



EUROPEAN COMMISSION
DG Competition

***Case M.7978 - VODAFONE / LIBERTY GLOBAL /
DUTCH JV***

Only the English text is available and authentic.

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

Article 6(1)(b) in conjunction with Art 6(2)
Date: 03/08/2016

This is a provisional non-confidential version. The definitive non-confidential version will be published as soon as it is available.



EUROPEAN COMMISSION

Brussels, 03.08.2016
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

To the notifying parties:

Dear Sir/Madam,

Subject: Case M.7978 -Vodafone / Liberty Global / Dutch JV
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004¹ and Article 57 of the Agreement on the European Economic Area²

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

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

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- (1) On 14 June 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 ("the Merger Regulation") by which the undertaking Vodafone Group plc ("Vodafone", United Kingdom) and Liberty Global Europe Holding B.V., belonging to the Group of Liberty Global plc ("Liberty Global", United Kingdom), acquire within the meaning of Article 3(1)(b) of the Merger Regulation, joint control of a newly created company constituting a joint venture ("the JV", the Netherlands) by way of contribution to the JV of their respective business activities in the Netherlands (the "proposed transaction" or the "Transaction").³ Liberty Global and Vodafone are designated hereinafter as the "Notifying Parties" or the "Parties" to the proposed transaction.

1. THE PARTIES

- (2) In the Netherlands, Liberty Global is an established retail fixed market player, offering TV, broadband Internet and fixed telephony services (under the name Ziggo) through its nationwide cable network.⁴ Liberty Global is not under any regulated access obligations, nor does it grant access to its cable network on a commercial basis. Liberty Global has a minimal presence in the mobile services market as a Mobile Virtual Network Operator ("MVNO") operating via Vodafone's network. It offers mobile services to its fixed customers only. It also offers fixed-mobile multiple play bundles. Liberty Global also holds the exclusive broadcasting rights of sports events and broadcasts two sports channels. Liberty Global also indirectly owns [...] of HBO Nederland Coöperatief U.A., which supplies three HBO-branded Pay TV and related video-on-demand channels to Dutch customers.
- (3) In the Netherlands, Vodafone is an established retail mobile market player as a mobile network operator ("MNO"). Vodafone is also present in the retail fixed telephony, broadband Internet and TV services markets, which it entered in 2014 through a combination of regulated and commercial access on the copper and fibre networks of the historical incumbent Dutch operator Koninklijke KPN n.v. ("KPN"). Vodafone has recently started offering fixed-mobile multiple play bundles.

2. THE OPERATION AND THE CONCENTRATION

- (4) On 15 February 2016, Liberty Global and Vodafone concluded a "Signing Protocol" which will lead to the execution of a definitive JV agreement. The following tangible and intangible assets will be transferred to the JV:
- (i) Vodafone Group will contribute all shares of Vodafone Libertel B.V., Vodafone Group's operating company in the Netherlands;
 - (ii) Liberty Global will contribute all shares of Ziggo Group Holding B.V.⁵
- (5) After the Transaction, Vodafone and Liberty Global will each hold 50% of the shares in the JV, will have equal voting rights in the JV and equal rights to appoint directors

³ Publication in the Official Journal of the European Union No C225, 22.06.2016, p. 4.

⁴ The acquisition by Liberty Global (which owned/operated the UPC cable network in the Netherlands) of rival Dutch cable operator Ziggo, was reviewed and cleared by the Commission subject to commitments on 10 October 2014 (Case M.7000 - Liberty Global/Ziggo).

⁵ Certain IP assets of Vodafone and Liberty Global will be excluded prior to the transfer of shares, as set out in detail in [...].

to the JV's Supervisory Board. Accordingly, following the Transaction, each of Vodafone and Liberty Global will exercise joint control over the JV.

- (6) The Transaction consists in the acquisition of joint control by Vodafone and Liberty Global over the JV to which each of the Parties contribute their respective businesses with an established market presence and, therefore, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

- (7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁶ (Liberty Global: EUR 16 476 million; Vodafone: EUR 53 776 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Liberty Global: EUR [...]; Vodafone: EUR [...]), and neither of them achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. REFERRAL REQUEST

- (8) On 5 July 2016, the Netherlands via its Authority for Consumers and Markets (the "ACM")⁷ requested a full referral of jurisdiction over the proposed transaction from the Commission to the ACM pursuant to Article 9(2) of the Merger Regulation (the "Referral Request").
- (9) In the Referral Request, the Netherlands considered that the proposed transaction threatens to significantly affect competition in the retail markets for: (i) mobile telecommunications services, (ii) fixed telephony, (iii) fixed internet access, (iv) TV services, (v) the possible market for multiple play services to end consumers; (vi) the retail market for business communications services as well as the (vii) wholesale market for supply and acquisition of Pay TV channels in the Netherlands. Furthermore, the Netherlands considered that it was best placed to deal with the proposed transaction.
- (10) The Notifying Parties were informed of the Netherlands' Referral Request on 12 July 2016 and submitted their comments on 19 July 2016. The Notifying Parties submitted that some of the relevant markets under consideration as part of the proposed transaction potentially have a geographic scope which is wider than national, and therefore, the legal requirements for referral are not met. In any event, the Notifying Parties submitted that the Commission is the most appropriate authority to review the proposed transaction. In addition, a referral of the proposed transaction to the Netherlands would cause a significant administrative burden on the Parties and on other third parties that have been involved in the Commission's investigation.
- (11) On the same date as this decision and in reply to that request, pursuant to article 9(3) of the Merger Regulation the Commission addressed to the Netherlands a decision rejecting the referral request. In its decision, the Commission stated that at least as regards some of the markets discussed in the Referral Request, the proposed

⁶ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁷ The Dutch *Autoriteit Consument en Markt* (Authority for Consumers and Markets) fulfils a dual role of competition authority and telecommunications regulator.

transaction threatens to significantly affect competition. Moreover, each of these markets presents all the characteristics of a distinct market within the Netherlands. In any event, even if the conditions for a referral provided for in Article 9(2)(a) of the merger Regulation were fulfilled with regards to the proposed transaction, the Commission considered that it was not appropriate to refer the proposed transaction to the Netherlands for a number of reasons, including the need to ensure a coherent and consistent approach when assessing mergers in the converging fixed and mobile telecommunications 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 telecommunications markets over the last years.

5. RELEVANT MARKETS

- (12) The proposed transaction gives rise to certain horizontal overlaps between the Parties' activities in the telecommunication sector in the Netherlands.
- (13) In particular, at the retail level, the Parties are both active in:
 - (i) the supply of fixed voice telephony services;
 - (ii) the supply of fixed internet access services;
 - (iii) the supply of TV services; and,
 - (iv) the supply of mobile telecommunications services to end consumers.
- (14) The Parties offer some of these services as stand-alone products and some in fixed-only or fixed-mobile bundles of the above-mentioned services (so-called "multiple play" offers).
- (15) The Parties' activities overlap at the retail level also in relation to:
 - (v) the supply of business connectivity services.
- (16) At the wholesale level, Vodafone and Ziggo are both present in:
 - (vi) the wholesale supply and acquisition of TV channels;
 - (vii) the wholesale provision of call termination on mobile networks;
 - (viii) the wholesale provision of call termination on fixed networks;
 - (ix) the wholesale provision of Internet connectivity;
 - (x) the provision of internet hosting services; and,
 - (xi) the provision of international carrier services.
- (17) These activities and the relevant markets to which they belong will be discussed in more detail in the remainder of this Section.
- (18) In addition, only Ziggo is active in:
 - (xii) the acquisition of broadcasting rights for individual audio-visual/TV content;

- (xiii) the wholesale supply of leased lines;
 - (xiv) the provision of domestic transit services on fixed networks; and,
 - (xv) wholesale termination and hosting of calls to non-geographic numbers.
- (19) Whereas solely Vodafone is active in:
- (xvi) wholesale access and call origination on mobile networks; and,
 - (xvii) wholesale international roaming services on mobile networks.
- (20) Those relevant markets that are either horizontally or vertically affected by the proposed transaction are outlined in Section 6 below.

5.1. RETAIL SUPPLY OF FIXED TELEPHONY SERVICES

- (21) Fixed telephony services comprise the provision of connection services at a fixed location or access to the public telephone network, for the purpose of making and/or receiving calls and related services. Both Vodafone and Ziggo offer fixed telephony services at retail level in the Netherlands.

5.1.1. Product market definition

- (22) The Notifying Parties submit that, in line with previous Commission decisions, the exact scope of the relevant product market can be left open, as no competition concerns arise on any plausible basis.
- (23) In previous decisions⁸, the Commission considered whether a distinction between local/national and international calls as well as between residential and non-residential customers should be drawn on the basis of the distinctions in the Commission Recommendation 2003/311/EC but ultimately left the exact product market definition open.
- (24) More recently, the Commission also considered that managed Voice over Internet Protocol ("VoIP") services and traditional telephony are interchangeable and therefore belong to the same market.⁹ In *Liberty Global/Ziggo*¹⁰ the Commission left the exact market definition open (and in particular whether there is a separate market for residential and non-residential customers, as well as whether VoIP and traditional fixed telephony belong to the same market) while in *Liberty Global/BASE*¹¹ the Commission considered that an overall retail market for fixed telephony services exists.

⁸ Commission decision of 7 September 2005 in Case M.3914 – Tele2/Versatel, paragraph 10; Commission decision of 29 June 2010 in Case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 35 and 39; Commission decision of 9 January 2010 in Case M.5730 – Telefónica/Hansenet Telekommunikation, paragraphs 16 and 17.

⁹ Commission decision of 20 September 2013 in Case M.6990 - Vodafone/Kabel Deutschland, paragraph 131.

¹⁰ Commission decision of 10 October 2014 in Case M.7000 Liberty Global/Ziggo, recital 125.

¹¹ Commission decision of 4 February 2016 in case M.7637 Liberty Global/BASE Belgium, recital 69.

- (25) The results of the market investigation conducted in the present case generally supported the market definition derived from the Commission's past decisional practice, and provided indications that there is an overall retail market for fixed services, which includes VoIP services.¹²
- (26) The Commission therefore considers that for the purposes of this decision, the relevant product market is the overall retail market for provision of fixed telephony services.

5.1.2. Geographic market definition

- (27) The Notifying Parties submit that, in line with the previous approaches taken by the Commission, the relevant geographic scope of the market is national.
- (28) In its previous decisions, the Commission concluded that the retail market for the provision of fixed telephony services was national in scope.¹³ The market investigation in the present case has not provided any suggestion that the Commission should depart from its previous findings.
- (29) Therefore the Commission considers that the relevant market for the retail provision of fixed telephony services is national in scope.

5.2. RETAIL SUPPLY OF FIXED INTERNET SERVICES

- (30) Fixed internet access services at the retail level consist of the provision of a fixed telecommunications link enabling customers to access the internet. Both Vodafone and Ziggo offer fixed internet access services at retail level in the Netherlands.

5.2.1. Product market definition

The Notifying Parties' view

- (31) With regard to a possible segmentation of the market for the retail provision of fixed internet services according to download speed, the Notifying Parties claim that, from a demand-side perspective, the various internet offerings with various speeds are clear substitutes. According to the Parties, this is illustrated by the fact that even the relatively slower broadband internet offerings are generally marketed as "high speed internet" offerings.
- (32) The Notifying Parties further submit that there is supply-side substitution in respect of internet offerings with various speeds enabling all providers of fixed internet services to expand their internet offering to internet speeds that far exceed the general demand.
- (33) With regard to a possible segmentation of the market for the retail provision of fixed internet services according to distribution technology (i.e. DSL, cable or fibre), the Notifying Parties argue that such a distinction would not be appropriate. In this

¹² See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 12.

¹³ See Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo*, recital 127; Commission decision of 19 May 2015 in Case M.7421 *Orange/Jazztel*, recital 37.

respect, the Parties point to the large majority of respondents to the market investigation in *Liberty Global/Ziggo* that considered such a distinction inappropriate¹⁴ as well as to a recent analysis conducted by the ACM which found that consumers in the Netherlands consider fixed internet services via copper, cable or fibre networks to be substitutable.¹⁵

- (34) The Notifying Parties further submit that, in any event, if a distinction were made on the basis of distribution technology, no overlap would result from the proposed transaction, given that Ziggo only provides internet services through cable access and Vodafone provides internet services on DSL and FttH networks.
- (35) In its most recent assessment of the retail market for internet access in its market analysis decision concerning the market for local loop unbundling ("LLU"), the ACM found that a market segmentation based on download speeds is not appropriate, primarily for the reason that there is substitution both at the demand side and at the supply-side of the market. The ACM also concluded that there should be no further segmentation by customer or infrastructure type.¹⁶

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

- (36) In recent cases, the Commission considered but ultimately left open possible segmentation according to (i) product type (distinguishing narrowband, broadband, and dedicated access), and (ii) distribution mode (distinguishing xDSL, fibre, cable, and mobile broadband), and has acknowledged that the retail market for fixed internet access services should not be divided according to download speed or technology.¹⁷
- (37) The results of the market investigation conducted in the present case generally supported the market definition derived from the Commission's past decisional practice.¹⁸
- (38) The Commission therefore considers that for the purposes of this decision, the relevant product market is the overall retail market for the provision of fixed internet services.

5.2.2. Geographic market definition

- (39) The Notifying Parties submit that, in line with the previous approaches taken by the Commission and the ACM, the relevant geographic scope of the market is national.

¹⁴ See Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo*, recital 131.

¹⁵ See ACM decision of 17 December 2015, Market analysis unbundled access, Annex B – Analysis of retail markets, paragraph 573

¹⁶ See ACM decision of 17 December 2015, Market analysis unbundled access, Annex B – Analysis of retail markets, pages 152-159.

¹⁷ See Commission decision of 29 June 2010 in Case M.5532 – *Carphone Warehouse/Tiscali UK*, recitals 7-21; Case M.6990 *Vodafone/Kabel Deutschland*, recital s192-194.

¹⁸ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 13.

- (40) In its previous decisions, the Commission concluded that the retail market for the provision of fixed internet services was national in scope.¹⁹ The market investigation in the present case has not provided any suggestion that the Commission should depart from its previous findings. Therefore the Commission considers that the relevant market for the retail provision of fixed internet services is national in scope.

5.3. RETAIL SUPPLY OF TV SERVICES

- (41) In the market for the retail provision of TV services, the suppliers of linear and non-linear (mainly Video-On-Demand, "VOD") TV services serve end customers who wish to purchase such services. Both Ziggo and Vodafone offer retail TV services in the Netherlands to end consumers.

5.3.1. Product market definition

The Notifying Parties' view

- (42) The Notifying Parties note that in previous decisions, the Commission has considered whether the retail market for TV services should be sub-divided according to:

(i) the type of technology used;

(ii) the nature of TV services provided in terms of Pay TV and Free-To-Air ("FTA") TV services; and,

(iii) the nature of TV services provided in terms of linear and non-linear services.

