

*Case M.7000 - Liberty Global/ Ziggo*

Only the English text is available and authentic

**REGULATION (EC) No 139/2004**  
**MERGER PROCEDURE**

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Article 9(3)

Date: 25/06/2014

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 25.6.2014

C(2014) 4163 final

PUBLIC VERSION

## **COMMISSION DECISION**

**of 25.6.2014**

**addressed to the Kingdom of the Netherlands**

**pursuant to Article 9 of Council Regulation (EC) No 139/2004  
relating to case No COMP/M.7000 - Liberty Global/ Ziggo  
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# COMMISSION DECISION

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**addressed to the Kingdom of the Netherlands  
pursuant to Article 9 of Council Regulation (EC) No 139/2004  
relating to case No COMP/M.7000 - Liberty Global/ Ziggo**

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THE EUROPEAN COMMISSION,

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

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 to Article 9(3) thereof,

Having regard to the notification made by Liberty Global plc on 14 March 2014 pursuant to Article 4 of Regulation (EC) No 139/2004,

Having regard to the request of the Netherlands, via the Netherlands' Autoriteit Consument en Markt (Authority for Consumers and Markets), of 25 March 2014 for a full referral of the proposed concentration and the reminder of the Netherlands, via that Authority, of 15 May 2014,

Having regard to the Commission's decision initiating proceedings under Article 6(1)(c) of Regulation (EC) No 139/2004 of 8 May 2014,

Having given Liberty Global plc the opportunity to make known its views on the request of the Netherlands of 25 March 2014 and having regard to the Liberty Global plc's comments of 1 April 2014,

Having given the Netherlands the opportunity to make known its views on the Commission's intention to reject its referral request and having regard to the fact that the Netherlands, informed the Commission on 5 June 2014, via the Netherlands Authority for Consumers and Markets, that it has no further comments,

Whereas:

- (1) On 14 March 2014, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ("the Merger Regulation") by which Liberty Global plc ("the Notifying Party") acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over Ziggo N.V. ("Ziggo") by way of a public bid (the "proposed transaction"). Liberty Global and Ziggo are collectively referred to in this Decision as the "Parties".
- (2) The Netherlands received a copy of the notification, via the ACM, on 17 March 2014.

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

- (3) By letter dated 25 March 2014 and received on the same day, the Netherlands, via the ACM, requested the full referral of the proposed transaction to its competition authority with a view to the application of the competition law of the Netherlands, pursuant to Article 9(2)(a) of the Merger Regulation (the "Referral Request").
- (4) On 8 May 2014, the Commission adopted a decision initiating proceedings under Article 6(1)(c) of the Merger Regulation ("the Article 6(1)(c) decision").
- (5) The Netherlands, via the Authority for Consumers and Markets ("ACM"), submitted a reminder of the Referral Request on 15 May 2014.
- (6) The Notifying Party was formally informed of the Referral Request by the Commission by way of a letter dated 3 April 2014 but submitted its comments on 1 April 2014, having already been informed of the Referral Request. On 21 May 2014 the Commission informed the Notifying Party that the ACM had submitted a reminder regarding the Referral Request.
- (7) The Netherlands was informed by way of a letter dated 28 May 2014 of the Commission's intention to reject the Referral Request. On 5 June 2014, the Netherlands informed the Commission, via the ACM, that it had no further comments.

## 1. THE PARTIES

- (8) **Liberty Global** is an international cable operator. It owns and operates cable networks offering TV, broadband Internet, fixed telephony and mobile telecommunications services in 12 European countries. Liberty Global is active in the Netherlands primarily through UPC Nederland B.V. ("UPC"), which owns and operates a cable network in the country. Liberty Global also distributes the Sport1 and Film1 TV channels in the Netherlands. Liberty Global is expanding its mobile telecoms business by launching Mobile Virtual Network Operator ("MVNO") offers across Europe, including in the Netherlands, where Liberty Global recently entered the mobile telecoms market.
- (9) **Ziggo** owns and operates a broadband cable network that spans 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, or "VoIP") services. Ziggo (indirectly) owns [...] % of HBO Nederland Coöperatief U.A. ("HBO Nederland"), a full-function joint venture jointly controlled by Ziggo and HBO. 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. Those channels are distributed on a wholesale basis to retail Pay TV suppliers in the Netherlands.

