

# ***M.7000 - LIBERTY GLOBAL / ZIGGO***

(Only the English text is authentic)

## **MERGER PROCEDURE REGULATION (EC) 139/2004**

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Article 8(2) Regulation (EC) 139/2004

Date: 10/10/2014

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EUROPEAN COMMISSION

Brussels, 10.10.2014  
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*PUBLIC VERSION*

COMMISSION DECISION

of 10.10.2014

declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7000 – LIBERTY GLOBAL / ZIGGO)

(Only the English text is authentic)

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# COMMISSION DECISION

of 10/10/2014

**declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.7000 - LIBERTY GLOBAL / ZIGGO)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 8 May 2014 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>2</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

Whereas:

## 1. INTRODUCTION

- (1) Liberty Global plc ("Liberty Global") is an international cable operator. It owns and operates cable networks offering television ("TV"), broadband Internet, fixed telephony and mobile telecommunications services in 12 European countries.<sup>4</sup> Liberty Global is active in the Netherlands primarily through UPC Nederland B.V. ("UPC"), which owns and operates a cable network in the country, covering amongst others Amsterdam. Liberty Global also distributes the Sport1 and Film1 TV channels in the Netherlands.<sup>5</sup> Liberty Global is expanding its mobile telecommunications business by launching Mobile Virtual Network Operator ("MVNO") offers across Europe, including in the Netherlands, where Liberty Global recently entered the Dutch mobile telecommunications market.

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<sup>1</sup> 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 in terminology, 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.

<sup>2</sup> OJ C .....200. , p....

<sup>3</sup> OJ C .....200. , p....

<sup>4</sup> Austria, Belgium, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Poland, Romania, Slovakia, Switzerland, and the United Kingdom.

<sup>5</sup> Liberty Global sold its Chellomedia division to the United States company AMC Networks Inc. on 3 February 2014. However, Liberty Global retained its Film1 and Sport1 TV channels, which did not form part of that transaction.

- (2) John Malone is the largest shareholder, and is also a minority shareholder of Liberty Global.<sup>6</sup> He is a United States citizen who also holds significant minority shareholdings in Liberty Interactive Corporation ("LIC"), Liberty Media Corporation ("LMC") and Discovery Communications, Inc. ("Discovery"). John Malone also holds the positions of Chairman of the respective boards of Liberty Global, LIC and LMC, as well as of director of Discovery. None of LIC, LMC or Discovery is part of Liberty Global. Discovery is active in the wholesale supply of TV channels, including in the Netherlands, and has recently acquired Eurosport SAS ("Eurosport").<sup>7</sup>
- (3) The issue of whether John Malone controls Liberty Global, LIC, or LMC can be left open<sup>8</sup> given that the outcome of the competitive assessment will not change whether or not Mr Malone controls those companies.
- (4) Ziggo N.V. ("Ziggo") owns and operates a broadband cable network that covers more than half of the Netherlands, including the third and fourth largest cities, Den Haag and Utrecht. Ziggo provides digital and analogue cable video, broadband Internet, mobile telecoms and digital telephony (Voice over Internet Protocol, "VoIP") services. Ziggo indirectly owns [...] of HBO Nederland Coöperatief U.A. ("HBO Nederland"), a full-function joint venture jointly controlled by Ziggo and a subsidiary of Home Box Office, Inc. ("HBO").<sup>9</sup> HBO is a subsidiary of Time Warner Inc. ("Time Warner"), a global media company, with operations in film, TV and magazine publishing. HBO Nederland operates three HBO-branded Pay TV channels and related Video-On-Demand ("VOD") services, offering films, exclusive TV shows and other entertainment content. These channels are distributed on a wholesale basis to retail Pay TV suppliers in the Netherlands.
- (5) For the purpose of this Decision, Liberty Global is referred to as the "Notifying Party", and Liberty Global and Ziggo together as the "Parties".

## 2. THE OPERATION AND THE CONCENTRATION

- (6) The proposed transaction involves the acquisition of sole control over Ziggo by Liberty Global. Liberty Global is currently the largest shareholder and is also a minority shareholder in Ziggo with a shareholding of 28.5%. Pursuant to an agreement between Liberty Global and Ziggo dated 27 January 2014, Liberty Global will launch a public bid for the remaining shares in Ziggo. If the bid is successful, Liberty Global will have sole control over Ziggo.
- (7) The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

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<sup>6</sup> Liberty Global is listed on the NASDAQ stock exchange with the largest shareholder, John Malone, ultimately holding approximately 28% of voting power in Liberty Global. To Liberty Global's knowledge, no other stockholder has a significant equity interest in Liberty Global.

<sup>7</sup> Commission's decision of 8 April 2014 in Case No M.7170 - Discovery Communications/Eurosport.

<sup>8</sup> The issue of possible control by John Malone over Liberty Global, LMC or Discovery was left open in the Commission's decision of 14 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, because the transaction did not raise competition concerns, even when assuming that such control were to exist. The same applies in this case given that LCI has no activities in the Netherlands and LMC's interest in relevant companies (Viacom and Time Warner) equates to less than 3% voting rights.

<sup>9</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland.

### **3. EU DIMENSION**

- (8) The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 000 million in 2012 (Liberty Global: EUR 13 082 million; Ziggo: EUR 1 537 million). They each had a combined aggregate Union-wide turnover of more than EUR 250 million in 2012 (Liberty Global: EUR 11 260 million; Ziggo: EUR 1 537 million). While Ziggo achieved more than two-thirds of its aggregate Union-wide turnover in the Netherlands, Liberty Global did not. The proposed transaction therefore has a Union dimension.

### **4. THE PROCEDURE**

- (9) Liberty Global notified the proposed transaction to the Commission on 14 March 2014. Based on its market investigation, the Commission considered that the proposed transaction raised serious doubts as to its compatibility with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 8 May 2014 ("the Article 6(1)(c) decision").<sup>10</sup>
- (10) The Notifying Party submitted its written comments to the Article 6(1)(c) decision on 21 May 2014.
- (11) During the second phase investigation, the Commission sent several requests for information to the Notifying Party. The Notifying Party responded to the request of 16 May 2014 on 23 May 2014; the Notifying Party responded to the request of 11 June 2014 on 17 and 18 June 2014; the Notifying Party responded to the request of 20 June 2014 on 24 June 2014; the Notifying Party responded to the request of 2 July 2014 on 4 July 2014; the Notifying Party responded to the request of 8 July 2014 on 9 July 2014; the Notifying Party responded to the request of 15 July 2014 on 21 July 2014; and the Notifying Party responded to the request of 30 July 2014 on 19 August 2014.
- (12) On 10 July 2014, the Commission held a state-of-play meeting with the Notifying Party and orally set out its competition concerns following the in-depth investigation.
- (13) On 1 August 2014, the Commission adopted a decision pursuant to article 11(3) of the Merger Regulation, following the Notifying Party's failure to respond to a Request for Information from the Commission. That decision suspended the time limits for the adoption of this Decision. The Notifying Party responded to the Request for Information on 19 August 2014 and the new time limit for a decision pursuant to Article 8 of the Merger Regulation became 3 November 2014.
- (14) On 14 July 2014, Liberty Global submitted commitments to the Commission. The Commission launched a market test on the commitments on 15 July 2014. Following the results of the market test, Liberty Global provided a new version of its commitments to take account of comments received during the market test. On 22 August 2014, Liberty Global submitted final commitments that render the proposed transaction compatible with the internal market.

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<sup>10</sup> OJ C 147, 16.05.2014, p.1.



## **5. REFERRAL REQUEST**

- (15) On 25 March 2014, the Netherlands via its Authority for Consumers and Markets (the "ACM")<sup>11</sup> requested a full referral of jurisdiction over the proposed transaction from the Commission to the ACM pursuant to Article 9(2)(a) of the Merger Regulation (the "Referral Request").
- (16) In the Referral Request, the Netherlands considered that the proposed transaction threatens to significantly affect competition in the Dutch markets for television and telecommunications, each of which present all the characteristics of distinct markets in accordance with Article 9(2)(a) of the Merger Regulation. Moreover, the Netherlands considered that it was best placed to deal with the proposed transaction.
- (17) After the initiation of proceedings, the Netherlands submitted a reminder of its referral request on 15 May 2014.
- (18) The Notifying Party was informed by the Commission of the Netherlands' referral request on 3 April 2014 but submitted its comments on 1 April 2014, having already been informed of the referral request by the ACM. The Notifying Party was furthermore informed of the Netherlands' reminder on 21 May 2014. The Notifying Party argued that the proposed transaction did not threaten to significantly affect competition and that the Commission was better placed to examine it. In its view, a review of the proposed transaction by the Commission would furthermore limit the administrative burden on the Notifying Party, in line with the principles guiding decisions on referrals.<sup>12</sup>
- (19) The Netherlands was informed on 28 May 2014 of the Commission's intention to refuse the Referral Request and given the opportunity to make known its views. The Netherlands informed the Commission that it had no further comments.
- (20) On 25 June 2014 the Commission adopted a decision rejecting the Netherlands' Referral Request. In its decision, the Commission stated its doubts as to whether the conditions for a referral provided for in Article 9(2)(a) of the Merger Regulation were fulfilled with regard to the proposed transaction. The Commission considered that in any event, even if those conditions were met, it was not appropriate to refer the proposed transaction to the ACM for a number of reasons, including the need to ensure a coherent and consistent approach when assessing mergers in the converging TV-related and telecommunication sectors in different Member States falling under the Commission's competence and the fact that the Commission has developed significant expertise in the European Union's telecommunication markets in recent years.

## **6. RELEVANT MARKETS**

- (21) The proposed transaction gives rise to certain horizontal overlaps and vertical 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 the Netherlands.

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<sup>11</sup> The ACM integrates the former Dutch Competition Authority ("NMa") and the former Dutch Telecommunications regulator ("OPTA"). Decisions adopted before the creation of the ACM will be referred to as ACM (NMa) or ACM (OPTA) depending on the authority that originally adopted them.

<sup>12</sup> Commission Notice on Case Referral in respect of concentrations, OJ C 56, 05.03.2005, p.2.

- (22) In particular, the proposed transaction would combine the following assets and businesses of the Parties:
- UPC's and Ziggo's cable TV business (based respectively on their own cable network);
  - UPC's and Ziggo's fixed telephony and fixed broadband businesses (based respectively on their own cable network);
  - UPC's and Ziggo's mobile communications business, mainly as an MVNO (based on Vodafone's network).
- (23) In sections (24) to (153), this decision addresses each of the relevant markets in turn.

## **6.1. Television services**

- (24) As regards the TV-related markets, and with respect to the licensing and distribution of content and channels, the Commission has in previous decisions<sup>13</sup> made a distinction between the following markets:
- Licensing and acquisition of broadcasting rights for TV content;
  - Wholesale and acquisition of TV channels; and
  - Retail supply of TV services.

### *6.1.1. Licensing/acquisition of broadcasting rights for TV content*

- (25) Audio visual TV content comprises "entertainment products", such as films, sports, and TV programmes that can be broadcast via TV.<sup>14</sup> The broadcasting rights generally belong to the creators of the content. These rights owners, which constitute the supply side of this market, license them to broadcasters which then incorporate them into linear TV channels, that is to say linear streams where programmes are broadcast at scheduled times or to 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"). Those broadcasters and content platform operators, together, comprise the demand side of this market.
- (26) Liberty Global does not produce individual TV content that is distributed in the Netherlands. This is, however, likely to change shortly given that Liberty Global is in the process of acquiring TV content.<sup>15</sup> Ziggo has only very limited activities in the production of individual TV content. The TV content produced by Ziggo<sup>16</sup> is only used by Ziggo itself. Parties are therefore only active on the acquisition side of those markets, as they purchase individual TV content from content owners. In particular, both Liberty Global and Ziggo acquire individual TV content for inclusion in their respective Dutch linear Pay TV channels, Film1, Sport1 and HBO Nederland, and those channels' related VOD services. Both Liberty Global and Ziggo also purchase non-linear individual TV content for the VOD services offered on their respective

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<sup>13</sup> See Commission's decision of 15 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, paragraphs 15-20, 28-37, and 43-50.

<sup>14</sup> Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 28.

<sup>15</sup> Liberty Global has publically announced its plans to increase its share in Belgian TV production and broadcasting company De Vijver Media NV to 50%, as well as to acquire joint control with Discovery Communications Inc over United Kingdom-based TV production company All3Media Holdings Limited. Recently Liberty Global also acquired a 6.4% stake in United Kingdom broadcaster ITV plc.

<sup>16</sup> Ziggo's production activities are limited to broadcasting concerts held in the Ziggo Dome and Club Ziggo.

retail TV platforms, that is to say as part of the UPC and Ziggo Pay TV subscriptions in the Netherlands.

#### 6.1.1.1. Product Market Definition

##### *Notifying Party's view*

- (27) The Notifying Party submits that the exact definition of the market can be left open as the proposed concentration would not create a significant impediment to effective competition on any potential submarkets.

##### *Previous Commission decisions, results of the market investigation and Commission's assessment*

- (28) In previous decisions, the Commission has divided the market for the licensing and acquisition of individual content in the following manner: (i) Pay TV versus Free-To-Air ("FTA") TV<sup>17</sup>, (ii) linear versus non-linear broadcast<sup>18</sup>, (iii) by exhibition window, that is to say subscription VOD ("SVOD"), transactional VOD ("TVOD")<sup>19</sup>, PPV, first Pay TV window, second Pay TV window<sup>20</sup>, and FTA, (iv) by content type, that is to say films, sports, other content.
- (29) As regards content type, the Commission has further distinguished between: (i) exclusive rights to premium films, (ii) rights to football events that are played regularly throughout every year (for example national league matches, national cup, UEFA Cup and UEFA Champions League), (iii) rights to football events that are played more intermittently, every four years, for example the FIFA World Cup and European Championship of Nations, and (iv) exclusive rights to other sport events,<sup>21</sup> and by type of supplier in respect of films, that is to say major Hollywood studios/smaller suppliers.<sup>22</sup>

##### *FTA TV and Pay TV rights*

- (30) A majority of respondents to the market investigation consider that the licensing of broadcasting rights for Pay TV and the licensing of broadcasting rights for FTA TV belong to separate product markets. According to those respondents, there are differences in prices since FTA TV is available to virtually all consumers free of charge whereas consumers need to have a paid subscription to access Pay TV.<sup>23</sup> FTA

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<sup>17</sup> Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 35.

<sup>18</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 27-36.

<sup>19</sup> Subscription VOD designates a product where an end user obtains the right to watch multiple titles within a designated time frame (for example one month) through a single payment. Transactional VOD designates a product where an end user obtains the right to watch a single title within a designated time frame (for example 48 hours) through a single payment. PPV designates a product where an end user obtains the right to watch a single title during a specific time frame (for example Sunday between 2.00 pm and 3.45 pm) through a single payment.

<sup>20</sup> Audio-visual content is typically sold separately for usage in different retail services or points in time. These different offers are generally referred to as broadcast windows.

<sup>21</sup> Commission's decision of 13 November 2001 in Case No COMP/M.2483 - Group Canal+/RTL/GJCD/JV, paragraph 21; Commission's decision of 2 April 2003 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraphs 61, 69 and 71.

<sup>22</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 18.

<sup>23</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 5 and 5.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 5 and 5.1; and replies

TV and Pay TV also have different window patterns, Pay TV represents an earlier segment of exploitation for film content, and a different customer base: customers which are willing to pay in order to watch films earlier and without commercial breaks choose Pay TV. The licensing contracts for content also distinguish between broadcasting rights for Pay TV and for FTA TV.<sup>24</sup>

- (31) However, a small number of respondents also note that in the Netherlands there are only three FTA channels: Nederland 1, 2 and 3 broadcast via unencrypted terrestrial TV signals<sup>25</sup> in a limited standard definition quality. All other TV channels are available only through a Pay TV subscription. Thus, from the Dutch consumers' perspective, there is no longer a clear distinction between FTA and Pay TV.<sup>26</sup>
- (32) In light of the limited significance of FTA TV in the Netherlands, since essentially, the Dutch TV market is a Pay TV market, the assessment of the proposed transaction would remain the same whether the licensing and acquisition of broadcasting rights for FTA TV and Pay TV are considered to belong to the same product market or to two separate markets. As a consequence, the Commission considers that the market definition can be left open in this regard.

*Rights for linear and non-linear broadcasting*

- (33) The Notifying Party submits that no distinction should be made between linear and non-linear broadcasting rights. The Notifying Party considers that from a demand side perspective providers of linear TV services are facing increasing competition from over-the-top ("OTT") players, that is to say operators providing audio visual services over the Internet, providing non-linear services. According to the Notifying Party there is also a high degree of supply side substitutability between the rights for linear and non-linear broadcast and those rights are often negotiated together and covered by a single agreement.
- (34) Although in previous decisions<sup>27</sup> the Commission has considered a possible distinction between licensing and acquisition of broadcasting rights for linear and for non-linear TV services, the Commission has to date left open the question whether separate markets for linear and non-linear rights should be defined.
- (35) The replies to the market investigation suggest that the market for the licensing of broadcasting rights can be sub-divided into linear and non-linear broadcasting rights. There are differences in pricing conditions and the rights are licensed separately due to different exhibition windows. Linear broadcasting rights are usually licensed for a flat fee for a fixed number of runs while the licence cost for non-linear broadcast depends on the customers' interest and the income generated as a result. From the perspective of rights holders and distributors, linear and non-linear broadcasting are

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to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 5 and 5.1.

<sup>24</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 5 and 5.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 5 and 5.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 5 and 5.1.

<sup>25</sup> Digital Video Broadcasting – Terrestrial (DVB-T).

<sup>26</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 5.

<sup>27</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 27-36; Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 21.

clearly treated as distinct and licensed as separate rights.<sup>28</sup> A small number of respondents pointed out that linear broadcasting faces some degree of competition from both catch-up TV and VOD from the demand-side as VOD falls in an earlier exhibition window and from a consumer perspective catch-up TV can sometimes be a substitute for linear viewing.

- (36) The Commission considers that the information gathered during the market investigation, and in particular the differences in the pricing models and the licensing conditions, suggest the existence of separate markets for licensing and acquisition of broadcasting rights for (i) linear broadcasting and (ii) non-linear broadcasting.
- (37) In any event, since the proposed transaction does not raise competition concerns under any possible market segmentation, the Commission considers that the exact scope of the relevant product markets can be left open in this regard.

*Segmentation by exhibition window*

- (38) The Notifying Party submits that a certain degree of demand-side substitutability exists between the broadcasting rights for the different exhibition windows, including SVOD and TVOD, pointing out that TV channels and VOD services often offer a mix of first Pay TV window, second Pay TV window and library content. In addition, the Notifying Party considers that substitutability also exists on the supply side, with some content right owners creating second Pay TV windows in response to the increased demand for exclusive windows created by the emergence of OTT providers thus blurring the distinction between the different exhibition windows.
- (39) In previous decisions<sup>29</sup> the Commission considered the existence of separate product markets for broadcasting rights for VOD, first Pay TV, second Pay TV and FTA exhibition windows, but ultimately left open the exact scope of the relevant product market.
- (40) A small majority of respondents to the market investigation consider that the market for licensing of content should be segmented by exhibition window (VOD, PPV, first Pay TV window, second Pay TV window, FTA TV).<sup>30</sup> Some TV channel suppliers and some content right owners consider that cost is the main driver in acquiring content and the windows structure reflects the different value attributed to the audio visual content in a given exhibition window. Each broadcasting right associated with a specific viewing window is negotiated separately. According to a small number of content right owners, this windowing structure allows the different rights in the exhibition chain to be exploited in the most profitable way.<sup>31</sup> Most providers of TV

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<sup>28</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 6 and 6.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 6 and 6.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 6 and 6.1.

<sup>29</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraphs 18 to 21; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - NewsCorp/BskyB, paragraph 60.

<sup>30</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 11 and 11.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 11 and 11.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 11 and 11.1.

<sup>31</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 13 and 13.1: a couple of content right owners note that this segmentation does not cover the entire exploitation chain of films: after theatrical release in the cinemas the next viewing window is in fact the so called Electronic Sell Trough (EST) or digital buying allowing the user to download a media file for a one-time fee, known

retail services who replied to the relevant question in the market investigation claim that the different exhibition windows are not substitutable and an increase in price of 5% to 10% cannot be addressed by switching to another exhibition window.<sup>32</sup>

- (41) Some providers of retail TV services, which consider that from a consumer's perspective the windows segmentation is increasingly blurred, state that it would be possible to replace first Pay TV window rights by second Pay TV window rights but only to a limited extent. Indeed, a Premium TV channel provider is expected to have at least some exclusive first Pay TV window rights in order to be perceived as a Premium Pay TV channel.<sup>33</sup>
- (42) Given the different conditions for the acquisition of rights for each exhibition window, and the limited instances in which a window can be replaced by another, there are indications that a different market for each exhibition window can be distinguished.
- (43) As regards VOD, the majority of content right owners and retail TV service providers, and around half of the TV channel suppliers consider that there is a clear distinction between SVOD and TVOD.<sup>34</sup> This is mostly due to the fact that both types of VOD services have different business models, different pricing conditions, and fall into separate and distinct viewing windows.<sup>35</sup> Those differences in business models and pricing conditions suggest that SVOD and TVOD could constitute two separate product markets.
- (44) In any event, since the transaction does not raise competition concerns under any possible market segmentation, the Commission considers that the question whether licensing and acquisition of broadcasting rights for each exhibition window, including for SVOD and for TVOD, belong to the same market or to separate markets can be left open.

*Films, Sport and Other content*

- (45) The Notifying Party submits that a single market exists for all individual content due to the high degree of supply-side substitutability. The Notifying Party argues that it is not always possible to make a strict distinction between the different content segments as TV products are highly differentiated and a given product could be aimed at various types of target audience.

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also as Download to Own (DTO) in parallel to release on DVD. The next release window is typically the transactional VOD or digital renting. However, since the Parties are not active in EST and DTO, these services will not be further addressed in this decision

<sup>32</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 11.1.

<sup>33</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 11.1.

<sup>34</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 12 and 12.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 12 and 12.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 12 and 12.1.

<sup>35</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 12 and 12.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 12 and 12.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 12 and 12.1.

- (46) In *HBO/Ziggo/HBO Nederland*<sup>36</sup> the Commission discussed the possible existence of separate markets for broadcasting rights for films, sport events, and other TV content but ultimately left the exact scope of the relevant product market open.
- (47) The majority of the respondents to the market investigation consider that films, sport events, and other type of content are distinct categories that are not interchangeable.<sup>37</sup> In particular, they consider that films and sport events have a different target audience. Moreover, licensing of broadcasting rights for sport events are usually concluded exclusively and for live broadcasts while film rights are negotiated on the basis of a window viewing system. This is because sport events, as a rule, generate their main audience via live broadcasts while films attract viewers during a much longer period of time. As a consequence, even in the event of a price increase of 5% to 10% in one type of content, the large majority of market respondents confirm they would not switch to another type of content. The absence of interchangeability between the various types of content, the different target audiences and the differences in licensing agreements that have been mentioned by the respondents to the market investigation suggest that the acquisition of rights for films could be distinguished from the acquisition of rights for sport events and from the acquisition of rights for other types of content.
- (48) In any event, since the transaction does not raise competition concerns under any possible market segmentation, the Commission considers that for the purposes of this decision, the exact scope of the relevant product market can be left open in this respect.

*Premium and non-premium content*

- (49) The majority of the respondents to the market investigation consider that there is a distinction between premium and non-premium content.<sup>38</sup> According to several of them, an important factor of differentiation between premium and non-premium content is the difference in price. Premium content is content that attracts additional viewers and that is, as a consequence, more expensive than non-premium content. Premium content is also offered to consumers as part of premium subscription packages or is accessible only for an additional fee.<sup>39</sup> However, as one market participant explained, from the supply-side, some right holders may negotiate packages where both premium and non-premium content is bundled.<sup>40</sup>
- (50) The majority of the respondents in favour of such a sub-division by type of content state that premium film content includes current film titles that are at an earlier stage in the window exploitation system. Older films that are no longer part of the window exploitation system, also referred to as "library" titles, are considered non-premium

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<sup>36</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraphs 20 and 21.

<sup>37</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 7 and 7.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 7 and 7.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 7 and 7.1.

<sup>38</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 8 and 8.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 8 and 8.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 8 and 8.1.

<sup>39</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 8 and 8.1.

<sup>40</sup> See replies to questionnaire Q2 to TV Channel wholesale suppliers of 14 March 2014, questions 8 and 8.1.

content. Other respondents have different definitions of "premium content". For instance, one respondent considers that films that have generated greater theatrical gross box office receipts during their first release windows, so called blockbusters, are regarded as premium content. According to a few market players, some TV series, produced by major Hollywood studios or by broadcasters, could also be considered to be premium content.

- (51) As regards sports events, several respondents state that premium sports content covers live events of popular sports such as Formula 1 races and football matches for the UEFA Champions League, European and World Football Championships.<sup>41</sup> A respondent notes that, in general, premium sport rights cannot be replaced with other non-premium sport content.
- (52) Most of the market participants share the view that premium content cannot be substituted with non-premium content in case of a permanent increase in price of by 5% to 10%.<sup>42</sup> Some of those respondents explain that premium content is an essential component in every TV offering and a factor of product differentiation. Others highlight that this is highly subjective and depends on the strategy of each broadcaster and on the importance attributed to premium content. Acquirers of content tend to purchase a wide range of different content based on a number of factors such as their available acquisition budget, their existing content portfolio, target audience and business model.
- (53) The Commission considers that the information gathered during the market investigation, and in particular the differences in price and ability to attract viewers, suggest the existence of a distinction between the acquisition of rights for premium content and the acquisition of rights for non-premium content. In any event, since the transaction does not raise competition concerns under any possible market segmentation, the Commission considers that for the purposes of this Decision, the question whether broadcasting rights for premium and for non-premium content constitute different markets can be left open.
- (54) Finally, as regards a differentiation between United States and non-United States film productions, the respondents to the market investigation had many differing views.<sup>43</sup> The Commission considers that it is unclear whether a differentiation between United States and non-United States films should indeed be made. However, this question can be left open, since the transaction does not raise competition concerns whether or not a differentiation is made between United States and non-United States film productions.

*Dutch-language film and TV series content*

- (55) The Commission has investigated whether a separate market for Dutch-language film and TV series content exists given the potential different market conditions for such

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<sup>41</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 8 and 8.1.

<sup>42</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 9 and 9.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 9 and 9.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 9 and 9.1.

<sup>43</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 10 and 10.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 10 and 10.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 10 and 10.1.



content and the fact that the pool of potential purchasers and target audience is more limited.

- (56) The majority of respondents to the second phase market investigation consider that there are some differences in the conditions for the licensing and acquisition of broadcasting rights for Dutch-language content as compared to other films and TV series.<sup>44</sup> Some respondents explain that pricing and availability of Dutch-language content are different; other respondents underline the specific characteristics of the production model for Dutch-language films and TV programs where production is very often financed by TV channel broadcasters who in return receive the FTA rights. On the other hand, most respondents consider that those differences are not large enough to justify the definition of a separate market for the acquisition of Dutch-language content.<sup>45</sup> Several market participants also share the view that Dutch-language content produced in the Netherlands in general does not perform well in Flanders and vice-versa.<sup>46</sup> A number of TV broadcasters and providers of retail TV services stress that it is important for them to include some Dutch-language content in their offerings in the Netherlands in order to be appealing for the local audience and to be able to differentiate themselves from competing services.<sup>47</sup>
- (57) Taking into consideration the results of the market investigation, the Commission considers that the differences in pricing, production model and terms of acquisition of broadcasting rights for Dutch-language content and other content do not seem to justify the delineation of a separate product market for Dutch-language content. In any event, even if a separate market for acquisition of Dutch-language content were to exist, the final commitments proposed by the Notifying Party would also address all possible concerns related to the acquisition of premium Dutch-language content.

#### *Further segmentation*

- (58) The large majority of respondents does not consider any alternative segmentation or sub-division of the market for the licensing and acquisition of broadcasting rights for individual audio visual content to be relevant.<sup>48</sup> Very few content owners mentioned additional rights in the film content value chain such as rights for hotels, airlines, boats, and hospitals. Only one provider of retail TV services retailer also states that a division of the market based on the language of the content, local language or foreign language, should be taken into account.
- (59) The Commission therefore considers that no further segmentation of the market for the licensing and acquisition of broadcasting rights will be considered in this decision.

#### 6.1.1.2. Geographic Market Definition

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<sup>44</sup> Replies to Request for information to content providers of 4 June 2014, question 5.

<sup>45</sup> Replies to Request for information to content providers of 4 June 2014, question 6.

<sup>46</sup> Replies to Request for information to content providers of 4 June 2014, questions 5, 10 and 11.

<sup>47</sup> Replies to Request for information to TV broadcasters of 28 May 2014, question 5; Replies to Request for information to providers of retail TV services of 28 May 2014, question 7.

<sup>48</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 13 and 13.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 13 and 13.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 13 and 13.1.

### *Notifying Party's view*

- (60) The Notifying Party does not take a position on the exact geographic delineation of the market for the licensing and 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.<sup>49</sup>

### *Commission's assessment*

- (61) The Commission has previously considered that the market for the licensing/acquisition of broadcasting rights for audio visual TV content is either national in scope or potentially comprises a broader linguistically homogeneous area.<sup>50</sup>
- (62) The ACM (NMa) concluded in its decision in *UPC-Canal+*<sup>51</sup> that, since licenses for exclusive rights to premium film content are limited to the Netherlands, the market is national in scope. In its later decisions in cases *Sanoma-SBS*<sup>52</sup> and *RTL NL-Radio 538*<sup>53</sup>, the ACM (NMa) stated that the geographic scope of the market for the licensing and acquisition of content is national in scope or relates to a linguistically homogeneous area. However, in each case, it ultimately left the question open, as the geographic market definition did not impact on the competitive assessment.
- (63) The vast majority of respondents to the market investigation considered that the geographic scope of the market for licensing and acquisition of broadcasting rights in general, but also broken down by film, sport and other content is national.<sup>54</sup>
- (64) As regards the geographic scope of a potential market for the licensing and acquisition of broadcasting rights for Dutch-language audio visual content, around half of the respondents to the second phase market investigation that replied to the relevant question consider that the geographic scope of such a market should cover the Netherlands only (excluding Dutch-speaking Flanders). Some respondents highlighted the fact that Dutch-language content produced in the Netherlands in general does not have the same commercial success in Flanders and vice versa. The other half of the respondents states that the geographic market should naturally comprise both the Netherlands and Flanders because of their linguistic homogeneity. That being said, the rights for the Netherlands and Flanders are still licensed and acquired separately and, as mentioned by one respondent, not all purchasers of broadcasting rights for Dutch-language content would even be interested in acquiring the rights for both the Netherlands and Flanders.<sup>55</sup> This latter point is indeed confirmed by the fact that the majority of respondents confirm that the scope of the

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<sup>49</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - *SFR/Télé 2 France*, paragraphs 48.  
<sup>50</sup> Commission's decision of 2 April 2003 in Case No COMP/M.2876 - *Newscorp/Telepiù*, paragraph 62; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - *News Corp/BSkyB*, paragraphs 73-75.

<sup>51</sup> ACM (NMa) decision of 28 June 2005 in case 4490/*UPC-Canal+*, paragraphs 42-43.

<sup>52</sup> ACM (NMa) decision of 22 July 2011 in case 7185/*Sanoma-SBS*, paragraphs 62-63.

<sup>53</sup> ACM (NMa) decision of 13 August 2007 in case 6126/*RTL NL-Radio 538*, paragraphs 39.

<sup>54</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, questions 14 and 14.1; replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 14 and 14.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 14 and 14.1.

<sup>55</sup> Replies to Request for Information to content providers of 4 June 2014, question 10; Replies to Request for information to TV broadcasters of 28 May 2014, question 4; Replies to Request for information to providers of retail TV services of 28 May 2014, question 6.

licensing contracts concluded for Dutch-language audio visual content encompass the Netherlands only.<sup>56</sup>

(65) [...] <sup>57</sup> [reference to supply agreements between the Parties and suppliers of audio-visual content] <sup>58</sup>

(66) Therefore, for the purposes of this Decision, the Commission considers that the markets for the licensing and acquisition of broadcasting rights are national in scope.

#### 6.1.1.3. Affected markets

(67) As regards the acquisition of content, the Notifying Party cannot rule out that the merged entity's market share would exceed 20% in the hypothetical market for the acquisition of film content and, in particular, the markets for the acquisition of first Pay TV window film content and TVOD film content. As such, those markets will be considered to be affected for the purposes of this Decision.<sup>59</sup>

#### 6.1.2. Wholesale supply and acquisition of TV channels

(68) TV channels suppliers 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, and mobile, 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 that market comprises TV channel suppliers. Its demand side comprises providers of retail TV services, which either limit themselves to "carrying" the TV channels and making them available to end users, or also act as channel aggregators, which also "package" TV channels.

(69) On the supply side, Liberty Global supplies Pay TV channels (Film1 and Sport1) and Ziggo, through its joint venture HBO Nederland, supplies HBO TV channels and related VOD services in the Netherlands.

(70) Both the Film1 channels and the HBO TV channels offer movies, series and documentaries. The movies and series are primarily in the "Pay TV window" or have not been broadcast in the FTA window before.<sup>60</sup> The content is acquired from international and Dutch studios as well as independent studios. The HBO TV channels also include original productions acquired from HBO itself. The content shown is also partly available on demand.<sup>61</sup>

(71) On the demand side, both Liberty Global and Ziggo negotiate channel carriage agreements as input for their retail TV offerings. Furthermore, Ziggo acquires TV channels from Liberty Global (initially through Liberty Global's Chellomedia division) to include them in the channel bouquets it offers in the Netherlands. Conversely, Liberty Global acquires the HBO channels from HBO Nederland.

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<sup>56</sup> Replies to Request for Information to content providers of 4 June 2014, question 11; Replies to Request for information to TV broadcasters of 28 May 2014, question 4.1; Replies to Request for information to providers of retail TV services of 28 May 2014, question 6.1.

<sup>57</sup> Form CO, annex 12.

<sup>58</sup> Form CO, annex 13.

<sup>59</sup> Neither Ziggo nor HBO NL acquire second Pay TV film content. Therefore, the proposed transaction does not lead to any overlap on that market. As regards VOD in general, the combined market share of the Parties would be below 20% and such a possible market would therefore not be affected.

<sup>60</sup> HBO channels also show content that has been broadcast before and is considered "library" content.

<sup>61</sup> Part of HBO's content is available through the operators' On Demand service or through HBO GO (available on PC/tablets/smartphones, etc.).

### 6.1.2.1. Product Market Definition

#### *Notifying Party's view*

- (72) The Notifying Party, on the basis of previous Commission decisions<sup>62</sup>, considers that there is a separate wholesale market for the supply and acquisition of TV channels. Although according to several Commission decisions, two separate product markets for FTA channels and for Pay TV channels are identified within this market<sup>63</sup>, the Notifying Party claims that, within the Netherlands, this distinction appears to be increasingly blurred and a more appropriate distinction can be made between Basic Pay TV channels which include FTA channels and ordinary commercial channels available in standard bundles and Premium Pay TV channels. The latter market can be split into two broad segments, namely Premium Pay TV sports channels and Premium Pay TV film channels. The Premium Pay TV sports channels segment covers channels carrying high-value sports' rights and includes only Sport1 and Fox Sports<sup>64</sup>. The Premium Pay TV films and entertainment segment includes channels carrying high-value blockbuster films or series. In the Netherlands, only Film1 and HBO Nederland are active in that segment.
- (73) The Notifying Party's view is that a strict distinction between general interest and thematic Pay TV channels cannot be made as a wide range of highly differentiated channels is available: although certain channels may not be always substitutable, depending on the content offered by the channel and viewers' preferences, there are also channels in both segments that overlap in target audience and type of content.
- (74) As regards a possible segmentation according to distribution infrastructure, the Notifying Party claims that distribution via satellite or Direct to Home (DTH) exerts a similar competitive constraint on the Parties as other distribution infrastructures such as Internet Protocol TV ("IPTV"), fibre and vDSL (very high bit-rate Digital Subscriber Line) in line with previous decisions of the Commission.<sup>65</sup>

#### *Previous Commission decisions, results of the market investigation and Commission's assessment*

- (75) In its previous decisions, the Commission identified two separate product markets within the wholesale market for the supply and acquisition of TV channels: one for

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<sup>62</sup> Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraphs 76 and 85; Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 22.

<sup>63</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 37-40; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraphs 80, 83 and 85; Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 24; Commission's decision of 15 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, paragraph 37.

<sup>64</sup> Pan-European sports thematic TV channels Eurosport SD & HD and Eurosport 2 SD & HD are distributed on various Pay TV platforms in the Netherlands. However those channels are predominantly carried in the Basic Pay TV tier and except for the Bundesliga rights for Eurosport 2 for the seasons 2012/13 to 2014/15 Eurosport does not currently acquire any other specific sport rights for the Netherlands (see Eurosport's reply to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 1, 14.1 and 50.1).

<sup>65</sup> Commission's decision of 21 December in Case No COMP/M.5932 - NewsCorp/BskyB, paragraphs 103-105, Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraph 44 and Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraphs 37 and 38.

FTA channels and another for Pay TV channels.<sup>66</sup> Within the market for the wholesale supply and acquisition of Pay TV channels, the Commission has in several cases also indicated that a differentiation should be made between "Basic" and "Premium" Pay TV channels. However, it has been left open whether those two categories of Pay TV channels constitute separate product markets.<sup>67</sup> In its previous decisions, the Commission has 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.).<sup>68</sup> Finally, the Commission has not further distinguished between the different means of infrastructure used for the delivery to the viewer that is to say cable, satellite, DVB-T and IPTV).<sup>69</sup>

- (76) As regards the Dutch market in particular, in *HBO/Ziggo/HBO Nederland*, the Commission stated that respondents to the market investigation explained that, in the Netherlands, "real" FTA TV channels no longer exist in practice with the exception of the three channels of the public broadcaster.<sup>70</sup> This reflects the fact that, in order to be able to watch any other TV channels, end users have to purchase a Basic Pay TV subscription. As a result, a market segmentation between Basic Pay TV and Premium Pay TV channels would more appropriately reflect the current Dutch market situation than the traditional segmentation between FTA TV and Pay TV channels. The exact definition of the product market was, however, ultimately left open.
- (77) The ACM (OPTA), concluded in its previous decisions that the relevant product market includes both Pay TV and FTA TV channels.<sup>71</sup> The ACM (NMa) distinguished between Pay and FTA TV in two early decisions<sup>72</sup> and left the matter open in *Cinven/Warburg Pincus/Essent Kabelcom*<sup>73</sup>, in which it considered FTA TV channels to be provided through standard packages and Pay TV channels through additional packages in the Netherlands.

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<sup>66</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 37-40; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraphs 80, 83 and 85; Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 24; Commission's decision of 15 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, paragraph 37.

<sup>67</sup> Commission's decision of 2 April 2003 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraph 76; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraph 85; Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraphs 24 and 27.

<sup>68</sup> Commission's decision of 2 April 2003 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraph 76; Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 41-42; Commission's decision of 26 August 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 35; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraph 81.

<sup>69</sup> Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraphs 41-44.

<sup>70</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 24.

<sup>71</sup> ACM (OPTA) decision in case OPTA/AM/2009/200371 – market analysis decision broadcasting markets dated 5 March 2009, paragraphs 288 - 296 and ACM (OPTA) assessment in case OPTA/AM/2011/202885 – market analysis assessment TV markets dated 20 December 2011, paragraphs 118 - 129.

<sup>72</sup> ACM (NMa) decision of 4 July 2001 in case 2425 / UPC – PrimaCom, paragraphs 101-103, and ACM (NMa) decision of 28 June 2005 in case 4490 / UPC - Canal+, paragraph 22.

<sup>73</sup> ACM (NMa) decision of 8 December 2006 in case 5796 / Cinven – Warburg Pincus – Essent Kabelcom, paragraph 40 and 42.

*FTA TV channels and Pay TV channels*

- (78) The large majority of respondents to the market investigation share the opinion that FTA TV and Pay TV channels belong to two separate segments of the TV market.<sup>74</sup> Although some TV channel suppliers explain that, from the demand-side, FTA TV and Pay TV channels might be perceived as substitutable, most respondents consider them as not being interchangeable. FTA TV and Pay TV have different financing models (FTA TV channels being financed mainly by advertising revenues whereas Pay TV channels rely on subscriber fees and only to some extent on advertising revenues) and have different pricing. A small number of respondents explain that, given the very limited number of available FTA TV channels in the Netherlands, a segmentation between Basic Pay TV and Premium Pay TV would reflect more accurately the current market conditions in the country.
- (79) The majority of respondents consider that retail TV services providers would not substitute a Pay TV channel with a FTA TV channel in case of a 5% to 10% permanent increase in price.<sup>75</sup> In addition, most respondents state that there are some Pay TV channels that are not substitutable with any other FTA channel, such as sports channels and, for a few respondents, Film1 and HBO.<sup>76</sup>
- (80) In light of the limited significance of FTA TV in the Netherlands as mentioned in recital (76) (essentially, the Dutch TV market is a Pay TV market), the assessment of the proposed transaction would remain the same whether FTA TV channels and Pay TV channels are regarded as belonging to the same product market or to two separate markets. Therefore, for the purposes of this decision the exact market definition can be left open.

*Basic Pay TV channels and Premium Pay TV channels*

- (81) The majority of the respondents to the market investigation consider that Basic Pay TV channels and Premium Pay TV channels are not substitutable even in case of a 5-10% price increase in Premium Pay TV channels.<sup>77</sup> This is in particular the case in respect of specific Premium Pay TV channels such as Film1, HBO, Sport1 and Fox Sports.<sup>78</sup>
- (82) Among the reasons for differentiating between Premium and Basic Pay TV channels, respondents list the following: (i) the difference in channel offering in terms of content - Premium Pay TV channels in general feature premium films and sport events with fewer interruptions for advertising, (ii) the difference in pricing conditions because Basic Pay TV channels are typically included in broader Pay TV

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<sup>74</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 16 and 16.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 16 and 16.1.

<sup>75</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 16.2 and 16.2.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 16.2 and 16.2.1.

<sup>76</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 17 and 17.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 17 and 17.1.

<sup>77</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 18.2 and 18.2.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 18.2 and 18.2.1.

<sup>78</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 19 and 19.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 19 and 19.1.

packages, while Premium Pay TV channels are offered under a dedicated additional subscription, (iii) the difference in the size of the audience attracted - Premium Pay TV channels generally have a smaller audience given the additional cost.

- (83) In light of the differences in content offering, pricing conditions and size of the audience attracted between Basic and Premium Pay TV channels, and for the purposes of this Decision, the Commission considers that Basic Pay TV channels and Premium Pay TV channels belong to separate product markets with the latter being possibly further segmented as explained in recitals (84) to (86).

*Premium Pay TV film channels and Premium Pay TV sports channels*

- (84) Half of the respondents to the market investigation consider that Premium Pay TV film channels are not substitutable with other type of premium or thematic Pay TV channels.<sup>79</sup> Several respondents clarify that Premium Film channels are not substitutable from a consumer's perspective as they offer exclusive premium film content that is not available on competing channels or services. Premium film channels have a specific profile, window viewing rights and target audience. Moreover, in general consumers purchase a separate subscription to a specific Premium Pay TV film channel which makes it impossible for that film channel to be substituted with some other film or sport channel without the consent of the consumer.<sup>80</sup>
- (85) More than half of the respondents to the market investigation state that in case of a 5% to 10% increase in the price of a Premium Pay TV film channel, retail TV providers would not substitute that channel with another type of premium channel. Respondents explain that Premium film channels are unique and there are no available alternatives on the market for Premium Pay TV film channels. Most respondents that consider substitution possible explain that a premium film channel would be substitutable only with another premium channel that has a comparable quality offering.<sup>81</sup> In addition most respondents identify Film1 and HBO as the only TV channels competing in the Premium Pay TV film segment in the Netherlands.<sup>82</sup> Furthermore, many respondents point to the fact that Film1 and HBO are must have channels which clearly suggests that respondents consider those TV channels not to be substitutable with other channels.
- (86) In any event, for the purposes of this Decision, the Commission considers that the questions whether the market for Premium Pay TV channels can be further segmented into areas of interest can be left open as the assessment of the proposed transaction would remain the same.

*General Interest Pay TV channels and Thematic Pay TV channels*

- (87) The Commission has also investigated whether, concurrently to the segmentations mentioned in recitals (45) to (48), the market for the wholesale supply and

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<sup>79</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 23 and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 23.

<sup>80</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 23.

<sup>81</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 24 and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 24.

<sup>82</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 25 and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 25.

acquisition of Pay TV channels could be further segmented between general interest and thematic channels regardless of whether those are considered to be premium or basic.

- (88) The replies to the market investigation suggest that general interest Pay TV channels are not generally substitutable with thematic Pay TV channels in particular with for example sports channels or films channels.<sup>83</sup> Moreover, thematic Pay TV channels would only be substitutable with other thematic channels in the same area of interest, for example sports channels with other sports channels.<sup>84</sup> Finally, the large majority of respondents consider that some specific thematic pay TV channels are not substitutable with any other channel, for example some sport and film channels.<sup>85</sup>
- (89) In any event, for the purposes of this Decision, the Commission considers the question whether all general interest Pay TV channels and all thematic Pay TV channels belong to separate product markets can be left open as the assessment of the proposed transaction would remain the same.

#### *Distribution Infrastructure*

- (90) Almost half of the respondents to the market investigation consider that, for the wholesale supply of TV channels, the different distribution infrastructures (such as cable, satellite, digital terrestrial, and IPTV over DSL) are to some extent interchangeable.<sup>86</sup> A minority of respondents consider that different infrastructures are not substitutable because the quality of the signal varies between the different infrastructures, not all infrastructures allow interactivity and provision of additional services, the geographic penetration of those infrastructures is not the same, or TV channels offering differs. However, others point to the fact that all infrastructures are in general available to the consumers, who have the ability to switch between them, and the majority of respondents acknowledge that cable is substitutable with other distribution infrastructures namely, IPTV over DSL and fiber.<sup>87</sup>
- (91) In light of the interchangeability of the different infrastructures, and considering the Commission precedents on this issue, the Commission considers for the purposes of this decision that at least cable, IPTV over DSL, fiber and possibly Satellite (DTH) belong to the same product market.

