3. Affected market

71. There is no horizontal overlap between Kabel Deutschland's activities in the market of wholesale TV signal transmission via cable, and that of Vodafone in the market for TV signal transmission via IPTV. There are also no vertical relationships between their activities. Hence, these markets are not affected.

72. Nonetheless, some respondents to the market investigation have raised concerns in relation to the possible impact of the proposed concentration on these markets. These concerns are discussed in paragraphs 294 to 305, for the sake of completeness. In adopting a prudent approach, the Commission made its assessment on the next narrowest possible market, which is the market for wholesale TV signal transmission via cable and IPTV.

4.1.5. Intermediary market for signal delivery

73. The cable network in Germany is separated into a network level 3 (which 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) and a network level 4 (which runs within a real estate property).

4.1.5.1. Product market definition

74. Referring to previous Commission and FCO decisions, the Notifying Party explains that the 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 the TV signal.

75. In the past, the Commission defined as the intermediary signal delivery market the market on which the negotiations between the Level 4 Operators, on the demand side, and the operators of the Level 3 network ("Level 3 Operators"), on the supply side, takes place.[51] On the supply side, the market is limited to Level 3 Operators, such as Kabel Deutschland) and does not include operators of non-cable infrastructures (for example IPTV operators, such as Vodafone). In this context, the Commission notes the FCO's finding that for technical reasons, a Level 4 Operator cannot receive signals through a broadband cable.[52]

76. There are no reasons to deviate from this product market definition in the case at hand.

4.1.5.2. Geographic market definition

77. The Notifying Party limits itself to referring to the Commission's and the FCO's precedents as regards the geographic scope for the intermediary market for signal delivery.

---

51 Commission decision of 15 June 2004 in case COMP/M.3355 *Apollo/JP Morgan/PrimaCom*, paragraph 7, Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 105.

52 FCO case B7-66/11 *Liberty/KBW*, paragraph 254.

78. In several past decisions, the Commission found that the intermediary market for signal delivery was regional in scope, comprising the network area of the relevant Level 3 Operator.[53] In a more recent decision, it was, however left open whether the intermediary market for signal delivery is national or regional in scope.[54]

79. For the purposes of the present decision, it is not necessary to conclude on the exact scope of the geographic market as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.5.3. Affected market

80. While Kabel Deutschland is active on this cable-specific market as a supplier, Vodafone is not active on this market either as a supplier or as a customer.

81. As both Kabel Deutschland and Vodafone are active in the downstream market for the retail supply of TV signal transmission with a combined share in excess of 25%, this market is vertically affected on a pure technical basis. However, because Vodafone is not active either as a supplier or as a customer on this market, the proposed concentration cannot have any impact on Kabel Deutschland's ability and/or incentive to foreclose its competitors and/or customers on the intermediate market for signal delivery via cable. This market will therefore no longer be discussed in this decision.

4.1.6. Retail supply of signal transmission

82. On the market for the retail supply of signal transmission, end customers looking for the supply of television signal on the demand side negotiate with infrastructure operators for the transmission of television signals mainly via cable, satellite, DVB-T and IPTV on the supply side.

83. A characteristic of the German market is that housing associations often negotiate and conclude basic TV supply contracts on behalf of their tenants and then pass on the fees as part of the monthly rent. While these fees are usually much lower than the fees payable by individual households for comparable services, tenants of multiple dwelling units are thus often not free to choose the supplier of basic free-TV services delivered to their apartment.

4.1.6.1. Product market definition

View of the Notifying Party

84. In presenting its views on the competitive impact of the proposed concentration in the retail supply of TV signals, the Notifying Party distinguishes between the retail supply of signal transmission to individual households/ single dwelling units ("SDUs"), and a market for the retail supply of signal transmission to multiple dwelling units ("MDUs)", usually housing associations.

---

53 Commission decision of 25 January 2010 in case COMP/M.5734 *LGE/Unitymedia* paragraphs 33 to 34; Commission decision of 15 June 2004 in case COMP/M.3355 *Apollo/JP Morgan/PrimaCom* paragraph 11.

54 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 106 to 109.

85. As regards distribution modes, the Notifying Party is of the opinion that at least satellite systems operated by the housing associations ("*Eigenversorgung*") should be included in the market (together with cable and IPTV). It submits that housing associations, especially the larger ones, have developed significant know-how in the operation of their own satellite systems and that this has become a competitive constraint on Kabel Deutschland as a retail supplier of TV signals. It explains that some housing associations even have dedicated subsidiaries that build and operate satellite reception systems and supply the TV signal to their own dwellings and, against remuneration to those of other housing associations.

86. As regards the SDUs market, the Notifying Party submits that all transmission modes of TV signal at the retail level, including cable and IPTV, but also satellite and DVB-T, belong to the relevant product market. This is because end customers who are not supplied with a TV signal via a multiple user contract can freely choose between cable, satellite, DVB-T and IPTV.

Commission's assessment

87. Past Commission[55] distinguished between a market for the retail supply of signal transmission to SDUs and a market for the retail supply of signal transmission to MDUs, usually housing associations.[56]

88. In this context, the Commission notes that past FCO decisions made the same distinction.[57] The Commission also takes note of the fact that however, in the annulment proceeding against the FCO's clearance decision regarding the acquisition of KabelBW by Liberty Global (FCO case B7-66/11), the Higher Regional Court of Düsseldorf decided to reject a distinction between individual and multiple user contracts as applied by the FCO. Instead, the Court only defined one single retail market for both kinds of customers.[58]

89. As regards a possible segmentation between the different technical modes of signal transmission, the Commission, in *LGI/ KBW*, regarded the market for the retail supply of signal transmission to MDUs to comprise cable and potentially satellite transmission, but not IPTV or DVB-T.[59] The Commission takes note that conversely, the FCO previously considered that the market comprised only cable and IPTV, but not satellite and/ or DVB-T.[60]

---

55 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 32. Prior Commission decisions mentioned individual customers and housing associations as parties on the demand side of the end customer market but did not subdivide this market, Commission decision of 15 June 2004 in case COMP/M.3355 *Apollo/JP Morgan/Primacom*, paragraph 12 and Commission decision of 25 January 2010 in case COMP/M.5734 *Liberty Global Europe/Unitymedia*, paragraph 35.

56 The latter market for signal transmission to MDUs is known as "*Gestattungsmarkt*" in German.

57 Most recently, FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph. 54 and FCO case B7-66/11 *Liberty/KBW*, paragraph 38.

58 Higher Regional Court Düsseldorf case VI Kart 1/12 [V] *Liberty/KBW*, p. 17.

59 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 29 et seq.

60 FCO case B7-66/11 *Liberty/KBW*, paragraph 46 et seq.; FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph 56 et seq.

90. The Commission further notes that as regards the SDUs market, previous decisions by the FCO considered the relevant market to be limited to two transmission modes: cable and IPTV. They excluded satellite and DVB-T from this market because essentially end-users do not "purchase" access to satellite and DVB-T from infrastructure operators, as they do from cable and IPTV operators, but rather buy themselves the necessary decoders and/or satellite dishes from third parties other than the satellite and DVB-T infrastructure operators.[61]

91. In *Kabel Deutschland/ Tele Columbus*, the FCO disagreed with the then notifying party's argument – also submitted by the Notifying Party in the present case – according to which monetary compensation would arise from the increasing demand for HD version of TV channels, for which satellite providers charge an annual fee, and continued to consider that satellite transmission was not part of the market for the retail supply of signal transmission to individual households.[62] Furthermore, as regards DVB-T, the FCO considered that the scope of TV channels offered through DVB-T is not sufficiently interchangeable and that popular FTA private TV channels are not part of the DVB-T offer in all regions.[63]

92. In the present case, respondents to the market investigation broadly expressed the view that the markets for the retail supply of signal transmission to SDUs and to MDUs are separate from each other.[64]

93. With respect to the types of infrastructure to be included in the relevant market for MDUs, respondents to the market investigation largely considered that cable continues to be by far the infrastructure of choice for housing associations.[65]

94. As regards IPTV, almost all housing associations stated that they see technical, quality and practical problems with this mode of transmission. However, some housing associations stated that they would consider offers from IPTV providers or the installation of a satellite system as an alternative to cable. DVB-T was not considered as a suitable alternative by the

---

61 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 233 and FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph 248 et seq.

62 FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph 250. The FCO pointed out that 95% of households using satellite do not pay for HD channels, so that standard definition channels are, at least for the time being, the standard market offer.

63 FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraph 251.

64 See replies to questionnaire Q1 to competitors of 16 August 2013, question 7; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 7; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 2.

65 As regards the MDUs market, the FCO left open in the past the question whether a segmentation into "*Gestattungsverträge*" and "*Versorgungsvereinbarung"* is warranted. Under "*Gestattungsverträge*", the TV signal is supplied to all housing units irrespective of whether the tenant is interested in receiving a TV signal or not. Cable operators collect their fees from the housing associations. Under *Versorgungsvereinbarungen,* tenants are supplied with a TV signal if they conclude an additional contract with the cable operator. The cable operators collect the fees from the tenants. The market investigation in the present case did not provide any indication that the market for the TV signal transmission to MDUs should be segmented along the lines of these two types of contract. Given the lack of horizontal overlap between Kabel Deutschland and Vodafone in this market, the distinction is also unlikely to have any material impact on the Commission's assessment in this case. It is therefore not further discussed in this decision.

vast majority of housing associations,[66] which can be explained by the limited range of TV channels receivable over DVB-T.

95. As regards the SDUs market, a majority of the respondents confirmed that cable and IPTV are interchangeable.[67] The results of the market investigation were mixed as to the question whether cable and IPTV are interchangeable with satellite.[68] Finally, a large majority of the respondents confirmed that DVB-T is not interchangeable with cable and IPTV.[69] Most respondents explained that the number of TV channels available via DVB-T is too limited compared to other means of signal transmission.

96. For the purposes of the present decision, it is not necessary to conclude on the exact scope of the product market as the proposed concentration does not raise any competition concerns under any alternative product market definition.

4.1.6.2. Geographic market definition

View of the Notifying Party

97. The Notifying Party does not take a position on whether the geographic scope of the market for the retail supply of TV signals to MDUs is national or regional, along the cable network operator's regional footprint. It considers that the precise geographic market definition can be left open for the purpose of the present transaction.

98. The Notifying Party submits that the market for the retail supply of TV signals to SDUs is national in scope.

Commission's assessment

99. The relevant geographic market for both MDUs and SDUs can be defined either as national or as regional, the latter corresponding to the cable network operator's regional footprint (in this case, the 13 *Bundesländer* covered by Kabel Deutschland's network).

100. As regards the market for the retail supply of TV signals to MDUs, the Commission concluded previously that the market appears to be national, but ultimately left open the precise definition.[70] In this context, the Commission notes that the FCO, in turn, defined the geographic scope as national, noting that a regional cable network operator could expand its activities to areas outside of its network, for example by leasing lines.[71] Furthermore, the Commission notes that in the previously mentioned annulment

---

66 See replies to questionnaire Q4 to housing associations of 16 August 2013, question 6.

67 See replies to questionnaire Q1 to competitors of 16 August 2013, question 8; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 8.

68 See replies to questionnaire Q1 to competitors of 16 August 2013, question 9; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 9; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 3.

69 See replies to questionnaire Q1 to competitors of 16 August 2013, question 9; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 9; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 3.

70 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 41.

71 FCO case B7-66/11 *Liberty/KBW*, paragraphs. 56-58; FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraphs 70-72.

proceeding against the FCO's clearance decision regarding the acquisition of KabelBW by Liberty Global (Case B7-66/11), the Higher Regional Court of Düsseldorf considered that the relevant geographic market had to be limited to the regional area covered by the network of the respective cable operators.

101. In the present case, the market investigation provided indications that the relevant market is regional in scope.[72]

102. As regards the market for the retail supply of TV signals to SDUs, the Commission left the precise definition open in the referral case *LGI/ KBW*.[73] The Commission notes that the FCO subsequently defined the market as regional.[74]

103. In the present case, the market investigation provided indications that the relevant market is regional in scope.[75]

104. For the purposes of the present decision, it is not necessary to conclude on the exact scope of the geographic market as the proposed concentration does not raise any competition concerns under any alternative geographic market definition.

4.1.6.3. Affected market

105. The possible market for the retail supply of signal transmission to MDUs is not affected by the proposed concentration since Vodafone is not active on this market and/or on any market that is vertically related to this market. However, some respondents to the market investigation expressed concerns about the impact of the proposed concentration on this possible market. These concerns will be discussed in paragraphs 308 to 316, for the sake of completeness.

106. The possible over-encompassing market for the retail supply of signal transmission to all types of dwelling units, as well as the possible market for the retail supply of signal transmission to SDUs are, however, affected and the impact of the proposed concentration on these markets is discussed in paragraphs 317 to 333.