## 2. THE CONCENTRATION

- (10) The proposed transaction involves the acquisition of sole control over Ziggo by Liberty Global. Liberty Global is currently the largest 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 hold sole control over Ziggo.

- (11) The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### **3. UNION DIMENSION**

- (12) 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 ARTICLE 9 REFERRAL REQUEST**

- (13) On 25 March 2014, the Netherlands submitted a request pursuant to Article 9(2)(a) of the Merger Regulation for a full referral of the proposed transaction from the Commission to the Netherlands. On 15 May 2014, the Netherlands submitted a reminder regarding its Referral Request.
- (14) The Netherlands argues in the Referral Request that the proposed transaction threatens to affect significantly competition in several Dutch TV-related markets and telecommunication markets which each present all the characteristics of a distinct market. In its view, a referral is appropriate in this case as the ACM would be the most appropriate authority for dealing with the case.
- (15) In its comments submitted on 1 April 2014, the Notifying Party argues that the proposed transaction does not threaten to affect significantly competition and that the Commission is better placed to examine the proposed transaction.
- (16) Pursuant to Article 9(3) of the Merger Regulation the Commission can refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that State's competition law if the conditions laid down in Article 9(2)(a) of the Merger Regulation are met, that is to say, if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.
- (17) In assessing a submission made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is first required to determine whether there is a market within the Member State concerned which presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case-law of the General Court<sup>2</sup>, the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the transaction threatens to significantly affect competition.
- (18) Finally, pursuant to Article 9(3) of the Merger Regulation, the Commission has to analyse whether it is appropriate to refer a given case to a national competition authority. The Commission therefore retains a margin of discretion in deciding

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<sup>2</sup> Joined cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] ECR II-4251, paragraph 105.

whether to refer a case or not.<sup>3</sup> In exercising such discretion the Commission will take into account the need to ensure effective protection of competition in all markets affected by the transaction.<sup>4</sup> The Commission exercises that discretion taking into account the criteria set out in the case law and the Referral Notice.<sup>5</sup>

- (19) In the following section 5, the Commission will first consider whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled and will then assess whether it is appropriate to refer this case to the Netherlands.
- (20) In its assessment of the Referral Request, the Commission takes into account all the arguments it received from the Parties, the Netherlands and any other third parties.

## **5. ASSESSMENT OF THE REQUEST UNDER ARTICLE 9(3) OF THE MERGER REGULATION**

### **5.1. Requirements of Article 9(2)(a) of the Merger Regulation**

- (21) As mentioned in recital (16), in order for the Commission to be able to refer the proposed transaction to the Netherlands, the latter is required to show that the proposed transaction threatens to affect significantly competition in a market in the Netherlands, which presents all the characteristics of a distinct market.

#### *5.1.1. Markets within the Netherlands which present all the characteristics of a distinct market*

- (22) In the Referral Request the Netherlands identifies the following markets that it considers to have a geographic scope that does not exceed the territory of the Netherlands and that therefore constitute distinct markets as referred to in Article 9(2)(a) of the Merger Regulation<sup>6</sup>: (i) the wholesale market for the licensing of individual content; (ii) the wholesale market for TV channels; (iii) the retail market for TV services to end consumers; (iv) the retail market for fixed-telephony services; (v) the retail market for Internet access; (vi) the wholesale market for broadband access, and; (vii) the hypothetical market for multi-play services.
- (23) The Commission, on the basis of the information gathered during its first phase market investigation and in light of its previous decision-making practice, reached the preliminary conclusion in the Article 6(1)(c) decision that the relevant product markets can indeed be broadly defined along the lines advocated by the Netherlands.
- (24) In particular, the Commission preliminarily identified the following markets as constituting separate relevant product markets that are affected by the proposed transaction<sup>7</sup>: (i) the market for the acquisition of premium first-window Pay TV film

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<sup>3</sup> Joined cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] ECR II-4251, paragraphs 173-175. See also Commission Notice on Case Referral in respect of concentrations ("Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

<sup>4</sup> Referral Notice, paragraph 8.