#### 6.1.2.2. Geographic Market Definition

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<sup>83</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 20 and 21; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 20 and 21.

<sup>84</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 22; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 22.

<sup>85</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 22.3; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 22.3.

<sup>86</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 15 and 15.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 15 and 15.1.

<sup>87</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 15.2 and 15.2.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 15.2 and 15.2.1.



### *Notifying Party's view*

- (92) The Notifying Party submits that the geographic market in the present case is national in scope.

### *Commission's assessment*

- (93) In a number of previous decisions, the Commission considered that the market for the wholesale supply and acquisition of TV channels was national in scope, or at most covering a single linguistically homogeneous area.<sup>88</sup> The exact geographic scope of the market was however ultimately left open.
- (94) With regard to the Netherlands, the Commission previously found that the differences in regulatory requirements, characteristics of demand, cultural barriers and viewers' share were such that the Dutch and Flemish wholesale markets for the provision of TV channels were geographically distinct.<sup>89</sup>
- (95) The ACM (NMa) distinguished a regional market for the wholesale TV supply based on each cable operator's footprint within the Netherlands in *Cinven/Warburg Pincus/Essent Kabelcom* whilst noting that it would take into account competitive pressure on a national scale.<sup>90</sup>
- (96) In this market investigation, suppliers of TV channels most frequently considered that the overall market for the wholesale supply and acquisition of Pay TV channels, and also the markets for the wholesale supply and acquisition of Premium Pay TV film channels, Premium Pay TV sports channels and other Pay TV channels, are national in scope. Similarly, most of the providers of retail TV services explained that contracts for the wholesale of Pay TV channels tend to be national in scope.<sup>91</sup>
- (97) [...] <sup>92</sup> [Reference to supply agreements between the Parties and suppliers of audio-visual content]\*.
- (98) Therefore, for the purposes of this Decision, the Commission considers that the markets for the wholesale supply and acquisition of TV channels are national in scope.

#### 6.1.2.3. Affected markets

- (99) As regards the supply side of the market for the wholesale supply of Pay TV channels, the Notifying Party considers the combined market share of the Parties to be below 20%. It would not, therefore, constitute an affected market.

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<sup>88</sup> Commission's decision of 2 June 2006 in Case No COMP/M.4217 - Providence/Carlyle/UPC Sweden, paragraph 19; Commission's decision of 6 September 2006 in Case No COMP/M.4338 - Cinven/Warburg Pincus/Casema/Multikabel, paragraph 31; Commission's decision of 26 February 2007 in Case No COMP/M.4521 - Liberty Global/Telenet, paragraph 35; Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraph 48 (French mainland); Commission's decision of 21 December 2010 in Case No COMP/M.5932 - News Corp/BSkyB, paragraph 88 and Commission's decision of 25 January 2010 in Case No COMP/M.5734 - Liberty Global Europe/Unitymedia, paragraph 30 (regional or national in Germany).

<sup>89</sup> Commission's decision of 20 September 1995 in Case No COMP/M.553 - RTL/Veronica/Endemol, paragraph 26.

<sup>90</sup> ACM (NMa) decision of 8 December 2006 in case 5796 / *Cinven – Warburg Pincus – Essent Kabelcom*, paragraph 51.

<sup>91</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 26; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 26.

<sup>92</sup> Form CO, annex 34.

- (100) As regards the supply of Premium Pay TV film channels, the Notifying Party considers that in the Netherlands, Film1 and HBO Nederland are the only players that offer channels in the Premium Pay TV films and entertainment segment. As such, the combined market share following the transaction would be 100%.<sup>93</sup> It is therefore an affected market.
- (101) The segment encompassing the supply of Premium Pay TV sports channels does not constitute an affected market, as Ziggo is not active therein.
- (102) As regards the demand side of the market for the wholesale supply of TV channels, according to the Parties' estimates based on the total spend by Dutch retail TV services providers for the acquisition of Pay TV channels, the combined market share of the Parties will be above 50% irrespective of the exact product market definition.<sup>94</sup> As a consequence, the market for the wholesale supply and acquisition of Pay TV channels in the Netherlands is horizontally affected.

#### 6.1.3. Retail provision of TV services

- (103) In the market for the retail provision of TV services, the suppliers of linear and non-linear (mainly VOD) TV services serve end customers who wish to purchase such services. Both Liberty Global and Ziggo offer retail TV services in the Netherlands to end consumers.

##### 6.1.3.1. Product market definition

#### ***Notifying Party's view***

- (104) The Notifying Party claims that the retail market for FTA TV services does not exist in the Netherlands as there is only one subscription-free TV offer in the Netherlands, that is to say a digital terrestrial TV (DTT) offer with three channels from the public service broadcaster, which has a very limited number of users. Instead, the Notifying Party considers it appropriate to distinguish between the retail provision of Basic Pay TV channels and Premium Pay TV channels. As regards linear Pay TV services and non-linear services, the Notifying Party's view is that those should be considered to belong to the same product market given the competitive constraints which VOD services exercise on linear Pay TV services. As regards a possible distinction between the different distribution technologies for the provision of retail TV services, the Notifying Party recalls the different Commission and ACM, (OPTA and NMa) precedents where no distinction between distribution technologies was made.

#### ***Commission's assessment***

- (105) In its previous decisions the Commission has considered the retail provision of FTA TV and Pay TV services as separate markets but ultimately left open the product market definition.<sup>95</sup> In *NewsCorp/BSkyB*<sup>96</sup>, the Commission also considered that linear and non-linear TV services belong to separate product markets, while leaving the exact

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<sup>93</sup> Form CO, paragraph 285.

<sup>94</sup> Form CO, Annex 33: combined market share for 2012 in the acquisition of TV channels for is [50-60]\*%, in the acquisition of FTA TV channels is [50-60]\*%, in the acquisition of Pay TV channels is [50-60]\*%, in the acquisition of basic Pay TV channels is [50-60]\*%, in the acquisition of Premium Pay TV channels is [50-60]\*% and in the acquisition of Premium Film Pay TV channels is [70-80]\*%.

<sup>95</sup> Commission's decision of 25 June 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraphs 15 and 21.

<sup>96</sup> Commission's decision of 21 December 2010 in Case No COMP/M.5932 - NewsCorp/BSkyB, paragraphs 106-107.

product market definition open in a number of other decisions.<sup>97</sup> Finally, the Commission has also considered whether different distribution technologies for the provision of retail TV services, that is to say (i) analogue terrestrial TV and digital terrestrial TV (DTT), (ii) satellite TV (DTH), (iii) cable, (iv) IPTV, (v) Internet and (vi) 3G/4G mobile technologies, constitute separate product markets, but has ultimately come to no conclusion on this point.<sup>98</sup>

- (106) The ACM (NMa) has also considered a distinction between FTA TV services and Pay TV services in previous cases<sup>99</sup>, leaving the exact product market definition open in *Cinven/Warburg Pincus/Essent Kabelcom*.<sup>100</sup> In its most recent analysis of the Dutch TV market, the ACM (OPTA) concluded that the relevant market comprised both FTA TV services and Pay TV services.<sup>101</sup>

*FTA TV services and Pay TV services*

- (107) Almost half of the respondents to the market investigation consider that there is a clear distinction between FTA TV and Pay TV retail services.<sup>102</sup> In particular, several respondents explain that FTA TV and Pay TV have different business models and pricing as well as different window patterns. However, a number of TV channel suppliers state that due to the limited presence of FTA TV in the Netherlands there is no meaningful distinction between FTA TV and Pay TV services.<sup>103</sup>

- (108) Therefore, and given the fact that the assessment of the proposed transaction would remain the same whether FTA TV services and Pay TV services are considered to belong to the same product market or to two separate markets, the market definition can be left open.

*Linear Pay TV services and Non-linear Pay TV services*

- (109) The majority of the respondents to the market investigation consider that there is a distinction between linear Pay TV services and non-linear Pay TV services.<sup>104</sup> Several respondents explain that linear Pay TV services and non-linear Pay TV services have a different content offering, different exhibition windows and different pricing. Furthermore, the majority of TV channel suppliers and providers of retail TV services consider that from the demand-side, the different types of retail content distribution services such as linear Pay TV and non-linear VOD are not necessarily substitutable

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<sup>97</sup> Commission's decision of 25 June 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 21.

<sup>98</sup> Commission's decision of 25 June 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 22; Commission's decision of 18 July 2007 in Case No COMP/M.4504 - SFR/Télé 2 France, paragraph 46.

<sup>99</sup> ACM (NMa) decision of 4 July 2001 in case 2425 / UPC – PrimaCom, paragraphs 101-103 and ACM (NMa) decision of 28 June 2005 in case 4490 / UPC - Canal+, paragraph 22.

<sup>100</sup> ACM (NMa) decision of 8 December 2006 in case 5796 / Cinven – Warburg Pincus – Essent Kabelcom, paragraphs 39-42.

<sup>101</sup> ACM (OPTA) market analysis assessment TV markets dated 20 December 2011, paragraphs 118-129.

<sup>102</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 27 and 27.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 27 and 27.1.

<sup>103</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 27 and 27.1.

<sup>104</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 28 and 28.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 28 and 28.1.

with one another.<sup>105</sup> As one respondent explains, OTT services are currently primarily focused on non-linear subscription services in the Netherlands, whereas linear OTT is still relatively small.<sup>106</sup> Traditional Pay TV services and services provided OTT are, however, moving towards converging and it is becoming increasingly difficult to distinguish between the two.

- (110) In any event, for the purpose of the assessment of the proposed transaction, the exact scope of the relevant market for Pay TV services can be left open in this regard, as the proposed transaction does not raise competition concerns on the market for the retail provision of Pay TV services under any alternative product market definition considered.

#### *Distribution technologies*

- (111) Half of the respondents to the market investigation consider the different distribution technologies, such as cable, IPTV, fiber-to-the-home ("FttH"), satellite, to be substitutable at least to a certain extent.<sup>107</sup> Some respondents explain that from the end customer's perspective, the different transmission technologies are regarded as substitutable. As pointed out by one respondent, consumers can switch between the different infrastructures as long as the necessary TV services are available on them. Another explains that providers of retail TV services to end customers generally consider TV packages offered via vDSL, FttH and cable as being substitutable between each other.<sup>108</sup> However, several respondents also state that from a technical perspective the distribution infrastructures have different characteristics that is to say the quality of the signal, bandwidth and interactivity.
- (112) The majority of the respondents did not provide a clear answer as to whether a significant proportion of viewers would switch from Pay TV subscription via cable to Pay TV subscription via an alternative distribution technology such as DTH satellite or IPTV in case of a 5% to 10% price increase.<sup>109</sup>
- (113) Taking into account the responses to the market investigation, and in particular considering the demand-side substitutability between retail Pay TV services provided through the different distribution technologies such as cable, DSL, FttH and possibly DTH satellite, the Commission considers that the provision of retail Pay TV services through those different distribution technologies belong to the same product market.

#### 6.1.3.2. Geographic market definition

##### ***Notifying Party's view***

- (114) The Notifying Party does not take a view on the exact geographic scope of the market for the retail provision of TV services.

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<sup>105</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 29 and 29.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 29 and 29.1.

<sup>106</sup> VIMN's reply to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 28.1.

<sup>107</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 30 and 30.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 30 and 30.1.

<sup>108</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 30.1.

<sup>109</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 31 and 31.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 31 and 31.1.

### *Commission's assessment*

- (115) The Commission has in the past considered that the geographic scope of the market for the retail provision of TV services is national since providers of retail TV services compete on a nationwide basis.<sup>110</sup>
- (116) In recent merger decisions, the ACM (NMa) assessed whether the markets for the retail provision of TV services are regional, corresponding to the footprint of the relevant TV services provider.<sup>111</sup> In *KPN-Concepts ICT-Edutel-XMS-KickXL*<sup>112</sup>, the ACM (NMa) considered that there were indications that the geographic scope of the market for the retail provision of TV services and the retail fixed telephony and Internet access markets was regional, and limited to the area of coverage of the relevant infrastructure, but that there were also indications that the geographic market could be broader. In particular, the ACM (NMa) referred to the possibility of a common pricing constraint exercised by national market participants which were unlikely to follow a profitable regionally differentiated pricing policy. This common pricing constraint could trigger a chain of substitution effects, through which price changes initiated by a regional market participant in a specific region could trigger price changes in the pricing policy of national market participants, which in turn could trigger price changes by regional market participants in another region. Ultimately, the ACM (NMa) left the definition of the geographic market open.
- (117) All respondents to the Commission's market investigation consider that the geographic scope of the market for the retail provision of TV services is national.<sup>113</sup> Only one respondent considers that since consumers can only access services that are available in their area and even if some retail TV service providers have national coverage, cable is limited to the region covered by the footprint of the cable operator and hence for cable operators, the geographic market should be limited to the relevant cable operator's footprint.<sup>114</sup>
- (118) Therefore, and considering that following the proposed transaction the merged entity would have almost national coverage, for the purposes of this Decision, the Commission considers that the relevant market is national in scope.

### **6.2. Fixed telephony and Internet services**

- (119) The Parties provide fixed telephony and fixed Internet services in the Netherlands. In particular, they provide the following services:

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<sup>110</sup> Commission's decision of 25 June 2008 in Case No COMP/M.5121 - News Corp/Premiere, paragraph 24; Commission's decision of 25 January 2010 in Case No COMP/M.5734 - Liberty Global Europe/Unitymedia, paragraphs 40 and 43; Commission's decision of 21 December 2010 in Case No COMP/M.5932 - NewsCorp/BSkyB, paragraph 109; Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 42; Commission's decision of 15 April 2013 in Case No COMP/M.6880 - Liberty Global/Virgin Media, paragraph 54.

<sup>111</sup> ACM (NMa) decision of 5 August 2011 in Case 7204/KPN-CAIW, paragraphs 76-80; and ACM (NMa) decision of 19 December 2008 in Case 6397/KPN-Reggefiber, paragraph 84.

<sup>112</sup> ACM/NMa decision of 16 October 2012 in case 7326/KPN – Concepts ICT – Edutel – XMS – KickXL, paragraph 66 - 67.

<sup>113</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 32 and 32.1; and replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 32 and 32.1.

<sup>114</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, questions 32 and 32.1.

- call termination on fixed networks at wholesale level<sup>115</sup>;
- fixed telephony/voice at retail level;
- fixed Internet access at retail level<sup>116</sup>;
- wholesale Internet connectivity<sup>117</sup>;
- carrier services at wholesale level<sup>118</sup>; and
- Business communication services.<sup>119</sup>

#### 6.2.1. Retail provision of fixed telephony/voice services

(120) In the downstream market for the retail provision of fixed telephony and voice services, operators provide fixed voice services to end customers. Both Parties are active on this market offering fixed voice services bundled together with fixed broadband Internet access and TV.

##### 6.2.1.1. Product market definition

(121) The Notifying Party submits that a product market exists for the retail provision of fixed telephony services, but that the definition of its exact scope and in particular whether it should be further segmented can be left open, as it would not significantly affect the competition assessment.

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<sup>115</sup> Although both Parties provide wholesale call termination on fixed networks, given that the Commission has traditionally considered each network to constitute a product market of its own and there are no developments in the market which suggest that a different approach should now be taken, the proposed transaction would not change the current situation. Each Party already had pre-merger a monopoly position towards fixed wholesale call termination on their own networks and post-merger, the merged entity will have a monopoly towards the combined network. For that reason, wholesale call termination on fixed networks will not be discussed further in this Decision.

<sup>116</sup> Neither party currently provides wholesale broadband access to third parties. The market for wholesale broadband access is therefore not discussed in this Decision. Furthermore, UPC provides Internet hosting services but Ziggo does not. As a consequence, this market will not be discussed further in this Decision. For the market definition, see Commission's decision of 16 January 2002 in Case No COMP/M.2648 - KPNQWEST/EBONE/GTS, paragraphs 19 and 20; Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 201.

<sup>117</sup> In previous decisions (Commission's decision of 7 October 2005 in Case No COMP/M.3752 - Verizon/MCI, paragraph 24), the Commission distinguished between (a) top-level (or universal) Internet connectivity, that is to say 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. In this case, Ziggo does not provide wholesale Internet connectivity services in that it does not support other Internet Access Providers or Content Application providers with routing traffic to third parties via its own network. As a result, there is no overlap between the activities of the Parties on that market. That market will therefore not be further discussed in this Decision.

<sup>118</sup> The supply of carrier services by Liberty Global and Ziggo relates to the provision of fixed capacity links on their telephony networks. The Parties estimate their combined market share on the global market for carrier services to be below [5-10]\*%. There are no vertical links between the market for carrier services and the market for call termination on fixed or on mobile networks or with any other market on which Liberty Global and Ziggo are active. As a consequence, there is no affected market and those services will not be discussed further in this Decision.

<sup>119</sup> The Notifying Party estimates the Parties combined market share on a national market for business connectivity services in the Netherlands would be [10-20]\*%. As a consequence, there is no affected market and those services will not be discussed further in this decision. For market definition, see Commission's decision of 3 July 2012 in Case No COMP/M.6584 - Vodafone/Cable&Wireless, paragraphs 8-10.

- (122) The Commission has previously defined a separate relevant product market for the retail provision of fixed telephony services. Within that market the Commission considered further possible sub-segmentations between managed VoIP and fixed line telephony services; residential and non-residential customers, and local and international calls, but left the product market definition open.<sup>120</sup>
- (123) In *Carphone Warehouse/Tiscali UK*, the results of 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 but the Commission ultimately left the exact product market definition open.<sup>121</sup> In *Vodafone/Kabel Deutschland*, the Commission concluded that traditional telephony and VoIP services are part of the same market for the retail provision of fixed voice services.<sup>122</sup>
- (124) The majority of respondents to the Commission's market investigation consider that fixed voice services through fixed telephony lines and VoIP services are interchangeable and no distinction between residential and non-residential customers at retail level should be made.<sup>123</sup> Furthermore, all respondents consider that a potential distinction between local and national calls on one hand and international calls on the other does not exist.<sup>124</sup>
- (125) In any event, the Commission considers that for the purposes of this Decision, the exact scope of the product market definition, and specifically, whether fixed line and VoIP telephony services belong to the same product market, and whether there is a separate market for residential and non-residential customers, can be left open as the proposed transaction does not raise competitive concerns under any alternative product market definition considered.

#### 6.2.1.2. Geographic market definition

- (126) The Notifying Party does not take any view on the geographic scope of the market. In its previous decisions, the Commission concluded that the market for the retail provision of fixed telephony services was national in scope.<sup>125</sup> This was confirmed in the present case by all respondents to the market investigation.<sup>126</sup>
- (127) Therefore, the Commission considers that the relevant market for the retail provision of fixed telephony services is national in scope.

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<sup>120</sup> Commission's decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 35 et seq.; Commission's decision of 29 January 2010 in Case No COMP/M.5730 - Telefonica/Hansenet Telekommunikation, paragraphs 16 and 17; Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 131.

<sup>121</sup> Commission's decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 38 and 39.

<sup>122</sup> Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 131.

<sup>123</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 33 and 34.

<sup>124</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 35.

<sup>125</sup> Commission decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraph 47. See also Commission decision of 7 September 2005 in Case No COMP/M.3914 - Tele2/Versatel, paragraph 18, Commission decision of 7 December 2012 in Case No COMP/M.4442 - Carphone Warehouse Group plc/AOL UK, paragraph 19; Commission decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 133.

<sup>126</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 36.

## 6.2.2. Retail supply of fixed Internet access services

(128) As regards the retail provision of fixed Internet access services, retail operators provide fixed Internet services to end customers. The Parties provide retail broadband Internet access services in the Netherlands, respectively within their own footprints over their own cable networks.

### 6.2.2.1. Product market definition

(129) The Notifying Party considers that both Parties' activities should be qualified as provision of broadband Internet access<sup>127</sup>, so that the Parties are not active on the market for narrowband products and that the nature of access services requested by large corporate customers is materially different from the services provided to residential and small businesses. The Notifying Party also claims that mobile broadband Internet accessible at retail level via 4G technology in the Netherlands exercises at least to a certain extent competitive constraint on fixed Internet access services.

(130) In previous decisions, the Commission considered, but ultimately left open, a number of subdivisions of the market for the retail provision of fixed Internet access services according to product type, distinguishing narrowband, broadband and dedicated access, and distribution mode, distinguishing xDSL, fiber, cable and mobile broadband. The Commission also considered that mobile broadband is more expensive and slower, so that it may constitute a separate market, but ultimately left the question open.<sup>128</sup> Finally, the Commission distinguished between residential and small business customers on one hand and large business customers<sup>129</sup> on the other based on their different need for Internet services, and considered those two categories of customers to belong to distinct product markets

(131) A large majority of the respondents to the present market investigation consider that segmentation based on the different infrastructures, that is to say DSL, cable and fibre, is not appropriate.<sup>130</sup> Similarly, a large majority of respondents consider that mobile broadband and fixed broadband do not belong to the same product market.<sup>131</sup> Finally, a majority of respondents consider that residential and small businesses on the one hand, and large corporate businesses on the other, belong to separate product markets given the different needs of those customer groups.<sup>132</sup>

(132) In light of the large majority of responses indicating that the distinction between the different infrastructures, that is to say DSL, cable and fibre, is not appropriate, the Commission considers that there is no reason to divide the relevant market according to those different infrastructures. However, the Commission considers that the responses regarding mobile and fixed broadband, justify the distinction between the market for mobile Internet and the market for fixed broadband Internet. As regards the question

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<sup>127</sup> The entry level internet service currently offered by UPC is an always-on connection with a downstream speed of 10 Mbps. The corresponding service for Ziggo is an always-on connection with a downstream speed of 20 Mbps.

<sup>128</sup> Commission's decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraph 20.

<sup>129</sup> Commission's decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraphs 26 et seq.

<sup>130</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 37.

<sup>131</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 38.

<sup>132</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 39.



whether fixed broadband Internet access services to residential and small business customers on one hand and large business customers on the other should be considered to belong to separate markets, this can be left open for the purposes of this Decision given that the proposed transaction does not raise competition concerns whether those customer groups are considered together or separately.

#### 6.2.2.2. Geographic market definition

- (133) The Notifying Party does not take a view on the geographic scope of the relevant market. In previous decisions, the Commission considered the relevant market to be national in scope.<sup>133</sup> In its most recent market analysis decisions, the ACM (OPTA) has considered the market for the retail provision of Internet access to be national in scope<sup>134</sup>, though in certain instances it has assessed concentrations on the basis of narrower regional markets.<sup>135</sup>
- (134) The majority of respondents to the present market investigation consider that the geographic scope of the relevant market is national.<sup>136</sup>
- (135) Therefore, and for the purposes of this Decision, the Commission considers that the relevant market is national in scope.

### 6.3. Mobile Services

- (136) The Parties provide mobile telephony in the Netherlands and in particular the following services:
- provision of mobile telecommunication services at retail level to end-customers
  - call termination on mobile networks at wholesale level<sup>137</sup>

#### 6.3.1. Retail supply of mobile telecommunication services to end customers

- (137) Mobile telecommunication services to end customers, or "retail mobile services", encompass services for national and international<sup>138</sup> voice calls, SMS (including

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<sup>133</sup> Commission's decision of 27 November 2007 in Case No COMP/M.4947 - Vodafone/Tele2 Italy/Tele2 Spain, paragraph 16; Commission's decision of 29 June 2009 in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK, paragraph 47; Commission's decision of 29 January 2010 in Case No COMP/M.5730 - Telefonica/Hansenet, paragraph 28; Commission's decision of 25 January 2010 in Case No COMP/M.5734 - Liberty Global Europe/Unitymedia, paragraph 42; and Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 197.

<sup>134</sup> ACM (OPTA) decision OPTA/AM/2012/203110, Market analysis ODF-access FttO, 28 December 2012, paragraph 1012; ACM (OPTA) decision OPTA/AM/2012/203111, Market analysis high quality wholesale broadband access, 28 December 2012, paragraph 1073, ACM (OPTA) decision OPTA/AM/2012/201220, Market analysis low quality wholesale broadband access, 27 April 2012, paragraph 728.

<sup>135</sup> ACM (NMa) decision of 5 August 2011 in Case 7204/KPN-CAIW, paragraphs 81-83. ACM (NMa) decision of 16 October 2012 in case 7326/KPN-Concepts ICT-Edutel-XMS-KickXL, paragraphs 51-67.

<sup>136</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 40.

<sup>137</sup> At present both Parties are active on that market only as MVNOs. In Case No COMP/M.6990 - Vodafone/Kabel Deutschland, the Commission considered that MVNOs are not active on the market for call termination on mobile networks. Within several months Liberty Global will launch mobile services on a full MVNO basis. Nevertheless the same reasoning as for call termination on fixed telephony networks applies here: each mobile network constitutes a product market of its own and each Party already had pre-merger a monopoly position towards mobile wholesale call termination on their own networks. Post-merger, the merger entity will have a monopoly towards the combined network. For that reason, wholesale call termination on mobile networks will not be discussed further in this Decision.

MMS and other messages), mobile Internet with data services, access to content via the mobile network and retail international roaming services.<sup>139</sup>

- (138) Those services are provided on 2G<sup>140</sup>/GSM<sup>141</sup>, 3G/UMTS<sup>142</sup> and 4G/LTE<sup>143</sup> networks with the 2G network historically having better coverage and the 3G network being better adapted for larger amounts of data and faster download speeds. 4G/LTE has only recently been launched and 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.
- (139) The mobile activities of both Parties are mainly provided as MVNO. Both Parties offer their mobile telephony services in the Netherlands [...]\*. The Parties also own licences for 40 MHz of spectrum in the 2.6 GHz range, via the joint venture ZUM B.V ("ZUM"). The commercial activities of ZUM relate to the offering of mobile data services in accordance with the licence conditions of the 2.6GHz spectrum band. However, the network has a small coverage (80 km<sup>2</sup> or 0.2 % of the total land surface of the Netherlands, this area is to be expanded to 800 km<sup>2</sup> as of 11 May 2015)[...] and the services are not actively marketed by the joint venture or its shareholders, that is to say UPC and Ziggo. Furthermore, the Notifying Party explains that UPC will launch mobile services on a full MVNO basis in the coming months.<sup>144</sup>

#### 6.3.1.1. Product market definition

- (140) The Notifying Party does not take a view on the exact product market definition.
- (141) In its previous decisions, the Commission assessed the concentrations on the basis of a single market for mobile telecommunication services without segmenting according to the type of customers, services or network technology.<sup>145</sup> In particular, the Commission did not define separate markets for pre-paid and post-paid customers in light of supply-side substitution.<sup>146</sup> For the purpose of this Decision, the Commission considers that the exact definition of the product market can be left open as the proposed transaction does not raise competition concerns, regardless of the precise product market definition retained.

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<sup>138</sup> In this context, "international calls" designate calls that are made by a domestic user when in his/her home country, but which terminate at destinations which are abroad, where the receiving number is a foreign one.

<sup>139</sup> See Commission's decision of 24 September 2004 in Case No COMP/M.3530 - TeliaSonera AB/Orange A/S paragraph 13; Commission's decision of 26 April 2006 in Case No COMP/M.3916 - T-Mobile Austria/Tele ring paragraphs 11 et seq., and Commission's decision of 1 March 2010 in Case No COMP/M.5650 - T-Mobile/Orange, paragraphs 21 et seq.

<sup>140</sup> 2G stands for "Second generation of mobile telecommunication technology".

<sup>141</sup> GSM stands for "Global System for Mobile Communications".

<sup>142</sup> UMTS stands for "Universal Mobile Telecommunications System".

<sup>143</sup> LTE stands for "Long Term Evolution".

<sup>144</sup> Document ID 751, RFI to Parties on mobile plans of 21st March 2014, question 2.

<sup>145</sup> See Commission's decision of 16 September 2003 in Case No COMP/M.3245 - Vodafone/Singlepoint, paragraph 8 et seq. (for the United Kingdom market); Commission's decision of 26 April 2006 in Case No COMP/M.3916 - T-Mobile Austria/Tele ring, paragraph 11 et seq. (for the Austrian market); Commission's decision of 1 March 2010 in Case No COMP/M.5650 - T-Mobile/Orange, paragraph 21 et seq. (for the United Kingdom market); Commission's decision of 12 December 2012 in Case No COMP/M. 6497 - Hutchinson 3G Austria/Orange Austria, paragraph 58 (for the Austrian market); Commission's decision of 20 December 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 216.

<sup>146</sup> See Commission's decision of 12 December 2012 in Case No COMP/M. 6497 - Hutchinson 3G Austria/Orange Austria, paragraph 41.

### 6.3.1.2. Geographic market definition

- (142) The Notifying Party does not take a view on the exact geographic market definition.
- (143) The Commission has consistently found that the markets for the retail mobile services provided to end consumers are national in scope.<sup>147</sup> Nothing in the course of the investigation in this case justifies a deviation from previous findings. Therefore, the Commission considers that the mobile telecommunication services market(s) is national.

## 6.4. Multiple play

### 6.4.1. Product market definition

- (144) "Multiple play" offerings comprise a bundle of usually three or more of the following retail services to end customers: fixed telephony services, mobile services, fixed 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 those services.
- (145) In the Notifying Party's view, multiple play does not constitute a separate market.
- (146) In previous decisions, the Commission ultimately left open whether there exists a market for multiple play services that is separate from the markets for each of the components of the package.<sup>148</sup>
- (147) Most respondents to the market investigation consider that multiple play services should not be considered as a separate market from each unbundled offer.<sup>149</sup> As one respondent explained, multiple play services are currently being constrained by unbundled offers. One respondent however considered that there is actually only one market, which is the market for multiple play services given the predominance of bundled offers in the Netherlands.
- (148) In this context, the Commission notes that both UPC and Ziggo only offer non-TV related services together with TV services. As such, the Parties' activities in non-TV related markets are influenced by their activities in multiple play bundles. Based on the results of the market investigation, the Commission also considers that TV services, along with Internet services, are key drivers for multiple play services and there is therefore a strong link between the strength of a market participant's TV offering (as well as its Internet offering) and its success in the provision of multiple play services. Finally, the Commission notes that the Netherlands in particular has a high penetration

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<sup>147</sup> See Commission's decision of 16 September 2003 in Case No COMP/M.3245 - Vodafone/Singlepoint, paragraphs 16 et seq.; Commission's decision of 20 August 2007 in Case No COMP/M.4748 - T-Mobile/Orange Netherlands, paragraph 16; Commission's decision of 1 March 2010 in Case No COMP/M.5650 - T-Mobile/Orange, paragraph 26; Commission's decision of 20 December 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraph 218.

<sup>148</sup> Commission's decision of 25 January 2010 in Case No COMP/M.5734 - Liberty Global Europe/Unitymedia, paragraphs 43-48; Commission's decision of 16 June 2011 in Case No COMP/M.5900 - LGI/KBW, paragraphs 183-186; Commission's decision of 20 September 2013 in Case No COMP/M.6990 - Vodafone/Kabel Deutschland, paragraphs 261 (all three for the German market). Commission's decision of 3 July 2012 in Case No COMP/M.6584 - Vodafone/Cable&Wireless, paragraphs 102-104 (for the United Kingdom). 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*".

<sup>149</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 47.

rate of multiple play customers with around 50% of the market being served through triple play subscriptions.

- (149) In any event, for the purposes of this Decision, the Commission considers that the exact product market definition can be left open since the proposed transaction does not raise competition concerns regardless of whether multiple play services are considered a separate market or included in the markets for unbundled offers.

#### 6.4.2. *Geographic market definition*

- (150) The Notifying Party does not take view as to the definition of the geographic market for multiple play offers.
- (151) Previously, the Commission considered that a possible market for triple play services would be national in scope due to regulatory barriers. However, ultimately, the exact geographic market definition was left open.<sup>150</sup>
- (152) Respondents to this market investigation mostly consider that the hypothetical market for multiple play services would be national in scope.<sup>151</sup>
- (153) Therefore, for the purpose of this Decision, the Commission considers that the geographic scope of the possible market for multiple play offers is national.

### 7. **COMPETITIVE ASSESSMENT**

- (154) During the second phase investigation, the Commission investigated in-depth a number of serious doubts that were identified in the Article 6(1)(c) decision as to the compatibility of the proposed transaction with the internal market.
- (155) Following the in-depth investigation, the Commission concludes that it no longer has concerns as to the compatibility of the proposed transaction with the internal market, in respect of (i) the possible market for the supply and acquisition of Dutch-language audio visual content; and (ii) the possible coordinated and non-coordinated effects on the retail markets for the supply of TV, Internet, fixed telephony, and multiple play services. The proposed transaction accordingly does not lead to a significant impediment to effective competition in any of those markets.
- (156) However, the Commission considers that the in-depth investigation has confirmed that the proposed transaction is unlikely to be compatible with the internal market in that it is likely to significantly impede effective competition in respect of (i) the possible market for the wholesale supply and acquisition of Premium Pay TV film channels, and; (ii) the market for the supply and acquisition of Pay TV channels, including negative effects on competition in the downstream market for the retail provision of Pay TV services. Absent commitments, the proposed transaction is likely to lead to a significant impediment to effective competition in the Netherlands in those markets.

#### 7.1. **Market for the licensing/acquisition of broadcasting rights for TV content**

- (157) There is a horizontal overlap between the activities of Liberty Global and Ziggo on the acquisition side of the market for licensing and acquisition of broadcasting rights for individual audio visual TV content in the Netherlands. Both Liberty Global and Ziggo acquire individual TV content for inclusion in their respective Dutch linear

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<sup>150</sup> Commission's decision of 16 June 2011 in Case No COMP/M.5900 - LGI/KBW, paragraphs 187-189.

<sup>151</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 48.

Pay TV channels (Film1, Sport1 and HBO) and those channels' related non-linear VOD services. Both Liberty Global and Ziggo also purchase non-linear individual TV content for the VOD services offered on their respective retail TV platforms (that is to say as part of the UPC and Ziggo Basic Pay TV subscriptions) in the Netherlands.

- (158) As indicated in recital (26), Ziggo has currently only very limited activities in the production of individual content and the content produced by Ziggo is used only captively by it. Whereas Liberty Global does not produce any individual TV content that is distributed in the Netherlands, that is likely to change shortly given that Liberty Global is in the process of acquiring content (see recital (26)).

*7.1.1. The Notifying Party's view*

- (159) The Notifying Party submits that the overall market for the acquisition of all individual audio visual TV content would not be affected as Liberty Global's and Ziggo's combined acquisition expenditure for individual TV content in 2013 would amount to a combined market share of [5-10]\*% if the geographic market is limited to the Netherlands.
- (160) The Notifying Party has been unable to collect reliable estimates for the sizes of the various possible separate relevant product markets involving TV content that were previously identified by the Commission. However, on the possible market for the acquisition of non-linear audio visual TV content only, Liberty Global's and Ziggo's combined expenditure for VOD content rights in 2013 would give them a combined market share of around [20-30]\*%<sup>152</sup> in the Netherlands. If this product market were to be segmented further between non-linear SVOD and non-linear TVOD services the Notifying Party submits that the merged entity's market share might exceed 20% on the segments of non-linear TVOD services. It has, however, been unable to provide market shares for the merged entity on the segment of non-linear SVOD services, although both Parties offer such services.
- (161) Within the possible market segments for the acquisition of first Pay TV window and second Pay TV window film TV content, the merged entity would be buying content for the only two premium film channels in the Netherlands (HBO and Film1), giving it in 2012 a combined market share of [90-100]\*%<sup>153</sup> in both segments (for first Pay TV window - Film1: [50-60]\*%, HBO Nederland: [50-60]\*% and for second Pay TV window - Film1: [90-100]\*%).<sup>154</sup>
- (162) According to the Notifying Party, the most important suppliers of premium audio visual content (both for films and series), which is the main input for the first and second Pay TV windows as well as for TVOD, are major producers of movies and TV series operating on a global scale. It submits that the merged entity would not have increased buyer power vis-à-vis those suppliers. The broadcasting rights for first and second Pay TV windows are usually negotiated on an exclusive basis and, in

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<sup>152</sup> This market share excludes Film1's and HBO Nederland's spend on VOD-rights. However, the Notifying Party indicates that their VOD-rights are included in the relevant first and second window Pay TV licenses. Arguably, these specific VOD-rights are not therefore part of the market for the acquisition of VOD-rights.

<sup>153</sup> If the relevant product market were limited to individual viewing windows, the merged entity's market share would similarly amount to [90-100]\*%, both for first-window films/series content as well as for second-window films/series content, based on 2012 figures).

<sup>154</sup> The Notifying Party notes that Netflix recently acquired a first window Pay TV license from Disney and a second window Pay TV license from Sony: Form CO, Annex 31.

addition to the Notifying Parties, there are a number of OTT VOD services providers<sup>155</sup> in the Netherlands that compete for the purchase of broadcasting rights for those two windows as well as for TVOD.

- (163) The Notifying Party also submits that TVOD services often provide access to both films and TV series on a non-exclusive basis prior to the first and second Pay TV exhibition windows thus facilitating the access of consumers to films and TV series and reducing the importance of first Pay TV window.
- (164) According to the Notifying Party, first Pay TV window broadcasting rights are supplied on an exclusive basis to only one TV provider at a time for a given geographic region and quite often those rights include exclusivity over SVOD rights in order to allow retailers of Pay TV services to extract the maximum value from the content during the limited first Pay TV window. [...]\*
- (165) Finally, the Notifying Party states that content right owners have a significant freedom in the negotiation of the level of exclusivity of their broadcasting rights for the different windows with different buyers, which further makes the distinction between them unclear.

#### 7.1.2. *Commission's assessment*

- (166) As a result of the proposed transaction, the Notifying Party's share of expenditure on the acquisition of individual audio visual content would increase. Based on the figures provided by the Notifying Party, and given that the Parties essentially only buy individual content for Film1, Sport1, HBO Nederland and their VOD services, the increase post-transaction would be very limited in the overall market for the acquisition of individual content. The proposed transaction would, however, result in a more significant increase of the Parties' market share in a number of possible narrower segments: (i) first Pay TV window; (ii) non-linear broadcasting rights (VOD) and in particular (iii) TVOD.
- (167) This could lead to two potential negative effects on competition:
- (i) the merged entity may have an incentive to buy less audio visual content in order to obtain lower prices, which ultimately may result in consumer harm in the form of less choice and diversity;
  - (ii) the merged entity may demand stricter conditions for example over more content in order to limit the availability of premium content for its rivals in the downstream markets for the wholesale supply and acquisition of Pay TV channels and the retail provision of Pay TV services.
- (168) The majority of the TV services retailers who replied to the Commission's market investigation consider that the proposed transaction will affect their bargaining position vis-à-vis providers of individual audio visual content as the merged entity will be able to negotiate more favourable price conditions from content owners, who will seek to recoup any decrease in revenue by increasing the price they offer to the other players on the market. Some retailers also state that film studios might have an increased incentive to deal exclusively with the merged entity through which a substantial portion of potential viewers can be reached and hence less incentive to deal with smaller players.<sup>156</sup>

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<sup>155</sup> Such as Netflix, RTL's Videoland and Pathé, Form CO paragraphs 400, 405, 406 and table 17.

<sup>156</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 51.

- (169) On the other hand, the majority of content owners who replied to the Commission's market investigation do not consider that the merged entity will have an incentive to acquire less content post-merger. Some respondents state that due to the fact that the number of potential buyers for VOD rights will decrease by one the prices and revenue derived from licensing of those broadcasting rights might indeed decrease.<sup>157</sup> However, such a potential decrease in the price may not be necessarily harmful given that it may also represent a cost reduction, which if ultimately passed on to consumers, could have an overall beneficial effect.
- (170) Furthermore, the Commission notes that most of the licensors of premium content, that being the only content using first and second Pay TV windows, are large Hollywood film studios whose negotiating position vis-à-vis the merged entity is unlikely to deteriorate as a result of the proposed transaction. Both the Premium Pay TV film channels operated by the Parties and their respective VOD offerings to a large extent rely on their broad variety of high quality content to appeal to consumers. Both first Pay TV and second Pay TV exhibition windows are licensed on an exclusive basis with the corresponding SVOD rights negotiated alongside and to date, the only two linear TV channels in the Netherlands acquiring those exclusive windows are Film1 and HBO. Broadcasting rights for TVOD distribution on the other hand are usually licensed non-exclusively and content rights owners confirm there are a number of other purchasers on the Dutch market for TVOD rights such as OTT and VOD services providers such as Videoland, RTL XI, Pathé Thuis, Netflix.<sup>158</sup>
- (171) As regards Dutch-language TV content, although the Commission considers that there are not sufficient grounds to define a separate market for Dutch-language content, it is clear that Dutch-language content is particularly important for TV channels and retailers of Pay TV services in the Netherlands. Both TV retailers and broadcasters consider that Dutch language films and series are very important for TV services retailers and especially for local OTT VOD providers operating in the Netherlands. For such providers, competing with international OTT services like Netflix, the ability to offer Dutch-language content to the local audience is an important advantage in terms of product differentiation.<sup>159</sup> A number of respondents, on the other hand, note that although Dutch content is undoubtedly important, United States Hollywood film content is considered even more important.<sup>160</sup>
- (172) Local distributors of films and TV series license and exploit broadcasting rights for both Dutch and non-Dutch content. The majority of titles distributed are international titles produced by both Hollywood studios and independents. According to estimates of the Notifying Party, the combined Liberty Global/Ziggo entity's share on the possible markets for acquisition of broadcasting rights for Dutch content in the Netherlands for 2013 would be between [20-30]\*% and [20-30]\*% for VOD, between 5% and 15% for SVOD and around [30-40]\*% for TVOD.
- (173) Similar to its position on the possible markets for the acquisition of first Pay TV window rights for individual audio visual content overall, the merged entity would

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<sup>157</sup> Replies to questionnaire Q1 to content providers of 14 March 2014, question 22.

<sup>158</sup> Replies to Request for Information to content providers of 4 June 2014, question 12.

<sup>159</sup> Replies to Q4 Questionnaire to Broadcasters of 27 May 2014, question 5 and replies to Request for Information to Retailers of 28 May 2014, question 7,

<sup>160</sup> Reply of CanalDigitaal (M7 Group S.A.) to Request for Information to Retailers of 28 May 2014, question 7 and reply of KPN to Q3 Questionnaire to retailers of TV, telephony and Internet access services of 5 March 2014, question 10.

have a combined market share of 100% for first Pay TV window rights for Dutch-language content via its premium film channels Film1 and HBO, which are the only Pay TV channels in the Netherlands acquiring first Pay TV broadcasting rights. Local content producers and right owners confirm that second Pay TV rights are in general not exploited for Dutch-language content.<sup>161</sup>

- (174) The Commission does not, however, need to conclude whether the proposed transaction would be likely to significantly impede effective competition were the relevant market to be defined as a market for the acquisition of Dutch-language content. This is true given that in any event the commitments proposed by the Notifying Party to remedy the effects of the merger on the Dutch market for supply and acquisition of Premium Pay TV film channels also eliminate any increment that the proposed transaction would bring to the possible markets for acquisition of individual audio visual content for first and second Pay TV windows, whether for international or Dutch-language individual audio visual content.
- (175) As regards VOD, the Commission considers that the merged entity is unlikely to purchase less VOD content as, in order for its own VOD service to be attractive to viewers, a large number of high-quality titles, both local and international, have to be offered. In addition, for the acquisition of such VOD broadcasting rights Liberty Global negotiates with large Hollywood film studios, towards which its buyer power is unlikely to increase as a result of the proposed transaction. There are also a significant number of alternative VOD services in the Netherlands competing with Liberty Global for the acquisition of both Dutch and international content.
- (176) Under a possible narrower market segmentation of VOD broadcasting rights into TVOD and SVOD windows, the Commission notes that TVOD deals are in general concluded on a non-exclusive basis. As the consumer pays a separate fee for each transaction the revenue which the content right owner receives from licensing the TVOD rights for a given content depends on the number of transactions made by consumers. Content rights owners therefore tend to make content that is available in the transactional viewing window available non-exclusively to any retailer in order to reach the widest audience and to increase the number of potential transactions and there is no reason to consider that this is likely to change post-transaction.
- (177) SVOD rights on the other hand can be negotiated both exclusively and non-exclusively. Licensing contracts for first Pay TV window rights commonly include exclusivity over the SVOD rights for the same content. In this case, [...] <sup>162</sup> [...] <sup>\*</sup> and the proposed transaction will not change this situation.
- (178) As a result, the Commission considers that the proposed transaction does not lead to a significant impediment to effective competition on the possible markets for acquisition of VOD, be it SVOD or TVOD, broadcasting rights in the Netherlands.
- (179) Furthermore, the commitments proposed by the Notifying Party to address the competition concerns identified on the market for supply of Premium Pay TV film channels in the Netherlands would in any event also remove any increment added by the proposed transaction to the possible market for acquisition of SVOD rights as Liberty Global will no longer acquire any exclusive SVOD rights associated with first Pay TV broadcasting rights for the Film1 channel.

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<sup>161</sup> Replies to Request for Information to content providers of 4 June 2014, question 4.  
<sup>162</sup> Form CO, paragraphs 416 and 417.