- (43) The Parties submit that the market definition can be left open and that it would be unnecessary to sub-divide the market for the following reasons:

Division with respect to the type of technology used

- (44) The Notifying Parties note that there are a number of different technologies that can be used in order to deliver retail TV services, including: (i) analogue terrestrial television and DTT (Digitenne); (ii) satellite (also referred to as Direct to Home or "DTH"); (iii) cable; (iv) IPTV; (v) the internet more generally; and (vi) 3G/4G mobile technologies.²⁰

- (45) In this regard, the Parties note that, in the *Liberty Global/Ziggo* decision the Commission considered that the provision of retail Pay TV services through those different distribution technologies belong to the same product market.²¹

- (46) In any event, the Notifying Parties submit that if the retail market for TV services were to be segmented by distribution technology, the proposed transaction would not

¹⁹ See Commission decision of 29 June 2010 in Case M.5532 – *Carphone Warehouse/Tiscali UK*, recital 47; Case M.5730 *Telefonica/Hansenet*, recital 28; Case M.6990 *Vodafone/Kabel Deutschland*, recital 197.

²⁰ See Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 44.

²¹ See Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo* recital 113.

result in any overlap between the Parties as Ziggo only provides TV services through cable access and Vodafone provides TV services on DSL and FttH networks.

Division between Pay TV and FTA TV services

- (47) With respect to the distinction between Pay TV and FTA TV services, the Parties note that the Commission has in previous cases considered separate markets for the retail provision of Pay TV services and FTA TV services, but ultimately left open the product market definition.²²
- (48) In the Netherlands, there is no meaningful distinction between FTA TV and Pay TV services, given the limited presence of FTA TV. The Parties consider that a retail market for FTA services does not exist in the Netherlands as there is only one subscription-free TV offer in the country with a very limited number of users.

Division between linear and non-linear TV services

- (49) The Notifying Parties observe that, in a recent case, the Commission noted that traditional Pay TV services and non-linear VOD services are converging and it is becoming increasingly difficult to distinguish between the two.²³
- (50) The Parties believe that this distinction is not appropriate, given the growing competitive constraint that VOD services exert on linear TV services and the continuing convergence between traditional linear Pay TV services and OTT services, both linear and non-linear.
- (51) In any event, the Parties submit that the Transaction does not raise competition concerns under any possible market segmentation and therefore the market definition can be left open.

Previous Commission decisions

- (52) 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.²⁴ In *NewsCorp/BSkyB*²⁵, the Commission also considered that linear and non-linear TV services belong to separate product markets, while leaving the exact product market definition open in a number of other decisions.²⁶ 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)

²² See Commission decision of 2 April 2003 in Case M.2876 - *NewsCorp/Telepiù*, recital 47; Commission decision of 13 July 2006 in Case M.4204 *Cinven/UPC France*, recital 18; Commission decision of 18 July 2007 in Case M.4504 - *SFR/Télé 2 France*, recital 45; Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recital 20; and Commission decision of 21 December 2010 in Case No COMP/M.5932 - *NewsCorp/BSkyB*, recital 99; and Case M.7000 *Liberty Global/Ziggo*, recitals 107-108.

²³ See Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo*, recital 109.

²⁴ See Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recitals 15 and 21.

²⁵ See Commission decision of 21 December 2010 in Case M.5932 - *NewsCorp/BSkyB*, recitals 106-107.

²⁶ See Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recital 21.

Internet and (vi) 3G/4G mobile technologies, constitute separate product markets, but has ultimately come to no conclusion on this point.²⁷

- (53) In *Liberty Global/Ziggo*, the Commission left the product market definition open and did not conclude as to whether (i) FTA TV and Pay TV services and (ii) Linear Pay TV and non-linear Pay TV services, belong to the same product market, as the proposed transaction did not raise competition concerns under any alternative product market definition considered.²⁸
- (54) As regards the distinction between different distribution technologies and after taking into consideration the demand-side substitutability, in *Liberty Global/Ziggo*, the Commission considered that the provision of retail Pay TV services through the different distribution technologies (such as cable, DSL, FttH and possibly DTH satellite) belong to the same product market.²⁹

Results of the market investigation and Commission's assessment

FTA TV services and Pay TV services

- (55) The majority of the respondents to the market investigation consider that a distinction exists between Pay TV and FTA TV services given the differences in their respective pricing models and window patterns. However, a number of respondents to the market investigation note that, as the large majority of Dutch households has a Pay TV service and the only real FTA TV service available is only used by 2% of households, the difference between real FTA and Pay TV is not really applicable for the distribution landscape in the Netherlands.³⁰
- (56) 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 in this regard.

Linear Pay TV services and Non-linear Pay TV services

- (57) All respondents to the market investigation who expressed a view consider that a distinction exists between linear and non-linear TV services (namely Pay-Per-View "PPV", VOD, etc.).³¹

²⁷ See Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recital 22; Commission decision of 18 July 2007 in Case M.4504 - *SFR/Télé 2 France*, recital 46.

²⁸ See Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo*, recitals 107-110.

²⁹ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 14 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 19.

³⁰ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 14 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 19.

³¹ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 14 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 19.

- (58) However, given the fact that the assessment of the proposed transaction would remain the same whether linear Pay TV services and non-linear Pay TV services are considered to belong to the same product market or to two separate markets, the exact scope of the relevant market for Pay TV services can be left open in this regard.

Distribution technologies

- (59) The market investigation was inconclusive as to whether the different distribution technologies for the provision of retail TV services, such as terrestrial television, cable, Internet Protocol Television ("IPTV"), the Internet more generally, satellite and mobile technologies, constitute separate product markets. Some respondents to the market investigation consider that, as far as distribution technologies are concerned, satellite, digital terrestrial and over-the-top ("OTT")³² cannot be considered as substituting IPTV and cable TV. Other respondents though submitted that as long as the relevant technology is available at the end user location, distribution technologies can generally be considered as substitutable.³³
- (60) Furthermore, with regard to TV services distributed over mobile networks (3G and 4G) vis-à-vis TV services distributed via other transmission technologies, most respondents to the market investigation who expressed a view do not consider that these services are regarded as substitutable in terms of price and quality by viewers. Some respondents mention that there are still differences in terms of screen size, cost of data, quality, and download speeds while others note that TV services distributed over mobile are considered as an add on and are not a substitute to terrestrial services.³⁴
- (61) In this regard, the Commission notes that, as regards TV services distributed over mobile networks (3G and 4G), there are indications from the market investigation that these services cannot be considered as substitutable with TV services distributed via other transmission technologies.
- (62) However, the Commission considers that the exact product market definition can be left open in this case as the assessment of the proposed transaction would remain the same irrespective of whether TV services offered through different distribution technologies would be considered to belong to the same product market or to separate markets.

³² Over-the-top (OTT) is any application or service that provides a product over the Internet and bypasses traditional distribution. Applications and services that are provided as 'over-the-top' are most typically related to media and communication.

³³ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 14 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 19.

³⁴ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 15 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, questions 19 and 20.

5.3.2. *Geographic market definition*

The Notifying Parties' view

- (63) In line with the Commission's finding in *Liberty Global/Ziggo*,³⁵ the Parties submit that it would not be appropriate to limit the geographic market for retail TV services to Ziggo's cable footprint.³⁶
- (64) Furthermore, the Parties submit that Ziggo, Vodafone and their main competitors all have a national TV offering. This means that even though Ziggo may not be able to serve all customers that KPN and other providers are able to serve, the service offering in such areas is constrained by the national offering of Ziggo. This points to a nationwide market for retail TV services.
- (65) In view of the above considerations and in line with previous Commission decisions, the Parties submit that the geographic scope of the market is national.³⁷

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

- (66) 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.³⁸
- (67) In recent merger decisions, the ACM assessed whether the markets for the retail provision of TV services are regional, corresponding to the footprint of the relevant TV services provider.³⁹ In *KPN-Concepts ICT-Edutel-XMS-KickXL*⁴⁰, the ACM

³⁵ Commission decision of 10 October 2014 in Case M.7000 *Liberty Global/Ziggo*, recital 118.

³⁶ As noted in that decision, there are a number of factors supporting this position: Ziggo's cable network covers over 90% of households in the Netherlands, in particular excluding certain rural areas, such as in the Zeeland province (where Delta has a cable network) and in the east of the Netherlands (where Caiway offers fixed services over the network owned by Cogas). Given Ziggo's current near-national coverage, a geographic scope limited to Ziggo's footprint would not materially alter the competitive assessment.

³⁷ See Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recital 24; Commission decision of 21 December 2010 in Case M.5932 - *NewsCorp/BSkyB*, recital 109; Commission decision of 21 December 2011 in Case M.6369 *HBO/Ziggo/HBO Nederland*, recital 42; Commission decision of 15 April 2013 in Case M.6880 *Liberty Global/Virgin Media*, recital 53; and See Commission decision of 10 October 2014 in Case M.7000 - *Liberty Global/Ziggo*, recital 118.

³⁸ See Commission decision of 25 June 2008 in Case M.5121 - *News Corp/Premiere*, recital 24; Commission decision of 25 January 2010 in Case M.5734 - *Liberty Global Europe/Unitymedia*, recitals 40 and 43; Commission decision of 21 December 2010 in Case M.5932 - *NewsCorp/BSkyB*, recital 109; Commission decision of 21 December 2011 in Case M.6369 - *HBO/Ziggo/HBO Nederland*, recital 42; Commission decision of 15 April 2013 in Case M.6880 - *Liberty Global/Virgin Media*, recital 54; Case M.7000 - *Liberty Global/Ziggo*, recital 118.

³⁹ ACM (NMa) decision of 5 August 2011 in Case 7204/KPN-CAIW, recitals 76-80; and ACM (NMa) decision of 19 December 2008 in Case 6397/KPN-Reggefiber, recital 84.

⁴⁰ ACM/NMa decision of 16 October 2012 in case 7326/KPN - Concepts ICT - Edutel - XMS - KickXL, recital 66 - 67.

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 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 left the definition of the geographic market open.

- (68) The majority of the respondents to the market investigation considered that the geographic scope of the market for the retail provision of TV services is national. Some respondents note that even though rights for video content are geographically negotiated and restrained, the recent success of global video content providers could eventually lead to the emergence of supra-national TV services in the near future.⁴¹
- (69) For the purposes of this decision, the Commission considers that the relevant market is national in scope.

5.4. RETAIL SUPPLY OF MOBILE TELECOMMUNICATIONS SERVICES

- (70) Mobile telecommunications services to end customers or "retail mobile services" include services for national and international voice calls, SMS (including MMS and other messages), mobile internet with data services, access to content via the mobile network and retail international roaming services.⁴² Both Parties provide mobile telecommunication services at retail level to end-customers in the Netherlands.⁴³

5.4.1. Product market definition

The Notifying Parties' view

- (71) The Notifying Parties submit that, in line with previous Commission decisions, the relevant product market is the overall retail market for mobile telecommunications services. They consider that it is not necessary for the Commission to further segment this market by reference to type of customer (business or private), service type (national or international calls, internet data services, voice and text services), type of

⁴¹ See Replies to questionnaire Q1 to Retailers from 15 June 2016, question 25 and replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 25.

⁴² See Commission decision of 10 October 2014 in Case M.7000 – *Liberty Global/Ziggo*, recital 137.

⁴³ At present, Vodafone is active in this market as an MNO and Ziggo as an MVNO.

tariff (post-paid or pre-paid) or type of network technology (2G⁴⁴/GSM-PPRS⁴⁵, 3G/UMTS⁴⁶, 4G/LTE⁴⁷).

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

- (72) In previous cases concerning retail mobile telecommunications services, the Commission has considered that there is an overall retail market for mobile telecommunications services constituting a separate market from retail fixed telecommunication services.⁴⁸ The Commission did not further segment the overall retail mobile market based on the type of service (voice calls, SMS, MMS, mobile Internet data services), or the type of network technology. The Commission considered possible segments of the overall retail market for mobile telecommunication services between pre-paid or post-paid services and private customers or business customers, concluding that these did not constitute separate product markets but represent rather market segments within an overall retail market.⁴⁹
- (73) Most respondents to the Commission's market investigation in the present case agreed with the Commission's previous product market definition and considered that the retail market for mobile telecommunications services should be defined as an overall market, without further segmentations.⁵⁰
- (74) Therefore, for the purpose of the present case, the Commission considers that the relevant product market is the retail market for mobile telecommunications services.

⁴⁴ 2G stands for "Second generation of mobile telecommunication technology".

⁴⁵ GSM stands for "Global System for Mobile Communications" and PPRS stands for "Precise Positioning Reference System".

⁴⁶ UMTS stands for "Universal Mobile Telecommunications System".

⁴⁷ LTE stands for "Long Term Evolution".

⁴⁸ See Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recital 252; Commission decision of 10 October 2014 in Case M.7000 – *Liberty Global/Ziggo*, recital 141 and Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*, recital 64.

⁴⁹ See Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 255, 261, 270, 279, 287; Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31 to 55; Commission decision of 10 October 2014 in Case M.7000 – *Liberty Global/Ziggo*, recital 141; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 141; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 58.

⁵⁰ See replies to Commission questionnaire to competitors Q1 of 23 June 2016, question 11.

5.4.2. *Geographic market definition*

The Notifying Parties' view

- (75) The Notifying Parties submit that, in line with the Commission's previous decisions,⁵¹ the market for mobile communications services to end customers is national in scope and therefore corresponds to the territory of the Netherlands.

The Commission's assessment

- (76) The market investigation in the present case has not provided any suggestions that the Commission should depart from its previous findings.⁵² In light of the above, the Commission considers that the retail market for mobile telecommunications services is national in scope.

5.5. RETAIL SUPPLY OF MULTIPLE PLAY SERVICES

- (77) The term "multiple play" relates to offers comprising two or more of the following services provided to retail consumers: mobile telecommunications services, fixed telephony, fixed internet access and TV services. Multiple play comprising two, three or four of these services is referred to as dual play ("2P"), triple play ("3P") and quadruple play ("4P") respectively.
- (78) Three of the four telecommunications services referenced in paragraph (77) above are fixed services, provided over a fixed network such as cable, copper or fibre infrastructure, namely fixed telephony, TV services and fixed internet access. Multiple play comprising any combination of two or more of these fixed services without a mobile component is referred to as "fixed multiple play". Multiple play comprising one or more of these fixed services in combination with a mobile component (including either voice or data, or both together) is referred to as "fixed-mobile multiple play". Fixed-mobile multiple play may involve a single mobile subscription (SIM card) or more than one mobile subscription combined with the fixed subscription.
- (79) Both Vodafone and Ziggo provide fixed telecommunications services to end users (fixed telephony, fixed internet access, TV services) in the form of fixed multiple play bundles or combined with retail mobile services into fixed-mobile bundles.

⁵¹ See Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 293; Commission decision of 10 October 2014 in Case M.7000 – *Liberty Global/Ziggo*, recital 143; Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*, recital 74; Commission decision in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 73; Commission decision in case No M.5650 – *T Mobile/Orange UK*, paragraphs 25 and 26 and Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 164.

⁵² See replies to Commission questionnaire to competitors Q1 of 23 June 2016, question 25.