<sup>5</sup> Referral Notice, paragraphs 5, 7-9.

<sup>6</sup> Referral Notice, paragraph 18.

<sup>7</sup> As regards the market for wholesale broadband access, the Commission concluded in its decision opening proceedings pursuant to Article 6(1)(c) of the Merger Regulation in relation to the proposed transaction that this market does not constitute an affected market given that the Parties only provide such access internally, rather than to third parties. The fact that the Parties do not offer wholesale broadband access externally was confirmed by the ACM in its 2012 market analysis decision dealing

content, in which market the Parties' combined market share amounts to 100%; (ii) the market for the acquisition of non-linear premium film VOD content, as well as its separate relevant sub-segment for non-linear premium film TVOD content, in which markets the Parties' combined market share exceeds 20%; (iii) the possible market for the acquisition of Dutch-language premium and first window Pay TV content, in which market the Parties' combined market share amounts to 100%; (iv) the market for the acquisition of Pay TV channels and its separate relevant sub-segments for basic Pay TV channels, premium Pay TV channels and premium Pay TV film channels, in which markets the Parties' combined market share exceeds 50%; (v) the market for the wholesale supply of premium Pay TV film channels, in which market the Parties' combined market share amounts to 100%; (vi) the market for the retail provision of Pay TV services as well as its separate relevant sub-segments for linear Pay TV services and non-linear Pay TV services, in which markets the Parties' combined market share amounts to respectively [60-70]%, [50-60]% and [20-30]%; (vii) the market for the retail provision of fixed broadband Internet services to residential and small business customers, in which market the Parties' combined market share amounts to between [30-40]% (value) and 43% (subscriber numbers); (viii) the market for the retail provision of fixed telephony services, in which market the Parties' combined market share amounts to between [30-40]% (value) and 41% (subscriber numbers) and; (ix) the possible market for the retail provision of multiple play services, in which market the Parties' combined market share amounts to between [55-75]%. As regards the latter market, the Commission preliminarily left open whether or not such a distinct market exists as this conclusion would not change the outcome of the competitive assessment. As regards the geographic scope of each of these affected markets, the Commission preliminarily concluded that it is limited to the territory of the Netherlands.

- (25) Notwithstanding that the Commission has reached the preliminary conclusion that none of the markets that are affected by the proposed transaction have a geographic scope that is wider than the territory of the Netherlands, its on-going in-depth investigation aims at establishing, amongst other things, whether the geographic scope of the possible relevant market for the acquisition of Dutch-language content could exceed the territory of the Netherlands. In that regard, it must be recalled that both the Commission and the ACM have in their previous decision-making practice left open the question of whether the market for the acquisition of individual audio visual content is national or narrower in scope, or whether it encompasses linguistically homogeneous areas (in this case encompassing the Netherlands and the Flemish part of Belgium).<sup>8</sup> If this were the case, the possible market for the acquisition of Dutch-language individual audio visual content would not satisfy the legal requirements for case referral set out in Article 9(2)(a) of the Merger Regulation.
- (26) On the basis of the foregoing, it is an open question whether all the markets in question present all the characteristics of a distinct market within the Netherlands, meaning that the second requirement of Article 9(2)(a) may not be fulfilled. This question can remain open for the purposes of the present decision, because, even

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with low quality wholesale broadband access: Opta/AM/2012/201220, 'Marktanalyse lage kwaliteit wholesalebreedbandtoegang' of 27 April 2012, paragraph 260.

<sup>8</sup> Cf., for example: case M.5932 – *News Corp/BskyB* OJ C 37, 05.02.2011, and case 7185/Sanoma-SBS.

assuming that all the markets involved with the proposed transaction were deemed to present all the characteristics of a distinct market under that provision, for the reasons set out below, the Commission in any event considers that the ACM is not a more appropriate authority to review the proposed transaction.