## 7.2. Market for the supply and acquisition of Premium Pay TV channels (supply side)

### 7.2.1. The Notifying Party's view

- (180) **Non-coordinated effects.** The Notifying Party acknowledges that if a separate product market for the supply and acquisition of Premium Pay TV film channels were to exist, the proposed transaction would combine the only two TV channels in this category in the Netherlands, namely Film1 and HBO Nederland. However, it also considers that both Premium Pay TV film channels represent complementary, rather than competing entertainment offers, mainly because the two TV channels have different focus (Film1 essentially focuses on providing a range of films, whereas HBO's focus is more on hit TV series).
- (181) Furthermore, the Notifying Party considers that the Premium Pay TV film channels are competitively constrained by the growing number of SVOD and TVOD offerings, including Internet-based OTT services, that are available in the Dutch market, such as RTL's Videoland and Netflix, which was launched in the Netherlands in September 2013. In addition, the availability of wholesale offers for non-linear content would render it relatively easy for providers of retail TV services to introduce or continue to expand their own VOD offerings, thus increasing the competitive constraint exerted on Film1 and HBO Nederland.
- (182) The Notifying Party also notes that Film1 and HBO Nederland constitute 'nascent' services, having a relatively low penetration rate with Dutch households. Accordingly, the potential to generate additional profits by increasing subscriber numbers for those two TV channels would be much more relevant than engaging in a pricing strategy that would reduce subscriber numbers.
- (183) In that regard, the Notifying Party submits that there is a large degree of price sensitivity for Premium Pay TV channels, which would mean that price increases for those TV channels would be likely to result in subscriber losses, something that would be undesirable for the merged entity. In respect of that claim, the Notifying Party notes that a precise estimate of the effect any price increase would have is not possible given the limited data available.
- (184) In addition, the Notifying Party considers that the proposed transaction would not in any way influence that situation, suggesting that HBO Nederland has at most a limited effect on Film1 subscribers. The Notifying Party therefore contends that if post-merger, it could simultaneously raise both Film1 and HBO Nederland prices, the resulting decline in the Film1 and HBO Nederland subscriber base would not be less significant than the decline that would currently result from an individual price increases for Film1.
- (185) In conclusion, the Notifying Party does not consider that the proposed transaction would give rise to either the ability or the incentive to increase the prices of either Film1 or HBO Nederland, which the Notifying Party claims would be unlikely due to the expected continuation of the HBO joint venture.
- (186) **Foreclosure effects.** As regards ability to foreclose, the Notifying Party considers that an ability to foreclose occurs only if the upstream input controlled by the merged entity is an important input for the downstream competitor. Furthermore, it is necessary that the merged entity's share of the upstream market is sufficient to give it a significant degree of market power.
- (187) The Notifying Party submits that in the cases of Film1 and Sport1, neither of those conditions will be met. Regardless of the exact market definition, the Notifying Party

submits that Film1 and Sport1 are neither TV channels with significant market power, nor ‘important’ must-have TV channels.

- (188) Moreover, in the case of HBO Nederland, the merged entity will not enjoy unilateral control, but will only have joint control of the company and, as such, will be unable to restrict the supply to its downstream rivals. [...] \* Ziggo is not in a position to unilaterally decide to no longer distribute the HBO Nederland channels to retail TV service providers that compete with Ziggo and UPC (such as for instance KPN), [...] \*.
- (189) As regards incentives to foreclose, the Notifying Party submits that even if it were able to foreclose KPN with respect to Film1, Sport1 or HBO Nederland, this would be both commercially unattractive and inconsistent with those channels’ business strategies of enhancing overall viewership and market penetration.
- (190) First, as regards HBO Nederland, the Notifying Party highlights that even if a foreclosure strategy were theoretically attractive to the merged entity, this would likely result in losses for Time Warner/HBO, which would gain nothing from any subscribers who switch to the UPC/Ziggo network as a result.<sup>163</sup> The Notifying Party therefore considers that any possible foreclosure strategy for HBO Nederland is likely to be vetoed by Time Warner/HBO and can thus be disregarded.
- (191) As regards Sport1, the Notifying Party notes that it is currently just breaking even in the face of competition from Fox Sports’ superior content offer and that as a result it would have every incentive to be distributed to as many platforms as possible and sold to as many subscribers as possible.
- (192) As regards Film1, the Notifying Party recalls that it is a ‘nascent’ service, having been launched in 2006 and been offered on the KPN platform for the first time in October 2013, and despite carrying a substantial proportion of first window Pay TV movie content, it is not a must-have channel for any retail operator.
- (193) Second, as regards a hypothetical complete foreclosure scenario, in which the merged entity would refuse to supply its remaining Premium Pay TV channel to retail competitors, the Notifying Party first notes that the market and incentives structure in this case are not substantially different from the existing, pre-merger situation. The Parties could already choose to foreclose just those retail competitors that overlap with their footprint and not other retail competitors that are unable to address the Parties’ geographic region. The only effect of the merger is therefore to gain the retail margin earned on subscribers diverting from the foreclosed competitors onto the other merged party’s footprint.
- (194) At the Commission's request, the Notifying Party performed a margin analysis for a merged entity strategy of complete foreclosure of Film 1 and/or HBO Nederland from rival platforms operating within the UPC/Ziggo footprint, for example KPN, Canal Digitaal, Tele2, under the hypothetical situation that the merged entity would fully control HBO Nederland. In its analysis, the Notifying Party compares the wholesale margin that is foregone by foreclosing those TV channels, with the expected retail earnings gained from subscribers that would switch to UPC/Ziggo because Film 1 and/or HBO Nederland has become unavailable to them. According to the calculation of the Notifying Party, the critical level of switching that is

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<sup>163</sup> The Notifying Party notes that in theory the JV partner could gain from a sufficiently large price effect. However, given the [...] \* of the JVs interests, the price effect would need to be so large as to make this highly unlikely.

required for such a foreclosure to be profitable is too high<sup>164</sup>, and therefore, it is unlikely that this could be a commercially attractive option for the merged entity. Furthermore, the Notifying Party points out that the margin analysis does not reflect the degree of substitution of viewers between platforms, and that as a result, the analysis leaves unclear what the magnitude of the effect of such foreclosure strategy may have, and what anti-competitive effect it could have on the foreclosed rivals, if any.<sup>165</sup> Furthermore, given those numbers, the Notifying Party submits that it would be unlikely that the Parties would have the incentive to engage in an input foreclosure strategy of Film1 only, especially as HBO Nederland would still be available as an alternative to Film1 on other platforms, even if at a higher price. The Notifying Party submits that it is unlikely that there would be such a significant number of subscribers switching to the merged entity's platform in case of foreclosure. It also adds that unless the margin analysis they have performed captures the degree of substitution of viewers between platforms in case such foreclosure takes place, the model is uninformative about the economic incentive of the merged entity to engage in a foreclosure strategy of Film1.

- (195) Third, as regards a scenario of 'partial' foreclosure, in which the merged entity continues to offer the retained Premium Pay TV channel to competitors but on worse terms, the Notifying Party submits that competing TV platform operators have the option to continue offering the other Premium Pay TV channel, which has *prima facie* no clear corresponding incentive to raise price. Given the close substitutability of those channels (as purported by the Commission), as well as the presence of the premium OTT SVOD alternative, the Notifying Party submits that there is no expectation that any such partial foreclosure strategy would be either harmful to consumers or beneficial to the merged entity.
- (196) As regards the overall competitive effect on competition, the Notifying Party contends that even if it were the case that the merged entity foreclosed for example KPN with respect to Film1 and/or Sport1, no anti-competitive effect could reasonably be envisaged. The Notifying Party does not regard Film1 and Sport1 channels as having must-have content whose absence could prevent an operator from competing effectively. Moreover, it would be highly unlikely under any scenario that the merged entity would have the incentive to raise the price of either the Film1 or Sport1 service post-transaction. The business strategy for those nascent services is to further enhance their subscriber bases. Irrespective of any foreclosure strategy, an increase in price can only be expected to reduce demand in the long run, which would be inconsistent with the long-term interests of the business.
- (197) As a result, the Notifying Party submits that the transaction, as originally notified, does not raise a significant impediment to effective competition as the result of vertical foreclosure concerns relating to the wholesale supply of Premium Pay TV film channels.

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<sup>164</sup> According to the Notifying Party's calculations, by way of example, if Film 1 was foreclosed from KPN, between [...] of affected KPN subscribers - depending on whether they take a premium triple play package or a basic Pay TV package - would need to switch to the merged entity for this strategy to be profitable. This would represent between [...] customers in absolute numbers.

<sup>165</sup> In particular, the Notifying Party argues that "*all the analysis shows is that the transaction might change the outside option of the merging parties in negotiations over Film 1 or HBO. In this sense the transaction could theoretically increase the bargaining power of the merged entity when selling these offerings of premium content to other retail TV operators. However, the analysis leaves entirely unclear what the magnitude of such an effect might be, or what (anti-)competitive effect it could have (e.g. through prices paid by consumers)*".

## 7.2.2. Commission's assessment

### 7.2.2.1. Non-coordinated effects - Horizontal concerns

- (198) The Commission investigated whether the proposed transaction, as originally notified, would result in a significant impediment to effective competition due to the fact that it would combine Liberty Global's and Ziggo's activities in the market for the wholesale supply and acquisition of Premium Pay TV channels, and, in particular, in the possible market for the wholesale supply and acquisition of Premium Pay TV film channels.
- (199) In sum, the Commission concludes, taking into account the results of its market investigation, that the fact that post-merger, Liberty Global would own the only two linear Premium Pay TV film channels in the Netherlands would give it scope to increase the wholesale price of those channels for retail TV operators.
- (200) The Commission considers that even on the broader market for the wholesale supply and acquisition of Premium Pay TV channels (comprising Film 1, HBO Nederland, Sport1 and Fox Sports), Liberty Global would still own the only two, and thereby closest, Premium film channels, which would give it scope to increase those channels' wholesale prices towards retail TV operators.
- (201) As a result, the Commission concludes that the proposed transaction, as originally notified, is likely to lead to a significant impediment to effective competition regardless of whether one considers the possible market for the wholesale supply and acquisition of Premium Pay TV film channels or a broader market for the wholesale supply and acquisition of Premium Pay TV channels. The basis for those conclusions is further explained in recitals (202) to (212).
- (202) First, the Commission notes that in the possible market for the wholesale supply and acquisition of Premium Pay TV film channels, the proposed transaction would combine the only two linear Premium Pay TV film channels (Film1 and HBO Nederland) in the Netherlands. Both of those channels are currently supplied to virtually all retail providers of Pay TV services in the Netherlands (except for Vodafone which currently does not offer Film1, and CAIW Holding B.V. ("CaiW") which does not offer HBO Nederland).<sup>166</sup> The Notifying Party itself considers that the merged entity would have a 100% share of such a market.<sup>167</sup>
- (203) Post-merger, retail providers of Pay TV services would have no possibility of switching supplier for those services in that market, making them particularly vulnerable to price increases. Hence a loss of direct competition between Film1 and HBO Nederland would likely result in higher wholesale prices (or more stringent conditions)<sup>168</sup> for the retail providers of Pay TV services which would, in turn, likely result in higher subscription fees for subscribers of Premium Pay TV services in the Netherlands.
- (204) The Commission notes that, post-merger Time Warner/HBO will retain joint control over HBO Nederland. The Commission has previously found that Time Warner/HBO has the ability and incentive to block HBO Nederland from engaging in any input foreclosure strategy.<sup>169</sup> However, the Commission also found that the

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<sup>166</sup> Form CO, paragraph 511 and Table 28.

<sup>167</sup> Form CO, paragraph 285.

<sup>168</sup> [...] Form CO, paragraph 428.

<sup>169</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 65.

principal reason for Time Warner/HBO not having an incentive to engage in any input foreclosure strategy in relation to HBO Nederland's Pay TV channels was the inability to sustain an increased high retail price without losing subscribers to, for example, Film1's Pay TV channels.<sup>170</sup> In that case, the Commission's assessment did not, however, need to consider a horizontal theory of harm combining Film1 and HBO Nederland in one company, meaning that it did not have to assess Time Warner/HBO's incentive to profitably raise prices to wholesale customers, as a result of the loss of competition at wholesale level.

- (205) In this case, the Commission considers that even if HBO Nederland's prices stayed stable, Liberty Global would have an incentive to raise the post-merger wholesale price of Film1, given that any lost subscribers would be likely to move to HBO Nederland and Liberty Global would be in a position to capture [...] of the additional revenues gained by HBO Nederland. Moreover, HBO Nederland would also have an interest in following the wholesale price increase of Film1 to take advantage of the demand switch.
- (206) Accordingly, the fact that Time Warner/HBO retains joint control over HBO Nederland does not prevent a finding of horizontal non-coordinated effects arising as a result of the proposed transaction, as originally notified, on the market for the wholesale supply of Premium Pay TV film channels.
- (207) As regards the Notifying Party's claim that Film1 and HBO Nederland constitute complementary, rather than competing entertainment products, it is first of all important to note that: (i) in *HBO/Ziggo/HBO Nederland*, the Commission found that Film1's Premium Pay TV channels compete with HBO Nederland's Premium Pay TV channels<sup>171</sup>; (ii) information provided by the Notifying Party shows that Film1 and HBO both offer TV series and films<sup>172</sup>; (iii) several of the Parties' internal documents clearly support the existence of competitive pressure being exerted between HBO and Film1<sup>173</sup>; (iv) the Notifying Party furthermore considered that [reference to internal business document of the Notifying Party]\*, which seemingly also necessitated the conclusion of a distribution deal for Film1 with KPN [reference to internal business document of the Parties]\*.<sup>174</sup> [...] <sup>175</sup>; (v) information provided by the Notifying Party shows that KPN, the only other major provider of retail TV services in the Netherlands, obtained distribution rights for Film1 only *after* the entry into the market of HBO Nederland, on 1 October 2013<sup>176</sup>; and (vi) data provided by the Notifying Party shows that at least a number of end customers of Film1 and HBO on Liberty Global's and Ziggo's distribution infrastructures switch between both services.<sup>177</sup>

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<sup>170</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 65.

<sup>171</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 65.

<sup>172</sup> Form CO, annexes 26 ('HBO programme listings Feb 2014'), 27 ('Film1 listings Feb 2014') and 28 ('Film1 series 2013').

<sup>173</sup> [Reference to the Parties' internal business documents]\*.

<sup>174</sup> Document ID330-805, Chellomedia presentation of 30 May 2012, 'Film1 NL Proposal', p. 2 and 7.

<sup>175</sup> Document ID330-1637, Liberty Global presentation 'F1/S1 update' of 31 May 2012, slides 23 and 26.

<sup>176</sup> Form CO, Table 28.

<sup>177</sup> Data provided by the Parties shows that during 2013 [...] subscribers on UPC's and Ziggo's retail TV platforms switched between Film1 and HBO [...], while about [...] of subscribers of Film1 and HBO on the latter platforms subscribed to both Film1 and HBO simultaneously (around [...] at the beginning of 2014); Form CO, annex 37.

- (208) The Commission notes that subscribers' preferences are heterogeneous. Although for some subscribers the two Premium Pay TV film channels at issue here are complementary, in the sense that they may subscribe to both, for the majority of subscribers the Premium Pay TV film channels tend to be substitutes, in that they switch between the two. Already a small proportion of subscribers switching between the two film channels could defeat the profitability of any unilateral retail price increase pre-merger. Therefore, although both Premium Pay TV film channels offer inherently largely complementary content, due to their – generally – exclusive distribution models, significant competitive pressure seems to be exerted between them.
- (209) Secondly, as regards the potential competitive pressure exerted by providers of SVOD services such as Netflix, RTL's Videoland and Pathé Thuis on Film1 and HBO Nederland, it must be noted that Film1 and HBO Nederland constitute the only two *linear* Premium Pay TV film channels in the Netherlands which, as opposed to for instance Netflix, are only available as part of or an add-on to a retail TV services provider's Pay TV subscription. Furthermore, as outlined in recitals (109) and (110), even though the Commission leaves the market definition open for the purpose of this Decision as regards the retail supply of TV services, it notes that the market investigation has shown the majority of respondents to consider that linear and non-linear (that is to say PPV and VOD) Pay TV services are not fully substitutable due to differences in for example the quality of content in terms of viewing window and amount.<sup>178</sup> Moreover, a majority of respondents to the Commission's market investigation consider that a 5-10% price increase for *linear* Pay TV subscriptions would not cause a significant proportion of viewers to switch to OTT SVOD services.<sup>179</sup> Finally, OTT SVOD services are nascent in the Netherlands and although their subscribers bases are increasing rapidly, it is not clear to what extent they could currently constrain post-merger price increases of linear Premium Pay TV film services.
- (210) Moreover, the majority of TV channel broadcasters<sup>180</sup> that responded to the market investigation, as well as all the Notifying Party's competitors on the market for the retail provision of Pay TV services<sup>181</sup> considered that, as a result of the proposed transaction, Liberty Global's market power would significantly increase to the extent that it would be able to dictate its prices and other conditions to Pay TV retailers, or to reduce the quality or choice of the Premium Pay TV film channels.
- (211) Finally, as regards the broader market for the wholesale supply of Premium Pay TV channels, the proposed transaction would bring together under Liberty Global's ownership three out of the four Premium Pay TV channels in the Netherlands<sup>182</sup>, that is to say Film1, HBO Nederland, and Sport1. As regards the two Premium Pay TV sports channels, the proposed transaction does not create any horizontal overlap as

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<sup>178</sup> Replies to questionnaire Q2 to TV channels wholesale suppliers of 17March 2014, question 28; replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 28.

<sup>179</sup> Replies to questionnaire Q2 to TV channels wholesale suppliers of 17March 2014, question 29.2; replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 29.2.

<sup>180</sup> Replies to questionnaire Q2 to TV channels wholesale suppliers of 17March 2014, question 55.

<sup>181</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 60.

<sup>182</sup> The four Premium Pay TV channels in the Netherlands are Film1, Sports1, HBO Nederland and Fox Sports.

Sport1 was already owned by Liberty Global prior to the proposed transaction and Fox Sports will not form a part of the proposed transaction.<sup>183</sup> However, the proposed transaction would bring together the only two competing Premium Pay TV film channels, that is to say Film1 and HBO Nederland. This would give Liberty Global the scope to increase their wholesale prices towards retail TV operators and the conclusions applying to the narrower market for the wholesale supply of Premium Pay TV film channels apply equally to the broader Premium Pay TV channels market.

- (212) Therefore, taking into account the results of its market investigation, the Commission concludes that the proposed transaction as originally notified is unlikely to be compatible with the internal market in that it is likely to create a significant impediment to effective competition in the possible market for the wholesale supply and acquisition of Premium Pay TV film channels in the Netherlands as well as in any broader market for the wholesale supply and acquisition of Premium Pay TV channels in the Netherlands.

#### 7.2.2.2. Non-coordinated effects – vertical concerns

- (213) Given the merged entity's position in the wholesale supply of Premium Pay TV film channels, the Commission also investigated whether Liberty Global, following the transaction as originally notified, would have the ability and the incentive to engage in an input foreclosure strategy in relation to its Film1 and/or HBO Nederland channels, in particular total foreclosure by refusing to provide access to these channels to its retail competitors, or partial foreclosure by degrading the conditions at which they are offered to them. The Commission also assessed whether such foreclosure strategies would have a significant detrimental effect on competition downstream.<sup>184</sup>
- (214) The aim of such a foreclosure strategy would be to increase demand for the merged entity's own downstream retail Pay TV services simultaneously reducing demand for competitor's retail services thereby increasing the merged entity's downstream profits.
- (215) In the case of partial foreclosure, that is to say an increase in the wholesale price for Film1's or HBO Nederland's TV channels, downstream competitors on the market for the retail provision of Pay TV services would likely pass on, at least partially, those increased costs to end consumers.<sup>185</sup> Input foreclosure would hence result in Premium Pay TV film channels no longer being available or being available at higher retail prices on competitors' platforms. The Commission considers that this would induce at least a proportion of customers valuing such services to switch away from the foreclosed competing retail Pay TV platforms to the merged entity's product.
- (216) Furthermore, the shift in downstream demand for Basic and Premium retail TV services away from its competitors to the merged entity would, in itself, increase the merged entity's downstream profits and expand sales at pre-merger prices.<sup>186</sup> The

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<sup>183</sup> Fox Sports is a joint venture between Fox International Channels, a subsidiary of 20th Century Fox, and Eredivisie.

<sup>184</sup> In line with the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265,18.10.2008, p.6) (the "Commission's non-horizontal Guidelines"), paragraph 32.

<sup>185</sup> To achieve this, the merged entity could worsen wholesale conditions for Film1 and/or HBO such that it increases downstream rivals' marginal costs of serving additional Film1 and/or HBO customers.

<sup>186</sup> Commission's non-horizontal Guidelines, paragraph 40.

merged entity might then further increase its profits by raising the subscription fees for Film1 and HBO Nederland on its network, that is to say raising retail prices.<sup>187</sup> In case the merged entity were to decide, after having fully or partially foreclosed its downstream competitors, to offer Film1 and HBO Nederland to end customers exclusively in combination with its multiple play offering, end customers may even be incentivised to switch their entire multiple play package including Basic and Premium Pay TV, Internet and fixed telephony, to that of the merged entity.

- (217) As regards a complete or partial foreclosure of both Film1 and HBO Nederland, the Commission found that the other controlling shareholder of the HBO Nederland JV, Time Warner/HBO, would advocate for the widest possible distribution of its TV channels.<sup>188</sup> In order to foreclose HBO Nederland, the merged entity would have to negotiate and possibly share its downstream profit from the foreclosure with Time Warner/HBO. Furthermore, Time Warner would have to be willing to risk reputational damage to its global HBO brand in return for potential additional profits for its operation limited to the Netherlands. This seems unlikely, as the Commission understands that Time Warner rather negotiated [...]\*.<sup>189</sup> Therefore, the Commission concludes that the merged entity would have a more limited ability to engage in an input foreclosure strategy for HBO Nederland, as Time Warner/HBO, the other controlling shareholder in the HBO Nederland joint venture, will have no incentive to engage in such strategy and as a result may likely resist it or demand compensation.
- (218) The merged entity will however have full control over Film1, which it can therefore foreclose more easily from its downstream rivals. That foreclosure scenario still allows for HBO Nederland to respond by increasing the wholesale price paid by such platforms for HBO Nederland's TV channels.<sup>190</sup> That follows from the fact that if Film1 is foreclosed from competing retail Pay TV platforms (for example KPN), then both controlling shareholders of HBO Nederland will have the incentive to increase its wholesale price to KPN, as there will no longer be an alternative to HBO, or only a more expensive alternative in case of partial foreclosure of Film1.

#### Foreclosure of Film1

- (219) In this section, the Commission analyses in turn whether Liberty Global would have (i) the ability and the (ii) incentive to completely or partially foreclose Film1 from its downstream retail Pay TV competitors.

#### ***Ability to engage in input foreclosure***

- (220) For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. It is only in those circumstances that the merged entity can be expected to have a

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<sup>187</sup> Commission's non-horizontal Guidelines, paragraph 31.

<sup>188</sup> As also noted by the Commission in its decision in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, para. 65.

<sup>189</sup> Form CO, para. 529; Document ID367-6684, Liberty Global document 'Q&A Legal – HBO Agreements'.

<sup>190</sup> For a theoretical economic model that explains the above mechanism see Ordober, Janusz A., Salop, Steven C. and Saloner, Garth, "Equilibrium Vertical Foreclosure," American Economic Review, March 1990, 80, 127-42.



significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.<sup>191</sup>

- (221) As regards the existence of market power on the part of the merged entity, the Commission recalls that the merged entity would control the only two linear Premium Pay TV film channels in the Netherlands and that even if the product market were to encompass all Premium Pay TV channels (that is to say Film1, HBO Nederland, Sport1 and Fox Sports), the merged entity would still control 3 out of those 4 channels in the Netherlands. Accordingly, the Commission considers that the merged entity would hold a significant degree of market power in the relevant upstream market.
- (222) In addition, all of the Notifying Party's competitors for the retail provision of Pay TV services which responded to the Commission's market investigation consider both Film1 and HBO Nederland to be must-have inputs in order for them to effectively compete on the market for the retail provision of Pay TV services in the Netherlands.<sup>192</sup> Furthermore, a majority of the competitors considers the ability to offer Premium Pay TV film channels in general to represent an important source of product differentiation, such that not being able to offer those would cause negative differentiation versus those competitors that do offer those TV channels.<sup>193</sup> That conclusion was also shared by a majority of TV broadcasters that responded to the Commission's market investigation.<sup>194</sup> Finally, a majority of the TV broadcasters<sup>195</sup> that provided meaningful responses to the Commission's market investigation and all retail Pay TV competitors<sup>196</sup> consider that the merged entity would have a merger-specific ability and incentive to stop its competitors on the market for the retail provision of Pay TV services from accessing its Premium Pay TV channels including Film1, or worsen the conditions of supply for those Pay TV channels.
- (223) The merged entity would therefore have the ability to foreclose Film1 from competing downstream rivals.

### *Incentive to engage in input foreclosure*

- (224) As regards the incentive of the merged entity to engage in a complete foreclosure strategy in relation to Film1, that is to say a refusal to supply Film1 to competing retail Pay TV distributors post-transaction, it is important to recall that the merged entity would hold a very significant market share both on the upstream market for wholesale supply of Premium Pay TV film channels and on the downstream market for provision of retail Pay TV services or multiple play services. Accordingly, the proposed transaction would increase the profitability of any foreclosure of Liberty Global's Film1 Premium Pay TV film channels. Indeed, pre-merger, the Notifying Party would stand to lose all revenues from Film 1 subscribers located outside its geographic footprint if it were to completely foreclose Film1 from its retail competitors. By combining the respective geographic footprints of UPC and Ziggo,

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<sup>191</sup> Commission's non-horizontal Guidelines, paragraph 35.

<sup>192</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 52.

<sup>193</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services' of 17 March 2014, question 72.

<sup>194</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 47.

<sup>195</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 61.

<sup>196</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 74.

the proposed transaction ensures that a much greater proportion<sup>197</sup> of subscribers of Film1 in the Netherlands on retail competitors' networks, for example KPN, could switch their subscription to the merged entity's network.

- (225) In respect of profitability of foreclosure, the Commission first notes that the profit margin that the Notifying Party currently enjoys on the downstream market for the retail provision of Pay TV services ranges between [...] regarding a basic dual play subscription and [...] regarding a premium triple play subscription per subscriber per month, therefore far exceeding the upstream profit margin enjoyed on the wholesale of Premium Pay TV film channels.<sup>198</sup> This provides a first indication that a Film 1 foreclosure strategy could be profitable even if only a small proportion of Film 1 subscribers on rival platforms would switch to the merged entity's cable network.<sup>199</sup> Also, any diverted demand resulting from foreclosure can be largely captured by the merged entity as a result of its increased geographic footprint that would cover around 90%<sup>200</sup> of the Dutch territory.<sup>201</sup>
- (226) Second, in relation to the profitability of a complete foreclosure of Film1, the Commission assessed the margin analyses performed by the Notifying Party, which aimed to calculate the percentage of Film1 subscribers on competing retail Pay TV platforms, for example KPN, that would need to switch to the merged entity's Pay TV subscription in order to make such foreclosure profitable. In the most recent version submitted, the Notifying Party expressed the critical switching levels as a percentage of total addressable Film1 subscribers from KPN/all competing platforms. That is to say, only those Film1 subscribers on rival platforms that are physically located within the UPC/Ziggo footprints are considered addressable and thus contested. The number of addressable subscribers was estimated by the Notifying Parties. Table 1 summarises the main findings of this margin analysis.

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<sup>197</sup> The merged entity will cover 90% of the Dutch territory post-transaction; Form CO, paragraph 665.

<sup>198</sup> The Notifying Party has provided the Commission with a calculation that assumes an upstream monthly profit margin per subscriber of Film1 and HBO Nederland on rival platforms of between EUR [...] and EUR [...]. At the same, the Notifying Party indicates that the combined retail and wholesale margin for Premium Pay TV services on its own network amounts to [...]; Form CO, paragraph 588.

<sup>199</sup> Commission's non-horizontal Guidelines, paragraphs 40 and 41.

<sup>200</sup> Form CO, paragraph 665.

<sup>201</sup> This in turn would also reinforce its downstream market position: 56% (on the basis of subscriber numbers) / [60-70] (value) of the market for the retail provision of Pay TV services and to 62% of the possible market for triple-play subscriptions. See: Form CO, paragraph 372, Tables 15, 36 and Annex 33.

**Table 1: Film 1 Margin Analysis**

Film1 margins analysis <sup>202</sup>	
	Film1
<i>Number of subscribers on rival platforms within merged entity's footprint</i>	[...]*
<i>Annual wholesale margin derived from the licensing to rival retail platforms</i>	[...]*
<i>Annual margin per subscriber switching to the merged entity</i>	[...]*
<i>Switches required to break-even from foreclosing rival platforms</i>	[...]*
<i>Switches required to break-even from foreclosing rival platforms (as percentage of total Film1 subscribers on rival platforms within merged entity's footprint</i>	[...]*

- (227) According to this margin analysis, a minimum of for instance [...]\*% of Film1 subscribers on the foreclosed competing retail TV platform of KPN would need to switch to the merged entity's Pay TV subscription in order to make such foreclosure profitable, depending on the retail package that those customers choose.<sup>203</sup>
- (228) The Commission assessed this margin analysis in detail and found a number of shortcomings. First, the Notifying Party's computations assume that KPN's Film1 subscribers are disproportionately located outside of the UPC/Ziggo footprints about 70% of KPN Film1 subscribers are not addressable according to the Notifying Party's estimates. In order to verify that, the Commission asked the retail Pay TV competitors of the merged entity to provide their actual figures for each different municipality in the Netherlands as regards the number of subscribers of Film1 on their Pay TV platform in the geographic footprints of UPC and Ziggo, and in the rest of the Netherlands.
- (229) The Commission established that the actual number of Film1 subscribers on KPN's retail Pay TV platform that are outside the geographic footprint of the merged entity is much lower than estimated by the Notifying Party. A re-calculation of the margin analysis with real data rather than estimations consequently resulted in a much lower percentage of required Film1 subscriber switches to make a foreclosure strategy profitable.
- (230) Based on this re-calculated margin analysis, it would appear that in order for a complete foreclosure of KPN to be profitable, only [...]\* to [...]\*%, as opposed to [...]\*% based on the Notifying Party's estimates, of current Film1 subscribers on KPN platform would be required to switch to the merged entity. The Commission notes that this percentage would represent approximately [...]\* to [...]\* current Film1 subscribers on KPN. Given that on average, as an example of order of

<sup>202</sup> Data provided by the Notifying Party: Form CO, table 29, and reply of 18 June 2014 to the Commission's Request for Information of 11 June 2014, questions 17, 18 and 19.

<sup>203</sup> That is to say, if the switching subscribers take the most premium triple play package combined with a Film1 add-on, [...]\* switchers are required; whilst if the switching subscribers choose a basic double play package combined with the Film1 add-on, [...]\* are required; This would correspond, according to the Notifying Party, to between [...]\*% and [...]\*% of KPN's Film1 subscriber base in the merged entity's footprint.

magnitude, between [...] and [...] subscribers of UPC switch their Pay TV subscriptions or multiple play packages to KPN per month<sup>204</sup>, the switching of [...] to [...] Film subscribers away from KPN could be achieved in less than 5 months even assuming pre-merger switching rates that do not take account of KPN being foreclosed. The Commission considers that this supports the finding of a likely financial incentive for the merged entity to foreclose access to Film1.

- (231) Finally, the Commission recalls that the Notifying Party [...] to KPN, [...] <sup>205</sup> Accordingly, [...] for Liberty Global.
- (232) Therefore, the Commission concludes that the Notifying Party would likely have a merger-specific incentive to engage in a complete foreclosure of Film1 on competing retail Pay TV platforms post-transaction.
- (233) While the Commission considers that the analysis shows that full foreclosure of Film1 from rival retail Pay TV platforms is likely to be profitable for the merged entity, it does not show that complete foreclosure is the most profitable and hence the most likely outcome after the merger. It is possible that a partial Film1 foreclosure strategy that would result in a wholesale price increase for the merged entity's retail Pay TV competitors, and a corresponding increase in the retail prices they charge to consumers, would be more profitable than complete foreclosure. To evaluate the likelihood of those two outcomes, it is necessary to have information on the actual degree of substitution of viewers between platforms, that is to say on how price changes at the retail level affect the demand for each operator's services.
- (234) The Notifying Party has not provided information on the actual degree of substitution of subscribers between competing retail Pay TV platforms and/or products, but instead conducted a calibration exercise to analyse the incentive for partial foreclosure. To assess whether the proposed transaction creates material incentives for a strategy of raising rivals' costs, the Notifying Party has constructed a model in which the wholesale price of Film1 is chosen to maximise its retail distributor's profits, that is to say UPC's profits before the merger and the merged entity's afterwards.<sup>206</sup> The values of the demand parameters were inferred by combining available information on prices and quantities at one point in time with estimates of demand from a study on the Portuguese cable market.<sup>207</sup> Using this demand information with additional assumptions on the supply model, the Notifying Party simulated price changes of KPN, UPC and Ziggo resulting from the merger.
- (235) The Notifying Party's initial analysis suggests that the merger would lead to lower retail prices for consumers buying the Film1 TV channel as the pro-competitive effect of the elimination of double mark-ups with respect to Ziggo more than compensates the wholesale price increase of Film1 to KPN and other retail Pay TV operators.
- (236) The Commission assessed the analysis in detail and found a number of shortcomings. Those shortcomings related to (i) the demand reactions used in the model differ from

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<sup>204</sup> Document ID 310 – Base Development UPC Netherlands August 2013 - M.7000ID00310\_O.pdf, slide 23.

<sup>205</sup> Document ID330-1637, Liberty Global presentation 'F1/S1 update' of 31 May 2012, slides 23 and 26.

<sup>206</sup> Document ID 1688 - Liberty Global submission "On bargaining power and 'vertical' concerns, 27 June 2014, CRA"

<sup>207</sup> See Pereira, P., T. Ribeiro and J. Vareda, 2013, "Delineating Markets for Bundles with Consumer-Level Data: The Case of Triple Play", Working Paper, Autoridad de la concorrencia, Lisbon.

what would be implied by numbers found in internal business documents<sup>208</sup>, (ii) the assumption that consumers choose products in proportion to those products' market shares, (iii) the degree to which KPN Film1 subscribers were assumed to be located outside the merged entity's geographic footprint, thus not being addressable customers and (iv) the model's inability to explain the observed pre-merger outcomes. Moreover, under modified and more realistic assumptions on these parameters, the Notifying Party's analysis would lead to the opposite conclusions.

- (237) Most importantly, however, the Notifying Party's conclusions from the model are largely driven by the assumption that the transaction would eliminate existing double mark-ups between Film1 and Ziggo arising from the fact that pre-merger both Film1 and Ziggo add a margin over their costs which leads, from the point of view of an integrated supplier, to higher than optimal prices. According to the Commission's assessment, there will likely be no elimination of double mark-ups post-transaction, so that there will be no or only very limited room to further improve efficiency by vertical integration post-transaction.
- (238) In that respect, the Commission notes that Ziggo's carriage agreement with Chellomedia includes [...] <sup>209</sup>, [...]\*. The Notifying Party explained that a CPS mechanism is a contractual fixed minimum amount per subscriber and that retail distributors, at least for Film1, pay per subscriber the greater of (i) the CPS, and (ii) the revenue share multiplied by the retail price excluding VAT.<sup>210</sup>
- (239) According to the Commission's assessment, this type of contractual arrangement, [...] \* can align the interests of independent upstream firms (Film1) and downstream firms (Ziggo).<sup>211</sup> This is because the downstream retailer has an incentive to set the retail prices low enough to achieve at least the minimum number of subscribers required.
- (240) Furthermore, the internal contract between Chellomedia and UPC for year 2013 has a very similar structure to Ziggo's carriage agreement with Chellomedia. Chellomedia and UPC were vertically integrated in 2013, since both were owned by Liberty Global at that time. The Commission considers that that the existing similarity between the two contracts renders it unlikely that any further vertical contracting efficiency can be realized post-merger.
- (241) Accordingly, a partial foreclosure would likely result in higher retail prices for Film1, placing the merged entity's downstream retail Pay TV competitors at a competitive disadvantage and leading to consumer harm either in the short term, where consumers stay with the merged entity's competitors but are forced to pay more for Film1, or in the long term, where consumers switch to the merged entity's platform in order to maintain access to Film1 and are eventually forced to pay more for their Film1, or overall Pay TV, subscriptions as a result of the merged entity's increased market power. Therefore, the Commission considers that the merged entity will likely have the incentive to engage in a complete or partial foreclosure of Film1 from competing retail Pay TV operators.

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<sup>208</sup> See for example Document ID296, UPC internal document, Portfolio & Pricing\_v3.pptx, Slide 8.)

<sup>209</sup> Document ID 1860 - Annex 4.2 – Memorandum of Understanding Ziggo – Chellomedia.

<sup>210</sup> Form CO, paragraph 428.

<sup>211</sup> See for example JH Mortimer "Vertical Contracts in the Video Rental Industry," *Review of Economic Studies* (2008) 75 (1): 165-199.

### *Impact of engaging in input foreclosure*

- (242) As regards the likely impact of a foreclosure of Film1 on effective competition in the relevant downstream market, the Commission considers that a number of elements are of importance. First, it should be recalled that the merged entity would control Film1 and jointly control HBO Nederland, and as a result would hold bargaining power over an input that is generally regarded as an important source of differentiation for downstream products, or even a must-have input in order for retail providers of Pay TV services to effectively compete on the downstream market. Second, the upstream input in question, Film1 and HBO Nederland's TV channels, is currently licensed to almost every downstream retail Pay TV operator, meaning that its foreclosure would have an effect across the entire downstream market.
- (243) Third, the mere fact that the merged entity may be likely to engage in input foreclosure in relation to its Premium Pay TV film channels can in itself already raise barriers to entry to the relevant downstream market.<sup>212</sup> In that regard, the Notifying Party itself seems to consider that the existence of premium content means that barriers to entry are already high: [...]\*.<sup>213</sup>
- (244) Finally, it should be recalled that, as already outlined in recital (215), if the merged entity increases the wholesale price of Film1 and HBO Nederland towards competing retail Pay TV operators, those would have to pass on those price increases and charge a higher retail price to consumers.
- (245) As regards the existence of possible efficiencies that could counter-balance the negative effect on competition in the form of elimination of double mark-up, the Commission found in recitals (237) to (240) that any further vertical contracting efficiency cannot be realised post-merger.
- (246) Therefore, the Commission considers that a complete or partial foreclosure of Film1 from competing retail Pay TV operators would likely increase retail prices of both the merged entity and the competing retail Pay TV operators.

### Conclusion

- (247) Therefore, based on the results of its market investigation, the Commission concludes that the proposed transaction as originally notified is likely to create a significant impediment to effective competition in the upstream market for the wholesale supply and acquisition of Premium Pay TV channels on the one hand, and the downstream markets for the retail supply of Pay TV services which would also form part of the possible market for the retail supply of multiple play services in the Netherlands on the other hand. If the relevant upstream market were defined as a market for the wholesale supply and acquisition of Premium Pay TV film channels, the proposed transaction would be likely to significantly impede effective competition thereon. However, the Commission does not need to make a definitive finding on this point, as the proposed remedies would in any event also address those possible competition concerns.

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<sup>212</sup> Commission's non-horizontal Guidelines, paragraph 49.

<sup>213</sup> Document ID330-1637, Liberty Global presentation 'F1/S1 update' of 31 May 2012, slide 23.

### **7.3. Markets for the supply and acquisition of Basic and Premium Pay TV channels (acquisition side)**

#### *7.3.1. Introduction*

- (248) The proposed transaction would combine the retail Pay TV operations of the two largest cable operators in the Netherlands. The merged entity would control access to around [60-70]\*% of the Pay TV subscribers in the Netherlands. This could in turn strengthen the market power that the merged entity would have as a purchaser of the Basic and Premium TV channels that are included in such Pay TV subscriptions. Against that background, the Commission has assessed whether the merger would strengthen the merged entity's buyer power on the upstream markets for the supply and acquisition of Basic and Premium Pay TV channels, and whether this would significantly impede effective competition.
- (249) According to the Horizontal Merger Guidelines, "increased market power" means the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.<sup>214</sup> Throughout the Guidelines, the expression "increased prices" is used to refer to those various ways in which a merger may result in competitive harm.
- (250) The Horizontal Merger Guidelines expressly recognise that both suppliers and buyers can have market power that is likely to produce such effects.<sup>215</sup> Thus, the Commission has to assess whether a merger brings about a degree of buyer power in an upstream market, that is likely to have negative effects on the availability of high-quality products, on the existence and availability a wide selection of services, and on innovation on a downstream market.
- (251) As concerns buyer power in particular, the Horizontal Merger Guidelines state that the Commission may analyse to what extent a merged entity will increase its buyer power in an upstream market.<sup>216</sup> The Guidelines explain that increases in a buyer's bargaining power may be beneficial for competition. In particular, lower input costs resulting from increased buyer power are likely to at least partly be passed on to consumers in case neither downstream competition nor total output is restricted.<sup>217</sup>
- (252) The Horizontal Merger Guidelines also make clear that a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. Competition in downstream markets may be adversely affected if the merged entity were likely to restrict output in the downstream market, or to use its buyer-power vis-à-vis its suppliers to foreclose its rivals.<sup>218</sup>

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<sup>214</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 05.02.2004, p.5), (the "Horizontal Merger Guidelines"), paragraph 8.

<sup>215</sup> Horizontal Merger Guidelines, paragraph 8.

<sup>216</sup> Horizontal Merger Guidelines, paragraph 61.

<sup>217</sup> Horizontal Merger Guidelines, paragraph 62.

<sup>218</sup> Horizontal Merger Guidelines, paragraph 61.

### 7.3.2. *Effect of the transaction on the merged entity's bargaining power vis-à-vis broadcasters*

#### 7.3.2.1. The Notifying Party's view

- (253) The Notifying Party disputes that it can exert market power vis-à-vis TV broadcasters.
- (254) In that context, the Notifying Party submits that the merged entity's share of expenditure on the acquisition of linear TV channels in the Netherlands would be [50-60]\*%.<sup>219</sup>
- (255) The Notifying Party submits that such share of expenditure on TV channels is not indicative of buyer power. It advances a number of arguments to support that contention. It argues first, that content rights are intangible assets that are not susceptible to economies of scale. It argues second, that there would be a mutual dependency between TV broadcasters, who rely on the widest possible distribution to secure advertising income, and retail TV service providers, who need attractive content in order to be competitive at retail level. It argues third, that the proposed transaction would have, if any, a limited impact on the negotiation position of TV broadcasters, as it would create an unavoidable trading partner for only a limited number of them. It also argues that in any event, many TV broadcasters are large multinational companies with significant bargaining power vis-à-vis retail TV providers.
- (256) The Notifying Party also submits that it would not be able to restrict the availability of TV content in the downstream market for retail TV services. In that context, the Notifying Party refers to the conclusion drawn by the Dutch competition authority in a previous case. In that case, the ACM found no link between the number of subscribers of a given TV service provider and the number of TV channels offered as part of the basic Pay TV package in the Netherlands. Accordingly, the ACM concluded that there was no indication that an increase in the size of a given retail TV service provider would lead to a lower quality TV offering.<sup>220</sup> The Notifying Party has submitted further correlation analysis to argue that this is still the case.<sup>221</sup>
- (257) Moreover, the Notifying Party argues that at most, the transaction would create a new unavoidable trading partner for a very small number of TV channels only.<sup>222</sup> The Notifying Party further argues that the specific characteristics of the proposed transaction make it significantly less likely that bargaining power could be materially enhanced through the merger than in the recent Universal/EMI case<sup>223</sup> and that the

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<sup>219</sup> Form CO, paragraphs 289, 454 and Annex 33. The Notifying Party considers that the merged entity's share of expenditure on Basic Pay TV channels will be broadly in line with its share of the market for the retail provision of Pay TV. With respect to Premium Pay TV film channels and Premium Pay TV sports channels, the position of the merged entity would be different as there are a small number of retail Pay TV providers who do not offer Film1, Sport1 and/or HBO Nederland. As a result, the Notifying Party expects that the merged entity's share of spend on Premium Pay TV channels will be slightly higher than its market share on the market for the retail provision of Pay TV services.

<sup>220</sup> Reference is made to the ACM (NMa) decision 5796/ Cinven – Warburg Pincus – Essent Kabelcom, of 8 December 2006.

<sup>221</sup> Liberty Global submission "Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004", prepared by Oxera, 21 May 2014.

<sup>222</sup> Liberty Global submission "Comments on the European Commission's Decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004" prepared by Oxera 21 May 2014.

<sup>223</sup> Commission's decision of 21 September 2012 in Case No COMP/M.6458 – Universal Music Group/EMI Music.



idea that becoming a "pivotal" buyer would increase bargaining power is incorrect. It also argues that it would not be possible to empirically verify the relationship between the number of downstream customers served by TV services providers and their bargaining power vis-à-vis TV broadcasters because contracts with broadcasters vary along many dimensions and because there are too few contracts to systematically distinguish bargaining effects from other influences.<sup>224</sup>

#### 7.3.2.2. Commission's assessment

- (258) The merging companies purchase TV channels to include those channels into the Pay TV packages that they offer to their subscribers. The Pay TV packages include both Basic Pay TV channels and Premium Pay TV channels (hereinafter referred to as "Pay TV channels"). The market position that the merged entity would have in the acquisition of both types of Pay TV channels is derived from similar market conditions, such as the position of the merged entity as a large distribution channel to reach subscribers, the size of their customer base and the scope of their network footprint. When assessing the likely competitive impact of the proposed transaction, the Commission undertakes its analysis for both sets of Pay TV channels together.<sup>225</sup>
- (259) The proposed transaction will lead to the creation of a merged entity that will account for [50-60]\*%<sup>226</sup> of the market for the acquisition of Pay TV channels in the Netherlands. The increment that the merger brings is very sizeable, namely [10-20]\*%.<sup>227</sup> The Commission considers that this market share is likely to understate the degree of buyer power that the merged entity would have on this market. This is due to the fact that the merged entity would have a far more significant market position downstream, namely on the market for the retail provision of Pay TV services.
- (260) Both the Commission<sup>228</sup> and the Dutch Competition Authority have in the past confirmed that the market position of purchasers of Pay TV channels is closely related to the number of households those purchasers serve as retail providers of TV services.
- (261) In *Liberty Media/Casema*<sup>229</sup>, the ACM assessed the then proposed merger between the Notifying Party and Casema Holding B.V. ("Casema"), which would later form Ziggo, together with Multikabel B.V. ("Multikabel") and Essent Kabelcom B.V. ("@Home"), in the Netherlands. In its decision to open in-depth proceedings, the ACM underlined that a combined Liberty/Casema would have served 60% of all cable subscribers in the Netherlands. According to the ACM, there were concerns

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<sup>224</sup> Liberty Global submission "On the applicability of insights from bargaining models in Universal/EMI" prepared by Cristina Caffarra, Kai-Uwe Kühn, Perre Régibeau of CRA, 9 June 2014.