---

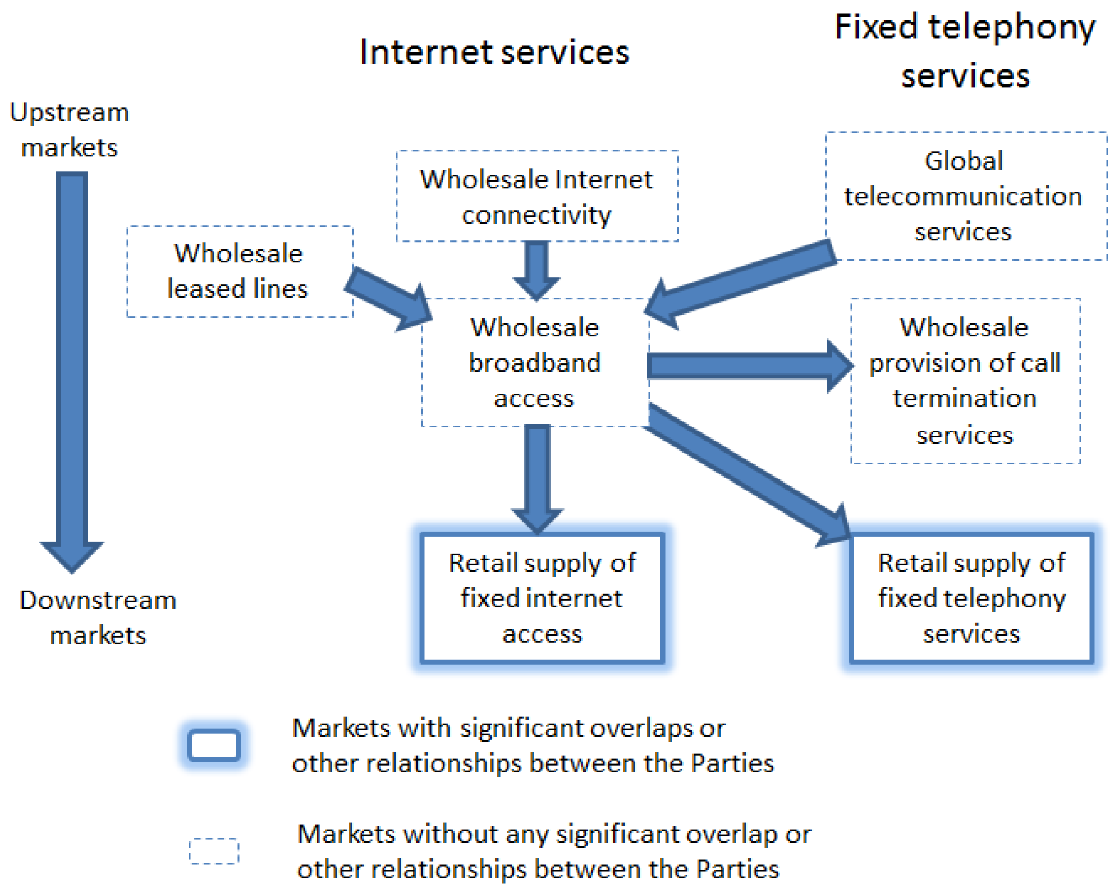
[72] See replies to questionnaire Q1 to competitors of 16 August 2013, question 18; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 18; see reply to questionnaire Q3 to consumer associations of 16 August 2013, question 4.

[73] Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraph 42.

[74] FCO case B7-66/11 *Liberty/KBW*, paragraph 235; FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraphs 253 et seq.

[75] See replies to questionnaire Q1 to competitors of 16 August 2013, question 8; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 8.

4.2. Fixed telephony and internet network services



107. As regards fixed network services (telephony and broadband Internet), a distinction can be drawn between telephony markets and Internet markets.

108. Within the telephony markets, further distinctions can be made between wholesale markets, including the wholesale provision of fixed call termination services, where both Parties are active, and retail markets, including the retail provision of fixed voice services, where both Parties are also active.

109. Within the Internet markets, a distinction can also be made between wholesale markets, including the wholesale of leased lines, wholesale broadband access, wholesale GTS international carrier services and wholesale Internet connectivity, in all of which only Vodafone is active, and retail markets, including the retail provision of Internet access and of hosting services, where both Parties are active.

110. Each of the relevant markets within the telephony and the Internet markets are discussed in the following paragraphs.

4.2.1. *Wholesale provision of fixed call termination services*

111. Call termination services are provided when calls originate from one network and terminate on another network (that is to say when the calling party and the called party do not use the same network) and thus allow users of different networks to communicate with one another. For such calls, the operator on which network the call terminates, routes the call and connects it to the called party. This service is provided at wholesale level between the network operator of the called party on the supply side and the network operator of the calling party on the demand side.

112. Both Parties offer wholesale call termination services on their respective fixed networks.

4.2.1.1. Product market definition

View of the Notifying Party

113. The Notifying Party submits that the Commission regarded each individual network as a separate market, as customers of a network can only be reached with the supply of call termination services of the respective network operator.

The Commission's assessment

114. In previous decisions, the Commission held that there is no substitute for call termination on each individual network since the network operator transmitting a call outgoing from his network to another network can reach the recipient only through the respective other network operator.[76] Furthermore, the market for fixed call termination services has been defined by the Commission's Recommendation for Member States on relevant product and service markets[77] as the market for call termination on individual public telephone networks provided at a fixed location.

115. In this context, the Commission notes that in accordance with the above mentioned recommendation, the German Federal Network Agency ("BNetzA") also defined individual markets for termination services to each individual network ("*netzweiter Markt für die Anrufzustellung in das einzelne öffentliche Telefonnetz*").[78]

116. The market investigation in *Vodafone/ Cable&Wireless* showed that there is no substitute for call termination services on each individual network.[79] The market investigation conducted for the purpose of the present case does not provide any element that would substantiate a change in this product market definition.

117. Accordingly, as regards wholesale call termination services, the Commission considers that each individual network constitutes a separate product market.

4.2.1.2. Geographic market definition

View of the Notifying Party

118. The Notifying Party considers the market to be national in scope.

---

[76] Commission decision of 24 October 2005 in case COMP/M.3920 *France Telecom/Amena*, paragraph 29; Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 37; Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 23.

[77] No. 3 in Annex to Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Official Journal of the European Union L 344/65.

[78] Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Verbindungsaufbau im öffentlichen Telefonfestnetz und Anrufzustellung in einzelnen öffentlichen Telefonfestnetzen, p. 159.

[79] Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 23.

The Commission's assessment

119. In previous decisions, the Commission considered the geographic market to be national in scope.[80]

120. The market investigation does not provide any element that would substantiate a change in the geographic market definition.

121. The Commission therefore concludes that the wholesale market for fixed call termination services is national in scope.

4.2.1.3. Affected Markets

122. As the parties are active on the separate markets for fixed call termination services over their respective networks, there is no horizontal overlap and hence no affected market. The market share of the merged entity in the downstream retail market for fixed telephony services is below 25% (see paragraph 341 below). Therefore, this market is not vertically affected either.

4.2.2. Retail supply of fixed voice services

123. On the market for retail supply of fixed voice services, operators on the supply side provide fixed voice services to end-customers on the demand side. In line with previous Commission decisions, these services include the provision of connection services or access at a fixed location or address to the public telephone network for the purpose of making and receiving calls and related services.[81]

124. Both Parties are active on this market. They offer fixed voice services as a separate service and bundled together with fixed broadband Internet access.

4.2.2.1. Product market definition

View of the Notifying Party

125. The Notifying Party submits that the exact product market for retail fixed-line telephony services can be left open. However, the Notifying Party takes the view that there is a single market for the provision of fixed voice services to business and private consumers. According to the Notifying Party, the distinction between business and private offers is blurred by the fact that (i) there is no strict division in the retail fixed voice market between residential and business customers and (ii) small businesses commonly purchase residential offers. Furthermore, according to the Notifying Party, the relevant product market should comprise domestic and international calls.

---

80 Commission decision of 24 October 2005 in case COMP/M.3920 *France Telecom/Amena*, paragraph 30; Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 38; Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 24.

81 Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 11.

The Commission's assessment

126. The Commission has previously considered drawing a distinction between residential and non-residential customers and between local/ national and international calls, but left the product market definition open.[82] The Commission has also considered that managed Voice over Internet Protocol (VoIP) services may be substitutable with fixed-line telephony services.[83]

127. In *Carphone Warehouse/ Tiscali UK*, the market investigation indicated that a distinction between local/national and international calls as well as between residential and non-residential customers may not be relevant and that managed VoIP services are likely to be substitutable with fixed telephony.[84]

128. The Commission's Recommendation for Member States on relevant product and service markets refers to one retail market for "*Access to the public telephone network at a fixed location for residential and non-residential customers*".[85]

129. In this context, the Commission notes that the BNetzA does neither distinguish separate markets for business and residential customers.[86] The BNetzA argues, *inter alia*, that the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) upheld the decision of the Administrative Court of Cologne not to distinguish different markets based on different customers.[87]

130. Virtually all respondents to the market investigation in the present case[88] expressed the view that the retail market for the provision of fixed voice services through traditional fixed telephony lines and through managed VoIP services are interchangeable and therefore part of the same market. The market investigation did not provide any other indication that the product market definition should be changed.

---

82 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraphs 35 et seq.; Commission decision of 29 January 2010 in case COMP/M.5730 *Telefonica/Hansenet Telekommunikation*, paragraphs 16 and 17;

83 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraphs 38 and 39.

84 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraphs 38.

85 No. 1 in Annex to Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Official Journal of the European Union L 344/65.

86 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 25 and 26.

87 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 26 with reference to the decision of the Bundesverwaltungsgericht dated 29 October 2008, 6 C 28 07, paragraph 23 et seq.

88 See replies to questionnaire Q1 to competitors of 16 August 2013, question 19, and replies to questionnaire Q3 to consumer associations of 16 August 2013, question 6.

131. The Commission concludes that traditional telephony and VoIP are interchangeable within the market for the retail supply of fixed voice services. With regard to other aspects of the product market definition, there is no need to take a definitive view for the purpose of the present case as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.2.2. Geographic market definition

View of the Notifying Party

132. The Notifying Party considers the market to be national in scope, based on the Commission and FCO precedents.

The Commission's assessment

133. In *Telefonica/ Hansenet Telekommunikation*, the Commission defined the German retail market for fixed telephony services as national in scope.[89] In *Carphone Warehouse/Tiscali UK*, the Commission also came to the conclusion that the relevant product market was national in scope, given the continuing importance of national regulation in the telecommunications sector, the supply of upstream wholesale services which works on a national basis, and the fact that the pricing policies of telecommunications providers are predominantly national.[90]

134. In this context, the Commission notes that the BNetzA regards the market for the retail supply of fixed voice services as national.[91] The FCO shares this view with the BNetzA.[92]

135. The market investigation in the present case did not provide any argument as to why the geographic market should not be regarded as national. Only Deutsche Telekom considered in its reply that, as the number of the competing operators differs significantly depending on the geographic area (that is to say that in densely populated areas, there are more operators than in rural areas), the analysis of the market has to be differentiated on a regional level.[93]

136. The Commission does not consider Deutsche Telekom's concerns to be founded for a number of reasons. First of all, according to the Commission notice on the definition of relevant market for the purposes of Community competition law,[94] a relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the

---

89 Commission decision of 29 January 2010 in case COMP/M.5730 *Telefónica/Hansenet Telekommunikation*, paragraph 28.

90 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraph 47. See also Commission decision of 7 December 2012 in case COMP/ M.4442 *Carphone Warehouse Group plc/AOL UK*, paragraph 19; Commission decision of 7 September 2005 in case COMP/ M.3914 *Tele2/Versatel*, paragraph 18.

91 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 56 et seq.

92 FCO case B7-70/12 *Kabel Deutschland/TeleColumbus*, paragraphs 283 and 284

93 See replies to questionnaire Q1 to competitors of 16 August 2013, question 40.1.

94 See 97/C 372/03.

conditions of competition are appreciably different in those areas[95]. The only reason Deutsche Telekom states why regional distinctions might be required is the different number and size of competitors in densely populated areas compared to rural areas. The Commission considers that the availability of competitors as a supply source is more relevant for market definition than their current sales presence. Accordingly, the Commission has consistently defined this market to be national in scope. Furthermore, the Commission notes that against this background, the BNetzA discusses objections raised by Deutsche Telekom in favour of a regional market at length.[96] The BNetzA states that there are strong nation-wide players and that there are no indications they have different strategies (regarding products, prices or rebates) for different regions within Germany. In fact, according to the BNetzA, the prices for individual fixed line products are the same within Germany.[97] Finally, no other respondent to the market investigation shared Deutsche Telekom's claim. In light of the above, the Commission finds that competition still takes place to a large extent on a national basis given the presence of strong nation-wide players, such as Deutsche Telekom itself.

137. For these reasons, the Commission concludes that there is no reason to modify previous geographic market definition of the German retail market of fixed voice services and that the respective market is national in scope.

4.2.2.3. Affected Markets

138. The following table shows the market shares of the Parties by revenue and by minutes:

Table 1: fixed telephony services market shares

	Vodafone		Kabel Deutschland		Combined	
	Revenue	Minutes	Revenue	Minutes	Revenue	Minutes
Total Market	**[5-10]%**	**[10-20]%**	**[0-5]%**	**[5-10]%**	**[10-20]%**	**[20-30]%**
Residential	[5-10]%	[10-20]%	[0-5]%	[5-10]%	[10-20]%	[20-30]%
Business	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[5-10]%	[10-20]%

<u>Source:</u> Notifying Party based on market data by IDC, EMEA Telecom Services Database, 1Q13

139. The Notifying Party claims that traffic volume (in minutes) is not an adequate measure in order to evaluate the market position given that flat rate tariffs are commonly used. Therefore, the Notifying Party claims, revenues provide a more reliable measure of market positions.

140. In this context, the Commission notes that the BNetzA regards revenue shares as crucial for the determination of market shares for fixed voice services.[98]

141. In the *Telefonica/ Hansenet Telekommunikation* decision, the Commission assessed the market shares of the combination in the market for fixed-line telephony services based on minutes.[99]

---

95 See paragraph 8 of the Commission notice on the definition of relevant market for the purposes of Community competition law.

96 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 56 to 59.

97 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 57.

98 Festlegung der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Zugang von Privat- und Geschäftskunden zum öffentlichen Telefonnetz an festen Standorten, p. 77.

142. The Commission Notice on the definition of the relevant market for the purposes of Community competition law provides that: "*As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier*."[100]

143. Given the differentiated products on the market for fixed voice services in Germany (in particular flat rate tariffs versus pay-per-call tariffs), the Commission regards the market shares by revenue as particularly important to assess whether the market is affected. According to these market shares, the combined undertakings of the Parties would result in a share of [10-20]% of the market.