5.1.2. *Markets within the Netherlands in which the proposed transaction threatens to affect significantly competition*

- (27) The Netherlands considers *prima facie* that the proposed transaction threatens to affect significantly competition on each of the affected markets identified in recital (22), that it considers to constitute distinct markets within the Netherlands as referred to in Article 9(2)(a) of the Merger Regulation.
- (28) As regards the wholesale market for the licensing of individual content, the Netherlands considers that the fact that several sub-segments of this market are likely to be affected markets suggests a significant impact on competition on market in the Netherlands, which present all the characteristics of a distinct market. As regards the wholesale market for TV channels, the Netherlands argues that the combined market share of the Parties on the possible market for the wholesale supply of TV channels is a direct indication that there would be a significant impact on competition on markets in the Netherlands which each present all the characteristics of a distinct market. In addition, it considers that there is a vertical relationship between the activities of the Parties as they are both suppliers and acquirers of TV channels in the Netherlands and that the question whether the proposed transaction would give rise to a risk of input or platform foreclosure for the Parties' competitors has to be further investigated. As regards the retail markets for TV services, fixed telephony services, and Internet access services, as well as the hypothetical retail market for multi-play services, the Netherlands argues that the combined market shares of the Parties on those markets are an indication that there would be a significant impact on competition due to non-coordinated effects and / or coordinated effects on telecommunication markets which each present all the characteristics of a distinct market within the Netherlands.
- (29) The Notifying Party argues that the ACM has not shown to the requisite standard that the proposed transaction threatens to affect significantly competition in the markets in question. With respect to the wholesale markets for the licensing of individual content, the Notifying Party points out that the ACM has only indicated that those markets are likely to be affected, which is not sufficient to conclude that the proposed transaction threatens to affect significantly competition in those markets. Regarding the wholesale market for the supply of TV channels, the Notifying Party considers that the ACM has not shown why competition is threatened, despite the extensive evidence on the absence of significant foreclosure effects presented to the Commission by the Notifying Party. Concerning the wholesale market for broadband access, the Notifying Party explains that the Parties do not engage in direct competition as they operate in separate geographic regions. The Notifying Party also argues in this respect that the combined market share of the Parties is not appropriate to measure competition effects since they only provide wholesale broadband access internally. Finally, as regards the retail markets for TV services, fixed-telephony services and Internet access services as well as the hypothetical retail market for multi-play services, the Notifying Party essentially argues that regardless of the precise geographic delineation of those markets, the fact remains that, as they operate in separate and non-overlapping geographic areas, Liberty Global and Ziggo do not compete with one another, either directly or indirectly. Accordingly, the proposed



transaction cannot give rise to non-coordinated effects on the markets in question. As regards coordinated effects, the Notifying Party furthermore argues that none of criteria in the horizontal merger guidelines<sup>9</sup> that suggest that such effects are likely to arise are met in this case, given that: (i) several competitors with significantly different bundled offers, which are less susceptible to effective coordination would remain active on the markets in question after the merger; (ii) the market position, infrastructure and associated cost base of the Dutch telecom incumbent KPN and the merged entity, the two national network operators that would remain after the merger, are different while both would have an overwhelming incentive to fully recoup costly network investments, such that coordination would be rendered difficult, and; (iii) destabilizing effects could result from current and future, smaller competitors, as new technologies such as 4G LTE networks, over-the-top (OTT) TV services<sup>10</sup> and improved Internet Protocol Television ("IPTV")<sup>11</sup> offers can challenge the incumbent operators which technologies render the markets in question ill-suited for a stable, coordinated outcome.