<sup>225</sup> The Commission notes that this approach is favourable to the Parties. In relation to the acquisition of Premium Pay TV channels, the merged entity would itself own three out of four Premium Pay TV channels in the Netherlands. The operator of the remaining fourth Premium Pay TV channel, Fox, is also a TV broadcaster that would have to negotiate the distribution of its Basic Pay TV channels with the merged entity. The combination of the merged entity's position as a purchaser of Premium Pay TV channels and its ownership of competing Premium Pay TV content could only aggravate any negative impact that the proposed transaction may have on the merged entity's ability and incentive to exert its buyer power vis-à-vis the owner of the remaining Premium Pay TV channel in an anticompetitive manner.

<sup>226</sup> Form CO, paragraphs 289, 454 and Annex 33.

<sup>227</sup> Form CO, Annex 33.

<sup>228</sup> Commission's decision of 16 April 2004 in Case No COMP/M.2876 - Newscorp/Telepiù, paragraphs 21, 42 and 186.

<sup>229</sup> Decision of the ACM of 6 November 2002 in Case 3052, *Liberty Media/Casema*, points 264-267, and 272.

that this could increase Liberty's market power in the market for the acquisition of Pay TV channels to such an extent that it could dictate the TV content that consumers in the Netherlands could access. The ACM did not take a final decision on the case since Liberty Media abandoned the proposed acquisition.<sup>230</sup>

- (262) The Notifying Party's reference to the ACM's decision in Essent Kabelcom/Multikabel/Casema<sup>231</sup>, where that authority reached a different conclusion, is not relevant to this case. The ACM concluded that that merger of the companies that now form Ziggo was not likely to significantly impede effective competition on the market for the acquisition of Pay TV channels. However, the market position of those companies was significantly more modest than the market position that a merged Liberty/Ziggo would have.<sup>232</sup> Second, the ACM took its decision based on the market features as they existed in the Netherlands at the time. Most notably, the ACM concluded that Ziggo's alleged market power in the acquisition of pay TV channels would be constrained by the potential competition from alternative digital distribution channels such as the Internet.<sup>233</sup> The ACM reached that conclusion whilst Liberty Global and Ziggo would still be active as independent competitors on the market. In this case, the Commission has to assess the likely impact that the proposed merger between Liberty Global and Ziggo would have on that potential competition, and needs to make that assessment on the basis of the competitive situation in relation to Internet services as they exist today. Third, the ACM also distinguished Ziggo from Liberty Global insofar as Liberty Global is a vertically integrated undertaking that has interests in content providers as well and whose strategy it is to expand those upstream interests. The ACM considered that this vertical integration could give it a further incentive to limit the availability of certain TV content, in particular competing TV content, to consumers in the Netherlands.<sup>234</sup>
- (263) In this case, therefore, the Commission needs to make its own assessment of the likely market power of the merged entity on the market for the acquisition of Pay TV channels.
- (264) The Commission acknowledges that the theoretical framework used in Universal/EMI<sup>235</sup> cannot easily be applied to the present case and that a "pivotal" buyer does not always have increased bargaining power.
- (265) The Commission also acknowledges that, given in particular the limited number of contracts with TV broadcasters and their complexity, it is difficult to calculate the effect of the merger on the merged entity's bargaining power while fully accounting for other factors such as variations in contract terms. Nevertheless, data collected during the market investigation by the Commission on annual payments received by TV broadcasters from different TV services providers confirmed that there is a negative correlation between the price paid by TV services providers per TV

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<sup>230</sup> <http://online.wsj.com/news/articles/SB1037655917540774628> [accessed at 4 September 2014].

<sup>231</sup> Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*.

<sup>232</sup> At that time, the companies that now form Ziggo had an approximate 40% share of the retail pay TV market in the Netherlands.

<sup>233</sup> Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*, paragraph 96.

<sup>234</sup> Decision of the ACM of 8 December 2006 in Case 5796, *Cinven/Warburg Pincus/Essent Kabelcom*, paragraph 84; Decision of the ACM of 6 November 2002 in Case 3052, *Liberty Media/Casema*, paragraph 266.

<sup>235</sup> Commission's decision of 21 September 2012 in Case No COMP/M.6458 – Universal Music Group/EMI Music.

household to TV broadcasters and the number of TV households served by the TV services providers. This is consistent with TV services providers' bargaining power increasing with the number of subscribers they serve.

- (266) Furthermore, the merged entity's share of the downstream market would amount to [60-70]\*% by value<sup>236</sup> and to [60-70]\*% by TV homes controlled.<sup>237</sup> The merged entity would thus control at least twice if not three times as many TV subscribers as the second-largest market participant KPN, which has an estimated retail market share of between 20% and 25%.<sup>238</sup> The Commission considers that the fact that the Parties' combined share of expenditure on broadcasters' TV channels is significantly smaller than their combined share of revenue generated from reselling those same TV channels is an indication that they already hold some degree of bargaining power vis-à-vis TV broadcasters in the Netherlands. It implies that the Parties pay less per subscriber than their rivals and that this relationship is not commensurate with the difference between the size of the customer base of the Parties and their competitors alone. Moreover, internal documents of Liberty Global confirm that from 2011 onwards, it was already paying [...]\*% under average market cost for the TV channels that it includes in its retail Pay TV packages.<sup>239</sup>
- (267) Other evidence on the Commission's file equally confirms that there is a close link between the number of households that a retail TV operator serves and the market power it exerts on the upstream market for the acquisition of TV channels.
- (268) The Notifying Party notes the following in its internal business documents:
- (i) [Reference to the Notifying Party's internal business documents]\*.<sup>240</sup>;
  - (ii) [Reference to the Notifying Party's internal business documents]\*.<sup>241</sup>;
  - (iii) [Reference to the Notifying Party's internal business documents]\*.<sup>242</sup>
- (269) The large majority of TV Broadcasters confirmed the direct relation between the number of TV subscribers served by a provider of retail TV services and the bargaining power that such a TV service provider exerts vis-à-vis TV Broadcasters.<sup>243</sup>
- (270) One respondent during the Commission's investigation stated the following: *"Commercial income via advertising is dependent on the amount of viewers a channel attracts. As TV broadcasters are looking for distribution as wide as possible, cable operators can leverage the amount of subscribers they serve. The amount of subscribers served is therefore one of the most important determinants of bargaining power of the cable operators. Since the market shares of the merged entity become greater, it is logical that their market power will increase"*.<sup>244</sup>

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<sup>236</sup> Form CO, Annex 33.

<sup>237</sup> [Reference to the Parties' internal business documents]\*.

<sup>238</sup> 22% in Q4 2012 and 25% in Q3 2013; Form CO, Table 36.

<sup>239</sup> [Reference to the Parties' internal business documents]\*.

<sup>240</sup> [Reference to the Parties' internal business documents]\*.

<sup>241</sup> [Reference to the Parties' internal business documents]\*.

<sup>242</sup> [Reference to the Parties' internal business documents]\*.

<sup>243</sup> Replies to questionnaire Q4 to Phase II Questionnaire to Broadcasters of 28 May 2014, question 19.1; Document ID2270, non-confidential minutes of conference call between Commission's services and Fox International Channels of 25 June 2014, page 3; Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, page 3.

<sup>244</sup> Reply to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 55.1.

- (271) SBS Broadcasting B.V. ("SBS") confirmed that *"The amount of TV households (eye-balls) a retail TV service provider serves is an important factor determining buyer power. The merged entity would serve more TV households, and thus exert more buyer power."*<sup>245</sup> NPO confirms that the merged entity would exert significant buyer power vis-à-vis it and other TV Broadcasters by merely re-stating the fact that the merged entity would serve around 70% of the joined cable, DSL and fibre market in the Netherlands.<sup>246</sup>
- (272) The Commission is not convinced by the Notifying Party's argument that after the merger, there would be a balance of bargaining power between it and the TV broadcasters. The Notifying Party has indicated that the licence or carriage fees it pays to TV broadcasters [...]\*.<sup>247</sup> The Notifying Party itself predicts that the proposed transaction [...]\*.<sup>248</sup>
- (273) Respondents to the Commission's market investigation also confirmed that the merger would significantly enhance the merged entity's market power as a buyer of Pay TV channels.
- (274) A large majority of TV broadcasters believes that in the market for the acquisition of Pay TV channels, retail providers of TV services already hold the most bargaining power.<sup>249</sup> That majority considers that the proposed transaction would lead to an increase of the merged entity's market power to the extent that it would be able to dictate its prices and other conditions to them.<sup>250</sup> That conclusion was also shared by all providers of retail TV services that provided a response to the Commission's first phase market investigation.<sup>251</sup>
- (275) In light of that evidence from the market investigation and from the Notifying Party the Commission considers that the transaction is likely to strengthen the merged entity's market power in the market for the acquisition of Pay TV channels.
- (276) The Commission reiterates that increases in a buyer's bargaining power may generally be beneficial for competition. The Commission's Horizontal Merger Guidelines explain that lower input costs resulting from increased buyer power are likely to, at least partly, be passed on to consumers in case neither downstream competition nor total output is restricted.<sup>252</sup>
- (277) Nevertheless, an increase in the merged entity's bargaining power could have detrimental effects on effective competition. Respondents to the Commission's market investigation indicated that there could be several such detrimental effects on competition. Following those submissions, the Commission assessed in detail whether the increase in the merged entity's market power as a purchaser of Pay TV channels could:

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<sup>245</sup> Document ID1400, non-confidential reply of SBS to Q4 Phase II Questionnaire to TV Broadcasters, question 19.

<sup>246</sup> Document ID1424, non-confidential reply of NPO to Q4 Phase II Questionnaire to TV Broadcasters, question 19.

<sup>247</sup> [Reference to the Parties' internal business documents]\*.

<sup>248</sup> RTL, SBS and NPO together accounted for an overall viewing share of 70% in 2013 in the Netherlands: Stichting KijkOnderzoek Jaarrapport 2013, available at: [https://kijkonderzoek.nl/images/SKO\\_Jaarrapport/SKO\\_jaarrapport\\_2013.pdf](https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf).

<sup>249</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 54.

<sup>250</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 55.

<sup>251</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services, question 64.

<sup>252</sup> Horizontal Merger Guidelines, paragraph 62.

- Increase its ability and incentive to hamper the emergence of innovative Pay TV services;
- Increase its ability and incentive to negatively influence the breadth and quality of the programming content that broadcasters offer in the Netherlands;
- Increase its ability and incentive to obtain terms and conditions from broadcasters that ultimately have a negative impact on the access of competing retail TV providers to that very same content;
- Increase its ability and incentive to block TV broadcasters' hybrid broadcast broadband TV signals.

### 7.3.3. *Effect of increased bargaining power on the emergence of OTT services*

- (278) In recent years, TV broadcasters that operate in the Netherlands have been taking initiatives to allow Dutch consumers to access and view TV content in innovative ways. In particular, TV broadcasters have taken initiatives to offer the content that is shown on the linear Pay TV channels that are offered via the Parties' Pay TV platform also over the Internet via OTT services.
- (279) The Parties are active as buyers on the Dutch market for the acquisition of Pay TV channels. This market is to a certain extent characterised by the existence of agreements that restrict TV broadcasters in their ability to offer their TV channels and content via the Internet. As far as the Parties are concerned, this mainly concerns agreements that Liberty Global negotiates with TV broadcasters. Liberty Global concludes those agreements as part of, or together with, the agreement under which it carries the broadcasters' Pay TV channels on its Pay TV platform.
- (280) Where TV broadcasters provide OTT services themselves, those agreements are between Liberty Global and providers that could compete with Liberty Global's Pay TV packages. Where TV broadcasters provide their content to third party providers of OTT services, those agreements could restrict the access of potential competitors of Liberty Global's Pay TV platform to the inputs that they need in order to operate their services.
- (281) Against that background, the Commission had to assess whether the merger between Liberty Global and Ziggo could increase the market power of Liberty Global to sustain such restrictive agreements, or to conclude agreements that are more onerous from the perspective of TV broadcasters and ultimately of consumers in the Netherlands.

#### 7.3.3.1. The Notifying Party's view

- (282) The Notifying Party argues that any claim that it seeks to hold back the OTT distribution of TV channels and content of TV broadcasters is not specific to the proposed transaction, as Ziggo and UPC already had an incentive to attempt to get TV broadcasters to hold back such OTT distribution of linear channels and associated content.
- (283) In order to support its arguments, the Notifying Party refers to the commercial negotiations that have taken place with NPO, which is its negotiation partner for the carriage of the TV channels of the Dutch public broadcasters. The Notifying Party submits that NLkabel, a trade association that includes both Liberty Global and Ziggo, have asked NPO already to hold back the OTT streaming of its linear TV channels.
- (284) Also, the Notifying Party explained that the request to NPO was made in the context of contractual negotiations in which NPO requested a significantly higher fee for the

carriage of the TV channels of the Dutch public broadcasters. This happened in light of a 2013 report prepared for the Dutch government, in which a suggestion was made that NPO could strengthen its bargaining position with the platform operators by expanding its OTT distribution of linear TV channels on the Internet. That hypothetical increase in bargaining power would be based on the threat that NPO could cease to offer its channels to cable operators and instead distribute nationally via OTT. In such situations – where TV broadcasters are demanding more compensation for their content – UPC and Ziggo would naturally respond by attempting to raise their revenues by preventing the same content from being given away for free via the Internet. TV broadcasters' commercial choice to provide free OTT access to their content would risk degrading the value of their content and this would be the case irrespective of any perceived market power of the merged entity.

- (285) The Notifying Party claims that ultimately, its new 2014 agreement negotiated with NPO does not include any restriction on the broadcasters with respect to OTT service provision. The Notifying Party submits that the same applies to the agreement that it recently concluded with RTL. Finally, the Notifying Party states that no such restriction is being sought in the ongoing negotiations with SBS.
- (286) The Notifying Party also explained that, from a conceptual viewpoint, it strongly believes that restrictions on broadcasters with respect to OTT service provision in the context of TV transmission agreements should be seen as a normal outcome of commercial negotiations, and not as an anti-competitive exercise of market power. It continued by explaining that, in principle, there would be several ways in which a broadcaster could monetize its content, which would include: carriage fees paid by platform operators in return for the right to air a channel; subscription fees paid by consumers who subscribe to pay-for channels; advertising or sponsorship fees paid to broadcasters for including adverts alongside their programming; as well as other less significant revenue streams such as advertising on channel websites or OTT portals, or premium rate 'phone-ins'. The broadcaster's choice of business model from those would also have implications for its optimal strategy with respect to content distribution. In that respect, the Notifying Party explained that, for example, a broadcaster that chooses to rely solely on advertising income would be incentivised to distribute content freely and as widely as possible, including all platforms as well as OTT. Conversely, a platform choosing to rely on carriage income alone would be incentivised to maximise the value of its channels to its customers, the platform operators. This might include exclusive deals, which would allow the platform operators to pay a greater price for carriage rights. In practice, most channels derive income from a combination of sources and would be required to balance those opposing incentives.
- (287) The Notifying Party claimed that, in the above context, a restriction with respect to OTT service provision can be seen as a simple commercial reality. By increasing the free distribution of content via OTT, broadcasters would necessarily be decreasing the value of that content for platform operators. It would follow that a widely available, free distribution model is therefore incompatible with a premium carriage fee model. This would not be unique to broadcasters: media owners of all kinds would struggle to trade-off the advantages versus the disadvantages of making content available for free. All of them would face the same choices and trade-offs, and, according to the Notifying Party, none of them can expect to charge high fees for content that is widely available for free on the internet. Again, in the Notifying Party's view, that market development is not related to any increase in market power that the proposed transaction would bring about.

### 7.3.3.2. Commission's assessment

- (288) In order to undertake its competitive assessment of the proposed transaction's likely impact on OTT services in the Netherlands, the Commission needs to take into consideration that the Parties and TV broadcasters deal with each other at multiple market levels.
- (289) The Parties and TV broadcasters negotiate the carriage of the broadcasters' Pay TV channels and associated content via the Parties' Pay TV platforms. This negotiation takes place on the Dutch market for the acquisition of Pay TV channels. At the same time, TV broadcasters are increasingly offering their content via Internet-based OTT services. To the extent that this content is offered to third-party operators of OTT services, those operators compete with the Parties as buyers of that content. Those operators also potentially compete, on the downstream retail market for Pay TV services, with the Pay TV platforms of the Parties. To the extent that broadcasters themselves offer their content online, they too potentially compete with the Parties' Pay TV platforms on the downstream retail market for Pay TV services.
- (290) The Commission has assessed whether the merged entity's increased market power as purchaser of TV channels could increase its ability to condition the carriage of TV broadcasters' linear TV channels (and associated catch-up services) on its Pay TV platform in the Netherlands on terms that would prevent those broadcasters from operating, or providing content to, Internet-based OTT services. The likely effects of such strategy would be felt beyond the Dutch market for the acquisition of Pay TV channels, namely on the retail market for Pay TV services on which those OTT services could compete with the merged entity's Pay TV platform.
- (291) OTT services are emerging services that constitute a significant competitive threat to traditional Pay TV. The Commission has found evidence that suggests that the Notifying Party already has every incentive to prevent, delay or hamper such OTT innovation. By using its increased buyer power, the merged entity could prevent innovative new TV services from entering the markets for the acquisition of Pay TV channels and for the retail provision of Pay TV services, thereby degrading the quality and choice for Dutch consumers.
- (292) In recitals (293) to (305), the Commission explains the role and importance of existing and future OTT services. In recitals (321) to (360), the Commission sets out the type of restrictive agreements that are in place in the Netherlands in relation to such OTT services. The Commission then also assesses the likely impact that the proposed transaction would have on the continuation or the worsening of such restrictive agreements.

#### ***Importance of OTT services***

- (293) A TV broadcaster that acquires the broadcasting rights to TV content can deploy that content in various ways. First, it can include that content in the programming of its linear TV channels that it in turn offers to retail TV services providers such as the Parties for distribution to consumers. Second, it can seek to offer that content, in a non-linear fashion, to retail TV services providers such as the Parties for inclusion into their VOD services. Third, it can seek to offer that content over the Internet. It can do so directly, or via the services of an aggregator that packages the content of different content owners in a broad Internet offer to consumers.

- (294) The Commission understands that it is also feasible to offer TV channels in a linear fashion over the Internet, for instance, live streaming of TV programmes as shown on the TV channels over the cable, which NPO has recently introduced.<sup>253</sup> However, as internal documents of the Parties also confirm<sup>254</sup>, OTT services until now have focussed on offering non-linear content to Internet users. Such OTT services are emerging in the Netherlands. A number of them are already available to consumers.
- (295) Various TV broadcasters in the Netherlands offer so-called "catch-up services" over the Internet. Consumers that use those services can re-watch the content that was available on their linear TV channels for a limited period of time after it was shown on such channels. Those catch-up services can be combined with "preview services", where consumers can watch individual TV programmes before they are shown on the linear TV channels.
- (296) An example of that type of service is the kijk.nl service of SBS. That service offers catch-up content that was available on the SBS channels SBS6, Net5 and Veronica. With its "kijk eerder" service, it also allows consumers to watch certain films and series before they are shown on those channels.
- (297) RTL has an OTT service called "RTLXL". That service includes content from RTL's main channels RTL 4, 5, 7 and 8, as well as its thematic channels RTL Crime, RTL Lounge and Telekids. In 2014, RTL also launched the Videoland Unlimited service. For a monthly payment of EUR 10, consumers obtain unlimited access to films and series. Through Videoland Unlimited, RTL also intends to produce its own series.<sup>255</sup>
- (298) Public broadcasters in the Netherlands offer their catch-up content and certain previews online on "Uitzending Gemist." Their more recent paid OTT service NPO Plus allows consumers to have access to a wider, more premium library of content offered by the Dutch public broadcasters.<sup>256</sup> Consumers can view this content in high quality.
- (299) Other OTT offers that are available in the Netherlands include the Eurosport Player service of Eurosport, which allows consumers to access live streamed sports events across the Internet connected devices that they use.
- (300) In June 2014, the three main TV broadcasters in the Netherlands – NPO, RTL and SBS - commercially launched their joint venture NLZiet. For EUR 7.95 per month, consumers obtain Internet access to the content that is shown on the TV channels of each of those TV broadcasters. NLZiet is integrated with the three stand-alone OTT offers of those broadcasters, allowing consumers to search and access content across those platforms in a streamlined manner. NLZiet offers access to catch-up and preview content. NLZiet markets itself as a complete, all-encompassing service that offers consumers access to all content that is shown on the linear TV channels of the associated broadcasters. The aim is to include content that goes back as far as is feasible under the broadcasters' content agreements with content providers. NLZiet also offers additional service features. For instance, it allows consumers an easy way to search for and access content of their liking that is available from each of these

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<sup>253</sup> <http://www.npo.nl/live>.

<sup>254</sup> [Reference to the Parties' internal business documents]\*.

<sup>255</sup> For March 2015, it plans to show the first episodes of a high-quality Dutch drama series called "Zwarte Tulp.": <http://pressroom.rtl.nl/videoland/persberichten/persbericht/sterrencast-in-eerste-eigen-serie-videoland-zwarte-tulp> [accessed 08 August 2014].

<sup>256</sup> Document ID1989, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014.



broadcasters. It provides alerts if a new episode of a consumers' favourite TV series is on-line. The content on NLZiet can be accessed on any connected device. NLZiet guarantees that consumers can access the available content in high quality.

- (301) The Commission considers that those OTT offerings constitute important innovations, potentially changing the way in which consumers in the Netherlands can search for, and watch, TV content online. If such OTT offerings become successful, consumers would face a genuine choice between the Notifying Party's cable TV subscription, and the content that is available on the Internet. OTT services are hence an emerging form of competition to the Parties' cable TV operations.
- (302) For the same reason, the Notifying Party sees those offerings as a threat to its own cable TV operations. In its response to the Article 6(1)(c) decision in the current matter, Liberty Global explains that "*the use of OTT services has expanded rapidly and expectations are that this expansion will continue, to the detriment of 'traditional' video and television services offered by network operators such as UPC, Ziggo and KPN*".<sup>257</sup> Also in the Form CO, the Notifying Party notes that "*the increased availability of channels via the internet is expected to negatively impact the Parties' retail TV services activities*".<sup>258</sup>
- (303) Ultimately, the Notifying Party fears that consumers could choose to end their cable TV subscription and subscribe instead to an Internet offer of a player like KPN and possibly the OTT SVOD service of a content provider. In industry parlance, this is the threat that Pay TV consumers "cut the cable or cord".
- (304) [...] this threat would be particularly credible if those OTT services offered a combination of [...] and catch-up TV offers.<sup>259</sup> [...] that an explosive growth of OTT providers constitutes [...].<sup>260</sup> The availability of TV broadcasters' content OTT [...] for reaching the end consumer.<sup>261</sup>
- (305) Therefore, the Commission considers that OTT services are a relatively new way for distributing content to end users and that they are growing in importance. If unhindered, OTT services are likely to exert a growing competitive constraint on the traditional distribution model of cable TV operators.

### ***The Parties' approach towards OTT services in negotiations with TV broadcasters pre-merger***

- (306) The acquisition of linear Pay TV channels and the provision of OTT services are typically negotiated jointly between TV broadcasters and the Parties.
- (307) This is mirrored in the contractual arrangements for those services. Typically, contractual clauses that govern the ability of TV broadcasters to offer their TV content OTT form part of the same agreement as the carriage agreements for their linear Pay TV channels. Irrespective of whether such contractual 'OTT' clauses are in the end contained in one and the same contract, or subject to a separate agreement, commercial negotiations on the TV broadcasters' OTT offers tend to take place

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<sup>257</sup> Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 37.

<sup>258</sup> Form CO, paragraph 464.

<sup>259</sup> [Reference to the Parties' internal business documents]\*.

<sup>260</sup> [Reference to the Parties' internal business documents]\*.

<sup>261</sup> [Reference to the Parties' internal business documents]\*.

simultaneously with, and form part of, the overall negotiations for the distribution of their Pay TV channels.

- (308) There is thus a strong and direct link between the merged entity's bargaining position in the acquisition of Pay TV channels and its market power to prevent, delay or hamper OTT innovation of TV broadcasters.
- (309) This link is strengthened by the fact that the agreements for, and the commercial negotiations of, the distribution of the TV broadcasters' Pay TV channels also cover the key content, namely the channels and attractive programming content, that could form part of the broadcasters' OTT offers.
- (310) In recitals (312) to (320) the Commission first reviews evidence from the market investigation regarding the link between OTT services and the acquisition of linear Pay TV channels in negotiations with TV broadcasters.
- (311) The Commission then reviews the contractual conditions which the Parties have sought to impose on TV broadcasters pre-merger.

**The link between negotiations for the acquisition of linear TV channels and OTT services**

- (312) Virtually all TV Broadcasters confirm that their commercial negotiations for the distribution of their linear TV channels simultaneously cover the distribution of non-linear TV content that is associated to those TV channels such as catch-up, preview and start-over TV content.<sup>262</sup> The Notifying Party's internal documents equally confirm that negotiations for the distribution of linear TV channels simultaneously cover the rights to distribute those channels and the content contained therein over the Internet.<sup>263</sup>
- (313) The Parties' internal documents also confirm that negotiations may even cover individual content, that is to say specific series and film titles, which broadcasters could include in their OTT offerings.
- (314) For instance, Ziggo has been negotiating [...] <sup>264</sup> The Notifying Party has done the same for [references to the individual content covered by commercial negotiations between the Notifying Party and various third party broadcasters] <sup>\*</sup>.
- (315) The Notifying Party's internal business documents confirm that [...] <sup>265</sup> [...] <sup>\*</sup>
- (316) Internal business documents of the Notifying Party confirm that it would be willing to use the leverage that it has over broadcasters for the distribution of their linear Pay TV channels to prevent, delay or hamper such innovation. [Reference to Notifying Party's internal business document] <sup>\*</sup> :
- (i) [...] <sup>\*</sup>;
- (ii) [...] <sup>266</sup>
- (317) This document reveals that Liberty Global would be willing to use its bargaining power in the distribution of linear Pay TV channels fully to prevent, delay or hamper OTT innovation.

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<sup>262</sup> Non-confidential replies of TV Broadcasters to Q4 Phase II Questionnaire to TV Broadcasters, question 17.

<sup>263</sup> [Reference to the Parties' internal business documents] <sup>\*</sup>.

<sup>264</sup> [Reference to the Parties' internal business documents] <sup>\*</sup>.

<sup>265</sup> [Reference to the Parties' internal business documents] <sup>\*</sup>.

<sup>266</sup> [Reference to the Parties' internal business documents] <sup>\*</sup>.

- (318) Other internal business documents show that the Notifying Party implements that strategy in individual commercial negotiations with TV broadcasters. [...]\*.<sup>267</sup> [...]\*.<sup>268</sup> [...]\*. The Notifying Party seems to have purposefully made thematic TV channels part of the overall linear TV channel negotiations with TV broadcasters in order for those to be used as 'leverage'.<sup>269</sup>
- (319) The same pattern emerges from the negotiations that the Notifying Party has been conducting with [...]\* for the distribution of its linear [...]\* Pay TV channels. In internal business documents, the Notifying Party indicates that it wishes to hamper the ability of [...]\* to offer the content of those channels via an OTT service online. If [...]\* does not agree with the Notifying Party's position, Liberty Global states that its distribution of its linear Pay TV channels "may very well have to be postponed".<sup>270</sup>
- (320) Therefore, the Commission considers that there is a strong link between the Parties' market power in the acquisition of Pay TV channels and their market power to influence the manner in which broadcasters distribute their TV channels and their individual content over the Internet. Against this background, any increased market power that the merged entity would enjoy in the acquisition of Pay TV channels translates directly into increased market power to influence the distribution of those channels and the content contained therein over the Internet.

**The Parties' approach to OTT services in their negotiations with broadcasters**

- (321) There are already agreements in place between the Notifying Party and some of the TV broadcasters in the Netherlands that hamper the latter's ability, directly or indirectly, to launch and sustain OTT services for Dutch consumers. For instance, such agreements have been concluded with [...]\*, [...]\* and [...]\*, which are important TV broadcasters in the Netherlands. The Commission has assessed whether the proposed combination of Liberty Global and Ziggo could significantly increase the ability of the merged entity to sustain such restrictive agreements, or to apply them to more TV broadcasters, or to overall impose agreements that are more onerous from the perspective of the TV broadcasters and ultimately the Dutch consumers.
- (322) The Parties' ability to insist on such contractual clauses should be assessed in conjunction with the technical means the Parties have at their disposal to hamper or limit the distribution of OTT content over their respective Internet networks. This assessment is made in recitals (366) to (394).
- (323) The Commission has assessed the available evidence on the Notifying Party's negotiations and agreements with the broadcasters RTL, SBS, NPO, Fox, the Walt Disney Company ("Disney"), HBO and VIMN.<sup>271</sup> This approach is justified as together, those broadcasters account for over 80% of the TV content that is available in the Netherlands. In fact, RTL, SBS and NPO alone account for more than 70% of the TV content that is available in that country.

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<sup>267</sup> [Reference to the Parties' internal business documents]\*.

<sup>268</sup> [Reference to the Parties' internal business documents]\*.

<sup>269</sup> [Reference to the Parties' internal business documents]\*.

<sup>270</sup> [Reference to the Parties' internal business documents]\*.

<sup>271</sup> [Reference to the Parties' internal business documents]\*. Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p. 3; [Reference to the Parties' internal business documents]\*.

- (324) That evidence revealed that the Notifying Party has sought to impose various direct and indirect restrictions on the ability of those broadcasters to offer their TV channels and individual content via OTT services in the Netherlands.
- (325) A first restriction that the Notifying Party has sought to impose is an outright contractual ban for broadcasters to offer their content via OTT services in the Netherlands. This ban targeted OTT services that broadcasters could offer themselves. It also targeted OTT services of existing and potential third party suppliers, such as Smart TV (TV connected to the Internet) providers and aggregators of OTT content that is offered online. The ban finally targeted the individual content, especially premium content that broadcasters can make available OTT.
- (326) An example is the clause that the Notifying Party sought to impose on [...]\*. The proposed clause was as follows:
- (a) *During the term [...]\* will not offer the linear channels and VOD content to so called OTT parties (among others: Netflix, Vodddler, Zattoo, Lovefilm, Weepee and Magix)*
  - (b) *During the term [...]\* will not offer the linear channels to so called Smart tv parties (among others: Samsung, Sony, LG and Philips). [...]\* is though allowed to offer her VOD content to these parties but only if the content will be offered in a transactional way to the consumer (regardless if content includes advertising)*
  - (c) *During the term [...]\* will not offer the linear channels OTT by herself*<sup>272</sup>
- (327) If accepted, that clause would have banned [...]\* from offering its content altogether to OTT service providers that are already active in the Netherlands, such as Netflix. It would also have banned [...]\* from dealing with OTT service providers that are currently active in other countries, but may wish to launch in the Netherlands in the future, such as Vodddler Inc. and LoveFilm (the latter is now part of Amazon). It bans [...]\* from dealing with players such as Magix that are currently active in adjacent markets, but may wish to launch OTT services with film and other content geared towards consumers in the future. The ban would also apply to online broadcasters of linear TV channels.<sup>273</sup>
- (328) In addition, that clause would have banned [...]\* from dealing freely with Smart TV providers such as Samsung Electronics Co., Ltd. and Sony Corporation. If accepted, [...]\* would not be allowed to distribute its linear channels to those providers. The VOD content that it would be allowed to distribute via them would be limited to TVOD services. That content would exclude potentially lucrative SVOD services.
- (329) Finally, the ban would have precluded [...]\* from offering its own linear channels over the Internet to consumers.
- (330) A second type of restriction that the Notifying Party has sought to impose on the ability of broadcasters to launch OTT services is a contractual right for it to terminate

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<sup>272</sup> [Reference to the Parties' internal business documents]\*. and; Document ID1674, non-confidential submission by [...]\*

<sup>273</sup> Zattoo is an on-line distributor of linear TV channels. It has experienced legal difficulties with content right holders regarding its ability to re-broadcast their signals over the Internet. However, YouCa B.V., another company wishing to enter the OTT market with a linear TV channels offering would also be covered by the contractual clause that Liberty Global sought to impose, which would have meant that it could not obtain the [...]\* content for inclusion in its services.

the agreement for the carriage of the broadcasters' linear Pay TV channels, should those broadcasters offer their channels or the content contained therein via OTT services in the Netherlands. The Notifying Party has sought to impose such clauses in relation to both paid and free OTT services. This type of clause creates a strong disincentive for broadcasters to launch OTT services, as that launch would mean that a large part of the reach of their TV channels would fall away. In order to sustain that reach, they would have to re-negotiate the carriage of their linear Pay TV channels, for which they are heavily dependent on the Notifying Party.<sup>274</sup>

- (331) That type of clause has been proposed to [...]\*, one of the largest commercial broadcasters in the Netherlands, as well as to other providers of TV channels and OTT services.<sup>275</sup> Internal business documents of the Notifying Party confirm that the goal of such clauses would be to prevent the emergence of OTT providers that could deliver their TV channels in competition with its own cable TV offering.<sup>276</sup>
- (332) A third category of restriction that the Notifying Party has sought to impose limits the possibility for broadcasters to offer their content to existing Pay TV platforms, such as competing cable companies, that may wish to broaden their offering in the future. For instance, the Notifying Party sought to ensure that broadcasters would limit the scope of the IPTV distribution right for other cable operators to the existing cable footprint of those operators. In that way, the Notifying Party sought to ensure that existing Pay TV operators could not expand their commercial presence through other means than their existing cable networks, for instance over the Internet.
- (333) For instance, the Notifying Party asked [...]\* to limit the scope of the IPTV distribution right that [...]\* was about to grant another cable operator, CAIW. CAIW had publicly expressed its strategy to "expand their footprint through other means than traditional cable networks". The Notifying Party explained that it could not "*risk a potential OTT IPTV in our [their] footprint*" and accordingly required [...]\* to limit CAIW's IPTV license to the latter's existing geographic footprint.<sup>277</sup>
- (334) A fourth category of restrictions on the ability of broadcasters to offer their content via an OTT service concerns the obligation for those broadcasters to only offer OTT services in the Netherlands, if those services are tied technically to the cable TV offering of the Notifying Party. That would for instance mean that broadcasters can only offer OTT services in an unencrypted fashion to subscribers that also have a Pay TV subscription with the Notifying Party. Some services cannot be available to consumers at all if those consumers do not take a Pay TV subscription with the Notifying Party, or only at lower quality.
- (335) The following clause imposed on [...]\* is an example of that type of restriction.
- [...]\*
- 4. Content Commitments, Free-to-air provisions and holdbacks*
- [Reference to the Notifying Party's internal business document]\*<sup>278</sup>
- (336) That clause covers both the [...]\* channels and the content that is shown on those channels. If both or either are included in an unencrypted or free Internet offer, it has

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<sup>274</sup> [Reference to the Parties' internal business documents]\*.

<sup>275</sup> [Reference to the Parties' internal business documents]\*.

<sup>276</sup> [Reference to the Parties' internal business documents]\*.

<sup>277</sup> [Reference to the Parties' internal business documents]\*.

<sup>278</sup> [Reference to the Parties' internal business documents]\*.

to be limited to authorised subscribers that also take the channels as part of a Pay TV bouquet from the Notifying Party. [...]’s existing [...]’ OTT services cannot be available to any end-consumers that do not also subscribe to the TV channels as part of a cable subscription with the Notifying Party.

- (337) The Commission notes that in the same document concerning [...]’, the Notifying Party proposed to go even further, and to force [...]’ to cease offering premium content to consumers directly altogether. Ultimately, the outcome of the negotiations between the Notifying Party and [...]’ was that that particular clause was not agreed upon.
- (338) [...]’<sup>279</sup>.
- (339) In fact, a similar tying arrangement to that with [...]’ has been considered for [...]’<sup>280</sup>, and for [...]’. As concerns the latter broadcaster, the Notifying Party wished to achieve the integration of the [...]’ service into its own TV services, thus preventing [...]’ from offering [OTT services]’ directly to consumers. In this regard, the Notifying Party wants to achieve the same technical restrictions that [a foreign cable operator]’ has managed to impose on [...]’ in [...]’.<sup>281</sup>
- (340) [...]’<sup>282</sup> [...]’<sup>283</sup>
- (341) Other clauses proposed to TV broadcasters in the Netherlands are a combination of the type of restrictions mentioned in recitals (321) to (339). [...]’<sup>284</sup> [...]’.<sup>285</sup> [...]’
- (342) A final category of restrictions on the ability of TV broadcasters to launch or sustain OTT services in the Netherlands relates to agreements that the merged entity would strike in relation to the TV content that can be included in such OTT offerings.
- (343) As mentioned in recitals (313) and (314), the Parties already seek to conclude agreements with TV broadcasters for the non-linear use of the TV content on their Pay TV platforms. For instance, Liberty Global has sought [...]’ such as [...]’.
- (344) In submissions to the Commission, the Notifying Party explained that it wishes to obtain the exclusive right to certain films, shows, series and other content of TV broadcasters. Although those types of exclusive agreements are not very prevalent currently, the Notifying Party sees them as an important tenet of its strategy in the near future.
- (345) To the extent that those content agreements are entered into with operators that own premium film and series content, such as the Hollywood majors (main Hollywood studios, including Fox, Warner Brothers and Disney), those agreements are entered into in the market for the licensing of TV content, where the Commission has not identified competition concerns in the context of this case.
- (346) However, to the extent that those content agreements are concluded with TV broadcasters that would be dependent on the merged entity to distribute their TV channels, concluding exclusivity agreements for the TV content that the TV broadcaster owns or for which it has the right to distribute it in the Netherlands,

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<sup>279</sup> [Reference to the Parties’ internal business documents]’.

<sup>280</sup> [Reference to the Parties’ internal business documents]’.

<sup>281</sup> [Reference to the Parties’ internal business documents]’.

<sup>282</sup> [Reference to the Parties’ internal business documents]’.

<sup>283</sup> [Reference to the Parties’ internal business documents]’.

<sup>284</sup> [Reference to the Parties’ internal business documents]’.

<sup>285</sup> [Reference to the Parties’ internal business documents]’.

could seriously undermine the viability of the OTT offers that those TV broadcasters could make to Dutch consumers. As shown in recitals (313) and (314), the commercial negotiations for TV content deals with TV broadcasters take place in the context of, or at the very least closely linked with, commercial negotiations for the carriage of the Pay TV channels of those same TV broadcasters. The market power that the merged entity would have vis-à-vis those TV broadcasters in the distribution of those Pay TV channels would then also translate into market power to pressure those TV broadcasters into exclusivity agreements for the content that is shown on those channels, or any other content that those TV broadcasters themselves own or for which they have the rights to distribute in the Netherlands. The Notifying Party itself underlines that the ultimate competitiveness of OTT services will depend on the attractive content, in particular recent films and series that those services offer to consumers. Allowing such exclusive deals to go ahead unfettered, would mean that the merged entity could use market power in a way that deprives the OTT services of the TV broadcasters of the attractive TV content they need in order to operate those services.

- (347) Insofar as the merged entity pursues such exclusivity agreements in the context of, or together with, its negotiations for the distribution of linear Pay TV channels, those agreements are an indirect restriction of the TV broadcasters' ability to launch or sustain OTT services for Dutch consumers.
- (348) The proposed transaction is likely to significantly increase the merged entity's market power to continue the restrictive agreements for OTT services of the types identified above, and to apply them to even more TV broadcasters. Overall, the merger is likely to significantly increase the Notifying Party's market power to make those restrictive agreements even more onerous.
- (349) While the Notifying Party has sought to implement such clauses in its contracts with TV broadcasters, the Commission notes that [...] as well as [...] have so far been able to resist, to a certain extent, attempts to conclude contractual bans for their OTT services.
- (350) [...] for example, was able to at least negotiate a change to the nature of the OTT clause that was initially proposed by the Notifying Party such that it was transformed from an outright prohibition on the provision of [...] content OTT to a unilateral right for the Notifying Party to terminate the carriage agreement in case [...] were to provide its linear TV channels to OTT parties.<sup>286</sup> Similarly, [...] managed to change an outright prohibition on the free provision of additional VOD content on its OTT catch-up TV service into a provision that would make the payment of certain minimum guarantees by the Notifying Party conditional upon [...] refraining from doing so.<sup>287</sup>
- (351) [...], in turn, did not agree to include any text on OTT in its agreement with the Notifying Party. The Notifying Party therefore moved away from the aforementioned ban on OTT, that is to say that the distribution agreement would be terminated in case [...] were to go OTT. Instead, it proposed that certain minimum guarantees and marketing commitments undertaken by it would be dropped in case [...] were to launch an OTT product in the Netherlands.<sup>288</sup> [...] was seemingly able to trade off a

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<sup>286</sup> Document ID1674, [...]. Document ID1908, non-confidential minutes of conference call between Commission's services and [...] of 19 June 2014, p. 4. [...]

<sup>287</sup> [Reference to the Parties' internal business documents].

<sup>288</sup> [Reference to the Parties' internal business documents].

contractual prohibition on the provision of its VOD content OTT for one on the provision of its linear content OTT.<sup>289</sup>

- (352) Finally, SBS, RTL and NPO have been able to jointly launch a standalone OTT catch-up TV service (NLZiet)<sup>290</sup> and NPO currently does provide its linear TV channels free of charge OTT.<sup>291</sup>
- (353) As regards Ziggo's approach to OTT services, the Commission found that, similarly to Liberty Global, Ziggo has also been proposing clauses to broadcasters to limit their freedom to offer OTT services. Ziggo's approach has however been more lenient than that of the Notifying Party. [...]\*.<sup>292</sup>
- (354) That policy of Ziggo is reflected in the documentation of its commercial negotiations with TV broadcasters. For instance, as regards [...]\*, Ziggo proposed that if [...]\* were to make its content available on the Internet for free, Ziggo should also obtain the non-exclusive right to distribute that content for free.<sup>293</sup> Ziggo has not, as the Notifying Party has, sought to insist on a clause that would ban [...]\* from such streaming entirely. During the market investigation, [...]\* indicated that only one of the two Parties has demanded it to refrain from free OTT streaming. The evidence from the Parties shows that this party is the Notifying Party, and not Ziggo.<sup>294</sup>
- (355) Likewise, the distribution agreement between [...]\* and Ziggo does not contain any provision limiting [...]\*'s ability to provide OTT services. Rather, it contains a clause whereby Ziggo is prohibited from transmitting [...]\*'s TV channels via the open Internet.<sup>295</sup>
- (356) The same pattern emerges in relation to [...]\*. Ziggo initially confronted [...]\* with the same [...]\* proposal that the Notifying Party made to [...]\*. However, [...]\* insisted on conducting separate negotiations with the Notifying Party and Ziggo, to which both parties seemingly agreed.<sup>296</sup> Ziggo's subsequent individual proposals were similar to the proposals that it made to [...]\*. In those proposals, Ziggo focussed on obtaining access to the OTT services that [...]\* chose to make available online, rather than seeking a ban on such OTT services altogether.<sup>297</sup> Thus, [...]\* was able to obtain more favourable draft clauses once it could avoid dealing with Liberty Global and Ziggo together.
- (357) Ziggo's agreement with [...]\* does not contain a clause banning [...]\* from offering its TV channels over the Internet. As concerns [...]\* non-linear [...]\* service, the agreement contains the right for Ziggo to obtain some monetary compensation for its

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<sup>289</sup> [Reference to the Parties' internal business documents]\*.

<sup>290</sup> Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, p. 4; Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p. 3; <https://www.nlziet.nl/> [accessed at 31 July 2014].

<sup>291</sup> Document ID01424, NPO's non-confidential reply to questionnaire Q4 to Phase II Questionnaire to Broadcasters of 28 May 2014, question 16.

<sup>292</sup> [Reference to the Parties' internal business documents]\*.

<sup>293</sup> [Reference to the Parties' internal business documents]\*. [...] also agreed that its free OTT offers would be at a maximum download speed, which would however be benchmarked against that of its competitors [...]\* and [...]\*.

<sup>294</sup> Document ID1400, SBS' non-confidential reply to questionnaire Q4 Phase II Questionnaire to Broadcasters of 28 May 2014, question 18.1; Document ID1769, SBS' non-confidential submission of 30 June 2014.

<sup>295</sup> [Reference to the Parties' internal business documents]\*.

<sup>296</sup> [Reference to the Parties' internal business documents]\*.

<sup>297</sup> [Reference to the Parties' internal business documents]\*.



subscribers using the [...] service directly over the Internet, rather than as part of the VOD offering of Ziggo.<sup>298</sup> The Notifying Party's contract restricts such direct consumer access to the [...] service.<sup>299</sup>

- (358) In the distribution agreement currently in place between Ziggo and [...]\*, [...]\* explicitly reserved to itself the right to freely exploit the rights granted therein via other means of distribution, including the Internet.<sup>300</sup>
- (359) In sum, the Commission's investigation has confirmed that the Dutch market is to a certain extent already characterised by the existence of agreements that restrict the TV broadcasters' ability to offer their TV channels and content via OTT services to Dutch consumers. However, some TV broadcasters have until now been able to resist the conclusion of such restrictive agreements, whilst others have been able to water down the restrictive nature of the initially proposed agreements. A factor that has played a role in those dynamics is that Ziggo has taken a more lenient approach to the OTT services of TV broadcasters.
- (360) In light of this evidence, the Commission has assessed the likely impact of the proposed combination of Liberty Global and Ziggo on the merged entity's market power to continue to enforce such restrictive agreements, or to apply them to more TV broadcasters or to make them more onerous overall, to the detriment of TV broadcasters and ultimately the Dutch consumers.