5.5.1. *Product market definition*

Notifying Parties' view

- (80) The Notifying Parties submit that there is no separate market for multiple play bundles. They argue that there are no indications of any lack of substitutability between the multiple play offers and their individual service components, both from the demand and from the supply side. In particular, as regards demand-side substitutability, the Notifying Parties claim that consumers can "unpick" a multiple play bundle and purchase the underlying services separately. Suppliers that offer the respective individual services can start offering these services as a multiple play bundle without incurring additional costs.
- (81) In addition, the Notifying Parties submit that due to the large number of possible variations of multiple play (dual play, triple play, quadruple play) it is not clear which package(s) should be taken as a possible candidate market and which packages are seen as substitutable from the consumer's perspective in the event of a price increase.
- (82) Lastly, the Notifying Parties claim that if there were a hypothetical market for multiple play bundles such a hypothetical market would not include multiple play services that are referred to as "undiscounted joint purchasing", that is, services offered jointly from the same provider to a single customer by means of separate contracts (such services being also available on a stand-alone basis) without any discount or additional benefit being provided to the customer as a result of sourcing the services from the same provider.
- (83) The Commission will first outline the state of multiple play services in the Netherlands. It will then present the results of the market investigation and finally, it will provide its own assessment.

Multiple play services in the Netherlands

- (84) In the Netherlands, telecommunications service providers offering services to residential customers at the retail level sell those services in a number of different ways. As regards fixed telecommunications services, the main providers offer only certain services as a standalone service: Ziggo for example does not provide fixed internet access services on a standalone basis⁵³ (in order to purchase this service the customer needs to purchase also TV services) whereas TV services are not available on a standalone basis from Vodafone or KPN.⁵⁴ For instance, in order to purchase fixed internet services from Ziggo, customers must first be subscribed to Ziggo's TV services. In a similar vein, customers willing to use Vodafone's TV services must first subscribe to its fixed broadband offer.⁵⁵

⁵³ Footnote 200 to Form CO.

⁵⁴ This is valid for all operators (including Vodafone) that offer IPTV over copper and fibre infrastructures, as technically it is not possible to offer TV without a broadband connection unlike satellite and cable infrastructures.

⁵⁵ Such situation is referred to as "tying". Non-Horizontal Merger Guidelines, paragraph 97.

- (85) In parallel to the tying of certain fixed services as discussed in recital (84), retail operators offer combinations of fixed or fixed and mobile services that allow the customers to buy the different services from the same provider by way of a bundle. In these cases, customers (i) benefit from a lower price due to the bundled purchase of two or more services and/or (ii) receive additional benefits (such as extra volumes of voice minutes, data or SMS) and/or additional value added services due to the fact that they purchase more than one service from the same provider (irrespective of whether these customers have a single or separate contracts with the same provider for these services).
- (86) In the Netherlands, multiple play bundles appear to be widespread: as shown in Table 1 below around [...] of the customers who have a fixed internet access subscription purchase this service together with another service. The number of those customers who purchase fixed internet services as a standalone service has declined from [...]in Q4 2014 to [...]in Q1 2016.⁵⁶

Table 1: Number of fixed internet subscribers in the Netherlands

	2014	2015	Q1 2016
Standalone fixed internet	[...]	[...]	[...]
Together with another service	[...]	[...]	[...]
TOTAL fixed internet subscribers	[...]	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

- (87) As regards the popularity of the different types of multiple play bundles, the very large majority of such bundles is dual play or triple play: [...]and [...]respectively, whereas quadruple play represents only [...]of all multiple play subscriptions. The proportion of dual play and triple play subscribers seems to have remained relatively stable over recent quarters whilst the total number of fixed internet subscribers has increased only marginally: dual play represented [...]of all fixed internet subscribers in Q3 2014 compared to [...]in Q1 2016 and triple play went from [...]to [...]over the same period. The number of quadruple play subscribers on the other hand seems to have been growing at a steady pace of at least [...]per quarter from [...]in Q3 2014 to [...]% in Q1 2016.

⁵⁶ In this decision, the term "bundles" is used irrespective of whether the product in question is offered as a bundle or whether the product is offered by way of tying. The Commission notes that many of the multiple play products offered in the Netherlands involve both a bundle simultaneously to a tie. The quadruple play products of KPN involve a tie on the fixed services as consumers who for instance would like to purchase TV services also need to purchase an internet connection. At the same time, the fixed services and mobile services are bundled in the sense that fixed KPN customers that also purchase a mobile subscription will receive a EUR 5 discount as well as additional benefits (e.g. additional TV channels, additional data on their mobile subscription etc.).

Table 2: Number of multiple play subscribers in the Netherlands in Q1 2016

	Total	As a % of all fixed internet subscribers	As a % of all multiple play⁵⁷
Single play/fixed internet	[...]	[...]	[...]
Dual play⁵⁸	[...]	[...]	[...]
Triple play⁵⁹	[...]	[...]	[...]
Quadruple play	[...]	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

Table 3: quarter-on-quarter evolution of the number of quadruple play subscribers in the Netherlands

	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015	Q1 2016
Total Number of subscribers	[...]	[...]	[...]	[...]	[...]	[...]
Change Q-on-Q by number of subscribers	[...]	[...]	[...]	[...]	[...]	[...]
Change Q-on-Q in %	[...]	[...]	[...]	[...]	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

- (88) Looking at the composition of each type of dual play and triple play bundle, both types of bundles are almost exclusively composed of different combinations of fixed services: the dual play and triple play offers which combine a fixed and a mobile component are *de minimis* (less than [...]). The bulk of the fixed-mobile multiple play therefore corresponds to quadruple play bundles.

Table 4: Composition of multiple play bundles by subscriber numbers in the Netherlands for Q1 2016

Multiple play type⁶⁰		Subscribers	% of relevant type
Fixed 2P	BB-TV and BB-FT	[...]	[...]
Fixed-mobile 2P	BB-MO	[...]	[...]
Fixed 3P	BB-FT-TV	[...]	[...]
Fixed-mobile 3P	BB-FT-MO and BB-TV-MO	[...]	[...]
4P	BB-FT-TV-MO	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

- (89) The Commission also notes the fact that quadruple play bundles have been present in the market only since relatively recently (the first quadruple play offer was launched by KPN in 2013).
- (90) For the full picture, it is appropriate to look at the fixed-mobile multiple play not only from the perspective of fixed broadband but from the side of the retail market for

⁵⁷ Excluding the number of 1P fixed internet subscribers.

⁵⁸ Any 2P combination that includes as one of its components fixed internet.

⁵⁹ Any 3P combination that includes as one of its components fixed internet.

⁶⁰ 2P designates dual play, 3P designates triple play and 4P designates quadruple play; BB, FT and MO stand for broadband, fixed telephony and mobile services respectively.

mobile services, as it provides an insight on the proportion of mobile services that are sold in combination with fixed services compared to the total number of mobile subscribers in the Netherlands.

- (91) In 2015 the total number of retail mobile subscriptions in the Netherlands stood [...] while the private subscribers amounted to [...]. Out of these private subscribers [...] were post-paid mobile subscriptions. As illustrated in the Table 5 below only [...] out of all [...] mobile subscriptions are purchased in a bundle with fixed services, which represents only [...] of the mobile subscriptions in the Netherlands. Even if one were to look at the proportion of fixed-mobile bundles out of the **private** mobile subscribers or the **post-paid** segment of mobile subscription still over [...] of these mobile subscriptions are purchased on a standalone basis. This ratio indicates that only a relatively small minority of mobile subscriptions in the Netherlands are purchased as part of a fixed-mobile bundle.

Table 5: proportion of fixed-mobile subscriptions out of total number of mobile subscribers in the Netherlands in 2015

	Fixed-mobile 2P	Fixed-mobile 3P	4P	TOTAL fixed-mobile
	[...]	[...]	[...]	[...]
As % of all retail mobile subscribers ([...])	[...]	[...]	[...]	[...]
As % of all PRIVATE retail mobile subscribers ([...])	[...]	[...]	[...]	[...]
As a % of all POST-PAID retail mobile subscribers ([...])	[...]%	[...]%	[...]%	[...]%

Source: Telecompaper

Results of the market investigation on multiple play bundles in the Netherlands and Commission's assessment

- (92) The majority of the respondents to the market investigation in the case at hand consider that in the Netherlands there are pronounced customer preferences for multiple play packages (and especially for fixed triple play bundles) over a combination of standalone services.⁶¹
- (93) The main drivers for that preference appear to be (i) the price discounts (as the price of a multiple play package is usually lower than the sum of the standalone services), (ii) other/additional benefits that customers can get from purchasing two or more services in a package from the same provider, and (iii) the convenience of having a single supplier (as one respondent explains: "*customers who buy packages also value the fact that they receive only one bill and that they have a single point of contact (one-stop shop)*").⁶² Almost all market participants consider that additional benefits (such as free additional data allowances on the mobile subscription, higher bandwidth speeds on the fixed internet subscription, additional channels on the TV subscription) are comparable to price discounts as a tool to incentivise customers to choose a

⁶¹ See replies to Q1 – Retailers of 15 June 2016, question 16.

⁶² See replies to Q1 – Retailers of 15 June 2016, question 17.

multiple play package over a combination of standalone services. According to the respondents, these benefits represent an indirect monetary advantage for the customer and are equivalent to a price savings for consumers.⁶³

(94) Such additional benefits may include⁶⁴:

- a. For fixed multiple play: higher internet speed, extra TV channel(s), premium TV content, free calls on fixed voice services;
- b. For fixed-mobile multiple play: free calls on mobile, additional mobile data, additional mobile content, extra TV channel(s), premium TV content, higher internet speed (for the fixed component of the fixed-mobile bundle).

(95) As to the minimum price difference between multiple play bundles and standalone combinations that would incentivise customers to choose a bundle, the results of the market investigation were not conclusive as to the exact percentage of discount that would be required, as market respondents suggested a wide range of percentages varying from 5% to between 25% and 30% for both triple play and quadruple play bundles.⁶⁵ As regards the number of customers who would switch to a bundle (either fixed-only or fixed-mobile) in the event of a permanent increase in the price of one or more of the standalone components, the results were also not conclusive as to the exact percentage of switchers to be expected.⁶⁶

(96) With regard to customers switching in the opposite direction (from a multiple play bundle to a combination of standalone services) in the event of a permanent 5% to 10% increase in the price of the multiple play bundle, the market investigation once again did not provide a clear picture as to the exact percentage of switchers to be expected.⁶⁷

(97) As regards switching from multiple play bundles to standalone services, the majority of respondents reported a number of inconveniences, including: (i) the loss of the bundle discount/additional benefits; (ii) the loss of the ease of having one provider; (iii) the lack of suitable standalone services provided by the operator of choice in some cases; (iv) the need for new equipment/decoders to be installed; and (v) potential temporary disruption of the service.⁶⁸

(98) The results of the market investigation were inconclusive also in relation to the expected speed of uptake of fixed-mobile multiple play bundles in the next two to three years in the Netherlands.⁶⁹ Notwithstanding the lack of unambiguous projections, market players expect the trend of quadruple play growth to continue in the future, coupled with an increase in data and video traffic via mobile. They argue

⁶³ See replies to Q1 – Retailers of 15 June 2016, question 19.

⁶⁴ See replies to Q1 – Retailers of 15 June 2016, question 20.

⁶⁵ See replies to Q1 – Retailers of 15 June 2016, question 18.

⁶⁶ See replies to Q1 – Retailers of 15 June 2016, question 22.

⁶⁷ See replies to Q1 – Retailers of 15 June 2016, question 21.

⁶⁸ See replies to Q1 – Retailers of 15 June 2016, question 23.

⁶⁹ See replies to Q1 – Retailers of 15 June 2016, questions 61.2 and 61.3.

that as a consequence, fixed-only bundles will become somewhat less important compared to their role today.⁷⁰

- (99) In previous decisions, the Commission ultimately left open the question as to whether there exists a market for multiple play bundles that is separate from the markets for each of the components of the bundles.⁷¹
- (100) In this case, the Commission considers that the results of the market investigation were not sufficiently conclusive to establish with the required degree of certainty the existence of a separate market for multiple play bundles in the Netherlands and which combinations of services would be included in such market, if it were to exist.
- (101) The Commission acknowledges that bundling of fixed services is quite common in the Netherlands with fixed triple play being the most popular bundle on the market as explained in paragraph (87) above. In spite of its currently marginal importance, there is also a growing trend towards multiple play bundles combining fixed and mobile services (referred to as "fixed-mobile convergence") and in particular quadruple play. However the Commission notes that this trend is fairly recent and at present quadruple play seems to be in a nascent stage of development in the Netherlands as it is far less widespread compared to fixed dual play and triple play multiple play packages. Whereas there are certain indications that fixed-mobile multiple play is expected to continue its development in the Netherlands (as evidenced by the nature of the proposed transaction itself) it is unclear how fast this development will progress and what the potential for growth of quadruple play on the market is.
- (102) As indicated in paragraph (93) above customers choose multiple play bundles mainly because of the lower price, additional benefits and convenience of having one supplier/point of contact. From the supply-side, the results of the market investigation indicated that operators offer bundled services as a tool to increase customer loyalty and reduce customer churn.
- (103) Internal documents of the Parties suggest that [...]:

Figure 1: [...]⁷²

[...]

- (104) As Liberty Global claims: [...]⁷³

- (105) [...]⁷⁴

⁷⁰ See replies to Q1 – Retailers of 15 June 2016, question 51.

⁷¹ Commission decision of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, recital 96; Commission decision of 19 May 2015 in case M.7421 Orange/Jazztel, recitals 86 and 91; Commission decision of 20 September 2013 in Case M.6990 - Vodafone/Kabel Deutschland, recital 261; Commission decision of 3 July 2012 in Case M.6584 - Vodafone/Cable & Wireless, recitals 102-104; Commission decision of 16 June 2011 in Case M.5900 - LGI/KBW, recitals 183-186; Commission decision of 25 January 2010 in Case M.5734 - Liberty Global Europe/Unitymedia, recitals 43-48.

⁷² [Reference to internal document of Vodafone].

⁷³ [Reference to internal document of Liberty Global]

- (106) Although there are indications that barriers for the customers switching from a multiple play bundle to a combination of standalone services exist as outlined in paragraph (97) above, there is no clear evidence on how easy or difficult it is for customers to switch providers of multiple play packages (either fixed multiple play or fixed-mobile multiple play) in the Netherlands.
- (107) The Commission also notes that due to different services, delivered over different infrastructures (fixed for dual play and triple play or fixed and mobile for quadruple play), that are included in the different multiple play bundles, instead of one possible market for multiple play, there could be several candidate multiple play markets: a market for fixed bundles (dual play and triple play) and another separate market for fixed-mobile bundles (quadruple play bundles). The possibility for several mobile subscriptions to be included in a quadruple play bundle further complicates the picture.