- (30) In the Article 6(1)(c) decision the Commission reached the preliminary conclusion that the proposed transaction raises serious doubts as to its compatibility with the internal market as a result of its effects on the following relevant markets – including each of their sub-segments that constitute separate relevant product markets: (i) the possible market for the acquisition of Dutch-language premium and first window Pay TV content; (ii) the market for the acquisition of Pay TV channels; (iii) the market for the wholesale supply of premium Pay TV film channels; (iv) the market for the retail provision of Pay TV services; (v) the market for the retail provision of fixed broadband Internet services to residential and small business customers; (vi) the market for the retail provision of fixed telephony services; (vii) the possible market for the retail provision of multiple play services.
- (31) On the basis of the foregoing, the Commission considers that the first requirement of Article 9(2)(a) of the Merger Regulation is met, as it has itself concluded in the Article 6(1)(c) decision that the proposed transaction raises serious doubts as to its compatibility with the internal market in relation to the affected markets, or certain sub-segments of those markets, identified by the Netherlands in the Referral Request.

### 5.1.3. *Conclusion on Article 9(2)(a) of the Merger Regulation*

- (32) As regards the possible market for the acquisition of Dutch-language premium and first window Pay TV content, despite its preliminary conclusion in the Article 6(1)(c) decision, the Commission has not been able to finally conclude that such a market is limited to the territory of the Netherlands, and presents all the characteristics of a distinct market. There therefore remains a doubt that the requirements of Article 9(2)(a) of the Merger Regulation are met in relation to all possible markets on which the proposed transaction threatens to affect significantly competition.

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<sup>9</sup> Reference is being made to the Commission's guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C-31/03 (2004).

<sup>10</sup> OTT TV services involve the delivery of audio-visual content over the Internet.

<sup>11</sup> IPTV involves delivery of streamed linear and on-demand TV content to subscribers or viewers using Internet protocol, the technology that is also used to access the Internet.

## 5.2. The Commission's discretion in assessing the Referral Request

(33) Even if the substantive criteria laid down in Article 9(2)(a) of the Merger Regulation were fulfilled in this case, the Commission has discretion under Article 9(3) of the Merger Regulation as to whether or not to refer the proposed transaction to the Netherlands. If the Commission considers that the ACM is not a more appropriate authority to review the proposed transaction than the Commission, a referral thereof would run counter to the principles guiding case referral.<sup>12</sup>

### 5.2.1. *The Netherlands' submission*

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

(35) The Netherlands highlights in this respect that the ACM, in its capacity as the Dutch telecom regulator, has collected a wide range of information – including results from market research among consumers of fixed telephony and Internet – as it is currently investigating several markets that are also affected by the proposed transaction, being the retail markets for internet access, fixed-telephony and business connectivity services and the wholesale markets for local loop unbundling and fixed telephony in preparation of draft market analysis decisions. The ACM is furthermore investigating various markets that are affected by the proposed transaction as part of its on-going merger review of KPN's proposed acquisition of sole control over Reggefiber, the company that is responsible for investments in the roll-out of a Next generation Network of Fiber-to-the-Home ("FttH") in the Netherlands. The ACM considers that in the assessment of the competitive effects that may result from that transaction, several upstream markets such as wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products and several downstream markets such as the retail markets for television, broadband internet access and fixed telephony must be analysed.

(36) Furthermore, whilst acknowledging that the Commission is currently conducting several investigations into the TV-related and mobile telecommunication sectors in the EEA, the Netherlands considers that the proposed transaction does not coincide with any of those on-going investigations.

(37) With regard to mobile telephony, the Netherlands points out that the position of both UPC and Ziggo on the mobile telephony market is very limited and is not expected to increase in importance over the next three years, as the mobile frequency spectrum for LTE that they have been able to acquire is limited and insufficient for the deployment of a full-scale mobile telephony network. The Netherlands furthermore

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<sup>12</sup> Referral Notice, paragraph 19.

considers that, although UPC and Ziggo are expected to exploit their WiFi-hotspots network in the Netherlands in order to increase their respective positions on the mobile telephony market, the WiFi-hotspots networks have not, to date, been considered as a substitute for a mobile network. As such, the proposed transaction is not comparable with mergers of Mobile Network Operators (MNOs) such as those recently observed in Austria, Germany and Ireland, nor do its potential effects relate to the mobile-telephony market.