144. If the market were to be further distinguished into a market for residential customers and a market for business customers, there would be no overlap in the latter as Kabel Deutschland is not active in such market. The combined market share in a potential market for residential customers amounts to only [10-20]% as well.

145. If the market share of the Parties is measured in revenue rather than minutes, the retail market for fixed voice services is not affected by the proposed concentration. For the sake of completeness the Commission assesses the competitive effects of the proposed concentration on this market based on minutes in Section 5.2.1.

4.2.3. Wholesale leased lines

146. Wholesale leased lines are lines with high capacity that allow communication providers to connect their own networks to end user sites for the supply notably of business connectivity services.

4.2.3.1. Product market definition

View of the Notifying Party

147. The Notifying Party does not take a view on the exact definition of the product market.

The Commission's assessment

148. Telecom regulators sometimes segment the wholesale leased lines between the element that can be considered to be customer access or backhaul (terminating segments) and that which can be considered part of the core network (trunk segments). In its recommendation on market definitions in the electronic communications sector, the Commission considers a separate market for terminating segments for leased lines.[101]

---

99 Commission decision of 29 January 2010 in case COMP/M.5730 *Telefónica/Hansenet Telekommunikation*, paragraph 36.

100 Commission Notice on the definition of the relevant market for the purposes of Community competition law as of 9 December 1997 (97/C 372/03), paragraph 55.

101 No. 6 in Annex to Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Official Journal of the European Union L 344/65.

149. In *Vodafone/Cable&Wireless*, the Commission left open whether the market for wholesale leased lines should be divided into trunk and terminating segments.[102]

150. In the present case, there is no need to decide on the exact definition of the product market as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.3.2. Geographic market definition

View of the Notifying Party

151. The Notifying Party considers the market to be national in scope.

The Commission's assessment

152. The Commission previously held that the market is national in scope.[103]

153. In the present case, there is no need to decide on the exact geographic scope of the market as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.3.3. Affected market

154. Vodafone is active in the wholesale leased lines market. However, Kabel Deutschland is not active as a supplier of wholesale leased line services. According to the Notifying Party, Kabel Deutschland neither has the organisation to market and administer respective activities, nor is its fibre of particular interest to third parties as it has been built to its own needs and often connects Kabel Deutschland's headends[104] with amplifier points instead of end customers.

155. With respect to its mobile activity, Kabel Deutschland could in theory be a purchaser of wholesale leased lines services. However, Kabel Deutschland does not own any mobile infrastructure and is therefore not a purchaser of wholesale leased lines services. Accordingly, there is no vertical link between the Merging Parties in relation to wholesale leased line services.

156. For these reasons, the market for wholesale leased lines is not affected by the proposed concentration and will no longer be discussed in this decision.

4.2.4. Wholesale broadband access

157. Wholesale broadband access includes different types of access that allow Internet service providers to provide services to end customers. It comprises notably physical access at a fixed location such as local loop unbundling and non-physical or virtual network access such as bit stream access at a fixed location.

---

102 Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 30.

103 Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 31.

104 Part of the cable network which receives communications signals (as cable television broadcasts) in view of their distribution at regional/local level.

4.2.4.1. Product market definition

View of the Notifying Party

158. The Notifying Party argues that there are two wholesale segments: a segment for wholesale local access, where an internet service provider on the demand side negotiates with the operator of local infrastructure on the supply side for the use of the "last mile" to the customer (*i.e.*, the internet service provider establishes a connection to the respective local exchange of the infrastructure operator by itself) and a segment for wholesale access to the entire local infrastructure, including the connection to the local exchange (so called "bitstream access"), with an internet service provider on the demand side and the operator of local infrastructure or a third party with access to the local infrastructure on the supply side.

159. However, the Notifying Party points out that the precise market definition can be left open.

The Commission's assessment

160. In the market investigation for the *Carphone Warehouse/Tiscali UK* decision, the Commission found significant differences in the characteristics, price, performance and service between different types of wholesale broadband access.[105]

161. In the present case, there is no need to decide on the exact definition of the product market as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.4.2. Geographic market definition

View of the Notifying Party

162. The Notifying Party considers the market to be national in scope.

The Commission's assessment

163. Although the Commission previously found that there are several arguments supporting a national geographic market definition from a merger control perspective in the decision *Carphone Warehouse/Tiscali UK*, the exact geographic scope has been left open.[106]

164. In the present case, there is no need to decide on the exact geographic scope of the market as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.4.3. Affected market

165. Kabel Deutschland is not active in the wholesale broadband access market. According to the Notifying Party, wholesale access to cable networks is technically feasible, through a bit stream offer, but associated with significant development expenses within a […] year development period. [evaluation of the wholesale broadband access market by Kabel Deutschland]. Even if Kabel Deutschland were to start offering a bit stream access product,

---

105 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraph 33.

106 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraph 49.

there would be no horizontal overlap as Vodafone is not active as a supplier of bit stream access products. Moreover, wholesale bit stream access services, in particular DTAG's access products, are regulated by the BNetzA[107].

166. For these reasons, the market for wholesale broadband access is not affected by the proposed concentration and will no longer be discussed in this decision.

4.2.5. *Global telecommunication services*

167. Global Telecommunication Services (GTS) are telecommunications services linking a number of different customer locations, generally in at least two different continents and across a larger number of different countries. They are generally purchased by multinational corporations with presence in many countries and a number of continents. The services provided are enhanced services -going beyond the provision of simple services, such as basic voice and fax, to provide customers with package solutions including virtual private networks for both voice and data services and advanced functionalities.[108]

4.2.5.1. Product market definition

View of the Notifying Party

168. The Notifying Party does not take a position on the precise market definition.

The Commission's assessment

169. The market investigation for the *Vodafone/Cable&Wireless* decision indicated that there is uncertainty as to whether a distinction between GTS and carrier services is appropriate. However, the Commission did not decide on the precise product market definition.[109]

170. In the present case, there is no need to decide on the exact definition of the product market either as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.5.2. Geographic market definition

View of the Notifying Party

171. With reference to a recent decision of the Commission, the Notifying Party considers the market to be global in scope.

---

[107] See BNetzA's decision "Festlegung der Präsidentenkammer der Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen Breitbandzugang für Großkunden Marktdefinition und Marktanalyse des Marktes Nr. 5 der Märkte-Empfehlung der EU-Kommission vom 17. Dezember 2007" of 16 September 2010.

[108] Cf. Commission decision of 28 June 2000 in case COMP/M.1741 WorldCom/Sprint, paragraph 70.

[109] Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 33.

The Commission's assessment

172. Based on findings of the market investigation for the *Vodafone/Cable&Wireless* decision, the Commission previous concluded that the market for international carrier services is global.[110]

173. The market investigation in the present case did not bring up any argument that speaks in favour of reconsidering the geographic scope of the market. The Commission therefore concludes that the market for international carrier services is global.

4.2.5.3. Affected market

174. According to the Notifying Party, the market share of Vodafone in the European wholesale international carrier services market amounts to approximately [0-5]%. Data on the global market have not been provided. However, the Notifying Party estimates that the market share of Vodafone would be much smaller, given that more than […]% of Vodafone's revenues in this market are located within Europe and that American and Asian providers achieve significant revenues outside the Europe.

175. Kabel Deutschland is not active in the wholesale market for international carrier services. Hence there is no horizontal overlap with Vodafone's activities in this market. The market for international carrier services is vertically related to fixed and mobile wholesale and retail markets. As described in this decision, the Parties have a combined market share of more than 25% in certain of these vertically related markets. Therefore, this market could potentially be considered to be vertically affected.

176. However, with regard to mobile markets, Kabel Deutschland as MVNO has no direct contractual relations to international carrier service providers. [information about Kabel Deutschland's contract partner and details regarding the contractual relationship]

177. Moreover, no foreclosure concerns in relation to the global market for international carrier services market can arise. According to market data, the top-10 carriers offering international carrier services each have a market share between 7 and 11 percent in the European market. Almost all of these carriers have vertically integrated businesses (*e.g.*, France Telecom, AT&T, Telecom Italia, Telefónica, Deutsche Telekom and KPN). Competitors will still be able to purchase international carrier services from other carriers. This market is therefore no longer discussed in this decision.

4.2.6. <u>Wholesale Internet Connectivity</u>

178. The Internet works as a network of networks. A local Internet Service Provider (ISP) that wants to offer Internet services to end-customers has to connect with other networks in order to allow his end-customers to exchange traffic with other end-customers/content providers beyond its own local network. In order to reach networks in far distance, an ISP has to connect to larger networks which can link both ISPs to each other.

[110] Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraph 34.

4.2.6.1. Product market definition

View of the Notifying Party

179. The Notifying Party submits that the exact definition of the product market can be left open.

The Commission's assessment

180. In the *MCI/Verizon* decision the Commission upheld the distinction made in previous decisions between (a) top-level (or universal) Internet connectivity, i.e., Internet connectivity providers that are capable of delivering complete Internet connectivity entirely or in the great majority through their own network or under mutual traffic transit agreements with other top-tier providers, on the one hand and (b) secondary Internet connectivity by second-tier providers that supplement the reach of their own network by purchasing transit rights from top-tier Internet connectivity providers on the other hand.[111]

181. The present case does not require a decision whether or not this market definition is still applicable today as the proposed concentration does not raise any competitive concern under any possible definition of the wholesale Internet connectivity market.

4.2.6.2. Geographic market definition

View of the Notifying Party

182. The Notifying Party considers the market to be either global in scope or EEA wide.

The Commission's assessment

183. The Commission previously concluded that the market for Internet connectivity is global.[112]

184. The exact definition of the geographic market can be left open in the present case as the proposed concentration does not raise any competitive concern under any possible geographic definition of the market.

4.2.6.3. Affected market

185. Vodafone but not Kabel Deutschland is active in the wholesale market for Internet connectivity. However, Kabel Deutschland purchases wholesale Internet connectivity for its fixed Internet access services.

186. Nevertheless, the market is neither horizontally nor vertically affected as neither Vodafone as supplier nor Kabel Deutschland on the demand side have significant market shares.

4.2.7. <u>Retail supply of fixed Internet access services</u>

187. As regards the retail provision of fixed Internet access services, operators on the supply side provide fixed Internet services to end-customers on the demand side.

---

[111] Commission decision of 7 October 2005 in case COMP/M.3752 *Verizon/MCI*, paragraphs 24.

[112] Commission decision of 7 October 2005 in case COMP/M.3752 *Verizon/MCI*, paragraphs 24.

4.2.7.1. Product market definition

View of the Notifying Party

188. The Notifying Party submits that there are strong arguments to consider that narrow band access services[113] are part of a same product market as broadband services. Narrow band services constitute merely a negligible part of the German retail market according to the Notifying Party.

189. The Notifying Party submits that the different infrastructures – DSL, cable and fibre – are all part of the same retail fixed broadband Internet access market.

190. In contrast, the Notifying Party submits that mobile broadband should not be considered to be part of the market. The Notifying claims that mobile broadband is still underdeveloped in terms of speed and quality of service compared to fixed broadband. It also submits that customers do not currently substitute between mobile and fixed broadband offers but rather use the mobile access as a complement.

191. Eventually, the Notifying Party notes that the Commission previously considered separate markets between residential and small business customers on one hand and large business customers on the other hand. The Notifying Party submits that this point can be left open as it does not change the competitive assessment.

The Commission's assessment

192. In the *Carphone Warehouse/Tiscali UK* decision, the Commission concluded that mobile broadband is more expensive and slower, so it may constitute a separate market, but the question was ultimately left open.[114]

193. Furthermore, in the *Carphone Warehouse/Tiscali UK* decision the Commission distinguished between (i) residential and small customers and (ii) large business customers[115] based on their need for Internet services.

194. For the purpose of the present decision, there is no need to take a definitive view on the precise product market definition as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.7.2. Geographic market definition

View of the Notifying Party

195. The Notifying Party considers the market to be national in scope in line with the Commission's decisions.

---

113 Narrowband services are defined by the Communications Committee as Internet access services with speeds lower than 144 kilobits per second.

114 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraph 20.

115 Commission decision of 29 June 2009 in case COMP/M.5532 *Carphone Warehouse/Tiscali UK*, paragraphs 26 et seq.

The Commission's assessment

196. The analysis in section 4.2.2.2 applies, with the necessary changes being made to this market as well. The market investigation did not provide any indication that would justify a change in the geographic market definition.

197. The Commission therefore concludes that there is no reason to modify its previous geographic market definition of the German retail market of Internet access services, i.e. that the market is national.

4.2.7.3. Affected market

198. Both Parties are active in the retail provision of fixed Internet access. They offer fixed Internet access as a separate service and bundled together with fixed telephony services. On a national level, the merged entity's combined market share in the overall fixed Internet access market in 2012 amounts to [10-20]% by revenues (Vodafone: [5-10]%, KDG: [0-5]%) and to [10-20]% by subscribers (Vodafone: [10-20]%, KDG: [5-10]%). The impact of the proposed concentration on this market will be assessed in paragraphs 346 to 349.

4.2.8. Internet hosting services

199. Internet hosting service providers operate Internet servers and offer organisations and individuals to serve content to the Internet via these servers. By using internet hosting services, organisations outsource their internal IT applications and infrastructure.

4.2.8.1. Product market definition

View of the Notifying Party

200. The Notifying Party submits that the exact definition of the product market can be left open.

The Commission's assessment

201. In the *KPNQWEST / EBONE / GTS* decision, the Commission considered four market segments within the general web-hosting sector, based on the range of different services and products offered: (a) the local (limited to the area where the web-hosting centre is located) supply of basic co-location services such as connectivity, power, and the facilities; (b) the national supply of shared and dedicated hosting consisting of hosting a customer's web-site on the web host's servers and providing the necessary support applications; (c) the national, possibly cross-border regional, supply of managed services to outsource complex enterprise applications and support infrastructure, including "front-end" and "back-office" applications hosted on the providers' platforms (so-called ASP), and (d) the national supply of content delivery services (CDS) such as Streaming Content Delivery Services and Static Content Delivery Products.[116] However, the Commission did not conclude on the exact market definition.