Conclusion

- (108) In any event, the Commission considers that, for the purposes of this decision, the question as to whether there exist one or more multiple play markets which are distinct from each of the underlying individual telecommunications services, can be left open, as the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market irrespective of the conclusion on this point.

5.5.2. Geographic market definition

The Notifying Parties' view

- (109) The Notifying Parties submit that the relevant geographic market for a possible retail market for multiple play services would be national.

Results of the market investigation and Commission's assessment

- (110) In previous decisions, the Commission considered that the geographic scope of any possible retail market for multiple play would be national since the components of the multiple play offers are offered individually at national level and the bundling of the services would not change the geographic scope of the components. It nevertheless ultimately left the question of the exact geographic delineation of the possible multiple play market open.⁷⁵ In *Liberty Global/Ziggo*⁷⁶, the Commission considered the geographic scope of the possible market for multiple play to be national.

⁷⁴ [Reference to internal document of Vodafone].

⁷⁵ Commission decision of 19 May 2015 in Case M.7421 - *Orange/Jazztel*, recitals 89-90; Commission decision of 20 September 2013 in Case M.6990 - *Vodafone/Kabel Deutschland*, paragraphs 263-265; Commission decision of 16 June 2011 in Case M.5900 - *LGI/KBW*, paragraphs 183-186.

⁷⁶ Commission decision of 10 October 2014 in Case M.7000 - *Liberty Global/Ziggo*, recitals 152-153.

- (111) The respondents to the market investigation of the case at hand considered that a possible market for multiple play (irrespective of what type of multiple play bundles are included in such possible market) would be national in scope.⁷⁷
- (112) Therefore, for the purposes of this decision, the Commission considers that the geographic scope of any possible retail market for multiple play in the Netherlands is national.

5.6. RETAIL BUSINESS CONNECTIVITY SERVICES

- (113) Retail business connectivity services constitute the fixed telecommunications services which large businesses, enterprise and public sector customers purchase to provide data connectivity between multiple sites. Both Vodafone and Ziggo are active in the provision of retail business connectivity services in the Netherlands.
- (114) In its decision on the market analyses for high quality wholesale broadband access and wholesale line rental, the ACM concluded that even with regulated LLU access to KPN's network, there would still be a risk of KPN having significant market power on the retail market for business communication services.⁷⁸ Consequently, the ACM imposed regulatory obligations upon KPN at wholesale level, including maximum tariff regulation and obligations for access, non-discrimination and transparency.⁷⁹

5.6.1. Product market definition

The Notifying Parties' view

- (115) The Notifying Parties submit that customers of business connectivity services in the Netherlands can be broadly categorized into three main groups:
- (i) Small office/Home office ("SOHO");
 - (ii) Small and medium-sized enterprises ("SME"); and,
 - (iii) Large enterprise customers.
- (116) In addition, the Notifying Parties consider multi-national corporations as customers of business connectivity purchasing telecom services on a cross-border basis.
- (117) Each of these categories of customers have different characteristics and requirements with respect to the combinations of fixed-only or fixed-mobile services for business connectivity and follow different purchasing processes when procuring such services.

⁷⁷ See replies to Q1 – Retailers of 15 June 2016, question 26.

⁷⁸ The term "retail business communication services" used by the ACM is equivalent to the following terms used in previous Commission decisions: (i) "retail dedicated connections and capacity", as in case M.5730 Telefonica/Hansenet, paragraphs 6, 20 and (ii) "business connectivity services" as in case M. 6584 Vodafone/Cable & Wireless, paragraphs 8-10.

⁷⁹ ACM decision of 28 December 2012, Market analysis for high quality wholesale broadband access and wholesale line rental, OPTA/AM/2012/203111, available (in Dutch) at: <https://www.acm.nl/nl/publicaties/publicatie/11049/Besluit-marktanalyse-hoge-kwaliteit-wholesale-breedbandtoegang-en-wholesale-huurlijnen-HKWBT-HL-2012/> .

- (118) With regard to SOHO customers, the requirements are similar to those of residential customers. They purchase a range of single, dual play, triple play and quadruple play offers through a negotiating and purchasing process which is broadly similar to the consumer market. According to the Parties' estimate, [...].
- (119) With regard to SME customers, the negotiating and purchasing process for business connectivity services generally follows a Request for Proposal ("RFP") process. Both fixed and fixed-mobile multiple play services are requested and purchased, either combined under a single RFP or separately and divided into distinct fixed services' and mobile services' contracts.
- (120) With regard to large enterprise customers, the negotiating and purchase process usually follows an RFP which may or may not require outsourcing agreements for the use of third party infrastructure. Alternatively, larger customers or government organizations may launch a public tender process to request bids which are often custom-made in order to cover each customer's specific needs. In cases of custom-made offers, the specific terms and conditions are negotiated separately. Similarly to SME customers, both fixed and fixed-mobile multiple play services are requested by large enterprises and are purchased either under a single RFP or separately.
- (121) With regard to multi-national corporations ("MNCs"), the purchasing of mobile and fixed telecommunications services is organized on a cross-border level through tenders. The Notifying Parties submit that MNCs mostly purchase fixed and mobile services separately, even though there is a trend towards joint procurement.
- (122) Furthermore, the Notifying Parties submit that business internet access and data services are regularly paired with voice services in order to arrive at specific combined offers for business clients.
- (123) On this basis, the Notifying Parties consider that the relevant product market is that of retail business communication services, including voice services.

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

- (124) In *Vodafone/Cable & Wireless*⁸⁰ the Commission considered a separate retail market for retail business connectivity services, defined as the fixed telecommunications services that large business, enterprise and public sector customers purchase to provide data connectivity between multiple sites. The Commission ultimately left the precise product market definition open.
- (125) Furthermore, in previous decisions the Commission noted that large corporate customers may require dedicated access (leased lines) and virtual private networks due to their increased needs for higher performance levels in terms of security, bandwidth and functionality, although the precise product market definition was left open.⁸¹

⁸⁰ Commission decision of 3 July 2012 in Case M.6584 *Vodafone/Cable & Wireless*, recital 9.

⁸¹ Commission decision of 29 January 2010 in Case M.5730 *Telefonica/Hansenet*, recital 12; Commission decision of 28 November 2006 in Case M.4417 *Telecom Italia/AOL German Access Business*, recitals 19-20. In Commission decision of 29 June 2009 in Case M.5532 *Carphone Warehouse/Tiscali UK*

- (126) The market investigation confirmed that there is no need to distinguish between residential customers, SMEs and SOHOs as their needs and requirements in terms of fixed or fixed-mobile multiple play telecommunications services are broadly similar and are usually satisfied by the services offered to residential customers. However, the requirements and purchase processes of larger business customers with respect to the combinations of fixed or fixed-mobile services for business connectivity are different than those of residential customers, SMEs and SOHOs.⁸²
- (127) In any event, for the purposes of the present decision the exact product market definition for the retail provision of business connectivity services can be left open as the proposed transaction does not raise serious doubts as to its compatibility with the internal market under any alternative product market definition.

5.6.2. *Geographic market definition*

- (128) The Notifying Parties submit that, in line with the previous approaches taken by the Commission, the relevant geographic scope of the market for the retail provision of business connectivity services is national, if not wider. However, they submit that the question can be left open as it would not affect the competitive assessment of the Transaction.
- (129) In its previous decisions, the Commission considered the retail provision of business connectivity services to be national in scope.⁸³ The market investigation did not provide any indication that it would be warranted for the Commission to depart from its previous practice for defining the relevant geographic market in the present case.
- (130) Therefore, the Commission considers that the relevant market for the retail provision of business connectivity services is national in scope.

5.7. **LICENSING/ACQUISITION OF BROADCASTING RIGHTS FOR TV CONTENT**

- (131) Audio-visual TV content comprises "entertainment products", such as films, sports, and TV programmes that can be broadcast via TV.⁸⁴ The broadcasting rights generally belong to the creators of the content. These right holders, which constitute the supply side of this market, license broadcasting rights 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 PPV or VOD. Those broadcasters and content platform operators, together, comprise the demand side of this market.

(recital 27) the Commission distinguished between retail broadband internet access services offered to residential and small business customers on the one hand, and to larger business customers on the other hand, as being part of separate product markets.

⁸² Questions 4, 5 and 7 of Questionnaire 3-Business Services.

⁸³ Commission decision of 3 July 2012 in Case M.6584 *Vodafone/Cable & Wireless*, recital 10; Commission decision of 29 June 2009 in Case M.5532 *Carphone Warehouse/Tiscali UK*, recital 47.

⁸⁴ Commission decision of 26 August 2008 in Case M.5121 - *News Corp/Premiere*, paragraph 28.

- (132) Liberty Global acquires TV content from content owners, and currently holds the following content rights: (i) content for its Ziggo Sport channels,[...]; (ii) content for its VOD service My Prime, [...]⁸⁵; (iii) content held by its joint venture with HBO in respect of film and series.[...].
- (133) Vodafone does not purchase or hold any content directly, and does not have its own channels.

5.7.1. *Product market definition*

Previous Commission decisions

- (134) 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 FTA TV,⁸⁶ (ii) linear versus non-linear broadcast,⁸⁷ (iii) by exhibition window, i.e., subscription VOD ("SVOD"), transactional VOD ("TVOD"),⁸⁸ PPV, first Pay TV window, second Pay TV window,⁸⁹ and FTA; and (iv) by content type, i.e., films, sports, and other TV content.
- (135) As regards content type, the Commission has further distinguished between: (i) exclusive rights to premium films, (ii) exclusive rights to football events that are played regularly throughout every year (for example national league matches, national cup, UEFA Europa League and UEFA Champions League), (iii) exclusive rights to football events that are played more intermittently, every four years, for example the FIFA World Cup and the UEFA European Football Championship, and (iv) exclusive rights to other sport events,⁹⁰ and by type of supplier in respect of films, i.e., major Hollywood studios/smaller suppliers.⁹¹

⁸⁵ [...].

⁸⁶ Commission decision of 26 August 2008 in Case M.5121 - *News Corp/Premiere*, paragraph 35.

⁸⁷ Commission decision of 18 July 2007 in Case M.4504 - *SFR/Télé 2 France*, paragraphs 27-36.

⁸⁸ 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.

⁸⁹ 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.

⁹⁰ Commission decision of 13 November 2001 in Case M.2483 - *Group Canal+/RTL/GJCD/JV*, paragraph 21; Commission decision of 2 April 2003 in Case M.2876 - *Newscorp/Telepiù*, paragraphs 61, 69 and 71.

⁹¹ Commission decision of 21 December 2011 in Case M.6369 - *HBO/Ziggo/HBO Nederland*, paragraph 18.

The Notifying Parties' view, results of the market investigation and Commission's assessment

FTA TV and Pay TV rights

- (136) The Notifying Parties underline the limited importance of FTA TV in the Netherlands given that there are only three FTA channels (Netherlands 1, 2 and 3) broadcast via unencrypted terrestrial signal in a limited standard definition quality, while all other channels are available only through a Pay TV subscription.
- (137) A majority of respondents to the market investigation note that this segmentation is not suitable for the Dutch market, since FTA TV is of limited importance in the Netherlands, with NPO being the only broadcaster offering three FTA channels. Thus, from the Dutch consumers' perspective there is no clear distinction between FTA and Pay TV.⁹²
- (138) In light of the limited significance of FTA TV in the Netherlands (where the TV market is essentially a Pay TV market), the Commission considers that the market definition can be left open, as the assessment of the proposed transaction would not change whether the licensing and acquisition of broadcasting rights for FTA TV and Pay TV were considered to belong to the same product market or to two separate markets.

Rights for linear and non-linear broadcasting

- (139) The Notifying Parties submit that no distinction should be made between the acquisition/licensing of broadcasting rights for linear and non-linear broadcasting. In fact, from a demand side perspective, linear TV services providers are facing increasing competition from providers of non-linear TV services, such as several OTT players (such as Netflix, NLZiet and Videoland), which have entered the Dutch market offering consumers a readily available and cost effective solution to access high quality content.
- (140) A small majority of respondents to the market investigation notes that a distinction should be drawn between the licensing/acquisition of broadcasting rights for linear and for non-linear TV services, although from a customer's perspective the lines between the two types of services are blurring and content traditionally distributed on a linear basis is increasingly distributed as non-linear.⁹³ A minority of respondents pointed out that both linear and non-linear platform operators compete essentially for the same rights and customer base.
- (141) The Commission considers that there are indications from the market investigation that licensing/acquisition of broadcasting rights for linear and non-linear services might belong to separate product markets. However, 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.

⁹² Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.1.

⁹³ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.2.

Segmentation by exhibition window

- (142) The Notifying Parties submit that it would not be appropriate to segment the market by exhibition window since TV channels and VOD services often offer a mix of first window, second window and library content and a degree of substitutability thus exists between these types of content from a demand perspective. Distinctions are also blurred from a supply side, since some studios are creating second Pay TV windows, apparently in response to an increased demand for exclusive windows following the emergence of several OTT providers.
- (143) The market investigation provided some indications that the market should be segmented by exhibition window.⁹⁴ However, the exact scope of the relevant product markets can be left open in this regard since the proposed transaction does not raise competition concerns under any possible market segmentation.

Premium and non-premium content

- (144) According to the Notifying Parties, there is no need to segment the market between premium and non-premium content, because there is no clear distinction and the value of certain content for TV operators will depend on various factors, which differ among operators (e.g., operator's primary target audience and its existing content portfolio).
- (145) The majority of respondents to the market investigation consider that there is a distinction between premium and non-premium content.⁹⁵ Market participants note that premium content is content that attracts more viewers than non-premium one and that is, as a consequence, more expensive. Such content is available to customers at an additional fee.
- (146) Other participants to the market investigation⁹⁶ do not share this view and point out that all content competes for customers' audience and that there is no sudden dividing line between content of varying degrees of attractiveness. Moreover, the definition of premium is also affected by the passing of time, as content initially considered premium might lose this feature later on.
- (147) 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.

⁹⁴ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.3.

⁹⁵ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.4.

⁹⁶ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.4.

Type of content (films, sports and other content)

- (148) The Notifying Parties submit that a single market exists for all individual content due to the high degree of supply-side substitutability as individual rights can be sold for use in different products or channels without any modifications.
- (149) 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 substitutable.⁹⁷ In particular, several market participants consider that sport and film belong to separate product markets as they appeal to specific audiences. On the other hand, other market participants note that broadcasters must acquire a mix of content to appeal to their customers and, thus, there is a degree of substitutability across the content range.
- (150) Furthermore, the majority of respondents⁹⁸ believes that, within sport events, a distinction should be made between: (i) rights to football events that are played regularly throughout every year, (ii) rights to football events that are played more intermittently, and (iii) rights to other sport events.
- (151) The indications from 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.
- (152) Finally, the vast majority of the respondents to the market investigation consider that there are no possible segmentations other than the ones discussed above.⁹⁹ Only one market player states that all "must-have content" (i.e., content which is essential for customers and cannot be substituted) should belong to a separate product market, encompassing a wide variety of broadcasting rights (including Dutch premier league, major national and international football competitions, Formula 1, Olympic Games, Tour de France and Giro d'Italia).
- (153) 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.