- (38) Concerning the cable industry, the Netherlands argues that the degree of similarity existing between the proposed transaction and a German concentration of 2011 (where Liberty Global sought to acquire Kabel Baden-Württemberg) which was referred by the Commission to the Bundeskartellamt, supports the argument that the ACM would be the more appropriate authority to investigate the proposed transaction. The findings of the Commission in that referral decision entailing that the merger between cable TV operators, whose operations are limited to non-overlapping geographic cable footprints, might significantly affect competition in regional or national markets and that the national competition authority has significant experience in this sector is also applicable in this case. Moreover, unlike in most other Member States, in the Netherlands two fixed networks with a national coverage compete in various markets with each other. This puts the ACM in a unique position as the sole authority familiar with the current competitive and regulatory landscape in the Netherlands.
- (39) Finally, the Netherlands considers that the Commission's current antitrust investigations into the licensing agreements between several major US film studios and the largest Pay TV broadcasters in Europe, only overlap to a very limited extent with the proposed transaction. This is essentially due to the fact that no Dutch Pay TV operator is subject to the on-going antitrust investigations and the fact that the investigations only concern a part of the activities of Liberty Global and Ziggo that are being examined as part of the review of the proposed transaction.

#### 5.2.2. *Comments of the Notifying Party*

- (40) The Notifying Party points out that jurisdiction should only be reattributed to another competition authority in circumstances where the latter is the more appropriate authority for dealing with the proposed transaction. According to the Notifying Party, it cannot be maintained that the ACM is better placed than the Commission to review the proposed transaction.
- (41) Despite its claim that none of the theories of harm put forward by the ACM are founded, the Notifying Party is of the view that the Commission can deal with these theories of harm, in particular in the light of the time and effort the Commission has already spent on investigating the proposed transaction.
- (42) The Notifying Party highlights the need for a coherent and consistent approach at Union level not only in relation to the consolidation taking place in the electronic communications markets in the Union but also in respect of the whole audiovisual supply chain.

### 5.2.3. *The Commission's assessment*

- (43) The Commission considers that in the light of the Referral Notice and the case law<sup>13</sup>, and mainly for reasons of legal certainty, referral decisions should only be taken in exceptional cases as, by their very nature, such decisions result in a derogation from the jurisdictional rules for the allocation of cases between the Commission and Member States provided for in Article 1 of the Merger Regulation. In exercising its discretion, the Commission takes into account the need to ensure the effective protection of competition in all markets affected by the proposed transaction, to respect the principle of subsidiarity, to protect the interests of the Member States in maintaining effective competition, to ensure legal certainty, to respect the "one-stop shop" principle, and to reduce efforts and costs for undertakings. In this respect, regard will be had to the implications for the Notifying Party, in terms of administrative effort, of any contemplated referral.
- (44) According to paragraph 9 of the Referral Notice "*jurisdiction should only be re-attributed to another competition authority [as opposed to the one which originally had jurisdiction based on the turnover criteria in Article 2 of the Merger Regulation] in circumstances where the latter is more appropriate for dealing with the merger*".<sup>14</sup>
- (45) The Referral Notice also provides that, in order to ensure legal certainty for the parties involved, a referral "*should only be made when there is a compelling reason for departing from original jurisdiction' over the case in question, particularly at the post-notification stage*".<sup>15</sup>
- (46) Further, the General Court has held that the "*referral conditions laid down in Article 9(2)(a) and (b) of Regulation 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Union dimension are limited to exceptional circumstances*".<sup>16</sup>
- (47) In the light of the above and in exercising its margin of discretion, the Commission considers that, in this case, there are no compelling reasons that justify a referral of the proposed transaction to the Netherlands.
- (48) First, the Commission has a particular interest in ensuring that competition is preserved in sectors such as the mobile and fixed telecommunications services sectors that are of crucial importance for the economic development of the Union as shown by the adoption of the Digital Agenda for Europe in 2010<sup>17</sup> and the adoption of the package on the Telecommunications Single Market in 2013.<sup>18</sup> At the same

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<sup>13</sup> Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paragraph 354.

<sup>14</sup> Referral Notice, paragraph 9.