116 Commission decision of 16 January 2002 in case COMP/M.2648 *KPNQWEST / EBONE / GTS*, paragraphs 19 and 20.

202. For the purpose of the present decision, there is no need to take a definitive view on the precise product market definition as the proposed concentration does not raise any competitive concern under any possible market definition.

4.2.8.2. Geographic market definition

View of the Notifying Party

203. The Notifying Party regards the market to be at least national in scope and possibly as wide as the EEA or worldwide.

The Commission's assessment

204. In previous decisions, the Commission did not conclude on the exact definition of the geographic market for Internet hosting services. [117]

205. As the proposed concentration raises no concerns under any geographic market definition, it is not necessary to conclude on the precise definition for the purpose of the current decision.

4.2.8.3. Affected market

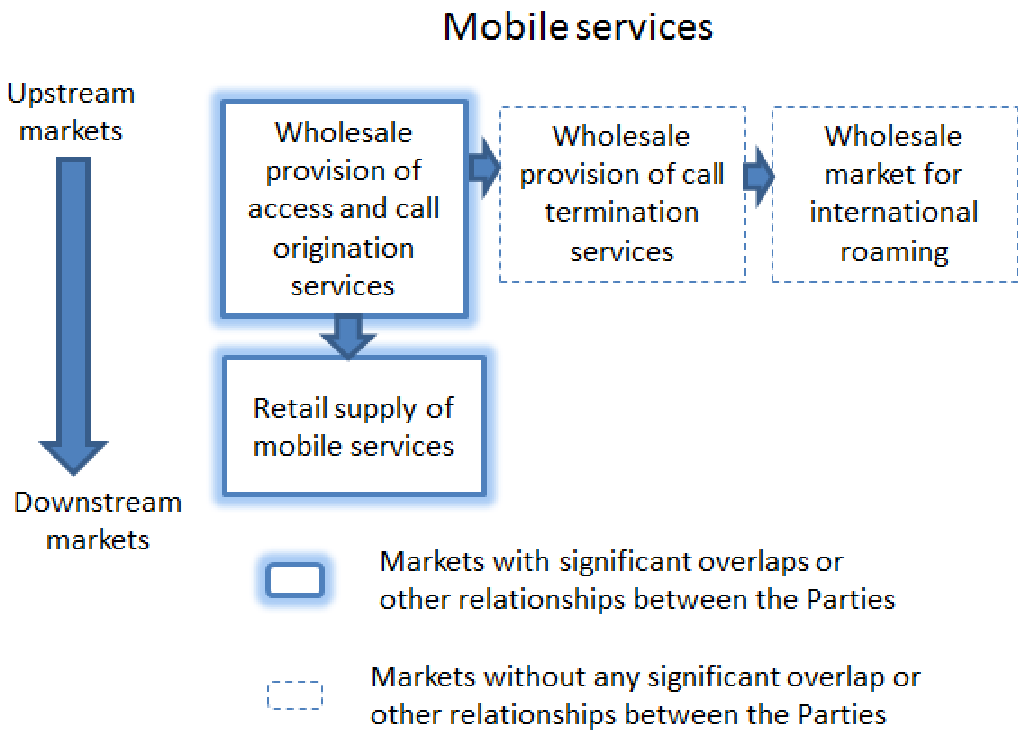
206. The Notifying Party offers various hosting services in France, Germany, Ireland, Malta and the UK. Kabel Deutschland offers a limited number of Internet hosting services to its customers in Germany. According to the Parties` estimates, the market share of Vodafone in any Member State is below [10-20]% and much lower in Germany, while the market share of Kabel Deutschland is less than [0-5]%.

207. Because the combined market share of the Parties is less than [10-20]% and the increase of the Notifying Party`s market share by the proposed concentration is minimal, the market for Internet hosting services is not affected by the proposed concentration and will no longer be discussed in this decision.

---

[117] Commission decision of 16 January 2002 in case COMP/M.2648 *KPNQWEST / EBONE / GTS*, paragraph 23.

4.3. Mobile Services



208. The relevant markets for the assessment of the proposed concentration are (1) the retail market for the provision of mobile telecommunication services to end customers and (2) the wholesale markets for services that are used as an input for these retail services, namely wholesale access and call origination on mobile networks, mobile call termination and international roaming.

4.3.1. *Retail supply of mobile telecommunication services to end customers*

209. Mobile telecommunication services to end customers, or "retail mobile services," encompass services for national and international[118] voice calls, SMS (including MMS and other messages), mobile Internet with data services, access to content via the mobile network and retail international roaming services.[119]

210. These services are provided on 2G[120]/GSM,[121] 3G/UMTS[122] and 4G/LTE[123] networks with the 2G network historically having better coverage and the 3G network being better

---

118 In this context, "international calls" designate calls that are made by a domestic user when in his/her home country, but that terminate at destinations which are abroad, that means the receiving number is a foreign one.

119 See Commission decision of 24 September 2004 in case COMP/M.3530 *TeliaSonera AB/Orange A/S* paragraph 13; Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/Tele.ring* paragraphs 11 et seq., and Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange* paragraphs 21 et seq.

120 2G stands for "Second generation of mobile telecommunication technology."

121 GSM stands for "Global System for Mobile Communications."

122 UMTS stands for "Universal Mobile Telecommunications System."

123 LTE stands for "Long Term Evolution."

adapted for larger amounts of data and faster download speeds. 4G/LTE that has only recently been launched, is a mobile technology which increases the speed and capacity of the network and is adapted for improved voice quality and high speed data transmission from wireless devices (for example, to stream video, Internet TV and to use broadband Internet).

211. While Vodafone operates on this market as an MNO, that is to say as a fully-fledged network operator, Kabel Deutschland is active on this market as an MVNO. The following table shows the market shares of the Parties by revenue and by number of subscriptions:

Table 2: Market shares in the retail supply of mobile services

	Vodafone	Kabel Deutschland	Combined
Market shares based on revenues	[30-40]%	[0-5]%	[30-40]%
Market shares based on the number of subscriptions	[20-30]%	[0-5]%	[20-30]%

<u>Source:</u> Notifying Party based on market data by IDC, EMEA Telecom Services Database, 2013

4.3.1.1. Product market definition

View of the Notifying Party

212. The Notifying Party submits that this market comprises all calls (national and international[124]) and related services (SMS, MMS, data services, access to content via mobile Internet, and roaming services[125]). The Notifying Party submits that these services are invoiced or charged together to end consumers and it would therefore not be practical to make a distinction in the product market definition.

213. The Notifying Party submits that all different network technologies (2G/GSM, 3G/UMTS and 4G/LTE) should be considered as belonging to the same product market because it is impossible to distinguish between the services that are provided by these network technologies. 3G phones have the ability to use 2G and 3G networks and 4G phones can use 2G, 3G and 4G networks.

214. Moreover, the Notifying Party submits that private and business customers would not constitute separate markets for two reasons: (1) the services offered are substantially the same and (2) people often use business phones for private calls as well as business calls, which blurs the distinction between the two categories.

---

124 International calls include all the calls that originate from Germany and that terminate in another country.

125 Roaming calls include all the calls that originate from another country where the user is travelling to (independently of where these calls terminate).

Commission's assessment

215. Previous decisions from the Commission in cases regarding other Member States ultimately left open the precise definition of the relevant product market.[126] The market investigation was equally inconclusive as regards the possible segmentations on this market.

216. For the purpose of the present decision, there is no need to take a definitive view on the precise product market definition as the proposed concentration does not raise any competitive concern under any possible product market definition.

4.3.1.2. Geographic market definition

View of the Notifying Party

217. The Notifying Party considers that the market should be considered national in scope in line with previous Commission's decisions.

Commission's assessment

218. The Commission has consistently found that the markets for retail mobile services provided to end consumers are national in scope. This includes the German market.[127]

219. The market investigation did not provide indications that the geographic market definition has recently changed and should be anything else than national. The Commission therefore concludes that there is no reason to modify its previous market definition and finds that the relevant market is the German market for retail mobile services.

4.3.1.3. Affected market

220. The market for the provision of mobile telecommunication services to end users (and its possible segments) is an affected market. The impact of the proposed concentration on competition in this market is discussed in section 5.3.1.

4.3.2. <u>Wholesale access and call origination services on mobile networks</u>

221. Mobile call origination services enable operators without a mobile network, that is to say MVNOs, to operate on the retail market.

222. As an MNO, Vodafone is active as a supplier on this market in Germany, as well as elsewhere in the EEA, while, as an MVNO, Kabel Deutschland is active on this market as a customer only in Germany.

---

[126] See Commission decision of 12 December 2012 in case COMP/M. 6497 *Hutchinson 3G Austria/Orange Austria*, paragraph 58 (for the Austrian market); Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 21 et seq. (for the UK market); Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/Tele.ring*, paragraph 11 et seq. (for the Austrian market); Commission decision of 16 September 2003 in case COMP/M.3245 *Vodafone/Singlepoint*, paragraph 8 et seq. (for the UK market).

[127] See Commission decision of 16 September 2003 in case COMP/M.3245 *Vodafone/Singlepoint*, paragraphs 16 et seq.; Commission decision of 20 August 2007 in case COMP/M.4748 *T-Mobile/Orange Netherlands*, paragraph 16; Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 26.

4.3.2.1. Product market definition

View of the Notifying Party

223. The Notifying Party submits that the Commission has previously considered wholesale access and call origination by MNOs to belong to the same relevant product market. This market also includes all technologies and voice, text and data as they are generally purchased together in one MVNO access agreement.

Commission's assessment

224. Previous decisions from the Commission have defined a product market for mobile access and call origination services.[128]

225. The market investigation did not provide any indication that the product market definition should be modified.

226. The Commission considers that the product market should be defined as the wholesale market for mobile access and call origination services.

4.3.2.2. Geographic market definition

View of the Notifying Party

227. The Notifying Party considers that the market should be considered as national in scope in line with previous Commission's decisions.

Commission's assessment

228. Previous decisions from the Commission considered that the market is national in scope[129].

229. The market investigation did not provide any indication that market conditions have changed to such an extent that the geographic market definition should be changed.

230. The Commission therefore considers that the relevant geographic market is national.

4.3.2.3. Affected market

231. The market for the provision of wholesale access and call origination on mobile networks is not horizontally affected since only Vodafone is active on this market. However, since each of Vodafone and Kabel Deutschland are active in the downstream retail market and their combined share is in excess of 25% (as is Vodafone's share at the wholesale level), this market is vertically affected. The impact of the proposed concentration on competition on this market is discussed in paragraph 5.3.2.

---

[128] See notably Commission decision of 27 November 2007 in case COMP/M.4947 *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 15 and Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraphs 27 to 30.

[129] See notably Commission decision of 27 November 2007 in case COMP/M.4947 *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 16, and Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 31.

4.3.3. *Wholesale provision of mobile call termination services*

232. Call termination services are provided when calls originate from one network and terminate on another network. For such calls, the operator on which network the call terminates, routes the call and connects it to the called party. This service is provided at wholesale level between two network operators.

233. Vodafone, as an MNO, is active on this market in Germany and in other EEA territories with a share of 100% on call termination services on its network, while Kabel Deutschland, as an MVNO, is not active on this market. However, Kabel Deutschland is active in the downstream market for the retail provision of mobile voice services in Germany.

4.3.3.1. Product market definition

View of the Notifying Party

234. The Notifying Party submits that there is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the network to which the recipient is connected. Accordingly, the Notifying Party submits that the Commission has previously defined that each individual network constitutes a separate relevant product market.

235. The Notifying Party also notes that the termination market is regulated at EU level.

Commission's assessment

236. For the termination of a call, there can be no substitute other than the access to the network to which the called party belongs. Accordingly, the Commission has previously defined each individual network as a separate product market for call termination services.[130]

237. The market investigation did not provide any indication that the product market should be defined in a different manner.

238. The Commission therefore concludes, in line with previous decisions, that each individual mobile network constitutes a separate product market.

4.3.3.2. Geographic market definition

View of the Notifying Party

239. The Notifying Party considers that the market should be considered as national in scope in line with previous Commission's decisions.

Commission's assessment

240. Previous decisions from the Commission have defined the markets to be national in scope[131].

---

[130] See notably Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable & Wireless*, paragraph 47 and Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 37.

241. The market investigation did not provide any indication that the geographic market definition should be changed.

242. The Commission therefore concludes that the markets for call termination of mobile calls are national.

4.3.3.3. Affected market

243. While the market for the wholesale provision of mobile call termination services is not horizontally affected since Kabel Deutschland is not active on this market, it could potentially be considered to be vertically affected since Vodafone is active on this market (with a 100% share on call termination services on its network) and Kabel Deutschland is active on the downstream market for the retail provision of mobile services. The competitive assessment is done in section 5.3.2 below.

4.3.4. *Wholesale market for international roaming*

244. For a provider of retail mobile services to be able to provide its end customers with telecommunication services outside their home countries, it enters into wholesale roaming agreements with providers of wholesale international roaming which are primarily active in other national markets.

245. Roaming agreements can be concluded with a preferred foreign operator which offers tailor-made service conditions, as can be seen in particular in the creation of international roaming alliances, such as the Freemove Alliance or the Vodafone partners.[132]

246. The roaming market is regulated within the EU. Prices are capped at EU level by the Roaming Regulation[133]. Under the Roaming Regulation, retail prices for making and receiving calls as well as sending SMS are capped for EU customers when using their mobile phones abroad, while receiving SMS is free. At the wholesale level, prices for voice roaming charges, SMS, and data roaming are equally capped for operators from EU Member States.

247. Vodafone is active on the wholesale market for international roaming by providing foreign MNOs with wholesale roaming services on its network. Kabel Deutschland is not active on the wholesale roaming market. At the retail level, Kabel Deutschland only acts as a reseller [information about Kabel Deutschland's contract partner and details regarding the contractual relationship].