5.7.2. Geographic market definition

Previous Commission decisions

- (154) 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.¹⁰⁰ In the *Liberty/Ziggo* case, the Commission also considered the market to be national in scope, rather than encompassing both the Netherlands and Flanders.

⁹⁷ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 8.5.

⁹⁸ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 9.

⁹⁹ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 11.

¹⁰⁰ Commission decision of 2 April 2003 in Case M.2876 - *Newscorp/Telepiù*, paragraph 62; Commission decision of 21 December 2010 in Case M.5932 - *News Corp/BSkyB*, paragraphs 73-75.

The Notifying Parties' view, results of the market investigation and Commission's assessment

- (155) The Notifying Parties consider that the exact geographic market definition can be left open as even on the narrowest possible market (i.e., the Netherlands), the Transaction would not raise any competition issues.
- (156) The majority of the respondents to the market investigation¹⁰¹ note that the geographic market should be national in scope, because content is licensed on a national basis. However, some respondents state that sometimes licenses are also negotiated for linguistically homogenous areas.
- (157) In light of the national scope of the licences, the Commission considers for the purposes of the present decision that the market for the licensing and acquisition of broadcasting rights is national in scope.

5.8. WHOLESALE SUPPLY AND ACQUISITION OF TV CHANNELS

- (158) TV broadcasters use the TV content that they have acquired or produced in-house in order to package it into linear TV channels. (Linear) TV channels are broadcast to end users either on a FTA basis or on a Pay TV basis.
- (159) At a very general level, FTA channels are TV channels that are available to viewers free of charge. Pay TV channels are channels for which the viewer must pay a subscription fee in order to watch the content. Traditionally, FTA channels finance their operations via advertising revenues, while Pay TV channels generate revenues through subscription fees.
- (160) These TV channels are then broadcast to end users via different distribution infrastructures (for example cable, satellite, internet, and mobile), individually or as part of so-called "channel bouquets". Hence, the supply side of the market comprises TV channel suppliers.
- (161) 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.
- (162) Liberty Global is active both on the demand and the supply side of the market: it purchases rights over channels for inclusion in its retail TV services (demand side), and it makes available its Ziggo Sport Totaal channel to third parties. Ziggo Sport Totaal is distributed via all major retail TV providers in the Netherlands (including KPN, CanalDigitaal, Vodafone, Tele2, Delta and Caiway). Liberty Global also distributes Ziggo Sport, but it is made available only to its own Ziggo TV subscribers. In addition, Ziggo is a shareholder in HBO Netherlands, which is focused on offering HBO channels and related VOD services in the Netherlands.
- (163) Vodafone is only active on the demand side of the market, purchasing rights over about 150 TV channels for distribution in different packages via its TV platform in

¹⁰¹ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 22.

the Netherlands. Vodafone does not own any exclusive rights over TV channels in the Netherlands.

5.8.1. *Product market definition*

Previous Commission decisions

- (164) In previous decisions, the Commission identified a wholesale market for the supply of TV channels in which TV broadcasters and TV distributors negotiate the terms and conditions for the distribution of TV channels to end users.¹⁰² Within that market, the Commission further identified two separate product markets for FTA TV channels and for Pay TV channels.¹⁰³
- (165) In *News Corp/Premiere*, the Commission noted that there are major differences with regard to the financing of FTA and Pay TV broadcasters, so that supply-side substitutability is limited.¹⁰⁴
- (166) In its *Liberty Global/Ziggo* decision, the Commission reiterated that FTA channels differ from Pay TV ones in several aspects, including financing models, pricing and window patterns.¹⁰⁵ However, given the limited significance of FTA channels in the Netherlands and the fact that the competitive assessment would have remained unchanged, in *Liberty Global/Ziggo* the Commission left the exact market definition open.¹⁰⁶
- (167) Within the market for the wholesale supply of Pay TV channels, in several cases the Commission has also previously indicated that there is a differentiation between basic and premium Pay TV channels, but ultimately left open the question whether those two categories of Pay TV channels constitute separate product markets.¹⁰⁷
- (168) In *Liberty Global/Ziggo* the Commission found that basic Pay TV channels and premium Pay TV channels belong to separate product markets, given *inter alia* the differences in terms of content, pricing conditions, and size of the audience attracted. Therefore, the Commission concluded that premium Pay TV was a separate market from that of basic Pay TV.¹⁰⁸

¹⁰² Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 76 and 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 22.

¹⁰³ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 37–40; Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 40; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 80, 83 and 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 24; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 37.

¹⁰⁴ Commission decision of 25 June 2008 in case M.5121 *News Corp/Premiere*, recitals 17–19.

¹⁰⁵ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 30 and 78.

¹⁰⁶ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 80.

¹⁰⁷ Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 76; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 85; Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recitals 24 and 27.

¹⁰⁸ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recitals 82–83.

- (169) In previous decisions, the Commission also examined, but ultimately left open, whether the market should be further segmented by genre or thematic content (such as films, sports, news, youth channels, and others).¹⁰⁹ The Commission has also considered whether a distinction could be drawn between linear channels and those non-linear services (VOD, PPV), as well as within non-linear services, but has left the market definition open.¹¹⁰
- (170) Finally, the Commission has not further distinguished between the different means of infrastructure used for the delivery to the viewer (cable, satellite, terrestrial TV¹¹¹ and IPTV).¹¹² In *Liberty Global/Ziggo*, the Commission found that at least cable, IPTV and possibly satellite belong to the same product market.¹¹³

The Notifying Parties' view, results of the market investigation and Commission's assessment

FTA TV channels and Pay TV channels

- (171) The Notifying Parties submit that the precise market definition can be left open, as the Transaction would not create a significant impediment to effective competition regardless of whether FTA TV channels and Pay TV channels are regarded as belonging to the same product market or to two separate ones.
- (172) The majority of respondents to the market investigation¹¹⁴ state that FTA TV channels are not substitutable with Pay TV ones for their differences in terms of financing models (Pay TV channels rely on subscription fees, while FTA one are financed through advertising), pricing and characteristics (e.g., content, image resolution and interactive features). Some respondents also point out that, contrary to Pay TV channels, the three public FTA channels in the Netherlands are subject to a must-carry obligation and therefore providers of retail TV services have to broadcast them as part of their offer.
- (173) Given the limited significance of FTA TV in the Netherlands mentioned above (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

¹⁰⁹ Commission decision of 2 April 2003 in case M.2876 *Newscorp/Telepiù*, 2 April 2003, recital 76; Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recitals 41–42; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 35; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 81; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 89.

¹¹⁰ Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 43; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 21.

¹¹¹ Terrestrial TV broadcasts land-based (terrestrial) signals from radio masts and towers, and is often referred to as DTT (Digital Terrestrial Television) or DVB-T (Digital Video Broadcasting – Terrestrial, which is the technical standard used for terrestrial TV in Europe).

¹¹² Commission decision of 18 July 2007 in case M.4504 *SFR/Télé 2 France*, recital 44; Commission decision of 26 August 2008 in case M.5121 *News Corp/Premiere*, recital 22.

¹¹³ Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 91.

¹¹⁴ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 12.

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

- (174) The majority of the respondents to the market investigation¹¹⁵ consider that basic Pay TV and premium Pay TV channels are not substitutable, in particular because of their differences in content (premium Pay TV channels offer, for example, recently released premium films and regular football events such as the UEFA Champions League or the national Dutch League, Eredivisie), pricing (customers pay an additional subscription fee for premium Pay TV channels) and business models (since basic Pay TV channels are financed primarily through advertising).
- (175) However, 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 Pay TV film channels and premium Pay TV sports channels

- (176) The majority of the respondents to the market investigation¹¹⁶ consider that premium Pay TV film channels and premium Pay TV sports channels are not substitutable, mainly because of their different thematic genre. Some respondents note that, among premium Pay TV sports channels, Ziggo Sport Totaal and Fox Sports channels compete for similar content and customer bases and that Ziggo Sport Totaal is increasingly becoming a substitute for Fox Sports.
- (177) However, 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.

Distribution Infrastructure

- (178) According to the majority of the respondents to the market investigation,¹¹⁷ 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. Some respondents note that cable and IPTV in particular are substitutable because both infrastructures can deliver the same kind of services (including interactive ones).
- (179) With specific regard to the distribution of TV channels over the internet, the majority of respondents note that these distribution rights are typically negotiated together with the ones over other infrastructures, falling under the same agreement and possibly the same fee structure.

¹¹⁵ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 14.

¹¹⁶ Replies to Questionnaire Q2 to Broadcasters and Content Owners, questions 15 and 16.

¹¹⁷ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 13.

- (180) 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.

5.8.2. *Geographic market definition*

Previous Commission decisions

- (181) In previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope¹¹⁸ or potentially to comprise a broader linguistically homogeneous area encompassing more Member States.¹¹⁹

Results of the market investigation and Commission's assessment

- (182) The large majority of the respondents to the market investigation note that the typical geographic scope of the contracts for the supply of TV channels is national.¹²⁰
- (183) Therefore, for the purposes of this Decision, the Commission considers that the market for the wholesale supply and acquisition of TV channels is national in scope.

5.9. WHOLESALE ACCESS AND CALL ORIGATION ON MOBILE NETWORKS

- (184) MNOs provide wholesale access and call origination services which enable operators without their own network, namely MVNOs and Service Providers, to have access to one or more of the MNOs networks in order to provide retail mobile voice services to end customers,. Such access is not regulated in the Netherlands. “Full” or “thick” MVNOs maintain their own core infrastructure and use MNOs only for access to a radio network. By contrast, “light” or “thin” MVNOs do not have their own infrastructure and rely entirely on the infrastructure of an MNO.¹²¹ From the Parties only Vodafone is active on this market in the Netherlands. Alongside Vodafone, three more providers in the Netherlands offer wholesale access and call origination on mobile networks, namely, KPN, T-Mobile and Tele-2.

5.9.1. *Product market definition*

- (185) In line with previous Commission decisions, the Notifying Parties submit that there is an overall market for wholesale access and call origination services.

¹¹⁸ Commission decision of 21 December 2011 in case M.6369 *HBO/Ziggo/HBO Nederland*, recital 39; Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 41; Commission decision of 10 October 2014 in case M.7000 *Liberty Global/Ziggo*, recital 98.

¹¹⁹ Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recitals 86–88; Commission decisions of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*, recital 41.

¹²⁰ Replies to Questionnaire Q2 to Broadcasters and Content Owners, question 24.

¹²¹ Light MVNOs may also use the services of a mobile virtual network enabler (“MVNEs”), an organisation that provides business infrastructure solutions to MVNOs such as billing, administration, operations support, mobile site subsystem support and other related services.

- (186) In previous cases,¹²² the Commission defined a wholesale market for access and call origination on public mobile networks. The services provided by MNOs to non-MNOs were considered as key elements required for non-MNOs¹²³ to be able to provide retail mobile communication services. Since both services were considered to be generally supplied together they were seen to be part of a single market. The market investigation in the present case has not provided any reasons to depart from this approach.
- (187) In view of the above, the Commission concludes that there is a distinct wholesale market for access and call origination on public mobile telephone networks.

5.9.2. *Geographic market definition*

- (188) In line with previous Commission decisions, the Notifying Parties submit that the relevant geographic scope of the market for wholesale access and call origination on mobile networks is national, i.e. limited to the territory of the Netherlands.
- (189) In previous cases, the Commission considered the wholesale market for access and call origination to be national in scope due to regulatory barriers stemming from the fact that licenses granted to MNOs are generally national in scope.¹²⁴ The market investigation in the present case has not provided any reasons to depart from this approach.
- (190) Based on the above, the Commission concludes the wholesale market for access and call origination on public mobile networks to be national in scope, that is to say limited to the territory of the Netherlands.

5.10. **WHOLESALE MARKET FOR CALL TERMINATION ON MOBILE NETWORKS**

- (191) Call termination services are provided when calls originate from one network and terminate on another network. Call termination thus allows users of different networks to communicate with one another. Call termination is a wholesale service provided by various network operators to one another on the basis of interconnection agreements, upstream of the provision of communication services to end customers.¹²⁵ Both Vodafone and Ziggo are active on this market in the Netherlands.

¹²² See Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 295 to 300; Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 77 to 79; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 156; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 61 to 63; Commission decision of 1 March 2010 in case M.5650 – *T-Mobile/Orange*, paragraphs 27 to 30; Commission decision of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 15.

¹²³ As explained above in recital 187, non-MNOs are MVNOs and Service Providers.

¹²⁴ See Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 305 and Commission decision of 12 December 2014 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 74 to 77 with further references.

¹²⁵ See Commission Decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 84; Commission Decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, paragraph 68; Commission Decision of 1 March 2010 in case M.5650 – *T-Mobile/Orange*, paragraph 36.

5.10.1. *Product market definition*

- (192) The Notifying Parties submit that each individual network constitutes a separate wholesale market for call termination on mobile networks, in line with previous Commission decisions.
- (193) In previous cases, the Commission concluded that each individual mobile network constitutes a separate product market.¹²⁶ More specifically, the Commission considered that there is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the operator of the network to which the recipient is connected. Each individual network therefore constitutes a separate market for termination. This applies both to fixed networks and to mobile networks.¹²⁷
- (194) In view of the above, the Commission concludes that each individual network constitutes a separate wholesale market for call termination. More specifically for the purposes of this case, the Commission concludes that the relevant markets are the wholesale market for call termination on the mobile network of Vodafone and the wholesale market for call termination on the mobile network of Ziggo.

5.10.2. *Geographic market definition*

- (195) The Notifying Parties submit that wholesale market for call termination should correspond to the dimensions of the operator's network and therefore be considered as national in scope.
- (196) In line with its previous decisions¹²⁸, the Commission considers the market to be national in scope. The information before the Commission does not provide any indication that it would be warranted for the present case to depart from the previous practice for defining the geographic market. For the purposes of this decision, the Commission therefore concludes that the wholesale markets for call termination on mobile networks are national.

5.11. **WHOLESALE INTERNATIONAL ROAMING SERVICES**

- (197) In order for a provider of retail mobile services to be able to provide its end customers with telecommunication services outside their home countries, it must enter into agreements with providers of wholesale international roaming services which are primarily active in other national markets. Only Vodafone is active on this market in the Netherlands.

¹²⁶ See Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 47; Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, recitals 36, 37; See also Commission decision M.1493 – *Telia / Telenor*, M.2803 *Telia / Sonera* and M.3806 – *Téléfonica / Cesky*. See also Revised Commission Recommendation of 17 December 2007 referring to wholesale voice call termination on individual mobile networks.

¹²⁷ See Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, recitals 36, 37.

¹²⁸ See Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, recital 48; Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, recital 39.

- (198) Roaming agreements can be concluded with a preferred foreign operator which offers tailor-made service conditions, as can be seen in particular in the creation of international roaming alliances.

5.11.1. Product market definition

- (199) The Notifying Parties submit that the Commission has defined a separate wholesale market for international roaming services comprising both terminating calls and originating calls.¹²⁹
- (200) In the case at hand, the Commission retains its previous product market definition of a separate wholesale market for international roaming comprising both terminating calls and originating calls.