<sup>15</sup> Referral Notice, paragraph 13.

<sup>16</sup> Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433. paragraph 354.

<sup>17</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Agenda for Europe, 26 August 2010, COM(2010) 245.

<sup>18</sup> The package, adopted on 11 September 2013, includes a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market - COM(2013) 634; a Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012- COM(2013) 627, an Impact Assessment accompanying the Proposal for a Regulation – COM(2013) 331; and a Recommendation on consistent non-discrimination obligations

time, the Commission has a strong interest in ensuring consistency in the way the different concentrations falling within its competence are assessed in these sectors. The TV-related and telecommunications markets in the EEA are characterised by a steady increase in the degree of convergence of media services and the way in which those services are delivered and consumed<sup>19</sup>, a development requiring the Commission to use its ability to conduct pan-European and consistent assessments of concentrations occurring in these sectors.<sup>20</sup>

- (49) Second, the Commission is well placed to deal with the proposed transaction. The Commission has indeed developed significant expertise in analysing the mobile and fixed telecommunications as well as the media markets over recent years as it has assessed (and is currently assessing) numerous proposed concentrations – including cases where consolidation took place within one and the same Member State, such as the present one – in several Member States.<sup>21</sup> In fact, in all but one<sup>22</sup> of the recent merger cases involving cable companies that were notified to the Commission, it has itself reviewed the proposed concentration. Those cases have enabled the Commission to acquire an extensive, thorough and recent knowledge of the sector and a sound understanding of the legal and economic issues raised by this type of case. Moreover, even though every national market in the TV, mobile and fixed telecommunications sectors in the EEA has different characteristics, the majority of the competition issues that arise in those cases present similarities across Member States. Finally, the Commission is itself active in the implementation of the Union telecoms regulations<sup>23</sup> and therefore has a sector-specific, thorough and up-to-date

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and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761.

<sup>19</sup> Green Paper, Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final.

<sup>20</sup> By way of example, the Commission notes that, besides the proposed transaction, it has been reviewing two proposed acquisitions in the mobile telecommunications sector (cases M.6992 – *Hutchison 3G UK/Telefonica Ireland*, decision adopted on 28 May 2014, and M.7018 – *Telefonica Deutschland/E-Plus*, investigation still on-going) while media reports suggest that further consolidation is likely to follow: <http://uk.reuters.com/article/2014/05/12/uk-bskyb-deutschland-talks-idUKKBN0DS07I20140512> [accessed at 21 May 2014]; <http://www.vodafone.com/content/index/media/vodafone-group-releases/2014/ono.html> [accessed at 21 May 2014].

<sup>21</sup> M.3245 – *Vodafone/Singlepoint*; OJ C242, 09.10.2003; M.3530 – *TeliaSonera/Orange*, OJ C263, 26.10.2004; M.3916 – *T-Mobile Austria/Tele.ring*, OJ L88, 29.03.2007; M.4521 – *LGI/Telenet*, OJ C99, 03.05.2007; M.4748 – *T-Mobile/Orange Netherlands*, OJ C243, 17.10.2007; M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, OJ C300, 12.12.2007; M.5650 – *T-Mobile/Orange*, OJ C108, 28.04.2010; M.5734 – *Liberty Global Europe/Unitymedia*, OJ C36, 13.02.2010; M.5779 – *Comcast / NBC Universal*, OJ C228, 25.08.2010; ; M.5932 – *News Corp / BskyB*, OJ C37, 05.02.2011; M.6497 – *Hutchison 3G Austria/Orange Austria*; M.6880 – *Liberty Global/Virgin Media*; M.6990 – *Vodafone/Kabel Deutschland*, OJ C308, 23.10.2013; M.7170 – *Discovery Communications/Eurosport*, OJ C144, 14.05.2014; M.6992 – *Hutchison 3G UK/Telefónica Ireland*; M.7018 – *Telefonica Deutschland/E-Plus*; M.7231 – *Vodafone/ONO*.