#### ***Ability to prevent, delay or hamper OTT innovation post-transaction***

- (361) Recitals (362) to (394) contain the Commission's assessment of the ability of the merged entity, post-transaction, to prevent, delay or hamper OTT innovation. As set out in recital (394), the Commission concludes that the proposed transaction clearly increases the merged entity's ability to prevent, delay or hamper OTT services by contractual means resulting from the merged entity's increased buyer power. That increased ability is furthermore compounded by the merged entity's ability to hamper Internet traffic via technical means.

#### ***Ability to prevent, delay or hamper OTT innovation by contractual means***

- (362) As the merger of the Notifying Party and Ziggo is likely to significantly enhance the Notifying Party's market power vis-à-vis TV broadcasters, the merged entity is likely to have an increased ability to impose its stringent contractual OTT conditions on TV Broadcasters compared to the situation absent the merger.
- (363) Moreover, the fact that Ziggo was present on the market with a relatively more lenient policy on OTT services, gave TV broadcasters a degree of leverage vis-à-vis the Notifying Party pre-merger. TV Broadcasters have explained that in terms of clauses on OTT services, they tend to benchmark the conditions of their supply agreements entered into with either the Notifying Party or Ziggo in subsequent negotiations with the other.<sup>301</sup> Some TV broadcasters confirm that they are able to

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<sup>298</sup> [Reference to the Parties' internal business documents]\*.

<sup>299</sup> [Reference to the Parties' internal business documents]\*.

<sup>300</sup> [Reference to the Parties' internal business documents]\*.

<sup>301</sup> Document ID1985, non-confidential minutes of conference call between Commission's services and NPO of 19 June 2014, p 2; Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014, p. 3; Document ID1700, non-confidential minutes of conference call between Commission's services and VIMN of 20 June 2014, p. 2; Document ID2209, non-confidential version of the European Broadcasters' Union's submission of 30 June 2014, p. 4;

put pressure on either the Notifying Party or Ziggo by communicating the outcome of the negotiations for the distribution of their TV channels with the other. The Parties' internal documents confirm the existence of this constraint. For instance, [...]»<sup>302</sup> As explained in recital (356), [...]» was able to obtain more favourable draft clauses once it could avoid dealing with Liberty Global and Ziggo together. This would however be precisely the situation in which it would be following the merger.

- (364) The Commission finds that it is unlikely that TV broadcasters would be able to resist contractual clauses that hamper their ability to launch or sustain OTT services by adapting a coordinated market response to the merged entity to relinquish such clauses. Indeed, when faced with requests by the merged entity to agree to restrictive OTT agreements, each TV broadcaster is likely to weigh its short term gain derived from not losing income from the merged entity – in the form of higher licence fees - if it agrees to such clauses against the longer-term gain that could be derived from cross-platform competition between cable TV and OTT TV, that is to say by facilitating entry at the downstream level. However, for OTT TV to become a viable and credible substitute to cable TV, it will likely require OTT content from a large proportion of major TV broadcasters. Each TV broadcaster therefore faces the risk that a sufficiently high proportion of TV broadcasters agree to restrictive contract terms on OTT, jeopardising the long-term benefit of additional competition from OTT services overall. Under those circumstances, the longer term benefits of cross-platform competition to TV broadcasters may be sufficiently uncertain to be outweighed by the short term benefit of agreeing to such restrictions. The risk of such coordination failure is likely increased by the dispersed nature of TV broadcasters.<sup>303</sup> The fact that some broadcasters have so far resisted these clauses does not alter that assessment. After the proposed transaction, they would face a combined Liberty Global/Ziggo. The short-term gain derived from the licensing income of such a large market player will only make it more difficult for those broadcasters to secure the long-term gain of bringing additional competition to the market in the form of OTT services.
- (365) Therefore, the Commission considers that, post-merger, the Notifying Party would likely have a greater ability contractually to prevent, delay or hamper OTT innovation. This increased ability to prevent, delay or hamper OTT innovation by contractual means, needs to be assessed in conjunction with the ability that each of the Parties already has pre-merger to technically degrade the distribution of OTT content via their Internet networks, which is another market where they are active.

***Ability to prevent, delay or hamper OTT innovation compounded by the ability to technically restrict OTT services***

- (366) Both Liberty Global and Ziggo are also active as a provider of Internet access services to consumers in the Netherlands. In that role, they operate the Internet networks that providers of OTT services need to access Liberty Global's and Ziggo's broadband customers in the Netherlands. Post-merger, the Notifying Party will

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Document ID2270, non-confidential minutes of conference call between Commission's services and Fox International Channels of 25 June 2014, p. 4.

<sup>302</sup> [Reference to the Parties' internal business documents]\*.

<sup>303</sup> This reasoning is in line with established models of exclusive dealing. See C. Fumagalli and M. Motta, 'Buyers' miscoordination, entry, and downstream competition' in Working Paper no. 152 *Centre for Studies in Economics and Finance* of January 2006, page 15, and Commission decision of 18 October 1996 in case IV/M.580, *ABB/Daimler Benz*.

provide access to around 43% of Dutch broadband customers. Under those circumstances, the Commission had to assess whether the merged entity's increased ability to prevent, delay or hamper OTT innovation by contractual means would be compounded by its ability to technically degrade the distribution of OTT content via its Internet network.

(367) In terms of access to the Parties' broadband customers in the Netherlands, providers of OTT audio visual services can reach the Parties' broadband customers in three distinct ways:

(i) *Private direct peering: the OTT provider can directly connect to the Parties' Internet networks via a private physical interconnection link.*<sup>304</sup> *The Notifying Party refers to this as direct physical network interconnect (PNI). OTT providers can achieve this PNI at a paid or settlement-free basis;*

(ii) *Public direct peering: the OTT provider can directly connect to the Parties' Internet networks via a physical interconnection link at a public Internet exchange. The Parties' overall interconnection capacity at an Internet exchange is shared between all of the companies they connect with there (between 50 and 500 Gbit/s for the Notifying Party);*

(iii) *Transit: the OTT provider can contract a third-party Internet connectivity transit provider, whose Internet network is connected to that of the Parties, through private direct peering*<sup>305</sup>, *to hand over its Internet traffic to the Parties' networks in exchange for a transit fee.*<sup>306</sup>

(368) The Commission's investigation confirmed that there are close links between the Parties' technical role in delivering OTT services to their broadband customers and their ability to insist upon contractual clauses that restrict, directly or indirectly, the ability of TV broadcasters to offer their content via OTT services. The existence of such links becomes apparent from the Notifying Party's current approach to, for example, the OTT TV[...] services of [...] and of [...]. As regards both of those OTT services, the Notifying Party was only willing to guarantee a free high quality (in this case meaning a direct, private and uncongested interconnection) access to its Internet network if those services would be exclusively available to its own [...] customers. In that way, the Notifying Party sought to achieve a contractual restriction of [...] possibility to offer OTT services to consumers in the Netherlands by partly relying on its position as an Internet network provider and route to deliver OTT traffic to its broadband customers.

(369) The Commission has assessed in detail the technical means that the Parties have at their disposal to influence the manner in which OTT services can reach their broadband customers. The Commission's investigation confirmed that, ultimately, each of the routes that OTT providers can use to interconnect with the Parties' Internet networks, thereby obtaining access to the Parties' broadband customers, are under the control of the Parties.

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<sup>304</sup> This is often a dedicated fibre connection between the two parties' routers to be used exclusively for the exchange of traffic flowing between their respective Internet networks.

<sup>305</sup> According to the Notifying Party, interconnections at an Internet exchange are usually not allowed to be used to provide transit services. See: Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014.

<sup>306</sup> Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014.

- (370) **Private and public direct peering.** As regards direct peering, that is to say the first way, so-called 'private direct peering', and the second way, so-called 'public direct peering', of interconnecting with the Parties' Internet networks, the Notifying Party currently publicly enforces a policy by which providers of OTT audio visual services will not be allowed to engage in settlement-free direct peering with it, whether public or private.<sup>307</sup> Moreover, under its peering policy, the Notifying Party has reserved the right not to engage in private direct peering with any party at all, regardless of whether the requirements for settlement-free private direct peering are met. The Notifying Party's policy is summed up in its internal documents as: [...]\*.<sup>308</sup> Given that any OTT audio visual service will thus only qualify for *paid* direct private peering, if at all, the Notifying Party could refuse or severely restrict those services from having access to its Internet network, either by charging excessive fees for paid direct private peering or by altogether refusing to engage in private direct peering.
- (371) As already mentioned in recital (368), the Commission has found evidence that suggests that the Notifying Party already refuses to offer direct high quality access to its Internet network to OTT service providers. [...]\*:  
 (i) "[...]\*"<sup>309</sup>;  
 (ii) "[...]\*"<sup>310</sup>;  
 (iii) "[...]\*"<sup>311</sup>;  
 (iv) "[...]\*"<sup>312</sup>;  
 (v) "[...]\*"<sup>313</sup>;  
 (vi) "[...]\*"<sup>314</sup>.
- (372) [...]\*. As regards [...]\*, the Notifying Party offered to conclude a [...]\* direct interconnection in relation to the imposition of a contractual clause that would prohibit [...]\* from providing its streaming service directly to end users.<sup>315</sup>
- (373) [...]\*. That indicates that the Notifying Party is unlikely to be deterred from engaging in such strategy due to any perceived risk that it infringes Dutch net neutrality law.
- (374) In addition to that inability to interconnect directly via a private link with the Notifying Party's Internet network, those OTT audio visual services cannot engage in *public* direct peering with the Notifying Party, that is to say direct peering at an Internet exchange, as those would not be allowed, pursuant to its peering policy, to generate traffic in excess of 3 Gbit/s at any one Internet exchange. This effectively

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<sup>307</sup> Indeed, OTT audio visual services will never comply with the maximum ratio of 3:1 between traffic incoming to the Notifying Party's Internet network and traffic outgoing from the Notifying Party's Internet network, required by the Notifying Party for settlement-free *private* direct peering. Such OTT services generate largely one-way traffic, sometimes achieving inbound-outbound ratios in excess of 100:1. Liberty Global's peering policy is available at: <http://www.libertyglobal.com/PDF/LGI-Settlement-Free-IP-Peering-Policy-2012-final.pdf> [Accessed at 16 July 2014].

<sup>308</sup> [Reference to the Parties' internal business documents].

<sup>309</sup> Document ID331-41175, Liberty Global Engineering PNI/ODIA Scope Document of 19 June 2013, section 1.2.

<sup>310</sup> Document ID331-7320, Liberty Global email 'RE: Fox sports GO | direct peering / Kosten direct peering' of 11 June 2013.

<sup>311</sup> Document ID331-10359, Liberty Global email 'RE: HBO NL – Big Questions' of 7 November 2012.

<sup>312</sup> [Reference to the Parties' internal business documents]\*.

<sup>313</sup> [Reference to the Parties' internal business documents]\*.

<sup>314</sup> [Reference to the Parties' internal business documents]\*.

<sup>315</sup> [Reference to the Parties' internal business documents]\*.

makes it impossible for any successful OTT service to use that route to reach the Notifying Party's broadband customers. In that regard, Ziggo indicated that even a limited number of around [...] concurrent OTT video streams at peak time currently already generates traffic far exceeding the threshold of 3 Gbit/s (namely around [...]).<sup>316</sup> In addition to that, the Notifying Party has confirmed that it would be unlikely to establish new direct peering relationships at the Amsterdam Internet Exchange with peers that do not already connect to its Internet network in some other way, that is to say it would be unlikely to establish direct peering relationships *only* at the Amsterdam Internet Exchange.<sup>317</sup> Furthermore, the Commission found that the Notifying Party currently maintains highly limited interconnection capacity and only for certain legacy interconnections that it still has at, for example, the NL-IX Internet exchange. This limited capacity for non-exclusive OTT competitors has, [...] already caused problems as a result of port congestion.<sup>318</sup>

- (375) For all of those reasons, OTT audio visual service providers already have limited prospects of using private or public direct interconnection effectively in order to reach the Notifying Party's broadband customers.
- (376) **Transit.** Direct interconnection capacity with third-party Internet interconnectivity/transit providers, that is to say the third way of reaching the Parties' customers ('transit') is the only access route for Internet content providers that do not obtain access through private or public direct peering.<sup>319</sup> Owners of Internet access networks such as the Parties are also capable of severely hampering access via any such transit links, for example by refraining from upgrading direct interconnection capacity in line with increased Internet traffic flows.
- (377) Importantly in that respect, the Notifying Party is not contractually bound, under its direct peering agreements with transit providers, to increase interconnection capacity in line with capacity utilization on the relevant interconnection point(s).<sup>320</sup> The Notifying Party acknowledged that it could even decrease the capacity of an entire transit connection, thereby increasing the risk of congestion.<sup>321</sup>
- (378) Refusal by the Notifying Party to upgrade transit capacity or to even degrade it, would have serious consequences for the viability of OTT services in the Netherlands. The Commission's investigation namely confirmed that only a small proportion of Dutch Pay TV subscribers would have to switch to linear OTT TV in order to significantly increase Internet traffic flows, such that the Parties' existing interconnection capacity with transit providers would be exhausted, resulting in port congestion.
- (379) For example, the Commission has compared Netflix' publicly available speed index for Ziggo (3.74 Mbit/s)<sup>322</sup> with Ziggo's current total paid transit capacity ([...]).<sup>323</sup>

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<sup>316</sup> Document ID1548, Liberty Global and Ziggo response to Commission's request for information of 11 June 2014, p. 10.

<sup>317</sup> Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 3.

<sup>318</sup> [Reference to the Parties' internal business documents]\*.

<sup>319</sup> Draft Report on the BEREC public consultations on net neutrality, Berec Conclusion on Question 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014].

<sup>320</sup> Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, p. 5.

<sup>321</sup> Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, para. 167.

<sup>322</sup> <http://ispspeedindex.netflix.com/netherlands> [accessed at 23 July 2014].

Based on that comparison, only [...] concurrent video streams at peak time would exhaust that total transit capacity. In other words, interconnection congestion would occur if only [...] of Ziggo's current DTV subscriber base of 2.253 million customers<sup>324</sup> were to switch to watching, for instance, the daily news, which currently attracts large viewing shares, via the Internet.

- (380) In terms of the Notifying Party's current overall paid transit capacity, which can be used by all Internet networks but is exclusively located in the United States, for its entire pan-European network, this would already be congested in the event that [...] concurrent video streams were to occur at peak time ([...] <sup>325</sup>). In fact, the Notifying Party's main Internet network AS6830 that currently covers 9 different European countries could potentially no longer be effectively reached via transit providers at all, including all settlement-free peers in Europe, in the event that around [...] concurrent video streams were to occur at peak time.<sup>326</sup> When taking account of the existing maximum peak-time capacity utilization on the same direct interconnections points, it becomes apparent that AS6830's direct settlement-free interconnection links with transit providers could in fact not – in the worst case scenario<sup>327</sup> – handle more than [...] additional concurrent peak-time video streams.<sup>328</sup> NPO in that regard indicated that the current Dutch Internet infrastructure is not well equipped to handle more than 300 000 – 400 000 concurrent Internet video streams.<sup>329</sup> Finally, the Notifying Party itself noted in internal business documents that [...] <sup>330</sup>
- (381) In any event, the Notifying Party currently maintains a total paid transit capacity of only [...] for its entire pan-European AS6830 Internet network, whilst those transit connections are located exclusively in the United States. That renders the connections less efficient for Internet traffic originating from and destined to Europe.<sup>331</sup>

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<sup>323</sup> Document ID1548, Liberty Global and Ziggo response to Commission's request for information of 11 June 2014, p. 10.

<sup>324</sup> Document ID1627, Liberty Global response to Commission's request for information of 20 June, annex XXI.

<sup>325</sup> Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014.

<sup>326</sup> This is based on AS6830's current overall direct interconnection capacity with transit providers of 3395 Gbit/s, as estimated in Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014. The Commission has compared this with the average speed of 3.6 Mbit/s that the Notifying Party currently attains for Netflix streams in the Netherlands. <http://ispspeedindex.netflix.com/netherlands> [accessed at 23 July 2014].

<sup>327</sup> The Commission notes that the Notifying Party has indicated that peak times do not necessarily coincide for all providers of Internet content; Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, p. 3.

<sup>328</sup> This is based on AS6830's current maximum peak-time capacity utilization of 2108 Gbit/s as estimated in Document ID2135, Liberty Global response to Commission's request for information of 15 July 2014, and an average speed of 3.6 Mbit/s that the Notifying Party currently attains for Netflix streams in the Netherlands (<http://ispspeedindex.netflix.com/netherlands>) [Accessed at 23 July 2014].

<sup>329</sup> Document ID1983, non-confidential version of NPO email of 3 July 2014.

<sup>330</sup> [Reference to the Parties' internal business documents]\*.

<sup>331</sup> Transit providers historically received two-sided payment; from the Internet content provider whose content was delivered to a terminating network, as well as from the terminating network itself, whose customers were thus able to access that content. When a terminating network ceases to pay transit providers for delivering traffic, the transit provider will in turn only hand over traffic for which it gets paid by its Internet content customers and not from its settlement-free peers. By limiting/eliminating paid transit capacity, the Notifying Party thereby already limits the interconnectivity of its Internet network because the entire network of Tier 1 transit providers will no longer hand over each other's traffic to the network of the Notifying Party, because that would mean doing it for free.

- (382) Finally, the availability of transit as a viable route to the merged entity's broadband customers cannot be assessed separately from the Notifying Party's peering policy in general. The Notifying Party does not currently *pay* for maintaining interconnection capacity with providers of transit services in Europe. [internal business policy of the Notifying Party]\*<sup>332</sup> [...] \*<sup>333</sup> [...] \*<sup>334</sup> This business policy affects the traffic that transit providers are likely, or capable, to hand over to the Notifying Party for final delivery to the broadband customers. During the Commission's investigation, a number of transit providers explained that if they interconnect with the Notifying Party on a settlement-free basis, they are only likely to hand over traffic of their own paying customers to the Notifying Party's Internet network. The providers of transit services that it interconnects with on a settlement-free basis will accordingly only hand over traffic of their own *paying* customers to the Notifying Party's Internet network. If the latter were to hand over traffic of their own settlement-free peers, for example other Tier 1 transit providers, to the Notifying Party, itself being a settlement-free peer as well, those transit providers would not receive any payment for providing their services.<sup>335</sup> They would have no economic incentive to hand over that traffic.<sup>336</sup>
- (383) Furthermore, the contractual arrangements covering the settlement-free direct interconnections between the Notifying Party and providers of transit services do not even allow transit providers to hand over traffic of their peers, that is to say other transit providers.<sup>337</sup> The Notifying Party is thereby able to congest specific interconnection links with providers of transit services in a targeted manner, knowing that congestion on that particular link will only affect the direct, paying customers of that particular provider of transit services, rather than the Internet at large. The Notifying Party acknowledges this in its internal business documents: [Reference to the Parties' internal business documents]\*.<sup>338</sup> In that regard, it is also important to note that the Notifying Party has indicated that several public tools exist, such as <http://bgp.he.net/> and <https://stat.ripe.net/widget/bgplay>, that give insight about who has a relation with what AS<sup>339</sup> and may or may not be a transit provider for it,

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<sup>332</sup> A Tier 1 network is an Internet Protocol (IP) network that participates in the Internet solely via settlement-free interconnection (also known as settlement-free peering), rather than paid interconnection – See [http://en.wikipedia.org/wiki/Tier\\_1\\_network](http://en.wikipedia.org/wiki/Tier_1_network) [accessed on 11 August 2014].

<sup>333</sup> [Reference to the Parties' internal business documents]\*.

<sup>334</sup> [Reference to the Parties' internal business documents]\*.

<sup>335</sup> See for an explanation on this issue, for example: Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014]; non-confidential minutes of conference call between the Commission's services and Level 3 of 31 July 2014, p. 2.

<sup>336</sup> Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014]; Michael Kende, *The Digital Handshake: Connecting Internet backbones* Office of Plans and Policy Federal Communications Commission Working Paper No. 32 of September 2000. Available at: <http://www.fcc.gov/working-papers/digital-handshake-connecting-internet-backbones> [as at 8 August 2014]; Comments of AT&T on the BEREC Consultation Paper, *An assessment of IP Interconnection in the context of net neutrality* of 31 July 2012. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014].

<sup>337</sup> [Reference to the Parties' internal business documents]\*.

<sup>338</sup> [Reference to the Parties' internal business documents]\*.

<sup>339</sup> Within the Internet, an autonomous system (AS) is a collection of connected Internet Protocol (IP) routing prefixes under the control of one or more network operators that presents a common, clearly defined routing policy to the Internet – see [http://en.wikipedia.org/wiki/Autonomous\\_System\\_\(Internet\)](http://en.wikipedia.org/wiki/Autonomous_System_(Internet)) [accessed on 11 August 2014].



although it claims this would never be exact.<sup>340</sup> Those tools indeed list the AS number of specific Internet content providers such as Netflix, RTL Nederland, NPO, SBS and others. They also seem to list the peers of such Internet content providers, as well as the extent to which those peers are exchanging traffic with them. The public tool *www.robtex.com* furthermore provides a detailed up-to-date insight into which transit providers are used for handing over Internet traffic by any given Internet content provider, the extent to which those are used, and the type of routing announcements employed (allowing one to determine whether a connection with a given provider of transit services is a *paid* transit connection), all in an efficient graphic representation. Using that tool would, for example, allow one to first find out which Internet network hosts NPO's catch-up service *Uitzending Gemist* – being NPO's AS25182 – and to subsequently determine which of the transit providers that are paid by NPO, for example, KPN International Eurorings that advertises all routes into NPO's AS, would be capable of handing over Internet traffic to the Notifying Party's Internet network AS6830.

(384) Regarding Ziggo, its internal documents show that despite the fact that it had a more ad-hoc policy in terms of establishing peering and interconnection relationships in the recent past, it has been moving towards a policy that is in line with that of the Notifying Party. [...] <sup>341</sup> The merger would cement that strategic shift of Ziggo as the Notifying Party's existing policy would apply to the merged entity.

(385) The Notifying Party's arguments as to why it would not be able to shut down or hamper the access of OTT service providers to its Internet network in such a manner, are not convincing.<sup>342</sup> Rather, explicit evidence to the contrary was found during the Commission's investigation:

- (i) "[Reference to the Parties' internal business documents]\*" <sup>343</sup>
- (ii) "[Reference to the Parties' internal business documents]\*" <sup>344</sup>
- (iii) "[Reference to the Parties' internal business documents]\*" <sup>345</sup>

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<sup>340</sup> Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 5.

<sup>341</sup> Document ID366-8846, Ziggo presentation of February 2014, 'Internet interconnectie / peering' by Arie van der Giessen, slide 1. The Parties explained, in their reply to the Commission's decision initiating proceedings, that the document in question merely concerned an internal exploration on the different peering policies that would be available. The Commission however notes that Ziggo's CEO has similarly been reported to want data-intensive Internet services to pay for direct interconnection: <http://www.nrc.nl/nieuws/2014/03/08/nieuwe-topman-ziggo-netflix-mogelijk-vragen-om-extra-betaling> [accessed at 25 July 2014].

<sup>342</sup> In that regard, the Commission understands that by creating so-called Border Gateway Protocol communities, it even seems to be technically possible to exclude certain specific, individual Internet networks from having access to the Notifying Party's own Internet network (or only via less effective, congested interconnections or more costly ones), without having to physically congest any interconnections. BGP is also employed by the Notifying Party's Internet network to communicate with other Internet networks: Document ID2384, Liberty Global presentation 'M.7000: technical presentation', of 1 July 2014. See for an explanation on this issue: Alexander Reicher, *Redefining Net Neutrality after Comcast v. FCC*, Berkeley Technology Law Journal, Vol. 26:733, pp. 757 and 758; Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, J. on Telecomm. & High Tech. L. 79 (2010); Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014].

<sup>343</sup> [Reference to the Parties' internal business documents]\*.

<sup>344</sup> [Reference to the Parties' internal business documents]\*.

<sup>345</sup> [Reference to the Parties' internal business documents]\*.



- (386) All of this evidence confirms that the Parties currently have the *technical* ability to preclude or significantly hamper OTT competitors from having effective access to their respective Internet networks.
- (387) Indeed, if the Notifying Party were to refrain from upgrading direct interconnection capacity with providers of transit services in line with increased Internet traffic levels, congestion could occur. Due to such congestion, providers of OTT audio visual services could then be altogether foreclosed from effective access to the merged entity's broadband customers in the Netherlands, as it would eventually result in lost IP packets, that is to say parts of the requested Internet content would be lost.<sup>346</sup> Importantly, any such congestion would likely be limited to peak time usage of OTT audio visual services and would not, in any case, affect the quality of the merged entity's broadband offer across the board. Indeed, first, given that the Notifying Party peers directly with Internet content providers such as [...] <sup>347</sup>, a foreclosure of providers of OTT audio visual services would leave these major Internet services ([...] <sup>\*</sup>) wholly unaffected. Second, it seems that the congestion on the merged entity's settlement-free direct interconnections with transit providers will only affect the direct paying customers of the transit providers in question, whose identity can be established through the public tools referred to in recital (383). Furthermore, the Notifying Party has confirmed that its own OTT service Horizon Online would be unaffected by such congestion.<sup>348</sup>
- (388) The implications of a general strategy to restrict overall interconnection capacity that is available for OTT services and to force providers of such OTT services to rely on paid peering models under Dutch net neutrality rules have never been investigated in full by the competent Dutch authorities. In any event, evidence referred to in recitals (370) to (372) shows that [...] <sup>\*</sup>.
- (389) A number of respondents to the Commission's market investigation confirm that finding. They indicated that insufficient interconnection capacity can affect, and in some cases has already affected the viability of OTT TV as a result of congestion, both in the Netherlands and abroad.<sup>349</sup> The majority of Pay TV retailers and a number of TV broadcasters confirmed that post-merger, the merged entity would be able to restrict OTT SVOD services in having effective access to its Internet network by technically degrading their quality.<sup>350</sup> The Commission considers that this technical ability compounds the merged entity's increased ability to hamper, delay or prevent OTT innovation by contractual means.

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<sup>346</sup> See for an explanation on this issue, for example: Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 6 and 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014].

<sup>347</sup> Document ID1623, Liberty Global submission 'Annex XVIII – List of direct peers', of 24 June 2014.

<sup>348</sup> Document ID1790, Liberty Global response to Commission's request for information of 2 July 2014, p. 9.

<sup>349</sup> Document ID1982, NPO's non-confidential email of 3 July 2014; Document ID2269, non-confidential minutes of conference call between Commission services and Fox International Channels, p. 3; Document ID1987, Netflix' non-confidential submission of 11 July 2014; Draft report for public consultation (BoR 12-33) An assessment of IP-Interconnection in the context of Net Neutrality Comments from Cogent Communications, p. 7. Available at: [www.berec.europa.eu](http://www.berec.europa.eu) [as at 8 August 2014].

<sup>350</sup> Replies to Phase I Questionnaire Q2 to TV channels wholesale suppliers of 17 March 2014, questions 69 and 70; replies to Phase I Questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 107 and 108.

- (390) Moreover, in internal business documents, the Notifying Party itself notes that [...]\*.<sup>351</sup>
- (391) The Notifying Party has highlighted the fact that OTT providers can always reach consumers in the Netherlands via KPN's Internet access network. However, the Commission has found indications that suggest that KPN's Internet network may currently be less suited to handle data-intensive OTT services than that of the merged entity. NPO indicated that congestion occurs on the last-mile of the DSL network, hampering the viability of large-scale OTT audio visual services.<sup>352</sup> CanalDigitaal pointed out that given the ongoing market trends towards bundled triple play services the DSL network has a competitive disadvantage since for it to carry a TV signal with an acceptable quality, comparable to the quality on cable, less bandwidth would be available on DSL for Internet access.<sup>353</sup>
- (392) Under those circumstances, the Commission finds that the risk of losing distribution on the merged entity's enlarged cable network combined with the possibility that an OTT TV service could not even effectively reach the single largest group of Dutch broadband customers is likely to severely limit content providers' prospects of successfully launching or contributing to OTT services.
- (393) Therefore, the Commission finds that the increased ability of the merged entity to restrict by contractual means the availability of OTT services in the Netherlands would be compounded by its technical ability to preclude or hamper OTT service providers from reaching their broadband customers over its Internet network.

#### Conclusion

- (394) Therefore, the Commission concludes that the proposed transaction would confer upon the merged entity an increased degree of buyer power vis-à-vis TV broadcasters in the Netherlands. This would increase its ability to impose contractual terms on TV broadcasters that prevent, hamper or delay, by direct and indirect means, the OTT services that include those broadcasters' content. The increased ability to do so would be compounded by the fact that the Parties already have the technical means at their disposal to shut down or to degrade the access to their Internet networks, which these OTT services will need to reach the merged entity's broadband customers.

#### ***The incentive to prevent, hamper or delay OTT innovation***

- (395) Preventing, hampering or delaying OTT innovation would reduce or eliminate the risk that such innovation would lead to cross-platform competition which might ultimately threaten cable companies' business model – a competitive threat which is well recognised in internal documents of the Parties, as outlined in recital (304).
- (396) Based on the Parties' approach to OTT services described in section 7.3.3.2 of this decision, the Commission considers that the Notifying Party currently already has the incentive to try and prevent TV broadcasters from providing their linear and non-linear content OTT, either on a standalone basis or in cooperation with others, but that, pre-merger, it may be limited in its ability to do so. The different contractual clauses that Liberty Global has sought to negotiate in its contracts with TV

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<sup>351</sup> [Reference to the Parties' internal business documents]\*.

<sup>352</sup> Document ID1982, NPO's non-confidential email of 3 July 2014.

<sup>353</sup> Document ID845, M7 Group's reply to questionnaire Q3 to retailers of TV, telephony and Internet access services' of 17 March 2014, questions 30.1 and 37.1.

broadcasters in order to restrict their ability to develop their OTT offers show that the Notifying Party has a clear incentive to engage in such practices.

- (397) Furthermore, the Commission considers that the existing incentive would increase as a result of the proposed transaction. Since the successful foreclosure of competition from OTT services at the retail level will benefit all existing Pay TV services providers, Pay TV services providers have an incentive to free-ride on the foreclosure efforts of their competitors at the retail level (i.e. Ziggo did not need to engage in the same foreclosure efforts in order to benefit from any such effort that could be made by its competitors). As shown in the previous recital (384), Ziggo has been less assertive than Liberty Global in preventing or hampering OTT innovation which is consistent with such an effect. Indeed, prior to the proposed transaction, Ziggo would have benefited as an external third party competitor from any success that Liberty Global would have had in restricting OTT services overall. However, the proposed combination of Liberty Global and Ziggo would allow the merged entity to internalise the benefit to both parties of successful foreclosure of OTT services. That increases the incentive for the merged entity to engage in such foreclosure.
- (398) The Commission therefore concludes that the existing incentive for the Notifying Party to prevent or hamper OTT services is likely to increase as a result of the transaction. In combination with the increased ability to prevent, hamper, or delay OTT innovation, and in light of the pre-merger approach by the Notifying Party towards OTT services, the Commission considers that the merged entity is likely to engage in strategies to prevent, hamper, or delay OTT innovation post-merger.

#### ***Likely negative effects on competition***

- (399) As set out in the Horizontal Merger Guidelines, the exercise of buyer power in an upstream market can adversely affect competition in a downstream market. That is particularly the case if the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals.
- (400) The Commission considers that the merged entity would indeed be likely to use its increased buyer power in the upstream market for the acquisition of Pay TV channels to foreclose its potential and existing competitors in the downstream market for the retail provision of Pay TV services, in particular, potential innovative OTT audio visual service providers.
- (401) First, the increased ability of the merged entity to restrict TV broadcasters' possibilities to offer their content over the Internet is likely to result in a foreclosure of rival third party OTT audio visual service providers that could distribute that content to retail consumers. Those third parties include Smart TV providers such as Sony and Samsung, but also potential new aggregators of Internet content such as Netflix, Weepee NV<sup>354</sup> and others. These third parties would be precluded from having access to consumers on the retail market for Pay TV, restricting consumer choice on that market. Second, TV broadcasters themselves can offer their content directly to consumers via the Internet. That concerns the OTT offerings that are currently available in the Netherlands, such as NLZiet and the individual OTT offers of TV broadcasters.

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<sup>354</sup> <http://www.broadbandtvnews.com/2013/05/13/weepee-tv-looking-at-dutch-ott-market/> [accessed at 8 September 2014].

- (402) Restrictions to that alternative distribution method for their TV content would ultimately cement the significant market power that the merged entity would hold vis-à-vis the TV broadcasters as the main distributor of their TV content in the Netherlands. That is likely to have negative effects on the upstream market for the acquisition of Pay TV channels.
- (403) Importantly, OTT offers would introduce further competition and innovation into the retail market for Pay TV services. The merger is likely to prevent that from happening. That would lead to higher prices to Dutch consumers and deprive Dutch consumers of the benefits of innovation in the way they watch TV.
- (404) The likely raising of barriers to entry to OTT competitors on the downstream market for the retail provision of Pay TV services is particularly relevant to the Netherlands, where significant developments in the provision of OTT TV services have already taken place. Indeed, the Commission notes that NPO has started streaming its linear TV channels, although in lower quality, that RTL has recently introduced a standalone OTT SVOD service and that Netflix has recently also entered the Netherlands, while RTL, SBS and NPO have jointly launched an OTT catch-up TV service.<sup>355</sup> That development is acknowledged by the Notifying Party, which notes the following: "*The use of OTT services has expanded rapidly and expectations are that this expansion will continue, to the detriment of 'traditional' video and television services offered by network operators such as UPC, Ziggo and KPN*".<sup>356</sup>
- (405) If the merged entity were to succeed in preventing, hampering or delaying the OTT TV services of the seven TV broadcasters that the Commission analysed in recital (323), that would already eliminate the potential OTT distribution of around 80% of all TV watched in the Netherlands.<sup>357</sup> If the merged entity were to succeed only in relation to RTL, SBS and NPO, that would eliminate the potential OTT distribution of around 70% of all TV watched in the Netherlands.<sup>358</sup> As the Notifying Party itself noted in its internal business documents, OTT TV cannot constitute a viable alternative to traditional cable TV without those TV broadcasters' content and the proposed transaction is accordingly likely to prevent, hamper or delay OTT competition.
- (406) The negative effects on competition would be felt beyond the merged entity's Internet subscribers alone. The Commission recalls that the successful inclusion of an OTT ban in a carriage agreement between the merged entity and any TV broadcaster in the Netherlands will prevent that particular TV broadcaster from offering its content via the Internet network of every broadband retailer in the Netherlands and not just that of the merged entity, thereby affecting all broadband customers in the Netherlands, and will prevent TV broadcasters from offering their content directly to end consumers, thereby eliminating likely efficiencies that derive from such vertical integration. Such an OTT ban would accordingly eliminate any

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<sup>355</sup> <https://www.nlziet.nl/> [accessed at 31 July 2014]; <http://www.npo.nl/live> [accessed at 31 July 2014]; <https://www.videoland.com/> [accessed at 31 July 2014]; <https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477&contentGroup=Company+Timeline> [accessed at 31 July 2014].

<sup>356</sup> Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 37.

<sup>357</sup> Stichting KijkOnderzoek Jaarrapport 2013, available at: [https://kijkonderzoek.nl/images/SKO\\_Jaarrapport/SKO\\_jaarrapport\\_2013.pdf](https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf).

<sup>358</sup> Stichting KijkOnderzoek Jaarrapport 2013, available at: [https://kijkonderzoek.nl/images/SKO\\_Jaarrapport/SKO\\_jaarrapport\\_2013.pdf](https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf).

potential cross-platform competition on retail TV services between traditional 'cable' TV and OTT TV.

- (407) The effects of a successful imposition of a contractual ban on TV broadcasters' OTT activities cannot, therefore, inherently, be off-set by the presence of the merged entity's competitors on the downstream market for the retail provision of fixed Internet access, such as KPN and the alternative operators on its network benefiting from wholesale access. The consequences of a contractual ban imposed by the largest provider of retail fixed Internet access services post-merger automatically extends to all competing providers of retail Pay TV services and retail fixed Internet access that would, post-merger, remain active in the market. Those remaining competitors would not, therefore, constitute a constraint on the negative effects on competition that would result from a foreclosure of existing and potential OTT TV competitors.
- (408) Without the threat of potential increased cross-platform competition from OTT TV, the existing providers of retail Pay TV services will be less constrained in their price-setting. Given the degree of concentration that will exist on this relevant downstream market for the retail supply of TV services, or the hypothetical retail market for the retail supply of multiple play services, the elimination of potential or emerging competition from OTT services is all the more likely to lead to consumer harm.
- (409) Therefore, the Commission finds that the proposed transaction is unlikely to be compatible with the internal market in that it is likely to significantly impede effective competition on the market for the acquisition of Pay TV channels, on the market for the retail provision of Pay TV services or on the hypothetical market for the retail provision of multiple play services.

#### 7.3.4. *Ability and incentive of the Notifying Party to use its increased buyer power to foreclose TV broadcasters' competing content from having access to its Pay TV distribution platform*

##### 7.3.4.1. The Notifying Party's view

- (410) In relation to the access of competing TV channel broadcasters to the merged entity's Pay TV platform, the Notifying Party claims that it would be in the interest of the merged entity to distribute as much attractive content as possible and to be able to offer to consumers a wide ranging of channels hence there is no reason to assume that post-transaction the incentive of the merged entity to foreclose TV channels from access to its TV platform would change.<sup>359</sup> The Notifying Party also notes that there is no correlation between the size and number of subscribers of a retail TV services provider and the number of channels offered by that provider.<sup>360</sup> The Notifying Party does not express a view on its ability or incentive to foreclose thematic TV channels in particular.

##### 7.3.4.2. Commission's assessment

- (411) In the Article 6(1)(c) decision, the Commission considered that the proposed transaction raises serious doubts as to its compatibility with the internal market also

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<sup>359</sup> Form CO, paragraph 560.

<sup>360</sup> Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraph 75.

to the extent that it may confer upon the merged entity an ability to engage in customer foreclosure in respect of TV broadcasters' new initiatives.<sup>361</sup>

- (412) As already established in recitals (258) to (275), the Commission considers it likely that the Notifying Party will, as a result of the proposed transaction, enjoy significantly increased bargaining power vis-à-vis TV broadcasters. That conclusion is based on several of the Notifying Party's internal business documents and has been overwhelmingly confirmed by the respondents to the Commission's market investigation.
- (413) According to the Notifying Party's own internal business documents, this increased buyer power [...]\*.<sup>362</sup>
- (414) During its in-depth market investigation, several respondents expressed their concern that the merged entity would be able to engage in customer foreclosure specifically in relation to TV broadcasters' new and existing thematic TV channels.<sup>363</sup> Thematic TV channels are linear TV channels that feature content revolving around one central theme such as, for example, nature, history, documentaries and cooking, or those that target a specific consumer group, such as women, men or children. Examples of thematic TV channels that currently exist in the Netherlands are 24Kitchen, NPO Cultura, NPO Doc, RTL Crime, RTL Telekids and Comedy Central Family. Given that those thematic TV channels would depend largely on income derived from retail TV distributors, the largest portion of which would be accounted for by the merged entity, the latter would have the ability to determine their very existence. NPO for example indicated that it is obliged, under the Dutch Media Act, to spend all income received from 3<sup>rd</sup> parties on programming and that, accordingly, any decrease in the licence fee secured by NPO from TV distributors would directly influence the content it offers on its thematic TV channels, given that its costs would remain the same.<sup>364</sup> Fox similarly indicated that its thematic TV channels would not be able to survive in the long term without receiving income both from advertising as well as from licence fees.<sup>365</sup> RTL, in turn, explained that 93% of the income generated by its thematic TV channels RTL Lounge, RTL Crime and RTL Telekids is derived from licensing fees paid by TV distributors.<sup>366</sup> Given that the merged entity will account for at least [50-60]\*% of the overall expenditure on TV channels and [50-70]\*% of all TV subscribers in the Netherlands, TV broadcasters' thematic TV channels are unlikely to be able to survive in the long term without being carried by, and receiving a licence fee from, the former.
- (415) Moreover, some of the respondents to the Commission's market investigation that raised this particular concern also indicated that providing their new thematic TV

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<sup>361</sup> Commission decision pursuant to Article 6(1)(c) of 8 May 2014 in case M.7000 – Liberty Global/Ziggo, paragraph 165.

<sup>362</sup> [Reference to the Parties' internal business documents]\*.

<sup>363</sup> Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014; Document ID1400, non-confidential response of SBS to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, questions 20.3.1 and 20.6; Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014, paragraph 6; Non-confidential response of RTL to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 20.3;

<sup>364</sup> Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014, paragraph 6.

<sup>365</sup> Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.

<sup>366</sup> Document ID1741, non-confidential submission of RTL of 26 June 2014.

channels OTT is not, currently, a fully adequate alternative to being carried by Pay TV distributors. This would be due to the fact that the OTT market (i.e. the percentage of the overall TV audience that receives its TV services OTT) is not yet sufficiently large to allow the advertising-based business model, while the price of OTT subscriptions would remain low.<sup>367</sup> The Commission however reiterates that the OTT market in the Netherlands has recently (even as recent as June 2014, when NLZiet was launched) seen a number of major developments that suggest that this market could become ever more interesting for advertisers and customers alike.

- (416) As already stated in the section on the Notifying Party's increased ability to hamper OTT innovation, there is evidence suggesting that the Notifying Party already considers its ability to cease carrying TV broadcasters' thematic TV channels to constitute a serious threat.<sup>368</sup> [...]\*
- (417) Those internal documents suggest that the Notifying Party already constitutes an important partner to TV broadcasters' thematic TV channels but that those same channels, if popular with TV viewers, can constitute a competitive threat at the retail Pay TV level if one were not to carry them.
- (418) Therefore, the Commission considers that the Notifying Party may well have the ability post-merger to determine which of the TV broadcasters' thematic TV channels would survive in the long run.
- (419) Whether the merged entity is likely to have an incentive not to carry thematic TV channels depends on the attractiveness of the content offered and whether the content is in competition with the merged entity's own content. A successful thematic TV channel that does not compete with the Notifying Party's own content would constitute an enrichment of its Pay TV offering, possibly allowing it to attract additional subscribers or to move more of its subscribers to its premium subscriptions. Indeed, the Notifying Party noted in an internal business document [...]\*.<sup>369</sup> However, the merged entity may have an incentive not to carry new thematic channels – thereby undermining TV broadcasters' business case for their launch or continuation – if such new channels compete with the merged entity's own content. Moreover, any post-merger ability to hamper thematic TV channels' viability could also help attain the Notifying Party's goal to prevent retail Pay TV competitors from obtaining exclusive carriage rights to such TV channels, as it mentioned in relation to [...]\*.<sup>370</sup>
- (420) It is in this respect important to note that, although the Parties' combined share of content ownership in the Netherlands currently remains limited, the Notifying Party seems to have a strategy whereby it aims to integrate the wholesale supply of content and of TV channels with the retail distribution thereof.<sup>371</sup> As part of the proposed transaction, the Notifying Party will add Ziggo's thematic TV channel Xite<sup>372</sup> and

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<sup>367</sup> See, for example, Non-confidential submission of RTL of 23 June 2014.

<sup>368</sup> [Reference to the Parties' internal business documents]\*.

<sup>369</sup> [Reference to the Parties' internal business documents]\*.

<sup>370</sup> [Reference to the Parties' internal business documents]\*.

<sup>371</sup> The Commission notes in this respect that the Notifying Party has recently acquired a 6.4% stake in ITV (Liberty Global press release of 17 July 2014, 'Liberty Global acquires a 6.4% stake in ITV, the leading commercial broadcaster in the United Kingdom), and is in the process of acquiring control over several important content production houses, including in the Netherlands (Cases No M.7282 - Liberty Global/Discovery/All3Media; No M.7194 - Liberty Global/Corelio/W&W/De Vijver Media).

<sup>372</sup> Form CO, paragraph 187; Document ID1989, non-confidential minutes of conference call between the Commission's services and NPO of 19 June 2014.

Premium Pay TV channel HBO to its content portfolio and its incentive to foreclose competing TV channels from having access to its network is thus expected to increase in the future. While the Commission considers that further integration by the Notifying Party in the wholesale supply of content may provide it with an incentive to foreclose TV broadcasters' thematic TV channels from having access to its cable network in the future, the current limited content ownership implies that the merged entity's incentive to foreclose thematic TV channels is also likely to be limited immediately following the proposed transaction.