5.11.2. Geographic market definition

- (201) In line with previous Commission decisions¹³⁰ the Notifying Parties submit that the wholesale market for international roaming services is national in scope, i.e. the Netherlands, for the case at hand. This is due to the fact that wholesale international agreements can only be concluded with companies which have an operating licence in the relevant country and the licences to provide mobile services are restricted to a national territory.
- (202) In line with its past decisions¹³¹, the Commission retains its previous geographic market definition and considers that the wholesale market for international roaming services is national in scope.

5.12. WHOLESALE CALL TERMINATION SERVICES ON FIXED NETWORKS

- (203) As set out in recital (191), call termination is the wholesale service provided by network operators that allows users of different networks to communicate with each other.
- (204) The market for wholesale termination of calls on fixed networks is therefore vertically related to the retail markets for fixed and mobile telephony services.
- (205) Both Vodafone and Ziggo are active in the provision of wholesale call termination services on fixed networks in the Netherlands. However as each of them is active on

¹²⁹ See Commission decision of 2 July 2014 in Case M.7018 - *Telefónica Deutschland/E-Plus*, recital 97; Commission decision of 20 September 2013 in Case M.6990 *Vodafone/Kabel Deutschland*, recital 249; Commission decision of 3 July 2012 in case M.5650 *T-Mobile/Orange*, paragraph 34; Commission decision of 12 December 2012 in case No. M.6497 *Hutchison 3G Austria/Orange Austria*, paragraph 67; Commission decision of 4 February 2016 in Case M.7637 *Liberty Global/Base Belgium*, recital 119.

¹³⁰ See Commission decision of 3 July 2012 in case M.5650 *T-Mobile/Orange*, paragraph 35; Commission decision of 12 December 2012 in case M.6497 *Hutchison 3G Austria/Orange Austria*, paragraph 78-79; Commission decision of 2 July 2014 in case M.7018 *Telefónica Deutschland/E-Plus*, recital 100; and Commission decision of 4 February 2016 in case M.7637 *Liberty Global/Base Belgium*, recital 122.

¹³¹ See Commission decision of 3 July 2012 in case M.5650 *T-Mobile/Orange*, paragraph 35; Commission decision of 12 December 2012 in case M.6497 *Hutchison 3G Austria/Orange Austria*, paragraph 78-79; Commission decision of 2 July 2014 in case M.7018 *Telefónica Deutschland/E-Plus*, recital 100; and Commission decision of 4 February 2016 in case M.7637 *Liberty Global/Base Belgium*, paragraph 122; Commission decision of 20 September 2013 in case M.6990 *Vodafone/Kabel Deutschland*, recital 252.

separate markets for fixed call termination services over their respective networks, there are no horizontal overlaps and hence no affected market arises. The termination markets served by Ziggo and Vodafone are vertically related to their fixed and mobile retail telephony activities.

5.12.1. Product market definition

- (206) In line with previous ACM¹³² and Commission¹³³ decisions, the Notifying Parties submit that the relevant product market is the wholesale market for call termination on each individual fixed network.
- (207) As indicated by the Notifying Parties and as set out in recital (96) above, in previous decisions the Commission considered an overall wholesale market for call termination on each individual fixed network, without it being necessary to consider further possible segmentations of the market.¹³⁴
- (208) For the purposes of the present decision, the Commission retains its previous product market definition and considers that the relevant product market is the overall wholesale market for call termination on the fixed network of Ziggo and on the fixed network to which Vodafone has access.

5.12.2. Geographic market definition

- (209) The Notifying Parties consider that the geographic scope of the wholesale market for call termination on fixed networks to be national. This is primarily due to regulatory barriers as the geographical scope of licenses is in principle limited to areas which do not extend beyond the borders of a Member State.
- (210) In line with previous decisions the Commission considers the geographic scope of the wholesale market for call termination on a fixed network to be national.¹³⁵

5.13. WHOLESALE TERMINATION AND HOSTING OF CALLS TO NON-GEOGRAPHIC NUMBERS

- (211) Voice calls are not only made to geographic numbers but also to non-geographic numbers. A non-geographic number is a number associated with a country, but not to any single geographic location within that country. Non-geographic number services

¹³² ACM (OPTA) decision, Market analysis fixed and mobile call termination, ACM/DTVP/2013/203266, p. 43.

¹³³ See Commission decision of 27 November 2007 in case M.4947 - *Vodafone/Tele2 Italy/Tele2 Spain*, recital 13; Commission decision of 1 March 2010 in case M.5650 - *T-Mobile/Orange*, recital 37; Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 23; and Commission decision of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland*, recital 117.

¹³⁴ See Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recital 126; Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 23; Commission decision of 1 March 2010 in case M.5650 - *T-Mobile/Orange*, recital 37.

¹³⁵ See Commission decision of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland*, recital 121; Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recital 128; Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 24; Commission decision of 1 March 2010 in case M.5650 - *T-Mobile/Orange*, recital 38; Commission decision of 27 November 2007 in case M.4947 - *Vodafone/Tele2 Italy/Tele2 Spain*, recital 16.

are less frequently used than standard services and are typically used for free and paid information services (e.g. for helpdesks, subscription services, TV voting lines etc.). In the Netherlands, numbers starting with 0800 or 0900 are the most common non-geographic numbers.

- (212) When a caller initiates a call to a non-geographic number, the call is automatically transferred from the originating operator to the terminating operator hosting the service provider that operates the service related to the non-geographic number, irrespective of the location.
- (213) Unlike ordinary call termination services, call origination and call termination regulation does not apply to these numbers. Therefore, different revenue sharing agreements exist between the originating operator, the terminating operator, and the service provider.
- (214) Only Ziggo provides wholesale termination and hosting of calls to non-geographic numbers in the Netherlands.

5.13.1. Product market definition

The Notifying Parties' view

- (215) The Notifying Parties indicate that, in a previous decision, the Commission has considered a wholesale market for termination of calls to non-geographic numbers to be distinct from a regular wholesale termination market, though it ultimately left the precise product market definition open.¹³⁶

Previous Commission decisions and Commission's assessment

- (216) In previous decisions, the Commission considered that there is an overall wholesale market for termination and hosting of calls to non-geographic numbers, without it being necessary to consider further possible segmentations.¹³⁷
- (217) For the purposes of this decision, the Commission retains its previous product market definition and considers that the relevant product market is the overall wholesale market for termination and hosting of calls to non-geographic numbers, without it being necessary to consider further possible segmentations, given that in any event the proposed transaction does not raise concerns on that market, irrespective of the exact product market definition.

5.13.2. Geographic market definition

The Notifying Parties' view

- (218) As regards geographic market definition, the Notifying Parties submit that the Commission has previously suggested that the geographic scope of the relevant market is national, although it has considered market shares also on alternative

¹³⁶ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 58-62.

¹³⁷ Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recitals 137-139 and Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 58-62.

bases.¹³⁸ For the purposes of this case, the Parties submit the relevant market to be national in scope.

Previous Commission decisions and Commission's assessment

- (219) In line with its previous decisional practice, for the purposes of this decision, the Commission considers that the geographic scope of the wholesale market for termination and hosting of calls to non-geographic numbers is national.¹³⁹

5.14. WHOLESALE PROVISION OF DOMESTIC CALL TRANSIT SERVICES ON FIXED NETWORKS

- (220) Domestic call transit on a fixed network is a wholesale service provided by a third party where there is no direct connection between originating communication providers and terminating communication providers.
- (221) Only Ziggo is active in the wholesale provision of domestic call transit services on fixed networks in the Netherlands.

5.14.1. Product market definition

The Notifying Parties' view

- (222) The Notifying Parties submit that they are in line with the product market definition considered in previous decisions by the Commission and, more particularly, they submit that the wholesale provision of domestic call transit services on fixed networks constitutes a separate product market.¹⁴⁰ While the Parties adopt this definition for the purposes of the notification of the proposed transaction, [...]

Previous Commission decisions and Commission's assessment

- (223) In previous decisions, the Commission has found that there is a separate market for the wholesale provision of domestic call transit services on fixed networks, distinct from the international wholesale market for voice carrier services.¹⁴¹
- (224) For the purposes of this Decision, the Commission retains its previous product market definition and considers that the relevant product market is the wholesale market for the provision of domestic call transit services on fixed networks, without it being necessary to consider further possible segmentations of the market, given that in any event the proposed transaction does not raise concerns on that market, irrespective of the exact product market definition.

¹³⁸ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 58, 62.

¹³⁹ Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recitals 142 and Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 18.

¹⁴⁰ Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telekom/GTS*, recital 77.

¹⁴¹ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 26. In its subsequent decision of 14 April 2014 in case M.7109 - *Deutsche Telekom/GTS*, the Commission considered that, in the specific circumstances of the case, the exact definition of the relevant market for the provision of wholesale domestic call transit services of fixed networks could be left open, as the transaction did not give rise to competition concerns on the basis of any alternative plausible market definitions (see in particular recital 77).

5.14.2. *Geographic market definition*

The Notifying Parties' view

- (225) The Notifying Parties submit that the relevant geographic market is national in scope, in line with previous Commission decisions and the assessment of the ACM.¹⁴²

Previous Commission decisions and Commission's assessment

- (226) In line with the Commission's previous practice, for the purposes of this decision, the Commission considers that the geographic scope of the wholesale market for domestic call transit on fixed networks is national.¹⁴³

5.15. WHOLESALE INTERNATIONAL CARRIER SERVICES

- (227) The wholesale market for carrier services involves the provision of transmission capacity on telecommunications infrastructure (typically international cable networks) to other telecommunications companies and business communications providers.
- (228) In cases where there is no direct connection between originating communications providers ("OCPs") and terminating communications providers ("TCPs"), third party networks are typically used to carry calls between them (domestic transit services).
- (229) Both Ziggo and Vodafone are active in the provision of international carrier services.

5.15.1. *Product market definition*

The Notifying Parties' view

- (230) The Notifying Parties submit that, although the precise market definition can be left open for the purposes of this case, they adopt the same approach as the Commission in its previous decisional practice, where the wholesale market for international carrier services was defined as the market for "the lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers."¹⁴⁴

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

- (231) In *Vodafone/Cable & Wireless*, the Commission found that the wholesale market for international carrier services comprised the lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers.¹⁴⁵

¹⁴² ACM (OPTA) Decision of 19 December 2008, p.50.

¹⁴³ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 26, 27; Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recitals 127, 128 and Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telekom/GTS*, recital 77.

¹⁴⁴ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recitals 33, 34.

¹⁴⁵ Commission decision of 3 July 2012 in case M.6584 *Vodafone/Cable & Wireless*, recitals 33, 34.

- (232) The market investigation also supports this product market definition.¹⁴⁶
- (233) The Commission therefore concludes that the market for wholesale international carrier services comprises the lease of transmission capacity and the provision of related services to third party telecommunication traffic carriers and service providers.

5.15.2. *Geographic market definition*

The Notifying Parties' view

- (234) In line with previous Commission decisions, the Notifying Parties submit that the market for carrier services is likely to be global in scope.¹⁴⁷

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

- (235) In its recent decisional practice, the Commission found that the market for wholesale international carrier services is global (worldwide) in scope.¹⁴⁸
- (236) The market investigation also supports this. The majority of respondents expressing a view consider that the market is global.¹⁴⁹
- (237) As the proposed transaction raises no concerns under any geographic market definition, it is not necessary to conclude on the precise definition for the purpose of the current decision.

5.16. WHOLESALE LEASED LINES

- (238) Wholesale leased lines are part-circuits that allow communications providers to connect their own networks to end user sites for the supply of business connectivity services. In addition, wholesale leased lines are an input for the provision of retail mobile services.
- (239) Telecom regulators sometimes segment the wholesale leased lines between the element that can be considered to be customer access or backhaul (terminating segments) and that which can be considered part of the core network (trunk segments). In its recommendation on market definitions in the electronic communications sector, the Commission considers a separate market for terminating segments for leased lines.¹⁵⁰

¹⁴⁶ See replies to Q3 Business Services, question 11.

¹⁴⁷ Form CO, paragraph 6.486.

¹⁴⁸ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 27.

¹⁴⁹ See replies to Q3 Business Services, question 14.

¹⁵⁰ In the Recommendation on product market definition in the electronic communications sector, market 6 is defined as follows: "Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity". Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a

- (240) Only Ziggo is active in the provision of wholesale leased lines in the Netherlands.

5.16.1. Product market definition

The Notifying Parties' view

- (241) The Notifying Parties submit that for the purposes of this case, there is an overall market for wholesale leased lines and no segmentation based on bandwidth of this market is required as no competition concerns arise on any plausible basis.¹⁵¹

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

- (242) In previous decisions, the Commission considered that the market for wholesale leased lines could be further segmented between trunk and terminating segments but ultimately left the market definition open.¹⁵²
- (243) The results of the market investigation have not provided any indication that it would not be appropriate for the Commission to define a separate market for wholesale access to leased lines, in line with its previous practice.¹⁵³
- (244) For the purposes of this decision, the Commission retains its previous product market definition and considers that the relevant product market is the wholesale market for access to leased lines, without it being necessary to consider further possible segmentations, given that in any event the proposed transaction does not raise concerns on that market irrespective of the product market definition.

5.16.2. Geographic market definition

The Notifying Parties' view

- (245) The Notifying Parties submit that for the purposes of this case, the relevant market for wholesale leased lines is national in scope, although the precise market definition can be left open.¹⁵⁴

common regulatory framework for electronic communications networks and services (2007/879/EC), OJ L 344, 28.12.2007, p. 65.

¹⁵¹ Form CO paragraph 6.491.

¹⁵² Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 30; Commission decision of 4 February 2016 in case M.7637 - *Liberty Global/BASE Belgium*, recital 146; Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telecom/GTS*, recital 70.

¹⁵³ See replies to Q3 Business Services, question 12.

¹⁵⁴ Form CO paragraph 6.491.

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

- (246) In previous decisions, the Commission has found that the wholesale market for access to leased lines is national in scope.¹⁵⁵
- (247) The responses to the market investigation have not provided any indication that it would be warranted for the Commission to depart from its previous practice for defining the geographic market in the present case.¹⁵⁶
- (248) In light of the above, for the purposes of this Decision, the Commission considers that the geographic scope of the wholesale market for access to leased lines is national.

5.17. INTERNET HOSTING SERVICES

- (249) Internet hosting service providers operate internet servers and offer organisations and individuals the means to serve content to the internet via these servers. Both Vodafone and Ziggo are active in the provision of internet hosting services in the Netherlands.