View of the Notifying Party

248. The Notifying Party does not submit any product market definition that would depart from the Commission's previous definition of the wholesale market for international roaming.

---

131 See notably Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 38.

132 See Commission decision of 12 December 2012 in case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*, paragraph 65.

133 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

Commission's assessment

249. In the case at hand, the Commission retains its previous product market definition of a separate wholesale market for international roaming comprising both terminating calls and originating calls.

4.3.4.1. Geographic market definition

View of the Notifying Party

250. The Notifying Party agrees with the Commission's previous decisions that the relevant geographical scope of the market for the supply of wholesale international roaming is national.

Commission's assessment

251. In previous decisions, the Commission found the wholesale markets for international roaming to be national in scope, given that wholesale international agreements can be concluded only with companies which have an operating licence in the relevant country and licences to provide mobile services are restricted to a national territory.[134]

252. In the case at hand, the Commission retains its previous' geographic market definition and considers the respective market to be national in scope.

4.3.4.2. Affected market

253. The wholesale market for international roaming is not horizontally affected since Kabel Deutschland is not active on this market. There is an indirect vertical link between the downstream retail market for mobile telecommunication services to end customers in Germany, on which Kabel Deutschland is active to a limited extent as reseller of [information about Kabel Deutschland's contract partner], and the upstream wholesale markets for roaming services in the EEA countries where Vodafone operates outside of Germany. As previously mentioned, Kabel Deutschland does not directly buy these services. Instead they are [information about Kabel Deutschland's contract partner and details regarding the contractual relationship]. Therefore, the Commission considers that the wholesale market for international roaming is not affected in the present case.

4.4. Multiple play

4.4.1. Product market definition

254. “Multiple play" offerings comprise a bundle of three or more of the following services to end-customers: fixed telephony services, mobile services, Internet access services and TV services. Such packaged offers may consist of so-called "triple play" comprising three services or even "quadruple play" comprising all the above services.

---

134 See Commission decision 12 December 2012 in case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*, paragraph 78; Commission decision of 1 March 2010 in case COMP/M.5650 *T-Mobile/Orange*, paragraph 35; Commission decision of 20 August 2007 in case COMP/M.4748 *T-Mobile/Orange Netherlands*, paragraph 27; Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/Tele.ring*, paragraph 28.

View of the Notifying Party

255. The Notifying Party submits that multiple play offerings do not constitute a separate product market as multiple play strategies have so far not taken hold in Germany.

256. First, as regards triple play offers, the Notifying Party explains that these are not standard commercial propositions in Germany. While operators would try to cross-sell the different services, there would usually be no discounts for customers purchasing a "package" of Internet, TV and telephone. Most of the cable operators (including Kabel Deutschland) only offer double play packages combining fixed telephony and Internet, while selling TV services separately.

257. Secondly, as regards quadruple play offers, the Notifying Party submits that there would be no real demand by customers in Germany. All service providers operating in Germany experienced that cross-selling between fixed and mobile services has been difficult, due to the different nature of purchasers (mobile services are bought by individuals while fixed line services are bought by households) and the different nature of sales channels (mobile services are primarily sold through shops, while fixed line services are primarily sold online or as telesales).

258. Moreover, the Notifying Party points out that 2012 Eurobarometer data suggests that only 2% of German households purchase quadruple play offers and a total of 12% purchase any variation of triple or double play packages that involve mobile telephony. In addition, a study by Analysys Mason estimates that fewer than 10% of households in Germany will have subscribed to a quadruple play package by 2017. In this context, the Notifying Party points out that these figures are in line with the findings by the German Federal Network Agency ("BNetzA"), according to which the vast majority of end customers in Germany did not purchase telephone services, Internet access and TV services as a bundle, but as stand-alone products.

Commission's assessment

259. Previous Commission decisions ultimately left open whether there is a market for multiple play that is separate from the markets for each of the components of the package.[135]

260. According to the results of the market investigation, customers in Germany purchase <u>triple play offers</u> combining either (i) TV, fixed telephony and fixed Internet or (ii) fixed telephony, fixed Internet and mobile telecommunication services.[136] The results of the market investigation were, however, mixed as to the extent to which German customers today purchase <u>quadruple play offers</u> combining mobile, fixed telephony, Internet and TV services. Consumer associations were of the view that today there is no demand for

[135] Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 183-186.; Commission decision of 25 January 2010 in case COMP/M.5734 *Liberty Global Europe/Unitymedia*, paragraphs 43-48 (both for the German market). Commission decision of 3 July 2012 in case COMP/M.6584 *Vodafone/Cable&Wireless*, paragraphs 102-104 (for the UK). However, in the *Vodafone/Cable&Wireless* decision, the Commission stated with respect to quadruple play that the market investigation had confirmed that "*the joint purchasing of mobile and fixed as one package has been the exception rather than the rule*".

[136] See replies to questionnaire Q1 to competitors of 16 August 2013, question 25; see replies to questionnaire Q3 to consumer associations of 16 August 2013, question 11.

quadruple play,[137] whereas the majority of competitors indicated that quadruple play offers are already purchased today or will be increasingly purchased in the near future.[138] However, only one respondent indicated that it markets quadruple play offers already today.[139]

261. In any event, for the purpose of the present decision, the question whether the different types of multiple play constitute separate relevant markets from each of the markets of their components can be left open, as the proposed concentration does not raise competition concerns under either product market definition.

4.4.2. Geographic market definition

View of the Notifying Party

262. As the Notifying Party submits that multiple play offers do not constitute a relevant product market, it does not make any submission as regards the geographic scope of a possible market for multiple play offers.

The Commission's assessment

263. Previously, the Commission considered that a possible market for triple play services was national in scope due to regulatory barriers. However, ultimately, the exact geographic market definition was left open.[140]

264. As regards the geographic scope of the respective services to be bundled in multiple play offers, in the case at hand, the Commission considers the markets for fixed line telephony, Internet access and mobile communication services to be national in scope. The Commission ultimately leaves open whether the retail market for TV services is national or regional in scope.

265. For the purpose of this case, the impact that this has on the exact geographic market definition and hence the definition itself, can be left open as the proposed concentration does not raise competition concerns under any alternative definition.

4.4.3. Affected market

266. Vodafone currently markets triple play offers combining fixed and mobile telephony and Internet access. In Vodafone's financial year 2012/ 2013, the number of subscribers of these triple play offers amounted to around [non-public information about Vodafone's number of customers]. Furthermore, Vodafone also has a small number of subscribers of quadruple play offers (around [non-public information about Vodafone's number of customers] in its financial year 2012/2013). In order to provide triple and quadruple play services, Vodafone uses its own mobile network and fixed telephony and broadband on the basis of wholesale access to DTAG's network.

---

137 See replies to questionnaire Q3 to consumer associations of 16 August 2013, question 10.

138 See replies to questionnaire Q1 to competitors of 16 August 2013, question 24.

139 See replies to questionnaire Q1 to competitors of 16 August 2013, question 47.

140 Commission decision of 16 June 2011 in case COMP/M.5900 *LGI/KBW*, paragraphs 187-189.

267. Kabel Deutschland currently only markets dual play bundles of fixed Internet and telephony, whilst offering cable TV as a separate service. Although it offers mobile telephony services on an MVNO basis, it currently does not offer mobile products bundled with its TV and/ or Internet and/ or fixed telephony services.

268. The Parties' activities do not overlap on the possible market for multiple play or in its different segments, that is to say in the provision of triple play, and quadruple play. Nevertheless, some respondents to the market investigation expressed concerns about the impact of the proposed concentration on this market. Furthermore, there are conglomerate links between the possible market for multiple play and the wholesale markets for the different components that are bundled in multiple play. As Vodafone holds a market share in excess of 25% on the market for the wholesale supply of mobile access and call origination services, the possible market for quadruple play would be affected in a conglomerate sense.

269. The impact of the proposed concentration on a possible market for multiple play, as well as on the markets for its components is therefore discussed in Section 5.4.

5. COMPETITIVE ASSESSMENT

5.1. Television services

5.1.1. *Acquisition of pay TV channels*

5.1.1.1. *View of the Notifying Party*

270. The Notifying Party submits that in the market for the acquisition of pay TV channels, the increment brought about by the proposed concentration is very limited. In the narrowest possible hypothetical relevant market (limited to cable and IPTV), the increment would be [0-5]%, leading to a combined market share of [30-40]% (the merged entity's share would not materially change if the market were to be segmented between basic and premium pay TV channels). In the Notifying Party's view, the addition of Vodafone's very small customer base of approximately [non-public information about Vodafone's number of customers] subscribers will not increase the merged entity's negotiating power vis-à-vis TV channel broadcasters, which enjoy a very strong bargaining power.

271. Moreover, the Notifying Party submits that, post transaction, the TV channel purchasing market will continue to be dominated by Sky with a share of 55-60% in the acquisition of pay TV channels for distribution via all type of infrastructure.

5.1.1.2. *Commission's assessment*

272. The Parties' market shares in the acquisition of pay TV channels in Germany are, respectively, [20-30]% for Kabel Deutschland and [0-5]% for Vodafone if the relevant market were to be considered as including all distribution infrastructures.[141] If,

---

[141] Given that the proposed concentration concerns the potential impact on the acquisition of pay TV channels by retailers that offer a broad range of genres, the Commission has no indication that a specific assessment of the merged entity's position in the acquisitions of TV channels belonging to genres is warranted nor has it any indication that any such assessment would materially differ from that carried out with respect to the acquisition of pay TV channels as a whole.

conversely, separate product markets were to be identified for each type of distribution infrastructure, the proposed concentration would not give rise to any horizontal overlaps, since Kabel Deutschland operates a cable infrastructure and Vodafone an IPTV infrastructure. On the narrowest possibly affected market, that is to say the market for the acquisition of pay TV channels by cable and IPTV operators in Germany, the Parties' respective market shares would be [30-40]% for KDG and [0-5]% for Vodafone. In other words, depending on the relevant product market definition chosen, either the proposed concentration does not give rise to any horizontal overlap between the Parties' activities or the scope of any such overlap is very limited (below [0-5]%).

273. During the market investigation, a number of respondents have taken the view that as a result of the proposed concentration, the combined entity would be able to secure exclusivity for the acquisition and subsequent distribution of certain TV channels because it would have increased bargaining power.[142] Similarly, respondents feared that the combined entity would be in a position to negotiate lower rates from TV broadcasters, which could in turn potentially weaken or foreclose competing TV retailers.[143]

274. The Commission has carefully assessed these claims and considers them unfounded.

275. As noted, Vodafone's market position as a licensee of TV channels is very limited (less than [0-5]%) even in the narrowest possible hypothetical market limited to cable and IPTV. An important bargaining criterion for negotiations between pay TV retailers and pay TV channel broadcasters is the number of TV subscribers. The addition of Vodafone's approximately [non-public information about Vodafone's number of customers] IPTV subscribers to Kabel Deutschland's customer base of 8.1 million corresponds to an increase of [0-5]%. Hence, the proposed concentration is unlikely to have any material impact on Kabel Deutschland's bargaining position vis-à-vis pay TV channel broadcasters.

276. In any event, despite its alleged market power, today Kabel Deutschland does not currently secure exclusivity for TV channels and any such alleged market power does not appear to translate into any ability on the part of Kabel Deutschland to secure significantly better terms than its competitors from TV broadcasters. Again, the addition of Vodafone's very limited market share is unlikely to change this market situation.

277. Moreover, some elements would indicate that Kabel Deutschland does not have an ability to secure significantly better licensing terms. First, TV channel broadcasters are expected to strongly resist any request for exclusivity on the part of the merged entity. Indeed, consistent with the Commission's findings in a series of earlier cases, TV channel broadcasters have a strong incentive to achieve the greatest possible distribution for their channels, which typically translate in pursuing a multi-platform strategy consisting of being present on as many competing TV retail platforms as possible.[144]

278. Second, possible foreclosure effects could only potentially arise if the merged entity were to be able to secure exclusive access to the most popular channels. However, these channels are precisely those with the greatest negotiating power and therefore the less

---

142 See responses to questionnaire Q1 to competitors of 16 August 2013, question 52.

143 See responses to questionnaire Q1 to competitors of 16 August 2013, question 37 and submission by the Fachverband für Rundfunk und BreitbandKommunikation (FRK) e.V. of 28 August 2013.

144 See responses to the questionnaire Q2 to suppliers of 16 August 2013, question 29.

likely ones to agree to any exclusivity. In its decision on the case *Liberty Global/Virgin Media*, the Commission also dealt with foreclosure concerns stemming from the ability to require exclusivity: "[E]*ven if, post transaction, the merged entity were to be able to secure better terms and conditions (and/or even exclusive access) to some of the TV channels, which are present across multiple territories, and which do not enjoy a sufficient degree of countervailing negotiating power to resist any such requests from the merged entity, it is unlikely that, as a result, the merged entity's competitors in the retail of audio visual content to end users would be foreclosed. This reflects the fact that the TV channels, which may be less likely to enjoy a sufficient degree of countervailing negotiating power to resist any such requests, are in all likelihood those TV channels which are less important for a Pay TV retailer to carry and to include in its channel bouquets*".[145]

279. Finally, even if Kabel Deutschland were to be able to negotiate lower rates from TV broadcasters, it is unclear whether these broadcasters would have the ability and/or incentive to increase their fees to Kabel Deutschland's competitors and, even if they were to do so, whether this conduct would have any foreclosure effects vis-à-vis these competitors.

280. Based on the above, the Commission considers that the proposed concentration does not raise doubts as to its compatibility with the internal market in relation to the market for the acquisition of pay TV channels in Germany.