- (421) Moreover, significant developments have recently taken place in the Netherlands that could contribute to the establishing of a successful alternative OTT route to customers for (thematic) TV channels. Amongst those are the launch of NLZiet, a major catch-up TV platform combining the content of the three largest TV broadcasters in the Netherlands, the launch of Netflix' OTT SVOD service and the launch of NPO's paid OTT service NPO Plus.
- (422) Although those OTT developments currently mainly revolve around VOD TV services, if such new services are successful they would provide different routes to customers and different models for distributing content. Over time, this is likely to undermine the merged entity's ability to prevent the emergence of new thematic TV channels.
- (423) The Notifying Party has – as part of the proposed transaction – entered into commitments vis-à-vis the Commission which aim at removing any ability on the part of the Notifying Party to use its buyer power in the market for the acquisition of Pay TV channels in order to hamper OTT innovation. Those commitments should therefore leave TV broadcasters at liberty to further develop the OTT TV market. Importantly, the Commission understands that new thematic TV channels generally require time to develop and are not, therefore, expected to be profitable from the start. Fox for example indicated that when it launched its thematic TV channel 24Kitchen, it had to offer it for free to the large TV distributors in the Netherlands in order for it to get onto their networks.<sup>373</sup> Regardless of whether a fully-fledged linear OTT TV market eventually develops, the commitments entered into by the Notifying Party allow TV broadcasters in the Netherlands to try and do so, without having to risk losing their existing business with the Notifying Party. The mere possibility that TV broadcasters may for example start offering their existing and new thematic or non-thematic TV channels OTT directly after having concluded a carriage agreement for those TV channels with the Notifying Party, should confer a degree of leverage on those TV broadcasters. The Commission considers that the risk that certain (potentially) successful thematic TV channels become exclusively available on TV broadcasters' OTT platforms should remove the Notifying Party's post-merger ability, and thereby its incentive, to foreclose them from having access to TV customers in the Netherlands.
- (424) In conclusion, the Commission considers that it does not need to conclude on whether the proposed transaction gives rise to competition concerns as a result of any increased ability and (future) incentive on the part of the merged entity to engage in customer foreclosure vis-à-vis TV broadcasters competing thematic TV channels, given that the commitments entered into by the Notifying Party are likely to eliminate potential adverse effects on competition that could stem therefrom.

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<sup>373</sup> Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.



7.3.5. *Ability and incentive of the Notifying Party post-merger to use its increased buyer power to foreclose its rivals in the retail market for the provision of Pay TV services*

(425) In their responses to the first phase market investigation, responding providers of retail TV services considered that the merged entity would enjoy increased bargaining power vis-à-vis TV broadcasters that could, in turn, negatively affect the availability or cost of TV channels for them.<sup>374</sup> Based on those results, and in line with its Horizontal Merger Guidelines, the Commission considered in the Article 6(1)(c) decision that the proposed transaction raised serious doubts as to its compatibility with the internal market as a result of the impact that an increase in the merged entity's bargaining power might have on the availability or cost of TV channels to rival providers of retail TV services in the Netherlands and whether this could significantly impact competition in the market for the retail provision of Pay TV services.<sup>375</sup>

7.3.5.1. The Notifying Party's view

(426) The Notifying Party argues that even if the proposed transaction results in increased buyer power of the merged entity, there is no reason to believe that this will have an impact on the costs of competing providers of Pay TV services, which is often called a waterbed effect. That would require TV channel suppliers to seek to recoup any potential loss in revenue resulting from lower fees that the merged entity would be able to negotiate given its increased bargaining power vis-à-vis TV channel suppliers, by charging higher fees to competing TV services providers.

(427) First, the Notifying Party considers that there is no reason to believe that a reduction in the price that one TV services provider could negotiate will lead to an increase in the price to another TV services provider operating in the same territory. TV channel suppliers would in any event seek to maximise to the extent possible the income derived from each individual agreement with a given TV services provider and the incentive for TV channel providers to do so would not be affected by the proposed transaction.<sup>376</sup> The bargaining power that TV channel suppliers enjoy vis-à-vis other retailers of TV services would not increase as a result of the proposed transaction thus preventing TV channel suppliers from charging increased fees in order to compensate any possible reduction in their revenue derived from the merged entity.<sup>377</sup> On the contrary, it cannot be excluded that a reduction in price might serve as a benchmark leading to a reduced price being offered to other TV service providers as well.<sup>378</sup> Second, the Notifying party considers that the conditions required for the waterbed effects to appear in economic theory models are very limited and unlikely to be satisfied in this case.

(428) As regards the possibility that the merged entity would foreclose downstream rivals from access to channels through exclusivity agreements with broadcasters, the Notifying Party submits that neither Liberty Global nor Ziggo in general aim at concluding exclusive distribution contracts with TV channel suppliers thus preventing competing TV services retailers from distributing certain channels. The Notifying Party claims that the proposed transaction will not increase the incentive of

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<sup>374</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services, question 65.

<sup>375</sup> The Article 6(1)(c) decision, paragraphs 168-173.

<sup>376</sup> Form CO, paragraph 489.

<sup>377</sup> Liberty Global response to the Article 6(1)(c) decision, paragraphs 16 and 79.

<sup>378</sup> Form CO, paragraph 488; [Liberty Global economic submission prepared by Oxera, 21 May 2014, Section 6.2.3].

the merged entity to seek exclusivity over channels and that in any event pursuing such exclusivity would be feasible only if the merged entity could compensate the TV channel supplier for the revenues foregone from competing TV services retailers and at the same time gain sufficient advantage at retail level in the form of attracting extra customers in order to offset the extra cost related to obtaining exclusivity over the channels at hand.<sup>379</sup>

- (429) The Notifying Party also claims that seeking exclusivity over a channel that is relatively less important would make no sense as customers are unlikely to switch to the merged entity only to be able to follow a relatively less important channel that is available exclusively on the Liberty Global/Ziggo TV platform. Even if the merged entity could obtain exclusivity over one of the most popular or attractive channels it is not likely that a sufficient number of consumers would switch to Liberty Global/Ziggo to offset the extra costs of obtaining the channel exclusively. In addition the Notifying Party submits that advertising revenues represent a very important part of the revenues generated by TV channel suppliers and they would expect a distributor seeking exclusivity over certain channels to pay substantially higher fees for exclusivity in order to compensate for the foregone advertising revenues thus making the cost for exclusivity unrealistically high.<sup>380</sup>

#### 7.3.5.2. Commission's assessment

- (430) During its in-depth investigation, the Commission first of all investigated whether the proposed transaction is likely to increase the degree of buyer power that the Notifying Party will enjoy in the market for the acquisition of Pay TV channels in the Netherlands. As indicated in section 7.3.2, such an increase in bargaining power is likely to indeed ensue from the proposed transaction, as evidenced by, amongst others, the Parties' internal business documents and the responses to the Commission's market investigation.
- (431) The Commission therefore continued to investigate whether an increased buyer power on the part of the merged entity could (i) allow it to limit the availability of TV channels in the Netherlands by forcing TV broadcasters to conclude exclusivity agreements in return for increased license fees; or (ii) lead to TV broadcasters in the Netherlands charging higher fees to the merged entity's downstream competitors to an extent that a significant impediment to effective competition would arise in the downstream market via a waterbed effect.
- (432) As regards point (i) of recital (431), the Commission notes that the TV broadcasters that responded to its in-depth market investigation unanimously indicated that they would not be able to operate profitably if their TV channels were exclusively broadcast on the merged entity's cable network.<sup>381</sup> Any lost income ensuing from exclusivity would not be able to be off-set by an increased fee paid by the merged entity. Relying mainly on advertising income, SBS requires its TV channels to have a national reach.<sup>382</sup> RTL also stated in that regard that, in order to remain economically viable, it will have to be able to reach 100% of Dutch households.<sup>383</sup> SBS further

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<sup>379</sup> Form CO, paragraphs 482, 483 and 484.

<sup>380</sup> Liberty Global submission "Financial data on broadcasters", 24 June 2014.

<sup>381</sup> Responses to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.

<sup>382</sup> Document ID1908, non-confidential minutes of conference call between Commission's services and SBS of 19 June 2014;

<sup>383</sup> Non-confidential response of RTL to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 11.

explains: *"In order to make a channel financially viable (based on an advertising model) a minimum coverage is required of at least 90% of the Dutch households. Thus advertisers would not choose a channel for their advertisements, if they were only to have access to only the merged entity's cable network (or generally anything lower than 90%). Thus, losing access to for example 20% of the viewer market would not amount to a linear decrease of advertising revenue, but probably with more than 40%".*<sup>384</sup> Commercial broadcasters such as SBS and RTL are accordingly unlikely to be able to concede to providing their content exclusively to the merged entity. Also, NPO's TV channels are subject to a 'must-carry' obligation for TV distributors in the Netherlands pursuant to the Dutch Media Act and cannot, therefore, be the subject of an exclusivity arrangement.<sup>385</sup> Given that NPO, RTL and SBS together already account for around 70% of all TV viewed in the Netherlands<sup>386</sup>, and given that the TV broadcasters that responded to the Commission's market investigation unanimously ruled out the possibility of licensing their TV channels exclusively to the merged entity, the Commission concludes that the merged entity is unlikely to have the ability to foreclose its downstream rivals by demanding exclusivity over TV broadcasters' channels.

- (433) As regards point (ii) of recital (431), a competitive concern based on a waterbed effect requires that the exercise of increased buyer power by the merged entity would lead to higher licence fees paid by downstream rivals, and that the negative effects on competition of higher costs for downstream rivals would outweigh the positive effect of lower licence fees paid by the merged entity.<sup>387</sup>
- (434) The Commission notes, first, that the retailers which voiced concerns that they would be harmed as a result of increased bargaining power by the merged entity have not identified a clear mechanism of how this would arise. An argument that better terms for the merged entity would put retail rivals at a relative competitive disadvantage does not imply that rivals have to pay higher licence fees to broadcasters. Rather it could simply be the result of a pro-competitive effect of lower licence fees by the merged entity that does not affect the level of fees paid by rivals.
- (435) Moreover, the Commission acknowledges that the argument that because broadcasters may receive lower licence fees from the merged entity, they would recoup those losses by extracting higher licence fees from the merged entity's downstream competitors is not convincing unless there is evidence for the mechanism through which this would arise. In particular, as pointed out by the Notifying Party, this argument does not answer the question why broadcasters, if they were in a position to negotiate higher licence fees from the merged entity's rivals post-merger, they could not use that ability to increase their revenues from those firms already pre-merger.
- (436) It is in theory conceivable that a merged entity that benefits from increased bargaining power will pay less for its inputs which allows it to be more competitive on the downstream market and gain market share from rivals. That in turn could

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<sup>384</sup> Document ID1400, non-confidential response of SBS to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1.

<sup>385</sup> Document ID1424, non-confidential response of NPO to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1.

<sup>386</sup> Stichting KijkOnderzoek Jaarrapport 2013, available at: [https://kijkonderzoek.nl/images/SKO\\_Jaarrapport/SKO\\_jaarrapport\\_2013.pdf](https://kijkonderzoek.nl/images/SKO_Jaarrapport/SKO_jaarrapport_2013.pdf).

<sup>387</sup> A waterbed effect further requires that upstream cost reductions will affect downstream prices, that is it requires a degree of pass-through.

worsen the bargaining position of rivals and lead to an increase in their input prices if the lower market share implies that not concluding an agreement with suppliers becomes relatively more costly for rivals. Such an effect on rivals' cost could negatively affect competition in the downstream market.<sup>388</sup>

- (437) However, in this case, the evidence collected during the market investigation did not allow the Commission to identify a specific mechanism by which the merged entity's increased buyer power would lead to higher licence fees for downstream rivals.<sup>389</sup> The market investigation did not produce convincing evidence that the merged entity's downstream competitors' bargaining position vis-à-vis TV broadcasters would materially deteriorate as a result of the transaction so that TV broadcasters would be able to recoup some of their lost licence revenues from the merged entity's rivals. In fact, some evidence from the market investigation indicates that TV broadcasters that exclusively rely on licence fees will become more rather than less dependent on the merged entity's downstream rivals were the merged entity to lower its licence fee payments and that broadcasters would not be able to recoup reduced licence revenues from the merged entity by increasing licence fees to downstream rivals.<sup>390</sup>
- (438) It should also be noted that Fox' premium sport channel, which carries the live football rights to the Dutch premier league, the Eredivisie, is subject to a non-discrimination obligation imposed by the Dutch regulator, which requires Fox to apply the same terms and conditions to all retail TV distributors in the Netherlands.<sup>391</sup> Any lost income derived from the merged entity could not, therefore, be recouped by Fox by charging higher, discriminatory prices to other TV retailers.
- (439) Therefore, following its in-depth investigation, the Commission considers that the proposed transaction would not significantly impede effective competition in so far as it is unlikely to confer upon the Notifying Party the ability and the incentive to engage in input foreclosure vis-à-vis its downstream rivals.

### 7.3.6. *Ability and incentive of the Notifying Party post-merger to block TV broadcasters' Hybrid Broadcast Broadband TV signals*

#### 7.3.6.1. The Notifying Party's view

- (440) The Notifying Party points out that the transmission of Hybrid Broadcast Broadband TV ("HbbTV") signals ('triggers') has recently been the subject of political discussions in the Netherlands, which ultimately resulted in the Dutch government refraining from imposing a compulsory transmission of that technology in view of

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<sup>388</sup> Such an effect has been discussed in a recent economic paper (Inderst, R and TM Valetti (2011), Buyer Power and the 'Waterbed Effect', Journal of Industrial Economics, Volume LIX(1), pp1-20). In that paper, it is shown that the worsening of the bargaining position of rivals occurs, because not agreeing triggers a fixed cost to self-supply the input. As the rival's market share is reduced, the cost per unit of self-supply (including the fixed cost element) increases.

<sup>389</sup> For example, there is also no evidence that the merger would affect the credibility of rivals' contingency plans in the absence of an agreement with broadcasters.

<sup>390</sup> See, for example, Document ID1380, non-confidential response of BBC to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 14.1, question 11; Non-confidential minutes of conference call between the Commission's services and the BBC of 25 June 2014.

<sup>391</sup> Non-confidential minutes of conference call between the Commission's services and Fox of 25 June 2014.

certain undesirable consequences that such intervention may cause.<sup>392</sup> The Notifying Party is of the view that any (further) rules that may be adopted in that area should be uniformly applicable and not be the product of an ad hoc intervention in particular merger cases.

- (441) Also, as a result of imposing an HbbTV standard, other more recent standards would be obstructed or jeopardised, leading to disproportionate costs.
- (442) The Notifying Party also claims that, contrary to the Commission's initial findings in this respect, Ziggo does not apply a more liberal policy towards allowing HbbTV signals in its footprint than the Notifying Party. Accordingly, the proposed transaction would not affect the ability or the incentive of the merged entity to engage in the blocking of TV broadcasters' HbbTV signals on its network.<sup>393</sup>

#### 7.3.6.2. Commission's assessment

- (443) In the Article 6(1)(c) decision, the Commission explained that certain specific internal business documents of the Parties warrant an investigation into the possible effects of the proposed transaction on the merged entity's ability and incentive to block HbbTV signals on its network. HbbTV signals are a recent development whereby TV broadcasters are able to allow retail TV customers that have a smart TV to directly connect to those broadcasters' own interactive OTT services via a linear broadcasting that encompasses so-called 'HbbTV triggers'.
- (444) The Notifying Party has provided the following high-level overview of how HbbTV content can be delivered to connected smart TVs:



- (445) The Commission's concern in this regard was mainly premised on the possible existence of a significant difference in the respective policies of the Notifying Party and of Ziggo on the carriage of HbbTV triggers. The Commission namely found

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<sup>392</sup> Letter of the Dutch Ministry of Education, Culture and Science to parliament, entitled 'Rode Knop (Amendement/motie Van Dam-Huizing)' of 7 April 2014.

<sup>393</sup> Document ID1179, Liberty Global response to the Commission's Article 6(1)(c) decision in case M.7000 – Liberty Global/Ziggo, paragraphs 149-151.

evidence that suggested that Liberty Global enforces a policy whereby [...]\*.<sup>394</sup>  
[...]\*.<sup>395</sup>

- (446) During the Commission's in-depth market investigation, however, evidence has been found of the fact that, currently, neither the Notifying Party nor Ziggo, allow HbbTV triggers in their respective cable network footprints in the Netherlands. Indeed, SBS, NPO and RTL all indicated that both the Notifying Party and Ziggo engage in the filtering out and blocking of HbbTV signals on their respective cable networks, something that is also publicly reported on and acknowledged by Ziggo and UPC.<sup>396</sup> The other TV broadcasters that responded to the Commission's market investigation indicated that they do not, currently, broadcast any HbbTV trigger at all. Ziggo has also recently published a position paper on HbbTV which suggest that it is currently already strongly opposed to freely allowing HbbTV signals on its network.<sup>397</sup> Finally, the Notifying Party seems to have very recently altered its strict policy on allowing HbbTV triggers on its cable network, as it has in fact reached an agreement with NPO for the carriage of its HbbTV triggers relating to the TV channels Nederland 1, Nederland 2 and Nederland 3.<sup>398</sup>
- (447) In light of the results of its in-depth market investigation, the Commission concludes that, insofar as the merged entity may have the ability and the incentive to engage in the filtering out and blocking of TV broadcasters' HbbTV triggers, any such ability and incentive is not specific to the proposed transaction. This is particularly true given that the Notifying Party and Ziggo have both already engaged in such filtering out and blocking of HbbTV triggers in the past, while the former currently is the only of the large TV distributors in the Netherlands (encompassing KPN, Ziggo and UPC) to partly support this technology.
- (448) Therefore, the Commission concludes that the proposed transaction would not significantly impede effective competition as a result of any possible ability and incentive on the part of the merged entity to, post-merger, refuse to carry HbbTV triggers on its network.

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<sup>394</sup> [Reference to the Parties' internal business documents]\*.

<sup>395</sup> [Reference to the Parties' internal business documents]\*.

<sup>396</sup> RTL's response to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 10; SBS' response to the Commission's questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, question 10; Annex to NPO's response to questionnaire Q4 'Phase II Questionnaire to Broadcasters' of 28 May 2014, answer to question 10; Non-confidential minutes of conference call between the Commission's services and RTL of 23 June 2014, paragraph 29. <http://www.broadbandtvnews.com/2014/01/03/dutch-delay-hbbtv-must-carry-enforcement/>; TNO-rapport 'Distributie interactieve televisiediensten', issued upon the request of the Dutch Ministry of Education, Culture and Science, of 18 December 2014, p. 38 and Bijlage C: Samenvattingen standpunten van partijen, UPC's and Ziggo's position papers, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/12/18/distributie-interactieve-televisiediensten.html>.

<sup>397</sup> TNO-rapport 'Distributie interactieve televisiediensten', issued upon the request of the Dutch Ministry of Education, Culture and Science, of 18 December 2014, Bijlage C: Samenvattingen standpunten van partijen, Ziggo position paper, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/12/18/distributie-interactieve-televisiediensten.html>.

<sup>398</sup> <http://www.upc.nl/klantenservice/uitleg/hbbtv/>; <http://www.broadbandtvnews.com/2014/08/08/upc-starts-hbbtv-distribution-for-npo-channels/>; <http://tweakers.net/nieuws/97714/upc-voorlopig-enige-grote-tv-aanbieder-met-hbbtv-ondersteuning.html>.

#### **7.4. The markets for the retail provision of Pay TV services, fixed Internet access services, fixed telephony services and multiple play services**

##### *7.4.1. Horizontal concerns – non-coordinated effects*

###### 7.4.1.1. View of the Notifying Party

(449) The Notifying Party notes at the outset that no direct competition currently takes place between the Notifying Party and Ziggo at retail level in the Netherlands, as the geographic footprint of their respective cable networks do not overlap. Accordingly, no standard unilateral upward price effect would result from the proposed transaction as it does not allow the merged firm to capture customers that would, pre-merger, have switched between the two independent parties in the event of a unilateral price rise.

(450) As regards the possibility that the proposed transaction would remove a form of indirect competition between the Notifying Party and Ziggo, the former submits that there will be no unilateral effect if firms set prices simultaneously which is the standard assumption in static economic models for unilateral effects.<sup>399</sup> The Notifying Party has further submitted an economic model showing that when firms set prices sequentially, the merger can only lead to a hypothetical price increase if KPN is not the price leader who systematically sets prices first and that if the way in which retail prices are set changed from sequential pricing pre-merger to simultaneous pricing post-merger, prices might actually decrease post-merger. Based on a simple calibration of that model, the Notifying Party further argues that even if the pricing sequence was such as to allow for the possibility of price increase such price increases would be small.<sup>400</sup> The Notifying Party has further performed an empirical analysis of how prices and other strategic variables of UPC, Ziggo and KPN have changed over the year 2012.<sup>401</sup> From that analysis it concludes that no consistent pattern exists in the pre-merger situation in terms of competitive moves by UPC, Ziggo and KPN and that there accordingly is no evidence for a theory of harm based on sequential pricing.

(451) Finally, the Notifying Party notes that if any direct benchmarking between the Notifying Party and Ziggo that does not exceed simple commercial benchmarking aimed at monitoring, and possibly imitating, industry's best practices were to discontinue after the proposed transaction, this would be unlikely to constitute a significant lessening of competition.

###### 7.4.1.2. Commission's assessment

(452) Both UPC and Ziggo are active in the retail supply of linear and non-linear Pay TV services. In Q3 2013, the Parties had a combined market share of 56% by number of subscribers, or [60-70]\*% by value,<sup>402</sup> in the retail supply of Pay TV services in the

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<sup>399</sup> Liberty Global submission 'M.7000 Liberty Global / Ziggo – Comments on the European Commission's decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004' prepared by Oxera, of 21 May 2014.

<sup>400</sup> Liberty Global submission 'M.7000 Liberty Global / Ziggo – Preliminary economic comments on the "retail theories of harm" in the 6(1)(c) decision' prepared by Charles River Associates, of 21 May 2014.

<sup>401</sup> Liberty Global submission 'M.7000 Liberty Global / Ziggo – Comments on the European Commission's decision pursuant to Article 6(1)(c) of Council Regulation No 139/2004' prepared by Oxera, of 21 May 2014; Liberty Global submission 'Analysis of changes to triple-play offers over time – M.7000 Liberty Global/Ziggo' prepared by Oxera, of 13 June 2014.

<sup>402</sup> Form CO, Table 36 and Annex 33.

Netherlands. KPN was the second largest retail TV operator with a market share of 25%, followed by CanalDigitaal with 10% and others with 10%, including Tele2.

- (453) The Parties' combined market share in the retail provision of fixed telephony services amounted to 34% in Q4 2012 and 41% in Q3 2013. In turn, KPN's market share was 60% in Q4 2012 and 43% in Q3 2013. Tele2 had a market share of 5% and other smaller competitors a combined market share of 12% in Q3 2013.
- (454) The Parties' combined market share in the retail provision of fixed Internet access services amounted to 42% in Q4 2012 and 43% in Q3 2013. In turn, KPN's market share was 43% in Q4 2012 and 41% in Q3 2013. Tele2 had a market share of 5% and other smaller competitors a combined market share of 11% in Q3 2013.
- (455) Finally, the Parties' combined market share on a hypothetical market for the retail provision of multiple play services (fixed and/or mobile telephony + TV + Internet) amounts to around [55-75]\*%.<sup>403</sup> On that market, the second most important participant would be KPN, with a market share of 30%, and Tele2, with a market share of 3% only.<sup>404</sup>
- (456) Ziggo and the Notifying Party, as does KPN, compete on all of the aforementioned retail markets and they often provide those retail services as part of multiple play packages<sup>405</sup>, the Commission presents the results of its investigation together in this section.
- (457) According to the Horizontal Merger Guidelines<sup>406</sup>, a merger can have a negative impact due to a reduction in key competitive pressure on one or more providers who would acquire, or benefit from increased market power. If, for instance, one of the companies to be merged increased its prices prior to the merger, it would have lost turnover to a certain extent to the other undertaking to be merged. The merger removes that competitive pressure, which could serve as an incentive for the new undertaking to increase prices. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that thus results from the merger since the merging firms' price increase may switch some demand to the rival firms which, in turn, may find it profitable to increase their own prices.<sup>407</sup> If that is the case, the merger results in so-called non-coordinated effects. Although a merger giving rise to non-coordinated effects typically creates or strengthens a dominant position in the relevant markets, that is not the only situation in which such effects can arise. Mergers in oligopolistic markets involving the elimination of important constraints that the Parties previously exerted on each other, together with a reduction of competitive pressure on the remaining competitors, may also result in a significant impediment to effective competition.<sup>408</sup>
- (458) The Commission notes at the outset that those retail services are exclusively provided within the Parties' respective geographic footprints in the Netherlands,

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<sup>403</sup> The Parties' combined share of a hypothetical market for the provision of multiple play services amounted to between 65%-75% in Q2 of 2013 and to between 55%-65% in Q4 of 2013. See: ACM Telecommonitor vierde kwartaal 2013 multiplay and ACM Telecommonitor tweede kwartaal 2013 multiplay (Form CO, annex 38).

<sup>404</sup> Form CO, Annex 38 (Section 6) – ACM Telecommonitor multi-play.

<sup>405</sup> Based on information provided by the Notifying Party, it appears that [a high percentage]\* of Liberty Global's and Ziggo's combined Dutch subscriber base take up a multiple play package (either dual, triple or quadruple play); Form CO, Table 14.

<sup>406</sup> Horizontal Merger Guidelines, recital 24.

<sup>407</sup> Ibid.

<sup>408</sup> Horizontal Merger Guidelines, recital 25.



which do not overlap. Accordingly, no direct customer switching can take place between the Parties. On that basis, the majority of respondents to the Commission's market investigation also stated that the prices charged by Ziggo for its retail TV, Internet and telephony subscriptions are not directly constrained by those charged by the Notifying Party or vice-versa.<sup>409</sup>

- (459) The Commission has however assessed whether the Parties, despite those different geographic footprints, still take account of each other's actions when making their commercial decisions. This could either be done directly, by benchmarking their pricing against each other, or via a mechanism that involves KPN as the nation-wide competitor of both Parties. For instance, if Ziggo changed its retail price, then KPN may react, and because it has a national pricing policy<sup>410</sup>, that may affect UPC, which may then react as well. If such indirect constraints are significant, constituting 'key' competitive pressure, the proposed transaction, which would remove such an indirect pricing constraint between the Parties and on the remaining competitors, could result in negative competitive effects even if direct customer switching between Liberty Global and Ziggo is not possible. It is, however, important to note that in the absence of direct competition between the Notifying Party and Ziggo for customers in the same geographic region due to non-overlapping network footprints, a unilateral upward price effect could not be the result of the standard logic for such effects, as the merged firm could not capture customers that would, pre-merger, have switched between the two independent parties in the event of a unilateral price rise. In order to give rise to a significant impediment to effective competition, any existing indirect competitive pressure that would be removed as a result of the proposed transaction would, therefore, have to be particularly strong.
- (460) The sequential pricing reasoning was assessed by the ACM in one of its precedents.<sup>411</sup> The ACM did not, however, take a final view on whether such an indirect constraint existed between the Parties in the Netherlands.
- (461) In this case, a number of TV broadcasters and Pay TV retailers who replied to the market investigation consider that the Notifying Party and Ziggo currently serve as an indirect competitive constraint on each other in the market for the retail provision of Pay TV services, through joint competition with KPN, which is active in both of their geographic footprints.<sup>412</sup> A number of Pay TV retailers also submitted similar arguments in respect of the markets for the retail provision of fixed telephony services and fixed Internet access services.<sup>413</sup> Some TV broadcasters specifically explained that both the Notifying Party and Ziggo organise national marketing campaigns that lead to public awareness of both Parties' retail prices throughout the

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<sup>409</sup> Reply to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 69.

<sup>410</sup> Non-confidential reply of KPN to the Commission's requests for information of 23 May 2014 and of 28 May 2014, p. 7.

<sup>411</sup> ACM (NMa) decision of 16 October 2012 in case 7326/KPN – *Concepts ICT – Edutel – XMS – KickXL*, paragraph 43.

<sup>412</sup> Replies to questionnaire Q2 to TV channel wholesale suppliers of 17 March 2014, question 60; Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, question 70; Document ID2561, non-confidential response of Tele2 to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, p. 8; non-confidential submission of Vodafone of 10 June 2014, pp. 14-15.

<sup>413</sup> Replies to questionnaire Q3 to retailers of TV, telephony and Internet access services of 17 March 2014, questions 93 and 101; Document ID2561, non-confidential response of Tele2 to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, p. 8; non-confidential submission of Vodafone of 10 June 2014, pp. 14-15.

Netherlands. The dissatisfaction that would ensue from the inability to switch between the two in case of diverging prices would accordingly pose an indirect competitive constraint.<sup>414</sup> The existence of such indirect competitive constraints via national marketing campaigns is however, in turn, denied – or said to in any case be limited – by several providers of retail Pay TV, Internet and telephony services in the Netherlands.<sup>415</sup> Aside from national marketing campaigns, several competing retail providers of Pay TV, fixed Internet access and fixed telephony services in the Netherlands consider that by observing the behaviour of KPN, Ziggo and UPC in those markets, it is clear that those three companies react to each other's behaviour, both in relation to pricing as well as promotions (that is to say, discounts offered).<sup>416</sup>

- (462) It is also noted that the Notifying Party has itself previously argued that chain substitution occurs in the Dutch market for the retail provision of TV services and that indirect competition existing between the various cable companies in the Netherlands could not, therefore, be ruled out.<sup>417</sup> Similarly, as part of a recent merger filing with the Commission, Ziggo argued that the relevant geographic scope of the market for the retail provision of TV services is national in the Netherlands, stating that competitive conditions are similar across the different cable networks nationwide.<sup>418</sup>
- (463) The Commission also reviewed the internal business documents of the Parties to see if they directly take each other's actions into account in their commercial decision-making. In that context, the Commission found some internal documents that suggest that although the Parties mainly monitor on a regular basis the bundled and unbundled offers of KPN, they also benchmark themselves against each other.<sup>419</sup> Those documents however mostly concern general industry developments as well as market share changes of all operators in the market, rather than individual strategies of either the Notifying Party or Ziggo. Following its in-depth investigation, the Commission has furthermore concluded that insufficient evidence exists to suggest that this limited direct benchmarking between the Parties exceeds simple commercial benchmarking that is aimed at monitoring and possibly imitating best practices in the industry. Indeed, for such benchmarking to constitute a significant form of competitive pressure between the Notifying Party and Ziggo, it would have to be consistently focused on the specific strategic behaviour of those two firms rather than on general developments seen in the wider industry. The Commission did not find any substantial evidence to suggest that this is the case.

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<sup>414</sup> Replies to questionnaire Q4 – Phase II Questionnaire to Broadcasters of 28 May 2014, question 25; non-confidential submission of Vodafone of 10 June 2014, pp. 14-15.

<sup>415</sup> Non-confidential reply of Canal Digitaal to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, p. 9; non-confidential submission of Vodafone of 10 June 2014, p. 15.

<sup>416</sup> Non-confidential reply of Canal Digitaal to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, pp. 8-9; non-confidential submission of Vodafone of 10 June 2014, pp. 14-15;

<sup>417</sup> College van Beroep voor het bedrijfsleven, Delta N.V. en Delta Kabelcomfort Netten B.V., KPN B.V., UPC Nederland B.V., Ziggo B.V., CAIW Diensten B.V., YouCa B.V., Tele2 Nederland B.V. en Online Breedband B.V., verdict of 18 August 2010, LJN BN4243, recital 4.2.

<sup>418</sup> Commission's decision of 21 December 2011 in Case No COMP/M.6369 - HBO/Ziggo/HBO Nederland, paragraph 41.

<sup>419</sup> Document ID304-157 UPC NL Update, of 19 September 2013, slides 1-6; Document ID304-225 Liberty Global presentation (prepared for Mike Fries) 'UPC NL Q4 & Horizon Portfolio', of August 2012, slides 11, 12 and 14; Document ID367-744, 'Ziggo growth levers – Shareholder Questions', of 23 January 2013, slides 8, 9, 10, 11 and 12; Form CO, annex 42 – Liberty Global presentation 'UPC NL Budget 2014 vFINAL', of 12 November 2013, slides 23, 24, 27, 58, 59, 74, and 85; Document ID367-14422, 'Ziggo growth levers – Shareholder Questions – Session II', of 20 February 2012, slides 1, 28, 29, 37, 103, 104, 106, 110, 115, 120, 123, 124.

- (464) In the Article 6(1)(c) decision, the Commission considered that the proposed transaction raised serious doubts as to its compatibility with the internal market as a result of possible non-coordinated effects arising in the markets for the retail provision of Pay TV services, fixed Internet access services, fixed telephony services and multiple play services. To further investigate those concerns, the Commission assessed the pricing data of the Parties to see how their retail prices generally evolve, and in particular whether some form of sequential pricing reaction between the retail prices of the Parties has already taken place in recent years in the Netherlands.
- (465) The Commission acknowledges that in order for the proposed transaction to potentially lead to non-coordinated price increases due to the elimination of an indirect competitive constraint between the Notifying Party and Ziggo, it must be established that firms in the retail TV, Internet and telephony markets currently revisit the same price elements in a recurring, consistent sequence. That sequence should furthermore be such that either UPC or Ziggo consistently initiates the price change, that is, one of the cable operators must act as a price leader. In that case, the leader's price is subsequently transmitted via KPN to the other cable operator thereby exerting an indirect constraint on the other cable operator. That indirect constraint would be eliminated by the merger. On the other hand, if KPN were to consistently initiate price changes, there would be no mechanism by which subsequent pricing decisions of one cable operator would be transmitted to the other. In that case the merger would not lead to an elimination of an indirect constraint due to sequential pricing. It is therefore important to establish whether there is evidence of sequential pricing patterns that could give rise to non-coordinated effects via the elimination of indirect constraints.
- (466) Moreover, price changes should also occur sufficiently close in time, as it would otherwise be impossible to discern whether any firm consistently moves first - rather than last or independently – thereby initiating a recurring sequence of price changes. In addition, given that it is difficult to assume that firms are able, and would have an incentive, to commit to refraining from changing their behaviour in response to rivals' reactions to their own prior behaviour, convincing evidence should exist to show that, currently, such a consistent sequence of pricing takes place between UPC, Ziggo and KPN.
- (467) In the absence of clear evidence of such sequential pricing, firms' static pricing incentives are typically analysed on the assumption that they set their prices simultaneously, that is to say based on what they expect others to do rather than on their rivals' actual choices. In a simultaneous price-setting model the lack of direct competition occurring between two regional players whose respective footprints do not overlap necessarily implies that a merger between such regional players does not generate non-coordinated effects.
- (468) In order to determine whether an elimination of indirect constraints in the present case could, at least in theory, lead to significant price rises post-merger, the Commission first evaluated the theoretical calibration model of the Notifying Party.<sup>420</sup> The Notifying Party argued that the model showed that even if indirect constraints existed, a price rise was likely to be very minor. The Commission, however, has found that under more realistic input values, the Notifying Party's

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<sup>420</sup> Liberty Global submission 'Liberty Global / Ziggo – Preliminary economic comments on the "retail theories of harm" in the 6(1)(c) decision' prepared by Charles River Associates, of 21 May 2014.

model can predict significant price increases even if the competitive constraint is only indirect and happens through a chain of substitution.<sup>421</sup>

- (469) The Commission assessed the empirical evidence on price movements of retail bundles in the relevant markets to determine whether there is a consistent sequence of price changes under which non-coordinated effects, through the elimination of an indirect constraint, could arise. The Commission could not draw a firm conclusion from the analysis of the retail price data submitted by the Notifying Party (covering the period from 2011 until April/May 2014) as to whether or not such sequential pricing takes place in the industry. The data indicated that prices of retail bundles do not change very often and in some cases fewer than once a year, and this fact makes it difficult to draw any statistical conclusion. There are occasions where both Ziggo and UPC have increased all their triple play bundle prices simultaneously, for example in October 2012 and April 2014, but the Commission did not find evidence that KPN has followed those particular price increases so in those cases KPN could not serve as a link between the two cable companies.
- (470) In sum, while the evidence indicates that the competitors on the Dutch retail market tend to closely monitor each other and respond to each other's promotional offers, the Commission did not retrieve any evidence that could suggest that price element changes in the Dutch retail telecommunications markets are consistently initiated by the cable operators, sufficiently close in time to each other and in the same sequence.
- (471) The market investigation provided support for that finding by the Commission, entailing that the limited price element changes that did occur in the Dutch retail markets over the past years were neither consistently initiated by the same entity – or even by either UPC or Ziggo – nor in the same recurring sequence.<sup>422</sup> KPN also indicated that UPC and Ziggo currently have comparable and coordinated strategies, which would rule out indirect competition occurring between the two.<sup>423</sup>

#### 7.4.1.3. Conclusion

- (472) The Commission considers that, although there are indications that support the notion of a chain of substitution currently occurring between KPN, Ziggo and the Notifying Party in the Dutch retail telecommunications markets, there is insufficient evidence to suggest that the firms would consistently price sequentially in the industry in a way that could give rise to non-coordinated effects through the elimination of an indirect constraint between the Parties. The Commission accordingly considers that the proposed transaction would not significantly impede effective competition as a result of any possible non-coordinated effects occurring in

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<sup>421</sup> The Notifying Party developed a simple model to quantify the possible magnitude of the effects stemming from the sequential pricing mechanism. It compares the changes in profits of the merged entity and its rival for any sequencing of moves and concludes that in a scenario where the national rival is the follower both before and after the merger, the predicted price increases are small (1.09%). The Commission has found that the model's assumptions on the substitution patterns among the competing products are unrealistic. (See the discussion in recitals (226) to (232)) Under more realistic assumptions the predicted price increases are significantly larger (over 6%).

<sup>422</sup> Non-confidential submission of Vodafone of 10 June 2014, p. 15; Non-confidential reply of Canal Digitaal to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, pp. 8-9; Document ID2561, non-confidential response of Tele2 to questionnaire Q5 – Phase II questionnaire to retailers of 28 May 2014, p. 8.

<sup>423</sup> Non-confidential reply of KPN to the Commission's requests for information of 23 May 2014 and of 28 May 2014, pp. 10-11.

the retail markets for the provision of Pay TV, fixed Internet access, fixed telephony and multiple play services in the Netherlands.

#### 7.4.2. *Horizontal concerns – coordinated effects*

##### 7.4.2.1. View of the Notifying Party

- (473) The Notifying Party submits that the proposed transaction cannot give rise to coordinated effects on the markets for the retail provision of TV, fixed and mobile telephony and Internet access, and on the possible market for multiple play products. The same reasoning applies equally to all markets.<sup>424</sup>
- (474) First, according to the Notifying Party, even if those markets met the conditions which are necessary for coordination, the proposed transaction would not increase the ability to coordinate, because the number of competitors is not reduced as a result of the merger. Pre-merger, KPN and other suppliers compete with Liberty Global in the area covered by the network of Liberty Global and with Ziggo in the area covered by the network of Ziggo. This will not change as a result of the merger, and thus, there will not be more room for coordination after the merger than before.
- (475) Second, the Notifying Party submits that "Airtours Criteria"<sup>425</sup>, as also reflected in the Commission's Horizontal Merger Guidelines are not met in any of the relevant markets being considered. It therefore does not consider it feasible for effective coordination to occur between the merged entity and KPN.
- (476) In particular, according to the Notifying Party, the retail offers provided by KPN and the Parties exhibit important differences. This high degree of differentiation would reduce the transparency of the market, substantially complicating any effort at coordination. In particular, KPN's offers would revolve around telephony or Internet services, with subscribers requiring Internet service in order to have TV services. On the contrary, whilst Liberty Global and Ziggo offer stand-alone TV services, Internet/telephony services are offered only in conjunction with TV. Specifically, as regards the market for the retail provision of Pay TV services, operators offer a range of different TV channel bundles at different price points, as well as a wide selection of possible add-on services that target particular viewers. Some operators such as UPC, Ziggo, Delta and Caiway offer standalone premium TV viewing, whilst others offer TV only as part of a multi-play bundle, such as KPN, which requires at least a fixed voice service in addition. Combining a variety of TV content, internet speeds, OTT services, call packs, and other features makes those bundles highly

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<sup>424</sup> Form CO, paragraph 692.

<sup>425</sup> These are general requirements for a finding of coordinated effects that were established by the General Court in case T-342/99 *Airtours v Commission* ECR II-2585 (2002). According to the Notifying Party, the first of those requirements is transparency around a focal product. In order to coordinate behaviour, firms must identify both the product and factors (such as price or features) that they are coordinating on. Furthermore, if a deviation from the coordinated outcome is to be easily detected, then the actual behaviour of each Party must be both observable and comparable. The second requirement is the existence of a credible punishment mechanism. If a deviation from the coordinated outcome is detected, firms require a quick and effective retaliation to discipline the deviant Party. To be credible, the punishment strategy must inflict sufficient harm on the deviant firm without any substantial long-term harm to the retaliatory Party (though a short period of profit sacrifice may be accepted to enforce a longer-term beneficial outcome). The retaliation must also be quick to ensure that the deviant Party understands they are being disciplined for their actions. Finally, to be effective the punishment should harm the deviant firm by at least as much as they gained from the profitable deviation. The third requirement for effective coordination is a sufficiently stable market such that neither current, nor potential future fringe competitors would disrupt the coordinated outcome. That is to say, all market participants should be party to the coordination and barriers to entry should be high.

differentiated. Furthermore, the Notifying Party submits that it is unclear which combinations of services should be included in the definition of multiple play, and that when considering the possibility for coordination between operators offering those bundles, the wide variety of differentiated bundle permutations would make it difficult to identify a focal product for such coordination to centre on.

- (477) In addition, the Notifying Party submits that the market for the retail provision of TV services has not been stable in recent years, with subscriber shares changing markedly. KPN's share of the Dutch TV market has risen steadily from 20% in Q3 2012 to 25% by Q3 2013. This share is higher still in the digital TV sub-segment, reaching 28% by Q3 2013. Furthermore, it is forecast that analogue cable and terrestrial services, around 20% of the market in 2013, will continue to decline over the next four years, to be replaced with FttH and DSL services.
- (478) In the Notifying Party's view, the respective infrastructure and associated cost-base employed by the two main competitors post-merger are also different in a number of respects, which would make any attempt at coordination difficult. Post-merger, the Parties' coax cable network would cover over 90% of the Netherlands, and would be capable of delivering broadcast, voice and high-speed Internet services. The cable network topology would typically involve individual homes being spliced into a shared cable running along the street. Linear broadcast services are then transmitted along that cable, to be shared by all receivers. Similarly, IP services are also transmitted along the shared cable, making cable internet services more susceptible to peak-traffic delays. The emergence of the DOCSIS 3.0 standard and the recently announced DOCSIS 3.1 allows upgrades offering higher speeds in excess of those possible with VDSL2 alone that can be achieved relatively easily and cost effectively. That presents an attractive opportunity for the Parties to compete fiercely with KPN to attract new subscribers. KPN on the other hand operates a combined copper and fiber network, offering voice, Internet, and IPTV services across the entirety of the country. With dedicated lines to the exchange, those networks are less susceptible to peak-time lag. Currently, around 20% of Dutch households are covered by KPN's fiber network, with around 75% offered VDSL. However, further upgrades to the speeds available via KPN's network are constrained by either the rate of development of improved DSL technologies, for example VDSL2 vectoring; or the progress of the high-cost roll-out of fiber deeper into the network with FttH.
- (479) As a result, for both KPN and the Parties, having made costly investments in network infrastructure (KPN through upgrades, UPC/Ziggo through acquisition), the incentive would be to take full advantage of their upgraded asset by aggressively pursuing additional subscribers. That incentives structure, according to the Notifying Party, is clearly incompatible with a theory of coordination.
- (480) Furthermore, the Notifying Party foresees a significant destabilizing effect resulting from both current and future smaller, innovative competitors, which will maintain an external competitive pressure on the main competitors. In particular, with the continued expansion of broadband Internet, a number of high-profile OTT services, such as Netflix and RTL's Videoland, have recently entered the Pay TV market, and IPTV offers from CanalDigitaal have increased. Similarly, the continued rollout of 4G LTE networks for mobile data poses a general threat to both fixed TV and Internet services. Moreover, consumer preferences are also changing, such as the increased focus on series that helps drive demand for TV channels and OTT services that have a comprehensive portfolio of high-value content, such as HBO and Netflix. Internationally, there is evidence from the USA that an increasing number of TV consumers are cord-cutting, that is to say, opting to take OTT services in place of traditional Pay TV services. With an increasing penetration of smart TVs and STBs

able to receive those services in the home, Liberty Global foresees that a similar trend could emerge in the Dutch market.

- (481) A number of white-label VOD services providers also exist, allowing potential competitors quick and cost-effective entry into the Pay TV market. Following its merger with the Reggefiber Group B.V., KPN has undertaken to offer wholesale access to its fiber network, allowing both broadcast and Internet services. Coupled with white-label VOD services from wholesale providers such as The Entertainment Group, a competitor with a strong brand in an adjacent market, such as mobile telephony, could easily expand into the Pay TV and fixed Internet market.
- (482) Those rapid technological advances, coupled with shifting consumer preferences makes the TV, broadband and telephony markets ones which are not well suited to a stable, coordinated outcome. On the contrary, according to the Notifying Party, competition between KPN and the merged entity will be fierce.
- (483) In its reply to the Article 6(1)(c) decision the Notifying Party argues that no indirect competition exists between the Parties hence the merger will not result in the removal of any indirect or indirect competitive restraint. Further in its reply the Notifying Party claims that the Airtours Criteria are not met and even if those criteria were fulfilled that would not have been sufficient to determine whether the merger would result in coordinated effects as the relevant criterion is whether the merger materially enhances the circumstances in which coordination is likely to work effectively.
- (484) The Notifying Party considers that the technological changes and dynamic supply and demand developments create an environment in which the operators face uncertainty about the evolution of the market and such a level of uncertainty makes tacit collusion unlikely. In addition the Notifying Party points out that while the merger will indeed increase the symmetry of the market shares of the merged entity and KPN in the broadband Internet and fixed telephony markets, it will at the same time decrease the symmetry in the Pay TV and multi play services markets post-merger. The Notifying Party also considers that market shares and churn rates, that is to say the number of customers switching from one operator to another during a certain period of time, are unsuitable focal points for coordination as operators cannot observe to which particular package a consumer switches making it impossible to determine the reasons behind the churn rate. Moreover according to the Notifying Party the internal documents quoted by the Commission in the Article 6(1)(c) Decision paint a picture of lively competition on parameters such as pricing, technological upgrades and especially quality of the user experience.
- (485) As regards the possible deterrent mechanism mentioned by the Commission the Notifying Party argues that such mechanism involving initiation of a price war as a punishment is not credible. A punishment strategy would typically aim at negating any possible gain from the deviation and in case of irreversible deviations such as investments in network or technological upgrades, entering into a price war does not seem to be a viable and effective punishment.
- (486) Finally the Notifying Party considers that reactions of outsiders, such as innovative service providers and OTT players like Netflix, can have a disruptive effect on the retail markets.
- (487) The Notifying Party also considered a kind of coordinated effects theory that might arise even without overlapping regional markets and without either direct or indirect competition between the cable companies. It argues that in theory, multi-market contacts can make collusion feasible in markets where it would not otherwise be so

by "transferring" punishment potential from markets where collusion is easier. One main condition to have such effect is that there are significant asymmetries between the different markets that generate differences in the ability to sustain collusion. The Notifying Party argues that in the current case in which the different markets would correspond to the different geographic footprints of the two cable operators, there are no such asymmetries and therefore no coordinated effect as a result of regional multi-market contacts.