5.17.1. Product market definition

- (250) The Notifying Parties submit that the Commission has previously considered a market for internet hosting services. While it has also previously examined various segments within the general web-hosting area (based on the range of different services and products offered), no such segmentation is required in this case, as no competition concerns arise on any plausible basis.
- (251) In the *KPNQWEST/EBONE/GTS* decision,¹⁵⁷ the Commission considered four market segments within the general web-hosting sector, based on the range of different services and products offered: (a) the local (limited to the area where the web-hosting centre is located) supply of basic co-location services such as connectivity, power, and the facilities; (b) the national supply of shared and dedicated hosting consisting of hosting a customer's website on the web host's servers and providing the necessary support applications; (c) the national, possibly cross-border regional, supply of managed services to outsource complex enterprise applications and support infrastructure, including "front-end" and "back-office" applications hosted on the providers' platforms (so-called ASP), and (d) the national supply of content delivery services (CDS) such as Streaming Content Delivery Services and Static Content Delivery Products.¹¹⁶ However, the Commission did not conclude on the exact market definition.

¹⁵⁵ Commission decision of 3 July 2012 in case M.6584 - *Vodafone/Cable & Wireless*, recital 31; Commission decision of 29 January 2010 in case M.5730 - *Telefónica/Hansenet Telekommunikation*, recital 28; Commission decision of 14 April 2014 in case M.7109 - *Deutsche Telecom/GTS*, recital 74.

¹⁵⁶ See replies to Q3 Business Services, question 15.

¹⁵⁷ See Commission decision of 16 January 2002 in case M.2648 - *KPNQWEST/EBONE/GTS*, recitals 19 and 20.

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

5.17.2. *Geographic market definition*

- (253) The Notifying Parties submit that for the purposes of this notification, the relevant market for hosting internet services is potentially wider than national in scope, although the precise market definition can be left open.
- (254) In previous decisions, the Commission did not conclude on the exact definition of the geographic market for Internet hosting services.¹⁵⁸
- (255) As the proposed transaction raises no concerns under any geographic market definition, it is not necessary to conclude on the precise definition for the purpose of the current decision.

5.17.3. *No affected market*

- (256) As part of its *B2B* offering,¹⁵⁹ Ziggo provides a range of basic internet hosting services but its activities in this field are limited.¹⁶⁰ Regardless of geographic market definition, Ziggo estimates its market share on this market to be *de minimis*, and as such no affected market arises.
- (257) Vodafone is a small player in the internet hosting services market, with an estimated market share of less than [0-5]% in the Netherlands¹⁶¹ as well as in the EEA.¹⁶² [details regarding Vodafone's internet hosting arrangements in the Netherlands] Vodafone is also a small player in internet hosting services at the European level.
- (258) On the basis of the above considerations, the Notifying Parties offer a limited number of internet hosting services hosting services in the Netherlands. According to the Parties' estimates, the market share of Vodafone in any Member State is below [10-20] %, and less than [0-5]% in the Netherlands while the market share of Ziggo is *de minimis* under any geographic market.
- (259) Because the combined market share of the Parties is less than [10-20] % and the increment arising from the proposed transaction is minimal, the market for Internet hosting services is not affected and will no longer be discussed in this decision.

¹⁵⁸ See Commission decision of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland* recital 205 and Commission decision of 16 January 2002 in case M.2648 - *KPNQWEST/EBONE/GTS*, recital 23.

¹⁵⁹ Business-to-business (B2B) refers to a situation where one business makes a commercial transaction with another.

¹⁶⁰ Ziggo's turnover in relation to these activities is less than [...] in 2015.

¹⁶¹ Vodafone's revenues in the Netherlands for the financial year 2015/2016 are approximately [...].

¹⁶² See Response to Commission Questions dated 20 July 2016, reply to Question 1.

5.18. WHOLESALE INTERNET CONNECTIVITY

5.18.1. *Product market definition*

- (260) Internet connectivity services allow corporate customers to be present on the internet by providing access to the entire routing table of the global internet or to a subset of the same, in which case the customer will need to cover the totality of its needs by means of a multi-homing strategy. Connectivity to the internet can be achieved by the purchasing of transit services, by means of peering with selected networks, or by means of a combination of the two. Entities which do not connect directly to the internet may also call upon hosting providers, who aggregate hosting needs and procure in turn internet connectivity for their customers.
- (261) Whilst global coverage is a primary requirement, more specific performance criteria also enter into a customer's internet connectivity strategy such as latency, reliability, speed and minimization of traffic-related costs.
- (262) Transit is a service whereby a customer pays for access to all or a large part of the internet, with performance characteristics which may vary according to the destination of the traffic. Peering, on the other hand, whether settlement-free or paid, provides access to individual networks but no further onward connectivity. Providers of transit services will in their turn use a combination of peering relationships and paid commercial relationships with other transit providers in order to provide global internet coverage. A transit provider which does not purchase transit services from other providers because it is able to reach the entire internet merely by means of peering relationships is referred to as "Tier 1".
- (263) Operators of retail internet access networks, sometimes called "eyeball networks", procure internet connectivity in the same way as any other corporate customer, and may themselves also provide wholesale internet connectivity services. Certain internet access providers ("IAPs") offer transit services, whereas many offer direct connectivity to their own network and subscribers. To the extent that the IAP purchases transit services, these may also be used to reach its users. The end users of a given IAP can also be reached by means of relationships with those networks which peer with the IAP in question.
- (264) Both Vodafone and Ziggo have operations in the provision of wholesale internet connectivity services.

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

- (265) In previous Commission decisions, and most recently in 2005, the Commission has identified distinct markets for the provision of internet connectivity in which a separate market was identified for Tier 1 transit providers¹⁶³. The Notifying Parties in the present case do not take a definitive position on the definition of the relevant market, suggesting that it can be left open, but question whether the approach taken in the earlier cases remains fully relevant.

¹⁶³ See Commission decision of 7 October 2015 in Case M.3752 - *MCI/Verizon*.

- (266) The market investigation in the present case has suggested that this distinction may no longer be fully appropriate and that other criteria need to be considered. In particular, a Content Delivery Network ("CDN") provider has noted that, while Tier 1 providers can provide a full routing table, they may face bandwidth constraints towards certain eyeball networks which render them unable to provide the quality of one-stop-shop services for all users which they could in the past. This is because of structural changes in the nature of internet traffic and the proportion of such traffic accounted for by a limited number of content providers.¹⁶⁴
- (267) It follows that certain content providers may have a need to complement transit routes with direct interconnection to certain eyeball networks if they serve a significant amount of traffic to that network and if performance would otherwise be below what their users would expect. The eyeball networks in question may also profit from this situation in order to generate additional revenue streams on the content side of the market which complement the revenue achieved from retail users.
- (268) Given the need which may arise at any given moment in time to access certain eyeball networks and the potential inadequacy of alternatives to direct interconnection, it is not, therefore, excluded that markets may arise for certain forms of direct interconnection towards certain IAPs which ultimately have or may acquire a monopoly on routes towards their end users, including on the part of the Parties to the present Transaction.
- (269) In the present case, however, the precise market definition can be left open since no competitive concerns arise regardless of the market definition considered.

5.18.2. Geographic market definition

- (270) The Commission has in the past considered that markets for internet connectivity were global in scope¹⁶⁵. The Notifying Parties agree with this approach. The market investigation has also tended to support this view.
- (271) In the present case, however, the precise geographic market definition can be left open since no competitive concerns arise regardless of the market definition considered.

6. AFFECTED MARKETS

- (272) The

¹⁶⁴ See replies to Q4 – Interconnectivity Transit Providers of 17 June 2016, question 9.1.

¹⁶⁵ See Commission decision of 7 October 2015 in Case M.3752 - *MCI/Verizon*.

- (273) Table 6 below illustrates the retail markets in the Netherlands that are horizontally affected as a result of the proposed transaction. The only wholesale market that is horizontally affected is the market for wholesale supply and acquisition of TV channels (on the acquisition side).

Table 6: List of markets horizontally affected by the proposed transaction (market shares for 2015 by number of subscribers).

RETAIL	Vodafone	Ziggo	Combined	Horizontally Affected
Fixed telephony	[0-5]%	[40-50]%	[40-50]%	<input checked="" type="checkbox"/>
Fixed internet access	[0-5]%	[40-50]%	[40-50]%	<input checked="" type="checkbox"/>
TV services	[0-5]%	[40-50]%	[40-50]%	<input checked="" type="checkbox"/>
Fixed dual play bundles*	[0-5]%	[40-50]%	[40-50]%	<input checked="" type="checkbox"/>
Fixed triple play bundles*	[0-5]%	[60-70]%	[60-70]%	<input checked="" type="checkbox"/>
Fixed-mobile 4P bundles*	0-5%	10-20%	10-20%	<input checked="" type="checkbox"/>
Mobile services	[20-30]%	[0-5]%	[20-30]%	<input checked="" type="checkbox"/>
Business connectivity	[10-20]%	0-5%	10-20%	<input checked="" type="checkbox"/>
WHOLESALE				
Supply and acquisition of TV channels (demand-side)	[0-5]%	[40-50]%	[40-50]%	<input checked="" type="checkbox"/>

**market shares based on Commission's market reconstruction data*

- (274) As regards the market shares listed in the table above for fixed telephony, fixed internet access and TV services the Commission first notes that these market shares reflect the total number of subscribers in the Netherlands that purchase each of these services either on a standalone basis or in a combination with other fixed or mobile telecommunication services.
- (275) Second, with respect to the retail supply of fixed internet access and fixed telephony services, the Commission notes that Ziggo does not offer any of these two services on a standalone basis in the Netherlands – these services are available from Ziggo only in combination with TV services. The only standalone fixed service that Ziggo offers to consumers at retail level is TV services. Vodafone on the other hand does not offer standalone TV services in the Netherlands as this type of service is always tied to the provision of fixed internet access services. Finally, as already explained in paragraph (86) above, over [...] of the fixed internet access service subscribers in the Netherlands purchase this type of service in a combination with another service.
- (276) The Commission therefore considers that Vodafone and Ziggo compete in the provision of these three fixed services (fixed telephony, fixed internet and TV services) only in the form of bundles (either fixed dual play and triple play or fixed-mobile quadruple play). As in the section below the Commission will assess the impact of the proposed transaction on the dual play, triple play and quadruple play bundles, where the actual competition between the Parties for the provision of these services takes place, it does not consider it necessary to carry an assessment on each of the fixed individual components markets. As the Commission's assessment of the different multiple play bundles will capture the effects of the Transaction on those fixed services provided together in a bundle with another service, the individual components markets would comprise only the portion of the relevant fixed services that are provided on a standalone basis as single play. As mentioned above, there is no horizontal overlap between the activities of each Ziggo and Vodafone with respect to the standalone provision of fixed internet access, fixed telephony and TV services.
- (277) Table 7 below illustrates the markets that are vertically affected as a result of the proposed transaction.

Table 7: List of markets vertically affected by the proposed transaction (market shares for 2015 by number of subscribers).

Upstream market	Downstream market	Vertically Affected
Wholesale access and call origination on mobile networks Vodafone: [5-10]%; Ziggo: not active	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%;	<input checked="" type="checkbox"/>
Wholesale international roaming Vodafone: [20-30]%; Ziggo: not active		<input checked="" type="checkbox"/>
Wholesale market for call termination on fixed networks Vodafone: [90-100]%; Ziggo: [90-100]%	Retail fixed telephony services Vodafone: [0-5]%; Ziggo: [40-50]%; Combined: [40-50]%;	<input checked="" type="checkbox"/>
	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%	<input checked="" type="checkbox"/>
Wholesale market for call termination on mobile networks Vodafone: [90-100]%; Ziggo: [90-100]%	Retail fixed telephony services Vodafone: [0-5]%; Ziggo: [40-50]%; Combined: [40-50]%	<input checked="" type="checkbox"/>
	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: : [0-5]%; Combined: [20-30]%;	<input checked="" type="checkbox"/>
Wholesale termination and hosting of calls to non-geographic numbers Vodafone: not active; Ziggo: [20-30]%	Retail fixed telephony services Vodafone: : [0-5]%; Ziggo: : [40-50]%; Combined: : [40-50]%	<input checked="" type="checkbox"/>
	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%	<input checked="" type="checkbox"/>
Wholesale provision of domestic call transit services on fixed networks Vodafone: not active; Ziggo: 5-10%	Retail fixed telephony services Vodafone: [0-5]%; Ziggo: [40-50]%; Combined: [40-50]%	<input checked="" type="checkbox"/>
	Wholesale international carrier services Vodafone: [0-5]%; Ziggo: [0-5]%; Combined: <10%	<input type="checkbox"/>
Wholesale international carrier services Vodafone: [0-5]%; Ziggo: [0-5]%; Combined: <10%	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%	<input checked="" type="checkbox"/>
	Retail business connectivity services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%	<input type="checkbox"/>
Wholesale leased lines Vodafone: not active; Ziggo: 0-5% Combined: 0-5%	Retail mobile telecommunications services Vodafone: [20-30]%; Ziggo: [0-5]%; Combined: [20-30]%	<input checked="" type="checkbox"/>
	Retail fixed telephony services Vodafone: [0-5]%; Ziggo: [40-50]%; Combined: [40-50]%	<input checked="" type="checkbox"/>
	Retail business connectivity services Vodafone: [20-30]%; Ziggo: [0-5]%;	<input type="checkbox"/>

	Combined: [20-30]%	
Acquisition of broadcasting rights for individual audiovisual/TV content Vodafone: non active; Ziggo: [30-40]% on the demand side	Wholesale supply and acquisition of Pay TV channels (demand side) Vodafone: [0-5]%; Ziggo: >40% under all possible segmentations Combined: >40% (supply side) Vodafone: non active%; Ziggo: <30% under all possible segmentations Combined: <30%	<input checked="" type="checkbox"/>
	Retail TV services Vodafone: [0-5]%; Ziggo: [40-50]% Combined: [40-50]%	<input checked="" type="checkbox"/>
Wholesale supply and acquisition of Pay TV channels (demand side) Vodafone: [0-5]%; Ziggo: >40% under all possible segmentations Combined: >40% (supply side) Vodafone: non active%; Ziggo: <30% under all possible segmentations Combined: <30%	Retail TV services Vodafone: [0-5]%; Ziggo: [40-50]% Combined: [40-50]%	<input checked="" type="checkbox"/>
Wholesale internet connectivity Combined: [0-5]%	Retail business connectivity services Vodafone: [20-30]%; Ziggo: [0-5]% Combined: [20-30]%	<input type="checkbox"/>
	Retail fixed internet services Vodafone: [0-5]%; Ziggo: [40-50]% Combined: [40-50]%	<input checked="" type="checkbox"/>
	Wholesale leased lines Vodafone: not active; Ziggo: 0-5% Combined: 0-5%	<input type="checkbox"/>

**market shares based on Commission's market reconstruction data, Parties' estimates and Telecompaper data*

- (278) As regards the wholesale market for call termination on fixed networks, given that fixed network operators have a 100% market share on fixed call termination services on their own network, Ziggo has a 100% market share on fixed call termination services on its own network and Vodafone has a 100% market share on fixed call termination services on the fixed network to which it has access. As the Parties are active on separate markets for fixed call termination services over their respective networks, there is no horizontal overlap between their respective activities in these markets.
- (279) In this regard, the Commission notes that the markets of wholesale call termination services on fixed networks in the Netherlands are subject to *ex-ante* regulation by the ACM. Pursuant to its latest decision on mobile and fixed termination rates, the ACM

imposed remedies (including price caps and detailed non-discrimination obligations) upon fixed network operators in the Netherlands.¹⁶⁶

- (280) Therefore, the Commission considers that the Transaction does not give rise to serious doubts as to the compatibility with the internal market as regards the wholesale markets for call termination on Vodafone's and Ziggo's fixed networks and this market will, therefore, no longer be discussed in this decision.
- (281) As regards the wholesale market for mobile call termination services, since each mobile network constitutes a separate market for the provision of wholesale call termination, there is no horizontal overlap between the Parties' activities on this market, as each Party is active on its own separate mobile network with a 100% market share over their network.
- (282) However, in the Netherlands the provision of wholesale mobile call termination services is regulated *ex-ante* by the ACM. Pursuant to its latest decision on mobile and fixed termination rates, the ACM imposed remedies (including price caps and detailed non-discrimination obligations) upon mobile network operators in the Netherlands.¹⁶⁷
- (283) Therefore, the Commission considers that the Transaction does not give rise to serious doubts as to the compatibility with the internal market as regards the wholesale market for mobile call termination services, given that such market is subject to the *ex-ante* regulation by the ACM. Therefore, this market will no longer be discussed in this decision.
- (284) As regards the market for wholesale international roaming, the Commission notes that this market is subject to sector-specific EU regulation, which prevents mobile operators from refusing access to their network and from charging excessive termination fees.¹⁶⁸ Under the Roaming Regulation, MNOs must meet all reasonable requests for wholesale roaming access¹⁶⁹ and MNOs are bound by the price cap imposed by the Roaming Regulation on the wholesale prices that MNOs can charge from their roaming customers. Key obligations under the regulation include an obligation to meet all reasonable requests, an obligation to publish a reference offer, caps on wholesale and retail charges (for calls, SMS messages and data services), and transparency and information requirements. The Roaming Regulation therefore effectively prevents MNOs from refusing access to their respective network and from charging excessive termination fees.