5.1.2. Retail supply of pay TV services

5.1.2.1. View of the Notifying Party

281. The Notifying Party submits that the increase of Kabel Deutschland's market share will be minimal in the German market for the retail supply of pay TV services. Moreover, according to the Notifying Party, Sky is the leading player in this market with a market share by subscribers of [40-50]%. The Notifying Party further submits that the average revenue per user of Sky is significantly higher than the respective average revenues of its competitors because the pay TV packages offered by Sky are more expensive. Hence, Sky's market share would be even higher if measured by revenue.

282. With regard to a potential segmentation into linear and non-linear markets, the Notifying Party submits that, according to a third party report, approximately 90% of the VOD market revenues in Germany are accounted for by Maxdome, Videoload, Lovefilm and iTunes. Hence, the Parties' position on this market is very limited.

5.1.2.2. Commission's assessment

283. Both Vodafone and Kabel Deutschland are active in the retail supply of linear and non-linear pay TV services.

284. Depending on the geographic scope of retail distribution of pay TV services, the combined entity would hold the following market share in the narrowest possible product market definition, that is to say the retail distribution of pay TV services by cable and IPTV:

---

145 See Commission decision of 15 April 2013 in Case COMP M.6880 *Liberty Global / Virgin Media*, paragraph 92.

Table 3: Retail supply of pay TV services by cable and IPTV

	By Subscribers	
	Regional	**National**
Kabel Deutschland	[40-50]%	[20-30]%
Vodafone	[0-5]%	[0-5]%
Combined	*[40-50]%*	*[20-30]%*

Source: *Notifying Party's estimates.*

285. First, the Commission notes that if the relevant market is considered to be national in scope, but limited to cable and IPTV only, the combined market share of the Parties would reach [20-30]%, with a limited market share increment of only [0-5]%. If the market was to include retail supply of pay TV by satellite as well, the combined entity's market share would even be lower. In addition, sizeable competitors such as Sky Deutschland and DTAG (that have higher market shares than the merged entity) as well as Unitymedia KabelBW would continue exercising a significant competitive constraint on the merged entity.

286. Second, on the narrowest possible affected product and geographic market, that is to say the regional market (corresponding to the footprint of the cable network of Kabel Deutschland) only including cable and IPTV, the merged entity's share would be [40-50]%. However, the merger increment would be below [0-5]%. If the market was to include retail supply of pay TV by satellite as well, the combined entity's market share would be lower at the regional level as well.

287. Furthermore, the market share of the Parties is smaller when measured by revenue. In the pay TV markets, revenues are also important proxies to assess the various market players' competitive position, as high monthly subscription fees will only be paid if the quality and/or the quantity of the respective pay TV bouquet exceed other pay TV products offered for less. Furthermore, often, different pay TV bouquets are offered to customers. If customers subscribe to more than one package, this will only be reflected in the revenues.

288. Despite the above, certain respondents to the market investigation stated that they expect competition in the retail supply of pay TV services to decrease as a result of the proposed concentration.

289. The Commission carefully assessed these concerns but does not share them.

290. First, as noted, regardless of the market definition adopted, Vodafone's current position in this market is very limited. While this limited market position may also be due to its relatively late entry into IPTV and hence the retail supply of pay TV services, there is no firm indication that Vodafone plays a special role in this market, or that, absent the merger, it might be expected to play such a role in the foreseeable future.

291. Second, even in case IPTV continues to increase its share within the market for TV infrastructure and thus a growing number of subscribers use pay TV services via IPTV, Vodafone currently only has a share of [5-10]% within the IPTV market. The Commission considers that a potential increase of pay TV via IPTV is more likely to benefit in particular DTAG, which has the vast majority of IPTV subscribers and, according to the Notifying Party, already the second largest share by subscribers in the market for the retail supply of pay TV.

292. The Commission notes that this analysis is not altered if a distinction is made between linear and non-linear TV services. The above outlined analysis also applies to a hypothetical

market segment for the retail supply of linear TV services, which accounts for the bulk of the Parties' activities on this market. The activities of the Parties in a potential market for the retail provision of non-linear TV services are very limited. The market investigation also did not reveal any concerns stemming from the horizontal overlap of the Parties' activities in this possible market segment.

293. Based on the above, the Commission considers that the proposed concentration does not raise doubts as to its compatibility with the internal market in relation to the market for the retail supply of pay TV services.

5.1.3. *Wholesale signal transmission*

294. The Commission reiterates that it finds that there are separate markets for the wholesale TV signal transmission via cable and the wholesale TV signal transmission via IPTV (see paragraph 65 above). Accordingly, the proposed concentration does not give rise to any horizontal overlaps between the parties' activities.

295. Irrespective of this, a number of respondents to the market investigation have raised concerns that Kabel Deutschland would already be a dominant player on the market for wholesale signal transmission in Germany and that it would become even stronger through the merger with Vodafone. According to these respondents, the combination of Kabel Deutschland's cable and Vodafone's IPTV activities would enable the merged entity to charge higher feed-in fees for signal transmission via cable and/or start charging fees also for the feed-in of signals into the IPTV network (Vodafone currently does not charge any such fees).[146] These concerns effectively relate to the alleged (1) strengthening of Kabel Deutchland's market position in signal transmission via cable through the combination of its business with Vodafone's IPTV business and (2) the alleged ability and incentive of Kabel Deutschland to leverage its possible dominant position in cable to IPTV, by requesting (higher) feed-in tariffs into the IPTV network.

296. The Commission does not consider these concerns to be founded for a number of reasons.

297. It is unlikely that the proposed concentration, which would result in the addition of Vodafone’s approximately [non-public information about Vodafone's number of customers] IPTV customers to Kabel Deutschland’s existing customer base of approximately 8.1 million subscribers, would materially enhance Kabel Deutschland’s market power. This is the case both on a separate market for TV signal transmission via cable, and on a broader market for TV signal transmission via cable and IPTV.

298. The Commission has also carefully analysed the concerns of market participants that post-merger, the merged entity would have the increased ability and incentive to leverage its market power in the wholesale signal transmission by cable to the wholesale signal transmission by IPTV. These respondents allege that the merged entity could start charging a feed-in fee to TV broadcasters for access to Vodafone’s IPTV infrastructure.

299. The Commission considers that there are instead various indications suggesting that such a strategy is unlikely to occur or to be successful.

146 See replies to questionnaire Q1 to competitors of 16 August 2013, question 37; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 29.

300. First, the extent to which Kabel Deutschland currently enjoys market power vis-à-vis TV broadcasters, which would supposedly be the lever that Kabel Deutschland would use to obtain (higher) feed-in fees for IPTV, is unclear.

301. There seems to be instead a relationship of mutual dependency between TV broadcasters and wholesale providers of TV signal transmission. In order to maximise their revenues from advertising, FTA TV broadcasters aim to be received by nearly all TV households. On the other hand, operators of infrastructure for TV signal transmission need to carry a sufficient number of attractive channels in order to be successful on the retail level. In this context of mutual dependency, Kabel Deutschland's bargaining power prior to the proposed concentration is counterbalanced by the TV broadcasters' market power.

302. A number of recent market developments confirm this situation of mutual dependency:

- While Kabel Deutschland receives a feed-in fee from some TV broadcasters to transmit their channels over its cable network, Kabel Deutschland has not been able to increase its fees for the last ten years (not even to adjust for inflation);

- Some public TV broadcasters have unilaterally stopped paying feed-in fees as of January 2013 (and in the ensuing litigation, at least in first instance, the courts have ruled in favour of the TV broadcasters).

- As regards private broadcasters, Kabel Deutschland had to accept a so called "cent-per subscriber" ("CPS") model for the transmission of HD channels of [details about private broadcasters using Kabel Deutschland's CPS model], which means that, while these TV broadcasters continue to pay feed-in fees to Kabel Deutschland, they also receive a per-subscriber payment by Kabel Deutschland for carrying their HD channels.

- Further, certain public broadcasting channels and certain small private regional or local channels are protected by a must-carry status for their respective area of distribution, which means that Kabel Deutschland would have to distribute them regardless of whether broadcasters pay a feed-in for IPTV or not. The same sometimes applies to national channels by private broadcasters, for example the popular private channels RTL and Sat.1 have must-carry status in Bavaria, Bremen and Lower Saxony.

303. In addition, it would not be possible for the merged entity to make feed-in into the cable network dependent on also purchasing wholesale signal transmission into the DSL network (and paying a fee for the latter). As already discussed, large TV broadcasters have negotiating power, and Kabel Deutschland needs their channels for an attractive offer to its customers. Therefore, it is unlikely that the merged entity would be able to refuse access or deteriorate access conditions to its cable network, in order to force broadcasters to pay feed-in fees for signal transmission via IPTV. To start with, a small gain in feed-in fees for IPTV would not offset a much bigger loss in revenues in cable transmission.

304. Finally, the Commission notes that even DTAG, which currently has a far more significant position in IPTV than Vodafone, has not been able to secure payments for its signal transmission via IPTV. This is an indication that such a strategy in relation to Vodafone's IPTV business, which is far less significant, is likely to be unsuccessful. TV broadcasters would continue to being broadcasted via DTAG and other IPTV providers. This makes it even less likely that the proposed concentration would alter anything in the merged entity's ability and incentive to secure (higher) payments for transmission via IPTV.

305. In light of the above, the Commission considers that the proposed concentration does not raise doubts as to its compatibility with the internal market in relation to the market for wholesale signal transmission.

5.1.4. *Retail supply of signal transmission to MDUs*

306. The Commission reiterates that the market investigation confirmed that cable is by far the infrastructure of choice for MDUs to receive TV signals and that Vodafone does not offer retail signal transmission via cable. Vodafone also does not offer its IPTV product to MDUs. There is therefore no current overlap between the parties' activities on this market.

307. Irrespective of this, some respondents expressed concerns that (1) the proposed concentration would eliminate Vodafone as a potential competitor on this market and that (2) it would increase Kabel Deutschland's position on this market through its ability to bundle its offering with Vodafone's IPTV and mobile offerings.[147]Adopting a prudent approach, the Commission also carefully assessed these claims. The Commission considers them unfounded for a number of reasons.

308. As regards potential competition from Vodafone, the Commission notes that Vodafone [details about Vodafone's business plan],[148] [details about Vodafone's business plan]. Moreover, the Commission understands that Vodafone's current contracts with the content providers [details about Vodafone's contracts with content providers]. The Commission considers that Vodafone is therefore not a potential competitor in this market.

309. The Commission also finds that the ability for the merged entity to combine its cable offering with the IPTV and mobile offerings of Vodafone is unlikely to raise competition concerns.

310. As noted, a number of housing associations expressed concerns about the suitability of an IPTV-based offering for their needs. However, even assuming that IPTV were to be a suitable alternative to cable for MDUs, Vodafone currently does not provide any IPTV service to MDUs in Germany. It does not have any contract with MDUs. None of the responding housing associations, which had received offers for providing their tenants with IPTV, indicated that such offer was made by Vodafone.[149]

311. In this context, the Commission notes that in assessing the market situation in Germany, the FCO concluded in *Kabel Deutschland/ Tele Columbus* that IPTV offerings as a whole do not provide any significant competitive constraint on cable operators in general (and on Kabel Deutschland in particular). According to the investigation of the FCO, even DTAG, which is considered to be the most important nationwide competitor in the network area of Kabel Deutschland, has only marginal activities and cannot be considered a serious competitive constraint. Vodafone is not even considered as a competitor in this market by the FCO.

312. For the sake of completeness, the Commission also notes that, according to the Notifying Party, DTAG does not use an IPTV solution to supply the TV signal to its MDU customers. The product "*TV-Grundversorgung*" offered to housing associations by DTAG uses a

---

147 See replies to questionnaire Q1 to competitors of 16 August 2013, questions 44, 49 and 52.

148 [details about Vodafone's business plan]

149 See replies to questionnaires Q4 to housing associations of 16 August 2013, question 9.

satellite head-end which is connected to the individual households via a fibre connection and a coax cable. It is therefore the Commission's understanding that, as of today, there is no credible supplier of an IPTV-based product for housing associations (multiple user contracts) in the German market.

313. With respect to the point raised by these complainants, according to which the addition of Vodafone's mobile offering, would grant Kabel Deutschland a significant competitive advantage over its competitors, the Commission notes first that Kabel Deutschland is able to include a mobile component into its offering already today, but this just does not happen in practice. [details about tenders]. This reflects the fact that tenders for MDUs contracts are focussed on finding a TV signal supplier for the housing units. This is again an indication that cable services for TV signal transmission are decisive for the housing associations.

314. This lack of relevance of mobile services for MDUs may in part be due to the fact that these services are based on a different infrastructure and hence are less relevant for housing associations. In addition, the customers for TV access and mobile telephony services are different: TV access is purchased by/ for entire households. Mobile telephony services are usually not purchased by households. Also, TV access is specific to a certain location. A tenant who moves to another address will not take the TV connection with him, but will continue to use the same mobile telephony connection irrespective of where he lives in Germany.

315. Finally, according to a specificity of German law ("Nebenkostenprivileg") for housing associations, an advantage with regard to basic cable TV access is that they can include the fees in their monthly rental invoices to their customers. This is not possible with regard to mobile telephony services. For these reasons, the Commission does not consider that the merged entity will have a significant competitive advantage in the retail market for TV signal transmission to MDUs resulting from the possibility to offer a stronger mobile component on top of its TV signal transmission.

316. In conclusion, the proposed concentration does not alter anything in the parties' market position in cable as the predominant TV service that is relevant for MDUs. Based on this and all the above, the Commission considers that the proposed concentration will not raise doubts as to its compatibility with the internal market on the market for retail signal transmission to MDUs.

5.1.5. *Retail supply of signal transmission to SDUs*

317. Both Parties supply individual households with TV signals – Kabel Deutschland via its cable network and Vodafone via IPTV.

5.1.5.1. View of the Notifying Party

318. The Notifying Party firstly submits that, while on the narrowest possibly affected market (the regional market corresponding to the cable network of Kabel Deutschland and limited to cable and IPTV) the proposed concentration results in a significant combined market share of [60-70]%, the increment of [0-5]% is relatively small due to the limited number of Vodafone subscribers.