#### 7.4.2.2. Commission's assessment

- (488) As set out in the case law<sup>426</sup> and in the Horizontal Merger Guidelines, coordinated effects only exist when a merger makes coordination more likely, more effective and more sustainable, to which end the Commission will consider the changes that the merger brings about. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations from the terms of coordination; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.
- (489) In the Article 6(1)(c) decision, the Commission considered that the proposed transaction raised serious doubts as to its compatibility with the internal market as a result of an increased likelihood of coordinated effects aimed at increasing prices or delaying investments arising on the Dutch markets for the retail provision of (i) Pay TV services, (ii) fixed Internet access services, (iii) fixed telephony services, and (iv) multiple play services. That preliminary conclusion followed from the need to investigate in more detail (i) whether the proposed transaction is likely to eliminate a sequential pricing-effect currently occurring between KPN, Ziggo and the Notifying Party, (ii) to what extent the Dutch retail Pay TV, fixed Internet access, fixed telephony and multiple play markets are characterised by transparency and stability, (iii) the Notifying Party's as well as Ziggo's past behaviour, (iv) to what extent the firms active in those markets are currently able to effectively retaliate against firms deviating from possible coordinated behaviour, (v) and to what extent existing outsiders in the market pose a threat to the success of coordinated behaviour.
- (490) The Commission therefore further investigated the risk of the proposed transaction giving rise to horizontal coordinated effects during its in-depth investigation and by a review of the internal documents provided by the Parties.

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<sup>426</sup> Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008].



- (491) It is important to recall from the outset that the proposed transaction involves a combination of two firms whose physical cable networks do not overlap geographically. Although in a market defined as national, encompassing the entire territory of the Netherlands, the proposed transaction theoretically eliminates an important competitor to both KPN and the Notifying Party, the Commission's previous finding of a lack of non-coordinated effects could mean that, in practice, the proposed transaction may have little impact on any existing ability of KPN to coordinate its behaviour with Ziggo and UPC – and post-merger with the merged entity – in their respective network areas. Accordingly, when assessing under the current market conditions, including possible competitive pressure exercised by third parties using regulated wholesale access, the degree to which the proposed transaction brings about a change to the likelihood of coordination occurring, which would generally derive from for example, a reduction in the number of firms active in the market and increased symmetries in terms of market shares and cost structures<sup>427</sup>, the absence of significant direct or indirect competition existing between UPC and Ziggo is likely to mean that, in practical terms, the number of large competitors in that national market is not truly reduced from three to two.
- (492) If one were to consider that there is no national market, *quod non*, but that the Parties are currently active in geographically separate regional markets and that no (significant) indirect competition were to exist between the two, the proposed transaction could only give rise to coordinated effects if it were to improve the conditions for coordination to work *across* those regional markets, rather than in each of them separately, as a result of the establishment of multi-market contacts. The Commission however considers that insufficient evidence exists to support such a multi-market coordinated effects theory of harm. What is more, that particular theory of harm can only apply to the proposed transaction if the transaction were to remove significant asymmetries that might currently exist between KPN and each of UPC and Ziggo in the latter's respective regional markets. The Commission considers this unlikely to be the case because the situation between KPN and the cable operators is comparable in each of the latter's respective footprints.
- (493) First, as can be seen in Table 2 below, KPN's market shares in UPC's footprint are broadly similar to KPN's corresponding market shares in Ziggo's footprint; and UPC's market shares in its footprint are broadly similar to the corresponding market shares of Ziggo in the latter's footprint. The position of KPN and that of the cable operator, UPC and Ziggo, is therefore largely similar in both of the latter's network footprints and will not change significantly in the combined footprint post-merger. Second, in each of their respective network footprints, Ziggo and UPC are currently active in the same retail TV, Internet, telephony and multiple play markets, using the exact same network technology (DOCSIS) and with broadly comparable product offerings. Third, neither UPC nor Ziggo can currently be, comparatively, qualified as a 'maverick' undertaking<sup>428</sup>: (i) as established in recital (469), both have made very limited price changes to their retail bundles over the past years while being similarly profitable<sup>429</sup>, and (ii) both have, between 2011 and 2013, been losing some market share mainly to KPN in the retail Pay TV market, while gaining some market share

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<sup>427</sup> N. Fabra and M. Motta, 'Coordinated Effects in Merger Cases', *CRC America Latina*, 25 February 2013, p. 93.

<sup>428</sup> Generally understood as an undertaking that acts aggressively on the market at hand, for instance in terms of pricing or in terms of introducing technological innovations.

<sup>429</sup> [Reference to the Parties' internal business documents]\*.

in the retail fixed Internet access and retail fixed telephony markets, with KPN's share of the former market being largely stable.<sup>430</sup> Fourth and finally, KPN and the merged entity would, post-merger, continue to face the same (number of) competitors that could potentially be able to distort coordination.

**Table 2: Dutch Retail Telecommunications Markets – Regional Market Shares**

Retail supply of Pay TV, broadband and fixed telephony services – market shares (2013) <sup>431</sup>								
	UPC footprint				Ziggo footprint			
	UPC	KPN	Tele2	Other	Ziggo	KPN	Tele2	Other
<b>Retail supply of Pay TV services</b>	87%	6%	2%	5%	78%	10%	4%	8%
<b>Retail supply of broadband services</b>	33%	50%	7%	10%	47%	40%	5%	8%
<b>Retail supply of fixed telephony services</b>	40%	43%	5%	12%	48%	37%	4%	10%

(494) As will be shown in recitals (495) to (513), the Commission concludes, on the basis of its in-depth investigation on the basis of current market conditions, that the proposed transaction does not significantly alter any of the factors generally considered conducive to coordinated behaviour. The absence of non-coordinated effects combined with the inherent non-overlapping nature of the Parties' cable networks limits any impact the proposed transaction may have on the post-merger ability of firms to reach terms of coordination. The Commission's in-depth investigation has, furthermore, not yielded any additional evidence of past coordination that could support a coordinated-effects theory of harm.<sup>432</sup> Therefore, the Commission considers that it does not have sufficient evidence to conclude that any existing ability of KPN and the Parties to coordinate their behaviour in the Dutch retail Pay TV, fixed Internet, fixed telephony and/or multiple play markets would be increased by the proposed transaction. This finding exists irrespective of the degree to which the latter markets may currently be conducive to coordinated behaviour. In that respect, the Commission's investigation showed that those markets may, to an extent, already be conducive to coordination.

Ability to reach terms of coordination

(495) As explained in recitals (509) to (512), given that the Commission has found insufficient evidence to support the contention that the proposed transaction is likely

<sup>430</sup> Form CO, annex 33.

<sup>431</sup> Form CO, annex 33.

<sup>432</sup> Some evidence was found during the Commission's first phase market investigation that could suggest that the Parties in fact may already have an incentive to coordinate with other operators in order to increase prices and to try and prevent price erosion but no evidence was retrieved that could suggest that such an incentive would increase as a result of the proposed transaction. [Reference to the Parties' internal business documents]\*.

to eliminate any significant destabilizing factors, the degree to which the retail Pay TV, broadband, fixed telephony and the hypothetical multiple play markets are, for example, currently stable is not material to establishing possible coordinated effects arising as a result of the proposed transaction. Similarly, given that the Dutch retail markets seem to be moving towards multiple play<sup>433</sup>, and given that KPN, Ziggo and UPC all already offer roughly the same types of bundled services, the Commission does not consider that the proposed transaction is likely to alter the degree to which those bundles' price points<sup>434</sup> can constitute effective focal points for coordination.<sup>435</sup>

- (496) In terms of changes brought about by the proposed transaction, it is important to note that it will result in the existence of only two near national providers of retail Pay TV, broadband, fixed telephony as well as multiple play services that hold ownership over their respective distribution infrastructures. Both entities will furthermore be the two largest players in all aforementioned retail markets:

**Table 3: Dutch Retail Telecommunications Markets – National Market Shares**

Retail supply of Pay TV, broadband and fixed telephony services – market shares <sup>436</sup>		
	Combined entity (Liberty Global/Ziggo)	KPN
Retail supply of Pay TV services	[60-70]*% by value (2013) / 56% by subscriber numbers (Q3, 2013) <sup>437</sup>	25% (Q3, 2013)
Retail supply of broadband services	[30-40]*% by value (2013) / 43% by subscriber numbers (Q3, 2013) <sup>438</sup>	41% (Q3, 2013)
Retail supply of fixed telephony services	[30-40]*% by value (2013) / 41% by subscriber numbers (Q3, 2013) <sup>439</sup>	43% (Q3, 2013)
Retail supply of triple play <sup>440</sup> services <sup>441</sup>	62% (Q3, 2013)	30% (Q3, 2013)

Source: the Notifying Party

- (497) In terms of market shares held by each of KPN, UPC and Ziggo pre-merger, and by KPN and the merged entity after completion of the proposed transaction, the Commission notes that the degree of symmetry increases in the broadband and fixed

<sup>433</sup> The Commission understands from the Notifying Party that [a high percentage]\* of Liberty Global's and Ziggo's combined Dutch subscriber base takes up a multiple play package (either dual, triple or quadruple play) and that Internet is not provided in an unbundled form by the Parties.

<sup>434</sup> Bundles' price points can include 'non-price' elements and are one possible focal point for coordination, besides, for example, market shares.

<sup>435</sup> The Commission has found some evidence suggesting that the existence of many different bundles does not necessarily impair operators' ability to monitor price and non-price changes:[Reference to the Parties' internal business documents]\*.

<sup>436</sup> Form CO, Tables 36, 43, 44 and annex 33.

<sup>437</sup> Form CO, Table 36 and Annex 33.

<sup>438</sup> Form CO, Table 44.

<sup>439</sup> Form CO, Table 43.

<sup>440</sup> Note that although one of the markets that is under investigation as part of the present matter is the hypothetical multiple play market, the market share depicted here relates only to triple play bundles.

<sup>441</sup> Form CO, Table 15.

telephony markets, while it decreases in the market for the provision of Pay TV and any hypothetical market for multiple play services. The Commission understands from the Notifying Party that [a high percentage]\* of Liberty Global's and Ziggo's combined Dutch subscriber base subscribes to a multiple play package, either dual, triple or quadruple play<sup>442</sup>, and that Internet and Pay TV are not currently provided in an unbundled form. Given the importance of bundles in the Dutch retail telecommunications markets, and the apparent importance of Pay TV along with Internet as possible differentiating elements of those bundles<sup>443</sup>, the Commission considers that the increased asymmetry to which the proposed transaction might give rise in terms of market shares in the Pay TV and hypothetical multiple play markets renders it unlikely that the increased symmetry in the broadband and fixed telephony markets significantly increases the firms' ability to reach terms of coordination across those retail markets, in light of the lack of evidence of non-coordinated effects arising in all those markets as a result of the proposed transaction.

- (498) In terms of cost structures, the Commission notes from internal business documents of the Notifying Party that those currently seem to be largely similar between UPC and Ziggo.<sup>444</sup> In any case, the degree to which symmetry – or a slight asymmetry – in cost structure in those markets can have a significant impact on firms' ability to coordinate is unclear, as the variable costs involved with operating cable/DSL/FttH networks are in any case considered to be comparatively low. Moreover, each of KPN, UPC and Ziggo have almost unlimited capacity to actively connect more households to their networks. Activating one additional household comes with almost no extra costs since both networks already have a connection to every household. Given that most costs are fixed and sunk, the additional costs for the use of the backbone of the network are very low and extending network capacity is relatively easy. Furthermore, given that the existing cost structures of UPC and Ziggo seem to be largely similar and given that the Notifying Party does not allege<sup>445</sup> - nor demonstrate that the proposed transaction leads to efficiencies, the Commission considers that it has insufficient evidence to show that the proposed transaction would have a material impact on any existing symmetry or asymmetry in the cost structures of KPN and the Parties.<sup>446</sup>
- (499) In terms of profitability, the Commission notes from internal business documents of the Notifying Party and from publicly available sources that it currently seems to be largely similar between UPC and Ziggo. Both cable companies appear to be highly profitable both in terms of absolute value and also in terms of international and industry comparisons.<sup>447</sup> The Commission notes that high profitability is generally not a sign of a fiercely competitive market pre-merger. The existing similarity between UPC and Ziggo in terms of profit however renders it further unlikely that the proposed transaction will have a significant impact on any existing symmetries or asymmetries in those markets.

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<sup>442</sup> Form CO, Table 14.

<sup>443</sup> [Reference to the Parties' internal business documents]\*.

<sup>444</sup> [Reference to the Parties' internal business documents]\*.

<sup>445</sup> Form CO, section 9.

<sup>446</sup> Potentially one could argue that the merger allows UPC and Ziggo some sort of economies of scale in respect of purchasing and marketing activities, allowing better internalisation of, for example, national marketing campaigns but given all the other factors, this alone is not sufficient to conclude that the merger significantly changes (a)symmetry.

<sup>447</sup> [Reference to the Parties' internal business documents]\*.

- (500) Both UPC and Ziggo also seem to be working on the development and implementation of the DOCSIS 3.1 technology in the Netherlands (both are currently operating DOCSIS 3.0)<sup>448</sup>, which is likely to be a driver for capacity of their cable networks. The various DOCSIS-related technological developments in the cable industry, including the DOCSIS 3.1 standard, in fact have been developed jointly through the industry body Cablelabs, of which Liberty Global and Ziggo are both a member company.<sup>449</sup> The proposed transaction is not, therefore, likely to allow the elimination of a comparatively more aggressive innovator that could have distorted firms' pre-merger ability to coordinate.
- (501) In light of UPC's and Ziggo's non-overlapping network footprints, (i) the lack of evidence of either party operating very aggressively on any of the Dutch retail Pay TV, broadband, fixed telephony and multiple play markets, (ii) the lack of evidence of significant differences in the Parties' cost structures, (iii) the Parties' existing cooperation through several industry bodies (they attempted joint negotiations with TV broadcasters through NLKabel and are both members of Cablelabs for example), and (iv) the cross-shareholding of 28.5%<sup>450</sup> (Liberty Global being the largest minority shareholder in Ziggo), the Commission does not consider that the proposed transaction is likely to significantly alter or improve any existing ability of firms to reach terms of coordination in the retail Pay TV, broadband, fixed telephony and multiple play markets in the Netherlands.

#### Deterrent mechanisms

- (502) In relation to the possible existence of effective deterrent mechanisms, the Commission considers that the proposed transaction cannot be considered to be likely to enhance the availability and/or efficiency of deterrent mechanisms as no evidence was retrieved to support that. Furthermore, UPC and Ziggo do not currently seem to be asymmetrical in such a way that the proposed transaction could provide the merged entity with additional or enhanced retaliatory measures. The Commission notes in this respect that (i) UPC and Ziggo are currently active in the exact same markets, also in relation to mobile telecommunications services, both Liberty Global and Ziggo are active – although to a very limited extent – in the Netherlands under a MNVO model [...]\*<sup>451</sup> and already jointly own licences for 40 MHz of spectrum in the 2.6 GHz range via the joint venture ZUM B.V.<sup>452</sup>, and the proposed transaction therefore does not increase the number of markets in which the Notifying Party could, post-merger, retaliate against diverging behaviour; (ii) UPC and Ziggo use the same DOCSIS technology and are both in the process of upgrading their network to DOCSIS 3.1 which means that the Notifying Party is not likely to have an enhanced ability to retaliate by implementation technology upgrades of its network; (iii) UPC and Ziggo seem to already coordinate, at least to an extent, their response to KPN in areas where the latter intends to roll-out FttH<sup>453</sup>, and; (iv) both Parties currently already own a Premium Pay TV film channel and the commitments that the Notifying Party has entered into as part of the proposed transaction will ensure that

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<sup>448</sup> Form CO, para. 31 and 665; [Reference to the Parties' internal business documents]\*.

<sup>449</sup> <http://www.cablelabs.com/news/new-generation-of-docsis-technology/>;  
<http://www.cablelabs.com/about-cablelabs/member-companies/> [accessed at 2 September 2014].

<sup>450</sup> Form CO, paragraph 73.

<sup>451</sup> Form CO, paragraphs 328 and 330.

<sup>452</sup> According to data provided in the Form CO, paragraph 328, the license conditions for the 2.6GHz spectrum band relate to the commercial offering of mobile data services.

<sup>453</sup> [Reference to the Parties' internal business documents]\*.

the latter's position in this market will not be strengthened as a result of the proposed transaction.

#### Transparency of the markets and ability to monitor deviations

- (503) Some characteristics of the post-merger retail markets for TV services, fixed telephony, Internet access and multi play services in the Netherlands seem to make those markets conducive to coordination. Coordination on retail prices for instance might be possible because prices seem to be transparent and publically available.<sup>454</sup> Notwithstanding the fact that the products offered in those retail markets are mostly bundled products that can be offered in different configurations and that have an array of features that could allow operators to differentiate, the Commission found some evidence that suggests that even "non-visible" price elements can be monitored. This degree of transparency might allow easy detection of deviations from coordination and may, therefore, be conducive to coordination.<sup>455</sup>
- (504) The majority of retailers active on the markets for TV services, broadband Internet and fixed telephony also stated during the in-depth investigation that prices and product characteristics of retail offerings, including also promotional offers, are relatively easy to observe and analyse as those offers are usually publically available and accessible via the competitors' websites. On the other hand, some retailers also note that information on certain specific types of offerings such as retention offers or non-standard propositions is in principle more difficult to obtain.<sup>456</sup>
- (505) According to competing providers of retail Pay TV, Internet, fixed telephony and multiple play services, the price and certain product characteristics such as download speed and content offered are the main criteria that retailers take into account when benchmarking their offers against those of competitors on the market. As stated in recital (463), some of the Parties' internal business documents suggest that a level of transparency exists on the relevant Dutch retail markets that would currently allow UPC and Ziggo to compare their bundled and unbundled retail offers with offers of competitors in terms of price as well as product characteristics – ranging from broadband speed (including actually delivered speed), number of analogue and digital SD and HD channels, to PVR functionality, and multiple connected devices, for example.<sup>457</sup>
- (506) Customer churn rates are to a certain extent also sufficiently easy to monitor and some existing forms of cooperation on the relevant Dutch retail markets seem to allow the Parties and their competitors to identify changes in customer churn. Regardless of whether such churn rates would be effective tools to monitor deviations however, the Commission notes that their workings will not change as a result of the proposed transaction. It is in that respect also important to recall that no customers can currently switch between UPC and Ziggo.
- (507) In terms of the speed and extent of network upgrades of the Parties and KPN, KPN informed the Commission that its roll-out of FttH is subject to certain transparency obligations while requiring so-called local 'customer aggregation' (also referred to as 'demand bundling'), which also means that any anticipated roll-out of FttH is as such

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<sup>454</sup> Market shares might also constitute a possible focal point for coordination, in light of their transparency and availability to the general public.

<sup>455</sup> [Reference to the Parties' internal business documents]\*.

<sup>456</sup> Replies to Request for Information to Retailers of TV, telephony and Internet access services of 28 May 2014, question 3 on Transparency of the retail markets.

<sup>457</sup> [Reference to the Parties' internal business documents]\*.

public knowledge. That particular transparency in turn facilitates the effectiveness of possible deterrent mechanisms in case coordination would aim at slowing down technology upgrades.

- (508) Therefore, the Commission considers that the Dutch retail Pay TV, broadband, fixed telephony and multiple play markets are characterised by a degree of transparency that could allow firms to monitor deviations from coordinated behaviour. However, since there is no evidence to suggest that the proposed transaction would materially change the existing degree of transparency of those markets, the Commission considers that any possible impact of the proposed transaction on transparency will not significantly alter firms' existing ability to monitor deviations.

#### Reaction of outsiders

- (509) The Commission notes that several alternative operators to KPN, UPC and Ziggo are currently active on a more or less national basis in the Dutch markets for the retail provision of Pay TV, broadband, fixed telephony and multiple play services, either exclusively or partly by means of regulated and commercial wholesale access to KPN's copper/vDSL and fibre/FttH networks. Those alternative, 'outsider' operators are Tele2, Canal Digitaal and Vodafone. Given that those alternative operators do not rely on either the Notifying Party or Ziggo for having access to those markets, the Commission considers that neither their technical ability nor their incentive to distort coordinated behaviour will change as a result of the proposed transaction.
- (510) Any competitive pressure that those alternative players are able to impose on KPN, UPC and Ziggo, stems from access obligations on both KPN's copper (vDSL) and fibre (FttH) networks. Based on unbundled local loop access as well as wholesale broadband access, those operators are able to compete on the Dutch markets for the retail provision of Pay TV, fixed telephony and fixed Internet access services.
- (511) Access to KPN's fibre (FttH) network is guaranteed through ex ante regulation as well as through previous commitments given by KPN in the context of its acquisition of joint control over Reggefiber.<sup>458</sup> Based on that fibre access, Vodafone seems to be currently capable of offering competitive triple and quadruple play bundles.<sup>459</sup> Furthermore, Vodafone indicated that it will roll-out FttH to one million homes in the Netherlands in the first quarter of 2015 through FttH unbundling and that it will expand this footprint in 2015 and afterwards, provided the fibre network will remain subject to effective regulated access in the future.<sup>460</sup>
- (512) As regards the threat that potential competition from OTT would pose to the successful outcome of coordination in the retail Pay TV market, the Commission considers that the commitments entered into by the Notifying Party as part of the proposed transaction similarly ensure that this will remain unchanged after the proposed transaction.

#### 7.4.2.3. Conclusion

- (513) In conclusion, although there are many elements which suggest that the Dutch retail Pay TV, broadband, fixed telephony and multiple play markets may currently be conducive to coordination, it is not necessary for the Commission to conclude on the precise degree to which that is the case since there is not sufficient evidence to

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<sup>458</sup> See the commitments in the ACM's decision in case 6397/KPN – Reggefiber of 19 December 2008.

<sup>459</sup> See for example, Document ID2377-145, Liberty Global presentation 'Perspective on Dutch telecom sector', of 4 July 2014, slides 2, 9 and 29.

<sup>460</sup> Non-confidential submission by Vodafone of 15 September 2014.

conclude that the proposed transaction would create the conditions for coordination or make coordination easier, more stable or more effective.

## **7.5. The market for the provision of retail fixed Internet access services – network access foreclosure**

### 7.5.1.1. The Notifying Party's view

- (514) Several respondents to the Commission's market investigation expressed a concern that the merged entity could leverage its increased share of the downstream retail fixed broadband Internet market to foreclose competing suppliers of OTT television services, either by raising the costs of OTT television services providers or by altogether limiting their effective access to its distribution network.
- (515) In respect of that theory of harm, the Notifying Party is essentially of the opinion that it is unrelated to the proposed transaction. The fact that the ACM considers that Internet Service Providers ("ISPs") in general could already technically block or throttle, that is to say limit the quality of, services of OTT SVOD providers by blocking packets based on IP source address<sup>461</sup> would show that any concerns in that regard would not be specific to the proposed transaction. Also, the Notifying Party notes that OTT services and the extent to which they need regulatory safeguards are currently the subject of extensive political and regulatory discussion, both in the Union and in the Netherlands. It accordingly considers that any further rules should be uniformly applicable and should not be the product of ad hoc intervention in a particular merger case, unless that merger leads to a significant change triggering specific competitive harm, which the proposed transaction would not.
- (516) Finally, the Notifying Party explains its difficulties in finding a relationship between the size of an ISP's footprint and that ISP's incentive to foreclose competing providers of OTT television services. To the extent that the transmission of OTT television services would constitute a threat and not an opportunity for ISPs, the Notifying Party considers that this threat is the same for all network operators, irrespective of the size of their footprint.

### 7.5.1.2. Commission's assessment

- (517) Several respondents to the Commission's market investigation indicated that the proposed transaction raises two distinct competition concerns that would stem exclusively from the increased size and importance of the merged entity's Internet network in the Netherlands. The first concern is that the merged entity would have the ability and the incentive to engage in Internet network access foreclosure vis-à-vis competing (OTT) providers of retail TV content, and the second is that the merged entity could leverage its position in the market for the retail provision of fixed Internet access vis-à-vis certain providers of data-intensive Internet content such as OTT audio visual services in order to force them to start paying for having access to its broadband customers.<sup>462</sup>

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<sup>461</sup> The ACM informed the Commission of this view during the latter's investigation of the proposed transaction: ACM Memo to the Commission of 25 March 2014, section 2. This statement relates merely to ISPs' technical ability to block or throttle OTT SVOD providers' services and does not, for example, go into incentives to do so in light of the existing Dutch net neutrality legislation.

<sup>462</sup> Document ID1983, non-confidential version of NPO's email of 3 July 2014; Document ID1987, non-confidential submission made by Netflix of 11 July 2014, p. 3; Document ID1674, non-confidential submission by SBS of 26 June 2014, pp. 4 and 5.



- (518) As regards the first concern, the Commission notes that the commitment to maintain sufficient interconnection capacity with providers of transit services would prevent the merged entity from engaging in any foreclosure of Internet content providers – either outright or by charging excessive fees for interconnection.
- (519) As regards the second concern, the Commission reiterates<sup>463</sup> that it does not consider that the proposed transaction would significantly impede effective competition merely as a result of the possibility that the merged entity could conclude direct paid peering agreements that would be necessary for the provision of higher quality Internet services than those available pre-merger through indirect interconnection. The commitment to maintain sufficient interconnection capacity with providers of transit services will furthermore ensure that the prices that the merged entity could charge for access to its Internet network (via private direct peering) will remain subject to price competition exerted by those same transit providers that are guaranteed to have effective access to its Internet network. For the sake of completeness, the Commission furthermore notes that KPN would, post-merger, continue to exert significant competitive pressure on the merged entity in the market for the retail provision of fixed Internet access with its market share of 41%, and that any incentive to have certain providers of Internet content pay for private direct peering is unlikely to change as a result of the proposed transaction, which is evidenced by a recent statement of Ziggo's CEO entailing that data-intensive Internet services should pay for private direct peering.<sup>464</sup>
- (520) In conclusion, the Commission considers that it does not need to conclude whether the proposed transaction raises competition concerns as a result of the merged entity's increased share of the market for the retail provision of fixed Internet access, given that the commitments entered into by the Notifying Party would eliminate any potential adverse effects on competition that could stem therefrom.

## 8. COMMITMENTS

- (521) At the State of Play meeting that took place on 10 July 2014, the Commission informed the Notifying Party of the following concerns based on the preliminary results of the market investigation:
- (i) The proposed transaction raises concerns as to its compatibility with the internal market as a result of the elimination of the competitive constraint that the only two Premium Pay TV channels in the Netherlands, Film1 and HBO Nederland, currently exercise on each other following the proposed transaction. The Commission considers that this would likely result in increased wholesale prices for those Pay TV channels. In addition, the Commission considers that, because of its 100% shareholding in Film1 and its increased presence on the retail market for Pay TV services, the merged Liberty Global/Ziggo would have the ability and the incentive to refuse or hamper the access that competing retail Pay TV providers have to Film1.
  - (ii) The proposed transaction also raises concerns as to its compatibility with the internal market as a result of the increased buyer power of the merged Liberty Global/Ziggo entity vis-à-vis TV channel suppliers, which will provide

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<sup>463</sup> The Article 6(1)(c) decision, paragraph 304.

<sup>464</sup> <http://www.nrc.nl/nieuws/2014/03/08/nieuwe-topman-ziggo-netflix-mogelijk-vragen-om-extra-betaling> [accessed at 25 July 2014].

Liberty Global/Ziggo with the increased ability and incentive through contractual means to hinder the development of innovative, OTT-related services of those broadcasters. That increased ability is compounded by the Parties' technical ability to hinder Internet traffic generated by such OTT services.

- (522) In order to address those concerns, the Notifying Party submitted commitments on 13 July 2014 (the "First Commitments"). The Commission launched a market test of the First Commitments on 15 July 2014 in order to gather the views of relevant market participants on the effectiveness and ability of the commitments to restore effective competition in the markets where competition concerns were identified (the "market test"). Questionnaires were sent to content providers, TV channel suppliers, providers of Internet interconnectivity, that is to say transit services, and retail Pay TV services providers, including providers of OTT TV services.
- (523) Following the market test, in order to take account of the comments received, the Notifying Party submitted an improved and final set of commitments (the "Final Commitments") on 22 August 2014.<sup>465</sup> The Commission assessed the Final Commitments, and their ability to eliminate the competition concerns raised by the proposed transaction, in line with its Remedies Notice.<sup>466</sup>

### **8.1. Description of the First Commitments**

- (524) The First Commitments submitted on 13 July 2014 comprised all of the following components:
- (i) a commitment to divest the Film1 business;
  - (ii) a commitment, for a period of four years after the adoption of this Decision, not to contractually restrict, directly or indirectly, the possibility for broadcasters who are carried on the merged entity's TV platform to distribute their content via an OTT service; and in order to ensure the effectiveness of this commitment and of the distribution of content via OTT services, the Notifying Party also committed for a duration of four years, to maintain sufficient interconnection capacity between its Internet network covering the Netherlands and third-party providers of transit services.

#### Commitment to divest Film1 - Divestment Business

- (525) The divestment business would include all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Film1 divestment business, and includes the following in particular:
- (i) all tangible and intangible assets which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Film1 divestment business;
  - (ii) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Film1 Divestment Business;
  - (iii) the contracts, leases and other rights and commitments and all records of the Film1 divestment business;

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<sup>465</sup> The Final Commitments were resubmitted on 5 September due to the need to reformat certain parts. The substance of the Final Commitments was not amended.

<sup>466</sup> Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice" (OJ C 267, 22.10.2008, p.1)

(iv) the personnel.

(526) Furthermore, in order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after the Effective Date, not acquire, whether directly or indirectly, the possibility of exercising influence over the whole or part of the Film1 divestment business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Film1 divestment business is no longer necessary to render the proposed concentration compatible with the internal market.

Commitment not to restrict distribution of content via OTT services

(527) The Notifying Party committed not to include, in any agreement with TV broadcasters for the distribution of their linear channels on the Pay TV platform of the merged entity in the Netherlands, that is agreed or renewed after the adoption of this Decision, any direct or indirect restrictions for such TV broadcasters to distribute their content via OTT.

(528) In order not to undermine the effectiveness of the contractual OTT remedy, the Notifying Party committed to maintain sufficient interconnection capacity between its Internet network covering the Netherlands and third-party providers of transit services. To that end, it would ensure that the capacity utilisation of interconnection routes across a group of three Internet Connectivity Providers ("ICPs") will not exceed 80% utilization on a daily basis. Those three ICPs, which may vary over time, would be selected by Liberty Global from a predetermined list of reputable ICPs.

## 8.2. Analytical Framework

(529) Where a proposed concentration raises concerns as to its compatibility with the internal market, the parties may seek to modify the proposed transaction in order to resolve the competition concerns.

(530) Pursuant to the Merger Regulation<sup>467</sup>, the Commission is required to verify, by means of a prospective analysis, whether a concentration referred to it would significantly impede effective competition. If that is the case, it is for the parties to the concentration to put forward commitments with a view to rendering the concentration compatible with the internal market. The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent any significant impediment to effective competition in all relevant markets where competition concerns were identified. To that end, the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view.<sup>468</sup> Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.<sup>469</sup> According to the case law, the basic aim of commitments is to ensure competitive market structures.<sup>470</sup> Therefore, commitments which are structural in

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<sup>467</sup> In particular the preamble and Article 2 thereof.

<sup>468</sup> Paragraph 9 of the Remedies Notice.

<sup>469</sup> Paragraph 9 of the Remedies Notice.

<sup>470</sup> See recital 8 of the Merger Regulation. Judgment of the General Court in Case T-102/96, *Gencor v Commission*, [1999], ECR II-753, paragraph 316, Judgment of the Court of Justice in Case C-12/03 P

nature, such as the commitment to sell a business unit, are generally preferable. Such commitments prevent durably the competition concerns which would be raised by the merger as notified and do not require medium or long-term monitoring. Nonetheless, it cannot be ruled out that other types of commitments may also be capable of preventing the significant impediment to effective competition.

- (531) Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in the decision initiating proceedings are removed as a result of commitments submitted by the parties. That applies to commitments proposed in second phase proceedings before the Commission has issued a Statement of Objections.<sup>471</sup>

### **8.3. Assessment of the first commitments**

- (532) In this section, the Commission assesses the First Commitments addressing the horizontal and vertical concerns related to Liberty Global's position in the upstream market of wholesale acquisition and supply of Premium Pay TV channels, or its possible sub-segment for Premium Pay TV film channels, and in the downstream market for retail of Pay TV services.
- (533) In light of the results of the market test, the Commission considered that the First Commitments were insufficient to eliminate the competition concerns raised by the proposed transaction.

#### *8.3.1. Commitment to divest Film1*

- (534) As regards the proposed divestiture of Film1 described in recitals (525) and (526), respondents to the market test stressed, in particular, that, in order to be viable after its divestiture, Film1 needs to have access to the merged entity's distribution network and that appropriate arrangements need to be in place in order to ensure that the broadcasting rights for content currently licensed to Film1 are transferred to the purchaser together with the channel.<sup>472</sup> The Commission considered that the latter issue was of particular importance because existing agreements with Hollywood studios typically feature a change of control clause that may, in practice, lead to the divestiture of Film1 without any content.
- (535) In addition a respondent also pointed out that the key personnel to be transferred with the Film1 business should include the employees responsible for the acquisition and management of content, including scheduling content, and for the distribution of content towards the consumers.<sup>473</sup>
- (536) In line with the concerns expressed by the respondents to the market test, the Commission considered that commitment regarding Film1 to be insufficient to eliminate the competition concerns raised by the proposed transaction. In particular, the Commission considered that the risk that the Film1 divestment business would not have access to sufficient content or to the merged entity's distribution network significantly impaired the likely effectiveness of that commitment.

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*Commission v Tetra Laval*, [2005]\*, ECR I-987, paragraph 86 and Judgment of the General Court in Case T-158/00, *ARD v Commission*, [2003]\*, ECR II-3825, paragraph 192 et seq.

<sup>471</sup> Paragraphs 18 of the Remedies Notice.

<sup>472</sup> Replies to Questionnaire Q7 of 15 July 2014, questions 4 and 7.

<sup>473</sup> Replies to Questionnaire Q7 of 15 July 2014, question 11.

### 8.3.2. *Commitment not to restrict distribution of content via OTT services*

- (537) As regards the commitment not to contractually restrict broadcasters in distributing their content via an OTT service, respondents to the market test emphasised, in particular, the need to extend and clarify its scope in order to include third-party OTT services rather than just the broadcasters' own OTT services, and also to cover any agreements predating the Commission Decision that might contain such restrictive clauses. Some respondents also pointed out that the duration of the commitment should be extended<sup>474</sup>, and others mentioned the need for a clear enforcement mechanism.<sup>475</sup> Some respondents also mentioned the risk that such a commitment may be circumvented through restrictions imposed by other means.<sup>476</sup>
- (538) As regards the commitment to maintain sufficient direct interconnection capacity between the merged entity's Internet network covering the Netherlands and third-party providers of transit services, respondents to the market investigation highlighted a number of technical improvements required for such a commitment to be effective<sup>477</sup>, relating mainly to the suitability of the ICPs proposed in the predetermined list that could benefit from the proposed commitment and to the lack of stability of the proposed relationships. Respondents to the market test indicated in particular that it should be ensured that the three selected ICPs are reputable, true providers of interconnectivity services and the Daily Utilization Peak and 80% congestion threshold should be calculated on each of the three links separately. Respondents also mentioned that Liberty Global should ensure that enough uncongested interconnection capacity is available over a period longer than four years.<sup>478</sup>
- (539) In line with the concerns expressed by the respondents to the market test, the Commission considered that the initial commitment not to restrict distribution of content via OTT services was insufficient to eliminate the competition concerns raised by the proposed transaction. In relation to the commitment not to contractually restrict broadcasters in their OTT activities, the Commission was of the opinion that this could only be effective if it applied to existing agreements as well and would be in effect for a longer period of time, in order to allow TV broadcasters the time to actually try and develop an OTT service. Furthermore, in order to improve the ability to enforce that commitment, the precise types of OTT restrictions covered by the commitment would have to be described in more detail and a dispute resolution mechanism included in the commitments. As regards the commitment to maintain sufficient direct interconnection capacity, the Commission considered that the possibility that the merged entity would calculate the capacity utilization rates *across* the three interconnections could mean that, for example, two of those three interconnections would be congested while only one would have low capacity utilization levels, regardless of the absolute size of the latter interconnection. Also, the fact that the merged entity could, at any time, change the identity of the three ICPs would require OTT audio visual service providers to contract all twenty-six

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<sup>474</sup> Replies to Questionnaire Q6 of 15 July 2014, questions 2 and 5.

<sup>475</sup> Replies to Questionnaire Q6 of 15 July 2014, questions 1 and 21.

<sup>476</sup> Replies to Questionnaire Q6 of 15 July 2014, questions 1 and 8.

<sup>477</sup> Replies to Questionnaire Q6 of 15 July 2014, questions 11 (possible capacity limitations under the 80% threshold), 12 (number of selected ICPs), 13 (calculation of the daily peak utilization threshold), 14 (change in identity of the selected ICPs), 15 (location of the interconnection points), and 17 (suitability of the ICPs mentioned in the Proposed Commitments).

<sup>478</sup> Replies to Questionnaire Q6 of 15 July 2014, question 14.

ICPs contained in the long list of ICPs in order to be guaranteed effective access to the merged entity's broadband customers in the Netherlands, which would not be feasible. Finally, the Commission considered that the duration of that interconnection capacity commitment should mirror the extended duration of the commitment not to contractually restrict broadcasters in their OTT activities, as the latter could not be fully effective without the former.

#### **8.4. Final commitments**

(540) Following the communication to the Notifying Party of the results of the market test and the Commission's own assessment of the First Commitments, the Notifying Party submitted an improved and final set of commitments ("Final Commitments") on 22 August 2014. The Final Commitments contain two elements.

##### Film1 Commitment

(541) In order to maintain effective competition in relation to premium Pay TV film channels in the Netherlands, the Notifying Party commits to divest, or procure the divestiture of the Film1 Divestment Business, by the end of the Trustee Divestiture Period, as a going concern to a purchaser and on terms of sale approved by the Commission.

(542) To carry out the divestiture, the Notifying Party commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Film1 Divestment Business within the First Divestiture Period. If the Notifying Party has not entered into such an agreement at the end of the First Divestiture Period, it shall grant the Divestiture Trustee an exclusive mandate to sell the Film1 Divestment Business.

(543) In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of 10 years after the Effective Date, not acquire, whether directly or indirectly, the possibility of exercising influence, as defined in paragraph 43 of the Remedies Notice, over the whole or part of the Film1 Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Film1 Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

(544) Under the Final Commitments the Notifying Party shall also enter into, with the Purchaser of the Film1 Divestment business, a [...]\*-year carriage agreement for the distribution of Film1 on the merged entity's Pay TV platform in the Netherlands on reasonable commercial conditions. The conditions included in the existing agreement for the distribution of Film1 between Film1 and Ziggo will be considered reasonable commercial conditions for that purpose.

(545) [...]\*.

(546) [...]\*.

##### Commitment not to prohibit OTT distribution of content

(547) In order to remove the significant impediment to effective competition in relation to OTT services, the Notifying Party commits not to enter into or renew agreements with TV broadcasters that contain terms which would directly or indirectly restrict the TV broadcasters' ability to offer their channels and associated content via OTT services. That Commitment applies to any agreements with TV broadcasters for the distribution of those broadcasters' linear channels and catch-up TV services on the Parties' Pay TV Platform in the Netherlands. The Final Commitments make clear

that the Notifying Party shall not, directly or indirectly, restrict the ability of the broadcasters to offer, on a standalone basis or in partnership with a third party, OTT services in the Netherlands, or the ability of those broadcasters to offer their linear channels and any content owned or controlled by the TV broadcaster via such OTT services in the Netherlands.

- (548) If any such restrictive terms are included in existing agreements that the Notifying Party and TV broadcasters have concluded for the distribution of those broadcasters' linear TV channels and catch-up TV services on the Parties' Pay TV platform in the Netherlands, the Notifying Party shall not enforce those restrictive terms.
- (549) In addition, the Notifying Party offers commitments to ensure the effectiveness of the distribution of OTT content via the merged entity's Internet network. To that end, the Notifying Party commits to maintain sufficient interconnection capacity for parties seeking to distribute data to its broadband customers by ensuring such parties have at least three uncongested routes into the merged entity's IP network in the Netherlands.
- (550) In more detail, the Notifying Party will ensure that the daily peak utilization, defined as the daily 95<sup>th</sup> percentile over 5-minute average bits transferred sample intervals, across its interconnection points with each of a group of at least three reputable ICPs who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to its broadband customers, will not exceed 80%, that is to say that there will be at least 20% capacity available above the daily peak as calculated in arriving at daily peak utilization. The Notifying Party will further ensure that the capacity available above the daily peak across that group of three ICPs shall be at least 20 Gbit/s. That figure shall be reviewed annually by the Monitoring Trustee.
- (551) The three ICPs that are subject to those additional commitments will be selected by the Notifying Party from a predetermined list of ICPs which will also contain the ten largest ICPs that are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to its broadband customers. The list, that holds the identity of the ten largest ICPs, may be changed from time to time with the approval of the Monitoring Trustee. One of the three selected ICPs must be one from those ten largest ICPs. The group of at least three reputable ICPs may vary from time to time. However, it cannot vary more than once per year for the ICP that is one of the ten largest ICPs and no more than once per quarter for the other two selected ICPs. Any alteration in a situation where there is an urgent need for the Notifying Party to upgrade capacity and it being impossible to achieve that upgrade in a timely manner with the three ICPs – must be approved by the Monitoring Trustee, and ultimately by the Commission. In that case the Notifying Party will use reasonable commercial endeavours to agree and implement an upgrade with the ICP at hand and, if it can do so, to immediately return that ICP to the group of three, in place of the ICP which replaced it, at least until it would otherwise have been possible to change that ICP pursuant to those additional commitments.
- (552) The Notifying Party shall request each ICP with whom it directly interconnects in the Netherlands for permission to publish in arrears on a monthly basis the highest Daily Peak Utilization in the preceding month, as a percentage of available aggregated direct capacity between that ICP and the Notifying Party itself. As long as at least half of such ICPs agree to such publication, the Notifying Party shall publish, on a publicly available website, on a monthly basis, that information with respect to any such ICP who is and remains willing for it to be published. Where fewer than half such ICPs agrees to such publication the Notifying Party shall publish, on a publicly

available website, on a monthly basis, only an aggregated figure based on the highest Daily Peak Utilization in the preceding month of aggregated direct interconnect capacity in the Netherlands.

- (553) A fast track dispute resolution procedure will be applicable in the event that a third party claims that the Notifying Party is failing to comply with any of those OTT Commitments. Any third party that wishes to avail itself of the fast track dispute resolution procedure ("Requesting Party") shall send a written request to the Notifying Party and the Monitoring Trustee setting out in detail the reasons leading the Requesting Party to believe that the Notifying Party is failing to comply with the OTT Commitments. The Notifying Party and the Requesting Party then have a maximum of fifteen working days after receipt of the request to resolve the issue through cooperation and consultation. Within eight working days after receipt of the request, the Monitoring Trustee will present its proposal to resolve the dispute and to specify in writing any action that the Notifying Party has to take to ensure compliance with the OTT Commitments. If the Requesting Party and the Notifying Party cannot resolve their differences of opinion, the dispute shall be resolved by arbitration under the Rules of the Arbitration Court of the International Chamber of Commerce. The arbitration will be conducted in Amsterdam and in the English language. It will also be fast-track, in that the Arbitral Tribunal will shorten all applicable procedural limits as far as admissible and appropriate. The Arbitral Tribunal can give a preliminary ruling within one month, and shall as a rule not give its final decision any later than six months after its confirmation.
- (554) The Commission will be closely associated to any arbitration proceedings. In case of disagreement between the arbitrating parties on the interpretation of the OTT Commitments, the Arbitral Tribunal may seek the Commission's interpretation and that interpretation shall be binding. The fast-track dispute resolution procedure does not affect the power of the Commission to take decisions in relation to the OTT Commitments and in accordance with the Merger Regulation.
- (555) The commitment not to prohibit OTT distribution of content will, in its entirety, be in force for a period of eight years following the date of adoption of this Decision.

## **8.5. Commission's assessment of the Final Commitments**

- (556) In accordance with the principles of the Merger Regulation on the acceptability of commitments, the Commission has assessed whether the Final Commitments:
- (i) are suitable and sufficient to eliminate the competition concerns; and
  - (ii) capable of being implemented effectively within a short period of time.
- (557) The Commission first makes that assessment in relation to the Film1 Divestment Commitment, and then in relation to the OTT Commitments.

### *8.5.1. The Film1 Divestment Commitment*

- (558) By this commitment, the Notifying Party aims to remove the significant impediment to effective competition that would arise from the combination of the only two available Premium linear Pay TV film channels in the Netherlands.
- (559) Divestiture commitments are the best way to eliminate competition concerns resulting from such horizontal overlaps.<sup>479</sup> If successful, the divestiture of the Film1 Divestment Business would remove in its entirety the overlap between the Parties'

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<sup>479</sup> Remedies Notice, paragraph 17.



activities in Premium film channels in the Netherlands. It would allow the emergence of a competitor that can immediately replace the Notifying Party as a provider of a Premium Pay TV film channel in the Netherlands. Such divestiture would allow the restoration of effective competition in relation to Premium Pay TV film channels in the Netherlands. It would also remove any concern that post-merger, the Notifying Party could foreclose its retail Pay TV competitors from having effective access to a Premium film channel since the purchaser of Film1 would have the incentive to distribute its film channel via as many Pay TV platforms as possible.