<sup>22</sup> M.5900 – *LGI/KBW*. Cases M.5748 - *Prisa / Telefónica / Telecinco / Digital* and M.5776 – *Telecinco/ Cuatro* were also referred back to Spain. However, these two cases were referred pre-notification, under Article 4(4) of the Merger Regulation, at the request of the Notifying Party.

<sup>23</sup> On the basis of: Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of

knowledge of the telecommunications markets in the Member States, both as a competition authority and as a stakeholder in the regulatory process in those markets.

- (50) Third, and finally, the Commission is actively investigating the proposed transaction. The Commission agrees with the ACM that there are serious doubts about the compatibility of the proposed concentration with the internal market as regards a number of TV-related and telecommunications markets in the Netherlands and, precisely for this reason, initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 8 May 2014.
- (51) In this context, the Commission has already conducted (and will continue to conduct) an extensive market investigation involving competitors and customers of the Parties, as well as other market participants. Several requests for information have been sent to the Parties in order to thoroughly investigate the key competition issues raised by the proposed concentration (including – but not limited to – issues highlighted in the Referral Request). The Commission has also collected and has started to review and process – including by conducting economic analyses – a significant volume of internal documents (over 200 000) and economic data of the Parties. The Commission has furthermore already prepared and sent additional requests for information to competitors and customers of the Parties. Moreover, given the amount of information and documents that has already been provided to the Commission and given the extensive discussions that have already taken place between the Parties and the Commission, a referral of the proposed transaction to the ACM would result in a significant burden on the Parties. Finally, the Commission notes that Liberty Global is in the process of acquiring an international content producer with activities in the Netherlands (All3Media)<sup>24</sup> and a number of Dutch-language TV channels and a content production house in Belgium<sup>25</sup>. The Commission expects that, if those transactions proceed, it will have jurisdiction to review them as they are likely to

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electronic communication networks and services; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services; Directive 2002/58/EC of the European Parliament and of the Council of 21 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2007/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the office; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member states concerning the provision of audio visual media services.

<sup>24</sup> <http://corporate.discovery.com/discovery-news/discovery-communications-and-liberty-global-acquir/> [accessed at 22 May 2014].

<sup>25</sup> <http://www.demorgen.be/dm/nl/2909/tv/article/detail/1776466/2014/01/17/Eigenaar-Telenet-aast-op-Woestijnvis.dhtml> [accessed at 22 May 2014].

meet the relevant turnover thresholds of the Merger Regulation. In that scenario, the Commission is the only authority capable of assessing any possible impact of those transactions on the proposed transaction.<sup>26</sup>

- (52) The Commission therefore concludes that there are no sufficiently strong reasons to refer the proposed transaction to the Netherlands.

## **6. CONCLUSION**

- (53) In the light of the above, it follows that the Commission has doubts as to whether the conditions to refer under Article 9(2)(a) of the Merger Regulation are met in relation to the proposed transaction. In any case, even if those conditions were to be met, the Commission considers that there are no compelling reasons for referring the case to the Netherlands in application of Article 9(3) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

### *Article 1*

The proposed transaction resulting in the acquisition of sole control of Ziggo N.V. by Liberty Global plc shall not be referred to the competent authorities of the Netherlands, pursuant to Article 9(3) of the Merger Regulation.

### *Article 2*

This decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 25/06/2014

For the Commission  
(Signed)  
Joaquín ALMUNIA  
Vice-President

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<sup>26</sup> What is more, even if the Commission were ultimately to establish, at the end of its in-depth investigation, that the possible market for the acquisition of Dutch-language individual audio visual content constitutes a distinct market within the territory of the Netherlands, the proposed transaction may nonetheless affect the overall availability of Dutch-language individual audio visual content, including for TV operators in the Flemish part of Belgium. Following its initial market investigation, the Commission came to the conclusion that the proposed transaction raises serious doubts in this respect ( these serious doubts are furthermore strengthened by a separately received, substantiated complaint from Belgacom that remains subject to further investigation). A referral of the proposed transaction to the ACM would accordingly mean that those serious doubts are not addressed, which would be contrary to the Union merger control system and the principles guiding referrals to Member States.