319. Second, according to the Notifying Party, DTAG is by far the closest competitor of Kabel Deutschland in this market.

320. Third, the Notifying Party submits that there would remain at least six other regional or local providers that have a market share similar to that of Vodafone now (between 1% and 5%).[150]

321. Fourth, Vodafone would currently lack competitive force, since its IPTV offer is dependent on DTAG's access networks (local loop unbundling).

322. Finally, satellite and DVB-T would exert significant competitive pressure on the merged entity.

323. Therefore, the Notifying Party submits that the transaction will not significantly impede effective competition on the markets for the Retail supply of signal transmission to individual households.

5.1.5.2. *Commission's assessment*

324. Depending on the precise definition of the product and geographic market for SDUs, the merged entity would hold the following market share:

Table 4: Market for SDUs based on number of connections/ housing units[151]

	National		**Regional**	
	Incl. satellite, DVB-T, IPTV	**Only cable and IPTV**	**Incl. satellite, DVB-T, IPTV**	**Only cable and IPTV**
Kabel Deutschland (cable)	[10-20]%	[30-40]%	[20-30]%	[60-70]%
Vodafone (IPTV)	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Combined	***[10-20]%***	***[30-40]%***	***[20-30]%***	***[60-70]%***
Unitymedia KabelBW (cable)	[10-20]%	[30-40]%	-	-
Deutsche Telekom AG (IPTV)	[10-20]%	[20-30]%	[5-10]%	[10-20]%
ASTRA Deutschland (satellite)	[50-60]%	-	[30-40]%	-
Media Broadcast GmbH (DVB-T)	[5-10]%	-	[0-5]%	-

Source: *Notifying Party' estimates*

325. First, the Commission notes that the proposed concentration would not affect the market for the retail supply of signal transmission to individual households if this market is considered to be national in scope and to include all modes of transmission (cable, satellite, digital terrestrial, and IPTV).

326. Second, if the relevant market is considered to be national in scope, but limited to cable and IPTV only, the combined market share of the Parties would reach [30-40]%, but with a limited market share increment of only [0-5]%. In addition, sizeable competitors would continue exercising a significant competitive constraint on the merged entity.

327. Third, if the market is considered to be regional in scope (that is to say limited to the geographic scope of the cable network of Kabel Deutschland), but comprising all modes of transmission, the merged entity's market share would be below [20-30]%, with an increase below [0-5]%. Moreover, post transaction, a number of strong competitors would continue exercising a significant competitive constraint on the merged entity.

150 Notably Tele Columbus, PrimaCom, Pepcom, DTK Deutsche Telekabel, Willytel and EWE Tel.

151 Based on estimated market sizes for 2011. However, Kabel Deutschland estimates that the number of connections in 2012 was similar to the number of connections in 2011.

328. Fourth, on the narrowest possibly affected product and geographic market, that is to say the regional market (corresponding to the footprint of the cable network of Kabel Deutschland) only including cable and IPTV, the merged entity's share would be [60-70]%. However, in the present case, the Commission can only assess the impact of the increment that the merger would bring on this market. This increment is insignificant, namely below [0-5]%.

329. Moreover, post-merger, a number of other competitors would continue to operate on this market, including not only DTAG, but also a number of smaller cable operators, with a market position similar to that of Vodafone. As a result, the proposed concentration leads to the elimination of only one of the many smaller competitors of Kabel Deutschland on this market and certainly not of its closest competitor, as further discussed in paragraph 332 below. Indeed, the vast majority of suppliers,[152] competitors,[153] and consumer associations[154] considered DTAG to be Kabel Deutschland's closest competitor in the retail market for signal transmission to SDUs.

330. In addition, the Commission does not consider that Vodafone is currently a significant competitive force in Germany as regards the provision of IPTV to SDUs. In fact, with [non-public information about Vodafone's number of customers] IPTV customers, Vodafone is a very small player at the national level, as well as in the regional area covered by Kabel Deutschland's cable network. This was confirmed by competitors and suppliers that responded to the market investigation.[155] This finding is also in line with the FCO's recent finding,[156] according to which DTAG is the "only significant competitor" in Kabel Deutschland's network area.

331. Despite the above, some respondents to the market investigation submitted, that even though Vodafone is currently not a significant competitor in Germany, the proposed concentration may eliminate a potential significant competitor, as Vodafone has recently started acquiring valuable TV content and to compete aggressively on prices.[157]

332. For the reasons set out in paragraph 330, the Commission does not consider that Vodafone constitutes a particularly significant competitive force in the relevant market. Moreover, the Commission does not share the view that Vodafone is a particularly aggressive competitor on this market. Based on an analysis of the retail offers of Vodafone, Unitymedia and DTAG, the Commission takes the view that overall, DTAG's and Vodafone's TV propositions are very similar in terms of price level, while Unitymedia seems to be the most price-aggressive player in the market. The majority of the respondents to the market investigation stated that they do not perceive Vodafone as a particularly price-aggressive competitor.[158] In addition, in their reply to the market investigation, the federal consumer

---

152 See replies to questionnaire Q2 to suppliers of 16 August 2013, question 23.

153 See replies to questionnaire Q1 to competitors of 16 August 2013, question 31.

154 See replies to questionnaire Q3 to consumer associations of 16 August 2013, question 12.

155 See replies to questionnaire Q1 to competitors of 16 August 2013, question 31; see replies to questionnaire Q2 to suppliers of 16 August 2013, question 23.

156 FCO case B7-70/12 *Kabel Deutschland/Tele Columbus*, paragraphs 257-258.

157 See replies to questionnaire Q1 to competitors of 16 August 2013 question 33.

158 See replies to questionnaires Q1 to competitors and Q2 to suppliers of 16 August 2013, question 33.

umbrella association explained that Vodafone does not advertise particularly aggressively its IPTV offering.[159]

333. Therefore, based on the above, the Commission considers that the proposed concentration does not raise serious doubts as to its compatibility with the internal market in relation to the retail supply of signal transmission to SDUs.

5.1.6. Retail supply of signal transmission to MDUs and SDUs

334. The Commission considers that the proposed concentration would equally not raise serious doubts as to its compatibility with the internal market on a hypothetical market (which was not confirmed by the market investigation conducted by the Commission in this case) encompassing the retail supply of signal transmission to both MDUs and SDUs.

335. On the narrowest possibly affected product market (cable and IPTV), the merged entity's share would be around [30-40]% with an increase of around [0-5]% only. If the geographic scope of the market were to be limited to the footprint of Kabel Deutschland's cable network, the merged entity's share would be [50-60]% with an increment of [0-5]%.

336. The Parties would not be particularly close competitors on this market. While more than [60-70]% of Kabel Deutschland's customers are housing associations, Vodafone does not serve this customer group at all. As mentioned above, the majority of respondents in the market investigation perceive DTAG, not Vodafone, as Kabel Deutschland's closest competitor.

337. Even on such a hypothetical market, the Commission would need to make its competitive assessment on its two segments, namely retail TV signal transmission to MDUs and SDUs. For all the reasons outlined in paragraphs 306 to 316 and 324 to 333, the proposed concentration does not raise competition concerns on each of the two market segments. Hence, this is also true on the hypothetical overall market combining the two segments.

5.2. Fixed telephony and Internet services

5.2.1. <u>Retail supply of fixed voice telephony services</u>

View of the Notifying Party

338. The Notifying Party considers that market shares should not be calculated on the basis of minutes because a large extent of retail offers are flat offers without volume limitation. On the basis of market shares calculated on revenues, the Notifying Party submits that the retail market of fixed voice telephony services would not be an affected market.

339. With respect to a possible business segment of the market, the Notifying Party submits that only Vodafone is active in this segment and hence there would be no overlap between the Parties.

340. The Notifying Party submits that the proposed concentration will not lead to the creation of a dominant duopoly with the merged entity on one hand and Deutsche Telekom on the other hand. On the contrary, the Notifying Party considers that the proposed concentration would lead to more intense competition between the merged entity and Deutsche

[159] See reply to questionnaire Q3 to consumer associations of 16 August 2013 question 14.

Telekom. The Notifying Party submits that double play offers, including fixed Internet services and fixed telephony services, are a standard offer in the German retail market and that the proposed concentration will make the merged entity less dependent on Deutsche Telekom.

Commission's assessment

341. The Parties' market shares in the overall market for the retail supply of fixed voice services amount to [10-20]% by revenue (Vodafone: [5-10]%; Kabel Deutschland: [0-5]%) and [20-30]% by volume (telephony minutes, Vodafone: [10-20]%; Kabel Deutschland: [5-10]%). As discussed, the Parties' activities do not overlap in the possible market segments for the retail provision of fixed voice services to business customers.

342. Post-merger, the merged entity would therefore hold a share below 25%, which, according to the Horizontal Guidelines, constitutes a first indication that the proposed concentration is not liable to impede effective competition. Moreover, post-merger, there will still be a number of other competitors including DTAG and other smaller players, which could provide competitive offers based on their own network or on the basis of regulated access to DTAG's fixed telephony network.[160]

343. Moreover, the results of the market investigation indicate that the Parties are not particularly close competitors on this market or, in any event, that they are closer competitors to each other than any other competitor is to them[161]. To the contrary, market participants confirmed that also in their view, the core business activities of the Parties are different and consist of the provision of mobile services for Vodafone and of TV and Internet broadband services for Kabel Deutschland.

344. Some respondents to the market investigation submitted that the proposed concentration will reduce the number of players active on the market[162] and will in turn reduce the intensity of competition for multiple play that include a fixed telephony offering.[163] These concerns, however, did not relate to the specific bundle of fixed Internet access and fixed telephony services. The possible impact of the proposed concentration on multiple-play that includes additional services (such as a mobile or TV component) is discussed in section 377. The Commission concludes in that section that these concerns are unfounded.

345. The Commission therefore concludes that the proposed concentration does not raise serious doubts as to its compatibility with the internal market in relation to the retail supply of fixed voice telephony services.

---

160 See BNetzA's decision to regulate Deutsche Telekom's call origination services on the fixed telephony network:

http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Marktanalysen/Festlegung_Markt2und3.pdf?__blob=publicationFile&v=1

161 See replies to questionnaire Q1 to competitors of 16 August 2013, question 39.

162 See replies to questionnaire Q1 to competitors of 16 August 2013, question 40.

163 See replies to questionnaire Q1 to competitors of 16 August 2013, question 49, 51.7 and 51.8.

5.2.2. Retail supply of fixed Internet access services

View of the Notifying Party

346. The Notifying Party submits that the proposed concentration will not have any negative impact on competition on this market given the limited market share of the merged entity, the presence of a strong player, namely DTAG, and of other smaller competitors.

Commission's assessment

347. The Parties' combined market share in the overall fixed Internet access market in 2012 amounts to [10-20]% by revenues (Vodafone: [5-10]%, Kabel Deutschland: [0-5]%) and to [10-20]% by subscribers (Vodafone: [10-20]%, Kabel Deutschland: [5-10]%).

348. This market is therefore only marginally affected by the proposed concentration. Moreover, the Commission's assessment in relation to fixed telephony also applies, all the necessary changes being made, on this market.

349. The Commission therefore concludes that the proposed concentration does not raise serious doubts as to its compatibility with the internal market in relation to the retail supply of fixed Internet access services.

5.3. Mobile services

5.3.1. Retail supply of mobile services

View of the Notifying Party

350. The Notifying Party submits that the proposed concentration would only combine its MNO business with the MVNO activities of Kabel Deutschland. The resulting market share increment would be negligible and therefore no horizontal concern should arise.

351. The Notifying Party also submits that the mobile market is characterised by intense competition, in particular on price. The Notifying Party claims that Kabel Deutschland is not currently an important competitive force on the retail market. Kabel Deutschland's activity as a MVNO is not only limited when compared to MNOs, but also compared to other MVNOs such as ALDI Talk which has more than 5 million subscribers (compared with [non-public information about the number of Kabel Deutschland's customers] subscribers for Kabel Deutschland).

352. The Notifying Party further submits that Vodafone and Kabel Deutschland are not close competitors and that strong MNOs and MVNO competitors will remain active in the market, thus making it unlikely that the proposed concentration could have any impact on competition.

Commission's assessment

353. Vodafone is among the leading mobile providers in Germany. Its share of the overall German retail mobile communications market is [30-40]% in terms of revenues and [20-30]% in terms of connections. By contrast, Kabel Deutschland's is a MVNO with a market share below [0-5]% both in terms of revenues and of subscribers.

354. Post transaction, strong competitors will continue to be active on this market, including the other three MNOs, namely DTAG, Telefónica/ O2 and E-Plus, and a number of MVNOs,

such as Freenet, Drillisch, ALDI mobile and others. In this respect, the Commission also notes that, even among the MVNO operators, Kabel Deutschland does not appear to be one of the strongest and/ or more aggressive market players.

355. In line with previous cases in the mobile communications sector,[164] the Commission has assessed the impact of the proposed concentration on the various possible markets/segments of the overall German retail mobile communications market.

356. Kabel Deutschland is not active in the segment for business customers. Kabel Deutschland is also not active in the pre-paid customers' market segment. In the post-paid segment, Vodafone's share based on number of SIM cards is approximately [20-30]% and Kabel Deutschland's share would respectively amount to [0-5]%.

357. With respect to a possible market for mobile data/broadband, the Commission notes that Kabel Deutschland is predominantly focussed on voice services. Only approximately [0-5]% of the Kabel Deutschland's active SIM cards use mobile data. Accordingly, Kabel Deutschland's presence on this market segment is even smaller than on the overall retail mobile telecommunication market.

358. The vast majority of consumer associations submit in the market investigation that the proposed concentration would not materially affect competition on this market.[165] They consider that Kabel Deutschland has not been a very aggressive competitor and that its removal would not materially harm end consumers.