- (560) The Commission considers that the Final Commitments contain all necessary safeguards to ensure the successful transfer of the Film1 Divestment Business to a suitable purchaser.
- (561) The Film1 Divestment Business consists of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern.<sup>480</sup> In particular, it includes all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness. Those assets are the following:
- (i) all intellectual property rights of the Film1 Business, including the Film1 trademark;
  - (ii) all main licences, permits and authorisations, including the broadcasting licence issued by the Dutch Media Authority (Commissariaat voor de Media) and collecting society agreements;
  - (iii) all agreements, customer contracts and other rights of the Film1 distribution contracts, in particular:
    - all Film1 distribution contracts with retail providers of Pay TV services;
    - all licence agreements related to the content included in the Film1 services;
    - the agreement for the provision of media logistics services by [...] and the sublease agreement relating to the Film1 office space currently used by the Film1 Divestment Business.
- (562) The Film1 Divestment Business also includes all personnel which are currently employed by or contribute to the Film1 Divestment Business. In particular, it includes five members of Key Personnel who are necessary to maintain its viability and competitiveness. It also includes acquisitions staff, planning and scheduling staff, creative services staff, marketing staff and new media staff.
- (563) If there is any asset or personnel which is not covered by recitals (561) and (562), but which is both used, whether exclusively or not, in the Film1 Divestment Business and necessary for its continued viability and competitiveness, the Notifying Party will offer that asset or an adequate substitute to potential purchasers.
- (564) In its final form, the Film1 Divestment Business includes all assets and personnel that respondents to the market test identified as being essential to ensure its viability and competitiveness. In particular, following the market test, the Notifying Party included the Film1 trademark, the Chello media logistics contract, as well as additional Key Personnel and other personnel. The Commission considers that this addresses the comments that third parties made during the market test.

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<sup>480</sup> Remedies Notice, paragraph 23.

- (565) Some licence agreements related to the content included in the Film1 services contain clauses according to which the counterparty of the Film1 Divestment Business has to give its consent to have its contract transferred to the purchaser of the business. Importantly, that concerned contracts that the Film1 Divestment Business has in place with certain of the Hollywood majors. In line with the opinion overwhelmingly expressed in the market test, the Commission considers that the transfer of those contracts is essential for the future viability and competitiveness of the Film 1 Divestment Business.
- (566) In order to resolve that concern, the Notifying Party has provided additional safeguards that the Film1 Divestment Business will contain the indispensable content agreements for the first Pay TV and second Pay TV windows for major Hollywood films and series. [...]\*
- (567) The Film1 Divestment Business also includes a [...]\*-year agreement with the merged entity for the distribution of the Film1 services via its Pay TV platform. That agreement will provide the purchaser of the Film1 Divestment Business with immediate access to four million paying subscribers, and potential access to [50-70]\*% of Pay TV subscribers in the Netherlands. That will be in addition to the distribution agreements with the remaining Pay TV providers, which will also be transferred together with the Divestment Business. The purchaser of the Divestment Business will therefore have a solid customer base to sell its Film1 services to.
- (568) In order to give full effect to the divestiture, the Notifying Party has to sell the Film1 Divestment Business to a suitable purchaser with proven relevant expertise and ability to maintain and develop the divested business as a viable and active competitive undertaking. The market test confirmed that various third parties could be interested in acquiring the Film1 Divestment Business. That includes third parties with relevant expertise and a market presence in the wider Pay TV sector.
- (569) Finally, the divestiture of the Film1 Divestment Business will be implemented under the standard procedures that the Commission applies for divestiture remedies. That includes the involvement of a Monitoring Trustee and possibly a Divestiture Trustee to affect the sale within a short time period after the adoption of this Decision.
- (570) The Commission considers that the Film1 Divestiture Commitment is suitable and sufficient to remove the competition concerns expressed prior to a statement of objections according to which the proposed transaction would lead to a significant impediment to effective competition in relation to Premium film channels in the Netherlands. The Commission also concludes that it can be implemented effectively within a short time period.

#### 8.5.2. *The OTT Commitments*

- (571) As explained in recital (530), divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.<sup>481</sup> Other commitments may be suitable and sufficient only if those remedies are equivalent to a divestiture in their effects.<sup>482</sup> The question whether a remedy, or more

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<sup>481</sup> Remedies Notice, paragraph 17.

<sup>482</sup> Remedies Notice, paragraph 61.

specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.<sup>483</sup>

- (572) In this case, the significant impediment to effective competition that would arise in relation to OTT services is a specific one. The Commission has found that the Dutch market for the acquisition of Pay TV channels is characterised by the existence of agreements that restrict or aim to restrict TV broadcasters in their ability to offer their TV channels and associated content via the Internet. The Commission has found that the merger would increase the Notifying Party's ability and incentive to continue such restrictive agreements, or to make them even more onerous. That would deprive consumers in the Netherlands from innovations in the way they can watch TV content over the Internet.
- (573) As set out in the Remedies Notice<sup>484</sup>, remedies that fall short of complete divestitures, but are equivalent to them in terms of effects, may be considered in situations where markets are characterised by agreements between the Parties and their competitors that restrict competition. In certain circumstances, the Commission may accept commitments to terminate such agreements.<sup>485</sup>
- (574) As also set out in the Remedies Notice<sup>486</sup>, the change in market structure resulting from a proposed transaction may cause existing contractual arrangements to be inimical to effective competition.<sup>487</sup> That is true for exclusive long-term supply agreements if such agreements foreclose upstream the input for competitors that are active downstream. In such circumstances, the termination or change of existing exclusive agreements may be considered appropriate to eliminate the competition concerns.<sup>488</sup> The available evidence must allow the Commission to determine that no de facto exclusivity will be maintained. Such change of long-term agreements will normally only be considered sufficient as part of a remedies package to remove the competition concerns identified.
- (575) The significant impediment to effective competition in relation to OTT services in the present case is similar to the two categories of agreements mentioned above.
- (576) As far as TV broadcasters are providers of OTT services themselves, the restrictive agreements that Liberty Global has in place are agreements between providers that at the very least potentially compete with each other. The effect of the OTT clauses is that this potential competition is limited, or in the extreme situation, eliminated altogether.
- (577) As far as TV broadcasters provide their linear channels or the content that they own or control to third party providers of OTT services, the restrictive agreements that Liberty Global has in place are agreements that restrict Liberty Global's potential competitors access to those inputs that they need to offer their OTT services.
- (578) Against that background and in the context of this case, the Commission considers that the effective termination of those agreements is a suitable and sufficient remedy to remove the significant impediment to effective competition.

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<sup>483</sup> Remedies Notice, paragraph 16.

<sup>484</sup> Remedies Notice, paragraph 17.

<sup>485</sup> Remedies Notice, paragraph 60.

<sup>486</sup> Remedies Notice, paragraphs 67 and 68.

<sup>487</sup> Remedies Notice, paragraph 67.

<sup>488</sup> Remedies Notice, paragraph 68.

- (579) With the OTT Commitments, Liberty Global effectively commits to terminate any agreement between it and TV broadcasters that relates to the carriage of the TV broadcasters linear and catch-up services on the merged entity's Pay TV platform and which restricts their ability to offer their channels and content via an OTT service in the Netherlands. Liberty Global also commits that the merged entity will not enter into such agreements in the future. The OTT Commitments cover all the restrictive agreements that the Commission has identified in this case. In particular, the Commitments cover the following:
- (i) clauses that restrict TV broadcasters in offering their linear TV channels and content in their own OTT services that can compete with the merged entity's Pay TV packages;
  - (ii) clauses that restrict TV broadcasters in offering linear TV channels and associated content to third party OTT services that can compete with the merged entity's Pay TV packages;
  - (iii) clauses according to which the distribution agreements for Pay TV channels and associated content would be terminated, in whole or in part, in the event that TV broadcasters were to offer their channels and associated content via such OTT services;
  - (iv) clauses that limit TV broadcasters in their ability to offer their channels and associated content to competing retail providers of Pay TV services that are willing to offer those channels and content via their Internet networks. Banning such restrictions preserves the freedom of KPN, other cable operators and remaining providers of Pay TV services to allow for such OTT innovation;
  - (v) clauses that limit the ability of TV broadcasters to offer their channels and associated content via OTT services in the Netherlands to content that can be viewed by subscribers of the Notifying Party only. This covers requirements to make unencrypted or free OTT services available only to authorised subscribers of the Parties. It also covers other clauses that tie the OTT services technically and exclusively into the Pay TV offering of the Parties;
  - (vi) exclusivity deals for the use of TV content that a TV broadcaster owns or for which it has the right to distribute it in the Netherlands, insofar as exclusivity is agreed as part of, or in parallel to, agreements between the merged entity and TV broadcasters for the distribution of linear Pay TV channels over the merged entity's Pay TV platform.
- (580) With those clarifications, the commitment not to include such direct or indirect restrictions in the agreements with the TV broadcasters is capable of being monitored effectively by market participants, the Trustee and ultimately the Commission.
- (581) The OTT Commitments apply in relation to contracts that TV Broadcasters conclude with the merged entity for the distribution of TV channels and associated catch-up content via its Pay TV platform. That is appropriate, given that the merged entity would enjoy market power at the level of the market where those agreements are concluded.
- (582) The fact that the OTT Commitments cover both existing and new agreements between Liberty Global and TV broadcasters addresses the concerns expressed by third parties in the market test that the Commitments will only be effective if they cover both sets of contracts. The OTT Commitments also cover exclusivity agreements for TV content that TV broadcasters own or for which they have the right to distribute it in the Netherlands. Those agreements are covered insofar they are

concluded as part of, or in parallel with, the agreement for the carriage of those TV broadcasters' linear Pay TV channels over the merged entity's Pay TV platform. That addresses the comments of those broadcasters that such exclusivity agreements could severely undermine the viability of the OTT services they wish to offer to Dutch consumers.

- (583) The OTT Commitments contain additional safeguards that ensure their viability and effectiveness.
- (584) In order to prevent *de facto* restrictions on the TV broadcasters' ability to offer their channels and content via OTT services to remain, Liberty Global commits in particular not to make the conclusion or renewal of a separate agreement to distribute TV channels and associated content via the Parties' Pay TV platforms conditional on the acceptance of such restrictive agreements. That safeguard is important to ensure that the OTT Commitments are not circumvented during commercial negotiations between the merged entity and TV broadcasters. It preserves a balance in the bargaining power between the merged entity and the TV broadcasters, allowing the TV broadcasters genuinely to resist the type of restrictive agreements that the Commission has identified as giving rise to a significant impediment to effective competition.
- (585) Moreover, since, as set out in recitals (366) to (394), the merged entity's role as an Internet network provider would compound its ability to restrict the TV broadcasters' ability to distribute their channels and content via OTT services, it is necessary to restrain its technical ability to hamper OTT services in order to preserve the viability and effectiveness of the OTT Commitments. Otherwise, the merged entity's ability to hamper the technical access that OTT service providers have to its Internet network could be used to circumvent the commitment not to restrict the TV broadcasters' ability to use OTT services by contractual means.
- (586) In order to ensure the effectiveness of the distribution of OTT content, Liberty Global therefore commits to maintain sufficient interconnection capacity for parties seeking to distribute data to its broadband customers. In particular, it will ensure that it has at least three uncongested routes into the merged entity's IP network in the Netherlands.
- (587) Importantly, one of those uncongested routes will have to be maintained with one of the ten largest IP transit providers in the world. This IP transit provider can only be changed annually. The Commission's market test confirmed that, as the Internet functions today, OTT service providers can quickly and easily locate the uncongested links that flow into the Notifying Party's Internet network. Accordingly, OTT service providers that wish to make use of the OTT Commitments can become direct customers of that large transit provider and in that manner guarantee that their traffic will always be delivered into the Notifying Party's Internet network.
- (588) Following the comments that were made during the market test, the Notifying Party extended the duration of the OTT Commitments from four years to eight years, following the date of adoption of this Decision. That duration is in line with the investment cycle that OTT service providers take into account when deciding to launch and sustain OTT services. The Commission therefore considers that this duration is suitable and sufficient, and addresses the concerns that third parties expressed during the market test.
- (589) The OTT Commitments are capable of being implemented effectively and immediately. They apply from the date of the adoption of this decision. They apply to contracts that are concluded after that date, as well as contracts that are in place

before it. Therefore, from the date of adoption of this Decision, TV broadcasters can insist upon, and monitor, the Notifying Party's compliance with the OTT Commitments.

- (590) Any third party can use fast-track dispute resolution to resolve any issues that may arise in relation to the compliance with the OTT Commitments. Given that the arbitration tribunal may make a preliminary ruling within one month and the final ruling shall be rendered within six months, the procedure should allow OTT providers to enforce any breach of the OTT Commitments quickly.
- (591) Moreover, the Final Commitments provide for the appointment of a Monitoring Trustee to be approved by the Commission and to carry out obligations consistent with the Commission's precedents<sup>489</sup> in this area. The function, mandate and related provisions provided for in the Final Commitments are in line with the Commission standard requirements for commitments, according to which the Monitoring Trustee must be in a position to ensure full compliance of the Notifying Party with the commitments.
- (592) Once appointed, the Monitoring Trustee has an extensive role in ensuring that the OTT Commitments are complied with in full. In particular, the Monitoring Trustee will act as a contact point for any complaints that the Final Commitments are not complied with. The Monitoring Trustee can give, in agreement with the Commission, any instructions to the Notifying Party to ensure full compliance. The Monitoring Trustee will also be closely involved in any fast-track dispute resolution that beneficiaries of the OTT Commitments may launch.
- (593) The Commission retains the ultimate authority to verify the compliance with the OTT Commitments.
- (594) Therefore, the Commission considers that the OTT Commitments are suitable and sufficient to eliminate the competition concerns expressed prior to a statement of objections according to which the proposed transaction would result in a significant impediment to effective competition in relation to OTT Services. The Commission also considers that the OTT Commitments can be implemented effectively and immediately.

#### Conclusion on the Final Commitments

- (595) The Commission concludes that the Final Commitments in their entirety are suitable and sufficient to eliminate the competition concerns expressed prior to a statement of objections according to which the proposed transaction would result in a significant impediment to effective competition. The Commission also concludes that the Final Commitments are capable of being implemented effectively within a short period of time.

## **9. CONDITIONS AND OBLIGATIONS**

- (596) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

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<sup>489</sup> See for example Commission's decision of 26 January 2011 in Case No COMP/M.5984 - Intel/McAfee.

- (597) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments pursuant to Articles 14(2) and 15(1) of the Merger Regulation.
- (598) In accordance with the basic distinction described in recital (596) as regards conditions and obligations, this Decision should be made conditional on the full compliance by the Notifying Party with Section B and paragraphs 14 to 17 of Section C, including Schedules 1 to 4 of the commitments submitted by the Notifying Party on 5 September 2014. All other Sections of those commitments should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is set out in the Annex to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby Liberty Global plc acquires sole control of Ziggo N.V. within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the internal market and the EEA Agreement.

*Article 2*

Article 1 is subject to full compliance with the conditions set out in Section B and in paragraphs 14 to 17 of section C of the Annex, including Schedules 1 to 4.

*Article 3*

Liberty Global plc shall comply with the obligations set out in the Sections and Schedules of the Annex not referred to in Article 2.

*Article 4*

This Decision is addressed to:

Liberty Global plc  
38 Hans Crescent  
London SW1X 0LZ  
United Kingdom  
Done at Brussels, 10/10/2014

*For the Commission,  
(Signed)*

*Joaquín ALMUNIA  
Vice-President*

European Commission  
DG Competition  
1, Place Madou  
B-1000 BRUSSELS

## Case COMP/M.7000 – Liberty Global / Ziggo

### COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) of Council Regulation (EC) No. 139/2004 as amended (the **Merger Regulation**), Liberty Global plc (**Liberty Global**, or **the Notifying Party**) hereby enters into the following commitments (the **Commitments**) vis-à-vis the European Commission (the **Commission**) with a view to rendering the acquisition of sole control by Liberty Global of Ziggo N.V. (**Ziggo**) (the **Concentration**) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the **Decision**), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the **Remedies Notice**).

#### Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the **Consolidated Jurisdictional Notice**).

**Assets:** the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Film1 Divestment Business as indicated in paragraph 5 of Section B and described in more detail in Schedules 1 to 4.

**Broadband Customers:** consumers located in the Netherlands, that have a subscription to the Parties' broadband internet services either on a stand-alone basis or as part of a bundle.

**Broadcaster:** a provider of one or more linear TV channels.

**Closing:** the transfer of the legal title to the Film1 Divestment Business to the Purchaser.

**Closing Period:** the period of [...] from the approval of the Purchaser and the terms of sale by the Commission.

**Confidential Information:** any business secret, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest:** any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.



**Film1 Divestment Business:** the business, as defined in Section B and Schedules 1 to 4, that Liberty Global commits to divest.

**First Pay TV Window:** the window in which television content can be shown on a subscription-based consumer platform for the first time.

**Divestiture Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Liberty Global and who has received from Liberty Global the exclusive Trustee Mandate to sell the Film1 Divestment Business to a Purchaser at no minimum price.

**Effective Date:** the date of adoption of the Decision.

**First Divestiture Period:** the period of [...] from the Effective Date.

**Hold Separate Manager:** the person appointed by Liberty Global for the Film1 Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**Hollywood Majors:** Sony, Disney, Universal, 20th Century Fox, Paramount and Time Warner.

**Key Personnel:** all personnel necessary to maintain the viability and competitiveness of the Film1 Divestment Business, as listed in Schedule 2, including the Hold Separate Manager.

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Liberty Global, and who has the duty to monitor Liberty Global's compliance with the conditions and obligations attached to the Decision.

**OTT Service:** any service that allows consumers access to audio-visual content, whether linear or non-linear, over the internet (howsoever delivered) via one or more devices.

**Parties:** Liberty Global plc and Ziggo N.V.

**Parties' TV Platform:** television content distributed pursuant to a contract for such distribution on the Parties' hybrid fibre co-ax network via the analogue PAL standard, the digital DVB-C standard, the IPTV standard or any future standard used for the distribution of such television content on the Parties' hybrid fibre co-ax network.

**Personnel:** all personnel currently employed by the Film1 Divestment Business, including Key Personnel, staff seconded to the Film1 Divestment Business, shared personnel and the additional personnel listed in Schedule 2.

**Purchaser:** the entity approved by the Commission as acquirer of the Film1 Divestment Business in accordance with the criteria set out in Section D.

**Purchaser Criteria:** the criteria laid down in paragraph 18 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

**Schedules:** Schedule 1, Schedule 2, Schedule 3, Schedule 4, Schedule 5 and Schedule 6 to these Commitments.

**Trustee(s):** the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

**Trustee Divestiture Period:** the period of [...] from the end of the First Divestiture Period.

## **Section B. The commitment to divest and the Film1 Divestment Business**

### **Commitment to divest**

1. In order to maintain effective competition, Liberty Global commits to divest, or procure the divestiture of the Film1 Divestment Business, by the end of the Trustee Divestiture Period, as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 19.
2. To carry out the divestiture, Liberty Global commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Film1 Divestment Business within the First Divestiture Period. If Liberty Global has not entered into such an agreement at the end of the First Divestiture Period, Liberty Global shall grant the Divestiture Trustee an exclusive mandate to sell the Film1 Divestment Business in accordance with the procedure described in paragraph 33 in the Trustee Divestiture Period.
3. Liberty Global shall be deemed to have complied with this commitment if:
  - (a) by the end of the Trustee Divestiture Period, Liberty Global has entered into a final binding sale and purchase agreement for the sale and purchase of the Film1 Divestment Business, and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraphs 19 or 33; and
  - (b) the Closing of the sale of the Film1 Divestment Business to the Purchaser takes place within the Closing Period.

### *Structural effect*

4. In order to maintain the structural effect of the Commitments, Liberty Global shall, for a period of 10 years after the Effective Date, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice) over the whole or part of the Film1 Divestment Business, unless, following the submission of a reasoned request from Liberty Global showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 77), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Film1 Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

### **Structure and definition of the Film1 Divestment Business**

5. The Film1 Divestment Business consists of Film1's activities in the Netherlands, being the provision of movies, series and documentaries to customers through a package of Premium Pay TV channels and related VOD services. The legal and functional structure of the Film1 Divestment Business as operated to date is described in Schedule 1. The Film1 Divestment Business, as described in more detail in Schedules 1 to 4, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Film1 Divestment Business, and includes in particular:
  - (a) all tangible and intangible assets (including intellectual property rights) which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Film1 Divestment Business;
  - (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Film1 Divestment Business;

- (c) all relevant contracts, leases and other rights and commitments and all records of the Film1 Divestment Business respectively described in Schedule 1, Schedule 3 and Schedule 4 (items referred to under (a) to (c) hereinafter collectively referred to as **Assets**); and
- (d) the Personnel.

## **Section C. Related commitments**

### **Preservation of Viability, Marketability and Competitiveness**

6. From the Effective Date until Closing, Liberty Global shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Film1 Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Film1 Divestment Business. In particular, Liberty Global undertakes:
  - (a) not to carry out any action upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Film1 Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Film1 Divestment Business;
  - (b) to make available, or procure to make available, sufficient resources for the development of the Film1 Divestment Business, on the basis and continuation of the existing business plans; and
  - (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Film1 Divestment Business, and not to solicit or move any Personnel to Liberty Global's remaining businesses. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Film1 Divestment Business, Liberty Global shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. Liberty Global must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.

### **Hold-separate obligations**

7. Liberty Global commits, from the Effective Date until Closing, to keep the Film1 Divestment Business separate from the businesses it is retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the businesses retained by Liberty Global have no involvement in the Film1 Divestment Business; (ii) the Key Personnel and Personnel of the Film1 Divestment Business have no involvement in any business retained by Liberty Global and do not report to any individual outside the Film1 Divestment Business.
8. Until Closing, Liberty Global shall assist the Monitoring Trustee in ensuring that the Film1 Divestment Business is managed as a distinct and saleable entity separate from the businesses Liberty Global is retaining. Immediately after the adoption of the Decision, Liberty Global shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Film1 Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Liberty Global and,

where appropriate, Liberty Global shall also procure the preservation of the economic viability and competitiveness of the Film1 Divestment Business. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in paragraph 6(c). The Commission may, after having heard Liberty Global, require Liberty Global to replace the Hold Separate Manager.

### **Ring-fencing**

9. Liberty Global shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Film1 Divestment Business and that any such Confidential Information obtained by Liberty Global before the Effective Date will be eliminated and not used by Liberty Global. This includes measures vis-à-vis Liberty Global's appointees on the supervisory board and/or board of directors of the Film1 Divestment Business. In particular, the participation of the Film1 Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Film1 Divestment Business. Liberty Global may obtain information relating to the Film1 Divestment Business which is reasonably necessary for the divestiture of the Film1 Divestment Business or whose disclosure to Liberty Global is required by law.

### **Non-solicitation clause**

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Film1 Divestment Business for a period of [...] \* years after Closing.

### **Due Diligence**

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Film1 Divestment Business, Liberty Global shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
  - (a) provide to potential purchasers sufficient information as regards the Film1 Divestment Business; and
  - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

### **Reporting**

12. Liberty Global shall submit written reports in English on potential purchasers of the Film1 Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than ten (10) days after the end of every month following the Effective Date (or otherwise at the Commission's request). Liberty Global shall submit a list of all potential purchasers having expressed interest in acquiring the Film1 Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within five (5) days of their receipt.
13. Liberty Global shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

## **Distribution agreement**

14. Liberty Global commits to enter into a distribution agreement with the Purchaser, providing for the distribution of Film1 on the Parties' TV Platform in the Netherlands for a period of not less than [...] \* years, on reasonable commercial conditions. For the purpose of this commitment the conditions included in the existing agreement for the distribution of Film1 between Film1 and Ziggo will be considered reasonable commercial conditions. This agreement must be approved by the Commission in accordance with the procedure described in paragraph 19.

## **Change of Control Provisions**

15. [...]\*.
16. [...]\*.
17. Liberty Global shall secure that there is a media logistics services agreement between Film1 and a reputable third party in place at the date of Closing. In the event that such agreement is not with [...]\*. Liberty Global will secure the seamless migration of services from [...]\* to ensure continuation of the broadcast operations and play out services provided to Film1 on reasonable commercial conditions.

## **Section D. The Purchaser**

18. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
  - (a) The Purchaser shall be independent of and unconnected to the Parties and their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture);
  - (b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Film1 Divestment Business as a viable and active competitive force in competition with the Parties and other competitors; and
  - (c) The acquisition of the Film1 Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Film1 Divestment Business (the afore-mentioned criteria for the purchaser hereafter the **Purchaser Criteria**).
19. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Film1 Divestment Business shall be conditional on the Commission's approval. When Liberty Global has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. Liberty Global must be able to demonstrate to the Commission that the purchaser meets the Purchaser Criteria and that the Film1 Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Film1 Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the

viability and competitiveness of the Film1 Divestment Business after the sale, taking account of the proposed purchaser.

## **Section E. Trustee**

### **I. Appointment Procedure**

20. Liberty Global shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. Liberty Global commits not to close the Concentration before the appointment of a Monitoring Trustee.
21. If Liberty Global has not entered into a binding sale and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Liberty Global at that time or thereafter, Liberty Global shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
22. The Trustee shall:
  - (i) at the time of appointment, be independent of the Parties and their Affiliated Undertakings;
  - (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient experience as an investment bank or consultant or auditor; and
  - (iii) neither have nor become exposed to a Conflict of Interest.
23. The Trustee shall be remunerated by Liberty Global in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Film1 Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

#### *Proposal by Liberty Global*

24. No later than two (2) weeks after the Effective Date, Liberty Global shall submit a name or names of one or more natural or legal persons whom Liberty Global proposes to appoint as the Monitoring Trustee to the Commission for approval.
25. Liberty Global shall submit a list of one or more persons whom Liberty Global proposes to appoint as Divestiture Trustee to the Commission for approval no later than one month before the end of the First Divestiture Period or on request by the Commission.
26. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 22 and shall include:
  - (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
  - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and

- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

*Approval or rejection by the Commission*

- 27. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Liberty Global shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Liberty Global shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New proposal by Liberty Global*

- 28. If all the proposed Trustees are rejected, Liberty Global shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraph 24.

*Trustee nominated by the Commission*

- 29. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Liberty Global shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

**II. Functions of the Trustee**

- 30. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Liberty Global, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

*Duties and obligations of the Monitoring Trustee with regard to divestiture*

- 31. The Monitoring Trustee shall:
  - (a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
  - (b) oversee, in close cooperation with the Hold Separate Manager, the on-going management of the Film1 Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Liberty Global with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
    - (i) monitor the preservation of the economic viability, marketability and competitiveness of the Film1 Divestment Business, and the keeping separate of the Film1 Divestment Business from the business retained by Liberty Global, in accordance with paragraphs 6 and 7;
    - (ii) supervise the management of the Film1 Divestment Business as a distinct and saleable entity, in accordance with paragraph 8;

- (iii) with respect to Confidential Information:
  - (i) determine all necessary measures to ensure that Liberty Global does not after the Effective Date obtain any Confidential Information relating to the Film1 Divestment Business;
  - (ii) in particular strive for the severing of the Film1 Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Film1 Divestment Business;
  - (iii) make sure that any Confidential Information relating to the Film1 Divestment Business obtained by Liberty Global before the Effective Date, if any, is eliminated and will not be used by Liberty Global; and
  - (iv) decide whether such information may be disclosed to Liberty Global as the disclosure is reasonably necessary to allow Liberty Global to carry out the divestiture or as the disclosure is required by law;
- (iv) monitor the splitting of assets and the allocation of Personnel between the Film1 Divestment Business and Liberty Global or Affiliated Undertakings;
- (c) propose to Liberty Global such measures as the Monitoring Trustee considers necessary to ensure Liberty Global's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Film1 Divestment Business, the holding separate of the Film1 Divestment Business and the non-disclosure of competitively sensitive information;
- (d) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process: (i) potential purchasers receive sufficient information relating to the Film1 Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process; and (ii) potential purchasers are granted reasonable access to the Personnel;
- (e) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
- (f) provide to the Commission, sending Liberty Global a non-confidential copy at the same time, a written report within fifteen (15) days after the end of every month that shall cover the operation and management of the Film1 Divestment Business as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;
- (g) promptly report in writing to the Commission, sending Liberty Global a non-confidential copy at the same time, if it concludes on reasonable grounds that Liberty Global is failing to comply with these Commitments;
- (h) within one week after receipt of the documented proposal referred to in paragraph 19, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Film1 Divestment Business after the sale and as to whether the Film1 Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Film1 Divestment Business without one or more Assets or not



all of the Personnel affects the viability of the Film1 Divestment Business after the sale, taking account of the proposed purchaser; and

- (i) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
32. If the Monitoring Trustee and the Divestiture Trustee are not the same legal or natural person, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

*Duties and obligations of the Divestiture Trustee*

33. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Film1 Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 18 and 19. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary documents) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Liberty Global, subject to Liberty Global's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
34. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to Liberty Global.

**III. Duties and obligations of Liberty Global**

35. Liberty Global shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Liberty Global's or the Film1 Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Liberty Global and the Film1 Divestment Business shall provide the Trustee upon request with copies of any document. Liberty Global and the Film1 Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
36. Liberty Global shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Film1 Divestment Business. This shall include all administrative support functions relating to the Film1 Divestment Business which are carried out at headquarters level. Liberty Global shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in

the due diligence procedure. Liberty Global shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.

37. Liberty Global shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary documents), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Liberty Global shall cause the documents required for effecting the sale and the Closing to be duly executed.
38. Liberty Global shall indemnify the Trustee and its employees and agents (each an **Indemnified Party**) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Liberty Global for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
39. At the expense of Liberty Global, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Liberty Global's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Liberty Global refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Liberty Global. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 38 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Liberty Global during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
40. Liberty Global agrees that the Commission may share Confidential Information proprietary to Liberty Global with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*.
41. Liberty Global agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and the shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
42. For a period of ten (10) years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

#### **IV. Replacement, discharge and reappointment of the Trustee**

43. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
  - (a) the Commission may, after hearing the Trustee, require Liberty Global to replace the Trustee; or
  - (b) Liberty Global, with the prior approval of the Commission, may replace the Trustee.

44. If the Trustee is removed according to paragraph 43, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 20 to 29.
45. Besides the removal according to paragraph 43, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented and/or have expired in accordance with Section H below. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

#### **Section F. Commitment not to prohibit OTT distribution of content**

46. By the below commitment, Liberty Global seeks to remove any link that could exist between, on the one hand, commercial negotiations of Liberty Global and Broadcasters and conditions agreed with Broadcasters in such negotiations regarding the distribution of Broadcasters' linear channels and catch-up TV services relating to content on such linear channels via the Parties' TV Platform in the Netherlands and, on the other hand, such Broadcasters' OTT activities, including the content that such Broadcasters could offer for inclusion in such OTT activities.
47. As of the Effective Date, Liberty Global shall not enter into or renew any agreement with a Broadcaster that includes the distribution of such Broadcaster's linear channels and catch-up TV services relating to content in such linear channels via the Parties' TV Platform in the Netherlands and that contains terms that would directly or indirectly restrict such Broadcaster's ability to offer to third parties and/or end-users, on a stand-alone basis or in partnership with another entity or third party:
  - (i) an OTT Service in the Netherlands;
  - (ii) its linear channels via an OTT Service in the Netherlands; or
  - (iii) any content owned and controlled by such Broadcaster (that is to say any content in respect of which that Broadcaster holds the relevant intellectual property rights for OTT distribution in the Netherlands, for so long as it is so owned and controlled), including content from such linear channels, for inclusion in an OTT Service in the Netherlands.
48. To the extent any such terms are included in agreements with Broadcasters regarding the distribution of linear channels and catch-up TV services relating to content on such linear channels of such Broadcasters on the Parties' TV Platform in the Netherlands made before the Effective Date, Liberty Global shall not enforce such terms. Furthermore, Liberty Global shall not make the entry into or renewal of agreements with Broadcasters regarding the distribution of linear channels and catch-up TV services relating to content on such linear channels of such Broadcasters on the Parties' TV Platform in the Netherlands in any way conditional upon the conclusion of a separate agreement with such Broadcasters relating to OTT Services and/or the linear and non-linear content contained therein.
49. In addition, in order to ensure the effectiveness of distribution of OTT content, Liberty Global commits to ensure that it maintains at least three uncongested routes into its IP network in the Netherlands. By doing this it seeks to ensure it has an incentive to provide sufficient interconnection capacity so as to allow its Broadband Customers to access OTT Services in

the Netherlands either via the interconnect points described in Annex 1 to Schedule 6 or otherwise. The applicable modalities are set out in Schedule 6.

## **Section G. Arbitration**

### **Fast Track Dispute Resolution**

50. In the event that a third party claims that Liberty Global or an Affiliated Undertaking is failing to comply with the requirements of the commitments described in Section F, including its associated Schedule 6, **OTT Commitments**) vis-à-vis that third party, the fast track dispute resolution procedure as described herein shall apply.
51. Any third party who wishes to avail itself of the fast track dispute resolution procedure (a **Requesting Party**) shall send a written request to Liberty Global (with a copy to the Trustee) setting out in detail the reasons leading that party to believe that Liberty Global is failing to comply with the requirements of the OTT Commitments. The Requesting Party and Liberty Global will use their commercially reasonable efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen (15) working days after receipt of the request.
52. The Trustee shall present its own proposal (the **Trustee Proposal**) for resolving the dispute within eight (8) working days, specifying in writing the action, if any, to be taken by Liberty Global or an Affiliated Undertaking in order to ensure compliance with the OTT Commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.
53. Should the Requesting Party and Liberty Global (together the **Parties to the Arbitration**) fail to resolve their differences of opinion in the consultation phase, the Requesting Party shall serve a notice (the **Notice**), in the sense of a request for arbitration, to the International Chamber of Commerce (hereinafter the **Arbitral Institution**), with a copy of such Notice and request for arbitration to Liberty Global.
54. The Notice shall set out in detail the dispute, difference or claim (the **Dispute**) and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Liberty Global (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.
55. Liberty Global shall, within ten (10) working days from receipt of the Notice, submit its answer (the **Answer**), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Liberty Global proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

## Appointment of the Arbitrators

56. The Arbitral Tribunal shall consist of three (3) persons. The Requesting Party shall nominate its arbitrator in the Notice; Liberty Global shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by Liberty Global shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three (3) arbitrators.
57. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and Liberty Global shall agree on the nomination of a sole arbitrator within five (5) working days from the communication of the Answer, communicating this to the Arbitral Institution which shall forthwith confirm the appointment of the arbitrator.
58. Should Liberty Global fail to nominate an arbitrator, or if the two (2) arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.
59. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the **Arbitral Tribunal**.

## Arbitration Procedure

60. The Dispute shall be finally resolved by arbitration under the Rules of the Arbitration Court of the International Chamber of Commerce, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the **Rules**). The arbitration shall be conducted in Amsterdam in the English language.
61. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.
62. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural timetable shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
63. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Trustee in all stages of the procedure if the Parties to the Arbitration agree.
64. The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Trustee, and outside counsel and experts of the opposing party.
65. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party

produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless Liberty Global can produce evidence to the contrary.

### **Involvement of the Commission**

66. The Commission shall be allowed and enabled to participate in all stages of the procedure by:
  - Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
  - Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
  - Having the opportunity to file *amicus curiae* briefs; and
  - Being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.
67. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.
68. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the OTT Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the OTT Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

### **Decisions of the Arbitral Tribunal**

69. The Arbitral Tribunal shall decide the dispute on the basis of the OTT Commitments and the Decision. Issues not covered by the OTT Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
70. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
71. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by Liberty Global or an Affiliated Undertaking in order to comply with the OTT Commitments vis-à-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
72. The final award shall, as a rule, be rendered within six (6) months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the OTT Commitments if asked by the Arbitral Tribunal.
73. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.

74. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the OTT Commitments in accordance with its powers under the Merger Regulation.

#### **Section H. Duration**

75. The Commitments described in Section F, including its associated Schedule 6, will expire eight (8) years from the Effective Date. The Commission may at any time, upon the application of Liberty Global, decide that the Commitments (or any of them) described in Section F shall terminate earlier than the date determined under the preceding sentence on the grounds that the conditions of competition in the relevant market(s) no longer justify the continuation of such Commitments.

#### **Section I. The Review Clause**

76. The Commission may extend the time periods foreseen in the Commitments in response to a request from Liberty Global or, in appropriate cases, on its own initiative. For the avoidance of doubt, the Commission cannot extend the duration of the Commitments in Section F beyond the eight (8) years specified in paragraph 75. Where Liberty Global requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Liberty Global. Only in exceptional circumstances shall Liberty Global be entitled to request an extension within the last month of any period.
77. The Commission may further, in response to a reasoned request from Liberty Global, showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall at the same time send a non-confidential copy of the report to Liberty Global. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

#### **Section J. Entry into Force**

78. The Commitments shall take effect upon the date of adoption of the Decision.

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[...]\* (*Signed*)

duly authorised for and on behalf of Liberty Global

## SCHEDULE 1 FILM1 DIVESTMENT BUSINESS

- (1) All tangible and intangible assets of the Film1 Divestment Business are currently owned by Liberty Global Content Netherlands B.V. and personnel is currently employed by Liberty Global CM B.V.
- (2) In accordance with paragraph 5 of these Commitments, the Film1 Divestment Business includes, but is not limited to:
  - (a) the following main intangible assets: all intellectual property rights of the Film1 Divestment Business, including the Film1 trademark.
  - (b) the following main licenses, permits and authorisations: the broadcasting license issued by the Media Authority (*Commissariaat voor de Media*) and collecting society agreements.
  - (c) the following main contracts, agreements, leases, commitments and understandings: all Film1 distribution contracts as described in Schedule 4, the license agreements related to content included in the Film1 services as described in Schedule 3, the agreement for the provision of media logistics services by [...] and the sublease agreement relating to the Film1 office space currently used by the Film1 Divestment Business.
  - (d) the following Personnel: acquisitions staff, planning and scheduling staff, creative services staff, marketing staff and new media staff.
  - (f) Key Personnel as described in Schedule 2.
- (3) The Film1 Divestment Business shall not include assets dedicated to Liberty Global's Sport1 activities.
- (4) If there is any asset or personnel which is not covered by paragraph (2) of this Schedule 1 but which is both used (exclusively or not) in the Film1 Divestment Business and necessary for the continued viability and competitiveness of the Film1 Divestment Business, that asset or adequate substitute will be offered to potential purchasers.



## SCHEDULE 2 ORGANISATIONAL CHART AND LIST OF KEY PERSONNEL

The Film1 Divestment Business will include all necessary key and other personnel dedicated to providing the Film1 business will be transferred to the Divestment Business.

### Key functions and team structure

The necessary key and other personnel will be transferred to the Divestment Business. The Film1 Divestment Business will comprise [...] staff across the following teams and roles:

- A General Manager that will head up the Film1 Divestment Business;
- The Acquisitions team [...]\*
- The Planning & Scheduling team [...]\*
- The Film1 Creative Services team [...]\*
- The Marketing team [...]\* and
- The New Media team [...]\*.

Furthermore, Liberty Global will transfer an additional [...] upon request of the purchaser. These FTE relate to support functions in the areas of Finance, Accounting and Legal. [...]\*.

[...]\*

### Key Personnel

Liberty Global considers that the following individuals would constitute Key Personnel as defined in the Commission's template for divestiture commitments:

1. [...]\*
2. [...]\*
3. [...]\*
4. [...]\*
5. [...]\*

The list of individuals above includes those individuals responsible for securing both content and distribution deals.

### SCHEDULE 3 PROFILES OF MAIN LICENSING AGREEMENTS

The Film1 Divestment Business will comprise the following licensing agreements with content providers.

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*;

[...]\*.

## SCHEDULE 4 PROFILES OF MAIN DISTRIBUTION AGREEMENTS

The Film1 Divestment Business will comprise the following distribution agreements with retail TV providers.

[...]\*.

[...]\*.

[...]\*.

[...]\*.

[...]\*.

[...]\*.

## SCHEDULE 5 ARRANGEMENTS FOR THE INTERIM PERIOD

[...]\*.

(a) [...]\*;

(b) [...]\*;

(c) [...]\*.

**SCHEDULE 6 PRACTICALITIES OF ENSURING THREE UNCONGESTED  
INTERCONNECTION ROUTES REMAIN AVAILABLE AT ALL TIMES**

- (1) For the purpose of this Schedule 6, Daily Peak Utilization means the daily 95th percentile over 5-minute average bits transferred sample intervals (technically Liberty Global takes 288 measurements of interface bit input counters per day, the highest 14 values are discarded and 15th highest is used for this purpose) of the sum of measured inbound capacity.
- (2) Liberty Global will ensure that the Daily Peak Utilization across its interconnection points with each of a group of at least three (3) reputable ICPs who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to Broadband Customers, will not exceed eighty (80) percent. That is to say that there will be at least twenty (20) per cent capacity available above the daily peak as calculated in arriving at Daily Peak Utilization.
- (3) Liberty Global will further ensure that the capacity available above the daily peak, as calculated in arriving at Daily Peak Utilization across that group of at least three (3) reputable ICPs, shall be at least twenty (20) Gbit/s. This figure shall be reviewed annually in accordance with the procedure described in paragraph (8) of this Schedule 6.
- (4) Subject to paragraph (5) of this Schedule 6 below, this group of at least three (3) reputable ICPs may vary from time to time but no more than once per quarter generally and once per year in respect of the one (1) ICP declared as being one of the ten (10) largest ICPs in accordance with paragraph (6) of this Schedule 6.
- (5) By way of exception to paragraph (4) of this Schedule 6, where there is an urgent need to upgrade capacity with a particular ICP and it does not prove possible to agree or implement such upgrade in a timely manner Liberty Global will seek the approval of the Monitoring Trustee in accordance with paragraph (8) of this Schedule 6. to replace that ICP with another ICP irrespective of when it was last changed. In that case Liberty Global will use its reasonable commercial endeavors to agree and implement an upgrade with that ICP and, if it can do so, to immediately return that ICP to the group of three (3), in place of the ICP which replaced it, at least until it would otherwise have been possible to change that ICP in accordance with paragraph (4) of this Schedule 6.
- (6) Annex 1 to this Schedule 6 contains a long list of ICPs which will include the three (3) reputable ICPs referred to above in paragraph (2) of this Schedule 6. This list may be changed from time to time in coordination with the Commission and the Monitoring Trustee, in particular by the addition of other reputable ICPs. This long list shall include the ten (10) largest ICPs who are willing to sell transit services via one or more physical interconnection points in the Netherlands over which traffic may flow to Broadband Customers. The group of three (3) reputable ICPs referred to above in paragraph (2) of this Schedule 6 shall include at least one of these ten (10) largest ICPs.
- (7) Liberty Global shall request each ICP with whom it directly interconnects in the Netherlands for permission to publish in arrears on a monthly basis the highest Daily Peak Utilization in the preceding month, as a percentage of available aggregated direct capacity between that ICP and Liberty Global. As long as at least half of such ICPs agrees to such publication Liberty Global shall publish, on a publicly available website, on a monthly basis, this information with respect to any such ICP who is and remains willing for this to be published. Where fewer than half such ICPs agrees to such publication Liberty Global shall publish, on a publicly available website, on a monthly basis, only an aggregated figure based on the highest Daily Peak Utilization in the preceding month of aggregated direct interconnect capacity in the Netherlands.

*Duties and obligations of the Monitoring Trustee with regard to Liberty's commitment to ensure three uncongested interconnection routes remain available at all times*

- (8) The Monitoring Trustee shall monitor compliance with this Commitment as set out in Section F and the practicalities set out in this Schedule 6. To that end the Monitoring Trustee shall:
- (a) verify, on the basis of information provided to it by Liberty Global that, in accordance with paragraph (2) of this Schedule 6, the Daily Peak Utilization across the relevant interconnection points does not exceed 80%;
  - (b) review Annex 1 to this Schedule 6 every three (3) months with the aim of ensuring that Annex 1 to this Schedule 6 will always contain a sufficient number of reputable Interconnectivity providers (**ICPs**);
  - (c) identify which of the ICPs referred to in Annex 1 to this Schedule 6 are amongst the ten (10) largest ICPs for the purposes of paragraph (6) of this Schedule 6. It shall determine the appropriate metric for defining the 10 largest ICPs in consultation with Liberty Global, having regard to paragraph 49 under Section F;
  - (d) review every year the minimum capacity level described in paragraph (3) of this Schedule 6 to determine whether such commitment is still required to prevent that the Concentration gives rise to a significant impediment to competition and if so, to agree with Liberty Global a number which allows for a reasonable level of spare capacity;
  - (e) in the event that Liberty Global contends that it needs to vary the group of three (3) ICPs in the situation referred to in paragraph (5) of this Schedule 6, where there is an urgent need to upgrade capacity and it does not prove possible to agree or implement such upgrade in a timely manner, to review this matter with Liberty Global and if deemed appropriate, to allow Liberty Global to make this change;
  - (f) provide to the Commission, sending Liberty Global a copy at the same time, a written report within fifteen (15) days after the end of each quarter that shall cover, for that period: (i) the three (3) ICPs referred to in paragraph (2) of this Schedule 6 and (ii) the Daily Peak Utilization; and
  - (g) promptly report in writing to the Commission, sending Liberty Global a copy at the same time, if it concludes on reasonable grounds that Liberty Global is failing to comply with this Commitment.

## ANNEX 1 LONG LIST INTERNET CONNECTIVITY PROVIDERS

1. [...]\*
2. [...]\*
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