359. Some respondents claim that, by acquiring Kabel Deutschland, which is mainly focussed on "discount" customers, Vodafone would increase its presence in the low-price segment of the market, where Vodafone is less strong. Regardless of whether the allegation that Kabel Deutschland is focussed on discount customers is founded, given the insignificance of Kabel Deutschland's mobile customer base, the proposed concentration is in any event unlikely to have any material anti-competitive effects. Moreover, if anything, this allegation would confirm that the Parties are not close competitors.

360. Certain respondents claim however that the proposed concentration would confer upon the merged entity a competitive advantage in the mobile retail market due to the merged entity's ability to combine Vodafone's mobile offerings with the current offerings of Kabel Deutschland, such as fixed telephony/broadband.[166] These concerns effectively relate to the impact that the proposed concentration would have on multiple play offers and on mobile communications as a component of those offerings. In Section 5.4, the Commission concludes that these concerns are unfounded.

361. The Commission therefore concludes that the proposed concentration is unlikely to lead to a significant impediment to effective competition in retail mobile services.

---

164 Most recently, see Commission decision of 12 December 2012 in case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*.

165 See replies to questionnaire Q3 to consumer associations of 16 August 2013, question 18.5.

166 See replies to questionnaire Q1 to competitors of 16 August 2013, question 44.

5.3.2. *Wholesale supply of call termination services*

362. Vodafone has 100% market share over calls terminating on its mobile network. Kabel Deutschland has no network and is therefore not active in wholesale supply of call termination services. Vodafone has a [30-40]% market share in retail mobile services while Kabel Deutschland has less than [0-5]%.

View of the Notifying Party

363. The Notifying Party submits that mobile termination call services are subject to regulated cost-oriented price caps and non-discrimination obligations.

364. The Notifying also submits that it is technically difficult to identify the operator who purchases termination services as some are purchased indirectly through international carriers. Any form of discrimination would face technical obstacles.

365. Hence, the Notifying Party claims that it does not have the ability to engage in foreclosure strategies in the downstream market.

The Commission's assessment

366. First, the Commission considers that the limited increment in market shares in the downstream retail market (below [0-5]%) would unlikely modify Vodafone's current incentive to engage in a foreclosure strategy.

367. Second, no respondent to the market investigation raised any concern related to the vertical link between the retail supply of mobile services and the wholesale supply of call termination services[167].

368. Third, the Commission notes that the markets for call termination of mobile networks are regulated by the BNetzA[168]. Furthermore, the Commission notes that its recommendation from 7 May 2009 aims at harmonising how the cost-orientation should be applied in the case of mobile and fixed termination rates[169].

369. The Commission therefore concludes that the proposed concentration does not raise any competitive concern in relation to the wholesale supply of mobile call termination services.

5.3.3. *Wholesale supply of mobile access and call origination services*

View of the Notifying Party

370. The Notifying Party submits that there is no risk that Vodafone could leverage its market position on the upstream market to foreclose access to competitors on the

---

167 See replies to questionnaire Q1 to competitors of 16 August 2013, question 51.6 and to questionnaire Q3 to consumer associations of 16 August 2013, question 18.5.

168 See the following decision from the BNetzA:

http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Marktanalysen/Festlegung_Markt7.pdf?__blob=publicationFile&v=1

169 Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

downstream market because there are several MNOs, which are credible alternative providers of wholesale access and call origination services. Even in the absence of Vodafone, MVNOs would have access to sufficient sources of input according to the Notifying Party.

371. The Notifying Party submits that granting wholesale access to MVNOs serves as an important revenue stream for Vodafone, and helps to even better use its mobile network to full capacity. Further, Vodafone (as other MNOs) has an incentive to sell network capacity to MVNOs rather than leaving it unused.

372. The Notifying Party also submits that Kabel Deutschland's downstream market share in retail mobile communication services is too low to raise any concern related to input and customer foreclosure.

Commission's assessment

373. Given the lack of horizontal overlap between the Parties' activities on this market, the only possible concerns that may arise from the proposed concentration are vertical in nature.

374. As regards possible input foreclosure concerns, which were raised by one respondent to the market investigation, the Commission notes that Vodafone's market share in the provision of wholesale access and call origination in Germany is below 30% ([20-30]%), that is to say below the level, which, according to the Commission's Non-Horizontal Merger Guidelines,[170] is typically considered necessary for a company to have the necessary degree of market power to engage in input foreclosure.

375. There are also indications that, in relation to the proposed concentration, any strategy by Vodafone to foreclose downstream MVNO competitors by refusing access or deteriorating access conditions for its network and call origination services is unlikely to significantly impede effective competition. Most importantly, if Vodafone was to engage in such a strategy, MVNOs would have three other alternative MNOs, accounting for more than 70% of the market, from which they can obtain network access. These three MNOs, DTAG, O2 and E Plus, have nation-wide network coverage. As a result, any input foreclosure strategy on the part of the merged entity would likely result in loss of revenues at the wholesale level and in no gain at the retail level, since MVNOs would likely be able to continue competing at the retail level by accessing third party mobile networks.

376. No respondent to the market investigation raised any customer foreclosure concerns in relation to the proposed concentration. The Commission finds that the proposed concentration will not give rise to any such concerns. Given Kabel Deutschland's limited market presence as an MVNO, the loss of its retail business is not likely to have any material impact on the activities of [information about Kabel Deutschland's contract partner], and/or on other MNOs, which could have potentially competed to have Kabel Deutschland as a customer.

377. The Commission therefore concludes that the proposed concentration does not raise serious doubts as to its compatibility with the internal market in relation to the wholesale supply of mobile access and call origination services.

---

170 See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, paragraph 25.

5.4. Multiple play

5.4.1. View of the Notifying Party

378. The Notifying Party argues that multiple play offers are not a market that is separate from the components constituting multiple play offers. Accordingly, it has limited its submissions to arguments that the increased ability of the merged entity to bundle Vodafone's and Kabel Deutschland's current offerings in multiple play would not result in foreclosure of competitors in any of the markets that make up the bundle.

379. In this context, the Notifying Party argues that the merged entity does not hold a significant degree of market power in any of the relevant markets to have the ability to foreclose competitors.

380. Moreover, other competitors such as DTAG could compete on quadruple play with its own infrastructure and other rivals could do so by combining their own infrastructure and wholesale arrangements. In this context, the Notifying Party submits that the proposed concentration will actually be pro-competitive, as the merged entity will be in a better position to compete fiercely with DTAG on a possibly nascent market for multiple play offers.

5.4.2. The Commission's assessment

381. As regards possible markets for triple and quadruple play services, the Parties activities currently do not overlap, as Kabel Deutschland does not offer these services today. However, considering that Kabel Deutschland is as such in a position to bundle its fixed telephony and internet services with its cable TV offering, as well as to include the mobile telephony services it offers as an MVNO, it is at least a potential competitor on the possible markets for multiple play. Hence, the proposed concentration will lead to the elimination of a potential competitor on a possible market for such multiple play.

382. Respondents to the Commission's questionnaires raised two concerns as to the impact of the proposed concentration on multiple play offers.

383. First, the majority of the respondents to the Commission's questionnaire were concerned that the proposed concentration leads to the elimination of a strong actual or potential player in the market for multiple play[171] and considered that post transaction, a sufficient number of suppliers of multiple play offers would not remain in the market.[172] Consequently, the majority of responding competitors as well as consumer associations indicated that competition in triple and quadruple play offers will decrease post-transaction.[173]

384. Second, respondents pointed out that post-transaction, competitors on the various markets for the components that make up the multiple play would find it more difficult to

---

171 See replies to questionnaire Q1 to competitors of 16 August 2013, question 48, submission of 28 August 2013 by the Fachverband für Rundfunk und BreitbandKommunikation (FRK) e.V.

172 See replies to questionnaire Q1 to competitors of 16 August 2013, question 49.

173 See replies to questionnaire Q1 to competitors of 16 August 2013, questions 51.7 and 51.8; and reply to questionnaire Q3 to consumer associations of 16 August 2013, question 18.

obtain wholesale access to the parties' components, mainly Vodafone's mobile offerings and Kabel Deutschland's fixed telephony, Internet and TV services over cable. This would hamper these competitors' ability to effectively compete on the various markets for these components, and ultimately on multiple play offers themselves.

385. This concern effectively relates to (1) the increased ability and incentive of the merged entity to hamper its competitors on a possible market for multiple play if such a market is defined (a concern of a horizontal nature) or (2) if there are instead separate markets for the components of the bundle, the increased ability and incentive of the merged entity to leverage its market position in relation to one component to the market for another by foreclosing its competitors (a concern of a conglomerate nature). Irrespective of the market definition, the assessment will essentially be the same.

386. The Commission therefore assesses these concerns in turn.

Elimination of a potential competitor

387. The Commission reiterates that the proposed concentration does not remove an actual competitor from the possible markets for multiple triple and quadruple play bundles, as Kabel Deutschland does not offer these bundles today.

388. Whilst it cannot be excluded that absent the proposed concentration Kabel Deutschland would enter the possible markets for triple and quadruple play in the future and hence the proposed concentration would lead to the elimination of a potential competitor, the Commission considers that Kabel Deutschland would not be a particularly strong player for those bundles that include a mobile component, given that it lacks the infrastructure of a mobile network. Having the necessary infrastructure to offer triple and quadruple play that include a mobile component, DTAG constitutes a much stronger potential competitor in the area of multiple play offers.

389. Moreover, the market investigation has shown that other operators currently offer triple and quadruple play bundles. At least four operators, namely Pepcom GmbH, PrimaCom Berlin GmbH, Liberty Global and Telefónica Deutschland responded that they currently offer triple play bundles, the latter two offer triple play packages that include a mobile component.[174] Liberty Global currently offers quadruple play bundles. Moreover, several players plan to offer quadruple play services in the foreseeable future.[175]

Access to components of multiple play

390. The Commission has also carefully assessed the likely impact of the proposed concentration on the merged entity's ability and incentive to grant its competitors in multiple play access to the components that it would control.

391. Respondents argue that post-merger, smaller cable operators that wish to offer triple play bundles combining cable TV, fixed Internet and fixed telephony services, will find it

---

174 See replies to questionnaire Q1 to competitors of 16 August 2013, question 46.

175 See replies to questionnaire Q1 to competitors of 16 August 2013, question 46.

more difficult to obtain wholesale access to a mobile network in order to add a mobile component to their bundles.[176]

392. These respondents argue that the merged Vodafone/Kabel Deutschland and DTAG would not have any incentive to enable smaller cable operators to offer multiple play bundles with a mobile component in order to compete in multiple play. Therefore, smaller cable operators would be left with two MNOs, namely Telefónica Deutschland and E-Plus, to negotiate wholesale access to a mobile network. In view of the announced merger between these two MNOs, respondents expressed the fear that in the near future, they may even be left with only one alternative to the merged entity and DTAG.

393. As concerns these claims, the Commission recalls that in the present case, it can only assess the impact that the combination of Vodafone's and Kabel Deutschland's offerings would have on competition in relation to multiple play.

394. The proposed concentration would add Kabel Deutschland's MVNO business to the MNO business of Vodafone. Kabel Deutschland's market share on the market for retail mobile communication services in Germany is only around [0-5]%. This is unlikely to have any material influence on Vodafone's ability and incentive to grant its competitors in multiple play access to its mobile offerings.

395. Importantly, the Commission has to assess the impact of the proposed concentration abstracting from the possible merger between the mobile operators O2 and E Plus. Hence, after the proposed concentration between Vodafone and Kabel Deutschland, competing providers of multiple play would still have access to two mobile operators with a nation-wide network coverage. Even if the merged entity and DTAG were to restrict wholesale access to their mobile networks in order not to enable other operators to sell competing triple and quadruple play offers, such operators would still have the opportunity to negotiate wholesale access to the mobile networks of Telefónica Deutschland and E-Plus, which currently do not have the ability to offer quadruple play services solely on the basis of their own infrastructure for all four components. Hence, there would be sufficient alternatives post-merger for the various fixed network players and potential wholesale customers of mobile access and call origination services to offer credible multiple play packages.

396. Similarly, respondents to the market investigation expressed the concern that the merged entity would not be willing to grant wholesale access to Kabel Deutschland's cable network in order not the enable MNOs or MVNOs to offer multiple play bundles combining mobile components with cable TV and fixed telephony and Internet services.[177]The Commission considers that the concern that the merged entity will not grant wholesale access to its cable network is not merger specific, as according to its business strategy, Kabel Deutschland has so far not offered wholesale access to its cable network to MNOs or MVNOs or any other players that are not level 4 cable operators.[178] Hence, the proposed concentration would not lead to any change in this respect.

---

176 See replies to questionnaire Q1 to competitors of 16 August 2013, question 49, 52 and submission of 28 August 2013 by the Fachverband für Rundfunk und BreitbandKommunikation (FRK) e.V.

177 See replies to questionnaire Q1 to competitors of 16 August 2013, questions 51.7 and 51.8.

178 On the market for intermediary TV signal delivery, Kabel Deutschland provides level 4 cable operators with TV signals over its level 3 cable network.

397. Finally, the Commission reiterates that other operators than the merged entity and DTAG already do offer or could offer triple and quadruple play bundles in the future. The proposed concentration would not alter that.

398. Given the lack of likelihood of any anticompetitive effects from the proposed concentration, the Commission considers that allowing the merged entity to possibly offer more attractive triple or quadruple play bundles based on its own infrastructure (including Vodafone's mobile network) and Kabel Deutschland's cable activities, may have a pro-competitive dimension, especially when/if these bundles gain more traction with customers.

399. Based on the above, the Commission concludes that: the proposed concentration does not raise competition concerns on the possible markets for triple and quadruple play offers. Based on the same evidence, it concludes that the proposed concentration does not give rise to concerns of a conglomerate nature on any of the markets for the components of these offers.

6. CONCLUSION

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

For the Commission

(signed)
Joaquín ALMUNIA
Vice-President