¹⁶⁶ ACM decision on mobile and fixed termination rates, published 5 August 2013.

¹⁶⁷ ACM decision on mobile and fixed termination rates, published 5 August 2013.

¹⁶⁸ Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L 172, 30.6.2012, pp. 10–35 (the “roaming Regulation”); amended by Regulation (EU) No 2015/2120 of the European Parliament and the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1–18.

¹⁶⁹ Article 3 Regulation (EU) No 531/2012 and Article 7 Regulation (EU) No 2015/2120

- (285) In light of the fact that after the Transaction the JV's wholesale roaming activities will continue to be subject to ex-ante EU regulation, the Commission considers that the vertical overlaps between the Parties' activities on the wholesale market for international roaming in the Netherlands created by the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for wholesale international roaming. Thus, this market will not be further examined in this decision.

7. COMPETITIVE ASSESSMENT

7.1. ANALYTICAL FRAMEWORK

- (286) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.
- (287) In this respect, a merger may entail horizontal and/or non-horizontal effects. Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. Non-horizontal effects are those deriving from a concentration where the undertakings concerned are active in different relevant markets.
- (288) As regards, non-horizontal mergers, two broad types of such mergers can be distinguished: vertical mergers and conglomerate mergers.¹⁷⁰ Vertical mergers involve companies operating at different levels of the supply chain.¹⁷¹ Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers).¹⁷²
- (289) A case where a merger entails both horizontal and non-horizontal effects may for instance be when the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned. In such a case, the Commission will appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices.¹⁷³
- (290) The Commission appraises horizontal effects in accordance with the guidance set out in the relevant notice, that is to say the Horizontal Merger Guidelines.¹⁷⁴ Additionally, the Commission appraises non-horizontal effects in accordance with

¹⁷⁰ Non-Horizontal Merger Guidelines, recital 3.

¹⁷¹ Non-Horizontal Merger Guidelines, recital 4.

¹⁷² Non-Horizontal Merger Guidelines, recital 5.

¹⁷³ Non-Horizontal Merger Guidelines, recital 7.

¹⁷⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31, 05.02.2004.

the guidance set out in the relevant notice, that is to say the Non-Horizontal Merger Guidelines.¹⁷⁵

7.2. HORIZONTAL ASSESSMENT

7.2.1. Introduction

- (291) The Horizontal Merger Guidelines distinguish between two main ways in which mergers between actual or potential competitors on the same relevant market may significantly impede effective competition, namely non-coordinated and coordinated effects.
- (292) Under the substantive test set out in Article 2(2) and (3) of the Merger Regulation, also mergers that do not lead to the creation or the strengthening of the dominant position of a single firm may be incompatible with the internal market. Indeed, the Merger Regulation recognises that in oligopolistic markets, it is all the more necessary to maintain effective competition.¹⁷⁶ This is in view of the more significant consequences that mergers may have on such markets. For this reason, the Merger Regulation provides that "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition*".¹⁷⁷
- (293) The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger, such as the large market shares of the merging firms, the fact that the merging firms are close competitors, the limited possibilities for customers to switch suppliers, or the fact that the merger would eliminate an important competitive force. That list of factors applies equally regardless of whether a merger would create or strengthen a dominant position, or would otherwise significantly impede effective competition due to non-coordinated effects. Furthermore, not all of these factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.¹⁷⁸
- (294) Finally, the Horizontal Merger Guidelines describe a number of factors, which could counteract the harmful effects of the merger on competition, including the likelihood of buyer power, entry and efficiencies.

¹⁷⁵ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008.

¹⁷⁶ Merger Regulation, recital 25.

¹⁷⁷ Merger Regulation, recital 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines. See also Commission decision of 2 July 2014 in case No M.7018 – *Telefónica Deutschland/E-Plus*, recital 113; Commission decision of 28 May 2014 in case No M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 179; Commission decision of 12 December 2012 in case No M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 88.

¹⁷⁸ Horizontal Merger Guidelines, paragraph 26.

7.2.2. Possible market for retail supply of fixed multiple play bundles

7.2.2.1. The Notifying Parties' view

- (295) The Notifying Parties submit that given Vodafone's minimal presence in retail fixed the Transaction will have no material impact on the fixed multiple play bundles.
- (296) In particular, the Notifying Parties submit that Vodafone's market shares in fixed are modest and the proposed transaction will bring only a small increment to the current share of Ziggo on these markets. Post-transaction KPN will remain a leading provider of fixed services in the Netherlands exerting competitive pressure on the JV. The Notifying Parties further submit that the merged entity will continue to face strong competition also from other fixed players such as Tele2, Online and Fiber Nederland.
- (297) According to the Notifying Parties an additional competitive constraint will continue to exist also from a potential entry in fixed as wholesale access to KPN's fixed infrastructures is regulated, the necessary input for providing fixed services at retail level is available and entrance of new players on the fixed markets is possible.
- (298) Furthermore the Notifying Parties submit that Vodafone is not a particularly close competitor to Ziggo as Vodafone's gross adds and diversion ratios suggest its closest competitor would be KPN. In addition, the Notifying Parties submit that Vodafone is not particularly price aggressive in its commercial strategy compared to other small players. The Parties also argue that Vodafone is not, and will not be, an important competitive force on the Dutch market as its projected growth in fixed retail services is modest ([0-5]% market share by 2020).
- (299) Finally, the Notifying Parties argue that Vodafone's investments in fixed services are not significant and as it relies on KPN's infrastructures for the provision of retail fixed services to consumers potential new entrants can replicate its current position based on the regulated wholesale access to KPN's fibre and copper networks.

7.2.2.2. Access regulation for fixed line services

Fixed networks and access regulation in the Netherlands

- (300) Vodafone, as well as all other competitors present in the market with the exception of Ziggo and other regional or local cable providers, provide their fixed line services in the Netherlands¹⁷⁹ by means of access to one or both of the networks of KPN.
- (301) KPN owns and operates two fixed line telecommunications networks in the Netherlands, a fibre to the home network ("FttH") operated by its subsidiary Reggefiber and a hybrid fibre-copper network. Both of these networks are subject to ex-ante access regulation in the form of local unbundling under the terms of the ACM's decision of 17 December 2015¹⁸⁰ resulting from the market review carried out

¹⁷⁹ I.e. retail markets for (i) fixed telephony services, (ii), fixed internet access services and (iii) TV services referred to in sections 5.1, 5.2, and 5.3 above.

¹⁸⁰ See <https://www.acm.nl/nl/publicaties/publicatie/15087/Marktanalysebesluit-ontbundelde-toegang-2016--2019/>. The draft measure was notified to the Commission under article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for

in the period of October 2013 to October 2015. More specifically, the ACM has imposed wholesale tariff caps on access to the unbundled local copper loop at the main distribution frame (MDF), to a virtual unbundled access product ("VULA") which is offered at metro core locations and gives access to vectored copper lines, and to unbundled local access to FttH at the optical distribution frame (ODF).¹⁸¹

- (302) Ziggo operates a hybrid fibre-coax network covering over 90% of Dutch households.¹⁸² This network is not subject to access regulation and Ziggo presently also does not provide access to it to any third party on voluntary commercial terms.
- (303) KPN's FttH network reaches 27% of Dutch households¹⁸³, whereas the remainder of households are served using the hybrid fibre-copper network.

Vodafone's fixed line business

- (304) Vodafone is able to offer fixed line services to [...] reached by KPN's FttH network using optical distribution frame (ODF) unbundling¹⁸⁴; the customers served in this way account for around [...] of its fixed customer base. For the remainder of the FttH footprint, Vodafone offers fixed line services using unregulated wholesale broadband access ("WBA") [...] Customers served in this latter way constitute a further [...] of its fixed customer base.¹⁸⁵ It follows that nearly [...] of Vodafone's customers – [...] – are customers of high speed fibre connectivity services. [...] ¹⁸⁶, [...]
- (305) In the rest of the Netherlands – that is to say, in order to offer services to the remaining [...] of households which are not passed by FttH – Vodafone relies on a commercial virtual unbundled access product offered by KPN on its hybrid fibre-copper network.¹⁸⁷ In this way, Vodafone is able to complete its offer and offer a nationwide service. The virtual product used by Vodafone is not the regulated VULA product, [...] Nevertheless, [...] ¹⁸⁸

electronic communications networks and services (the "Framework Directive") as case NL/2015/1794. The Commission issued comments by way of its Decision C(2015) 8657 of 30 November 2015.

¹⁸¹ Form CO, Annex 12, para 2.10(a).

¹⁸² According to information at <http://www.libertyglobal.com/oo-netherlands.html>, 7 million homes in the Netherlands are connected to Liberty Global's fibre-coax network (accessed on 12 July 2016). The total number of households in the Netherlands in 2015 was around 7.7 million (see <http://statline.cbs.nl/statweb/publication/?vw=t&dm=slen&pa=82905eng&d1=0,23-25,62&d2=%281-12%29-l&hd=160114-1608&la=en&hdr=t&stb=g1>, accessed 12 July 2016).

¹⁸³ According to information at <http://www.telecompaper.com/news/reggefiber-grows-to-21-million-homes-passed--1095697>, 2.1 million homes were passed in 2015 (accessed on 12 July 2016).

¹⁸⁴ Backhaul for ODF unbundling is obtained by [...]: see Form CO, annex 8, 1.4(i).

¹⁸⁵ Form CO, paragraph 6.124, indent (iii).

¹⁸⁶ Form CO, footnote 146.

¹⁸⁷ Referred to in the Form CO as "VULA" (virtual unbundled local access). For clarity, this decision avoids the term as regards Vodafone's access arrangements, as access does not in fact take place at local level. This decision is without prejudice to the Commission's position on any matters arising under the Framework Directive, including the substitutability or otherwise of virtual access products for unbundled local access.

¹⁸⁸ [...].

- (306) The access arrangements with KPN of the remaining players in the DSL part of the fixed market are further discussed below.

Concerns expressed relating to possible impact of the Transaction on the access regime going forward

- (307) In its submission of 5 July 2016 requesting referral, the ACM argues that there are strong indications that following a hypothetical unconditional approval of the merger there would be joint dominance on the part of KPN and Ziggo on potential retail fixed and fixed-mobile markets. It is further argued that KPN had, at that date, already filed a request with the regulator for a new market review arguing that conditions post-merger would have changed.
- (308) ACM states that "*whether the assessment of a collective joint dominance in a new market review by ACM will lead to the same kind of access regulation is currently unclear*" and that this "*makes the continuation of current wholesale local access regulation uncertain*". It argues that "*ACM is of the opinion that the uncertainty of the regulation as a direct result of the joint venture, has as a consequence that the current access regulation cannot be taken into consideration as a sufficiently certain future market condition in the assessment of the concentration*".¹⁸⁹
- (309) In its issues paper of 13 May 2016, Tele2 states that "*should the planned JV be allowed to go through by the Commission, KPN would seize the opportunity to request the ACM to broaden the wholesale local access market to include cable. If that were to happen, the access obligations currently imposed on KPN would likely be lifted, hence triggering adverse consequences for all operators relying on its network*".¹⁹⁰
- (310) The Notifying Parties, on the other hand, claim that the Transaction can have no impact on the obligation to regulate unless the ACM can demonstrate that such regulation is no longer necessary to ensure effective competition.¹⁹¹

Relevant counterfactual

- (311) The Commission evaluates mergers in the market context within which they arise, which includes the regulatory environment. Anticipated changes to the regulatory environment within the timeframe of the prospective merger analysis can be taken into account if future changes can be reasonably predicted.¹⁹²

¹⁸⁹ Request for referral under Article 9(2)(a) of the EC Merger Regulation in case M.7978 — Ziggo/Vodafone Netherlands/JV, paragraph 60 (page 13), Doc ID 1324.

¹⁹⁰ "Tele2's Observations on the Planned JV between Ziggo and Vodafone", dated 13 May 2016, page 10, Doc ID 265.

¹⁹¹ Form CO, Annex 12, para 1.1.

¹⁹² According to paragraph 9 of the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/ C 31/03), generally, the conditions existing at the time of the merger constitute the relevant comparison for evaluation the effects of a merger. Only in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.

- (312) In the case at hand, as just indicated, Tele2 has suggested that the proposed transaction could lead to a situation in which the ACM would be required to, or would be likely to choose to, lift the regulatory access obligations to the fixed access networks of KPN discussed above, thereby leading to less favourable terms of access for third parties to these networks, or their exclusion from access entirely, whereby competition in the provision of fixed retail internet access would be further reduced relative to the pre-merger situation. The ACM, for its part, says that the future of regulation in such a scenario would be uncertain.
- (313) There is, however, no suggestion that the regulatory environment would be likely to evolve in the near term absent the merger. In this respect it should be noted that, as already indicated, the market review on the basis of which the current access remedies are imposed is recent in date and that therefore, in the normal course of events, no significant changes are to be expected in the next two to three years at least.
- (314) The question therefore arises whether a possible change in the regulatory environment might result from the proposed transaction itself. If this were to be the case and such a change could be reasonably predicted, the impact that it would have on competition in the affected markets might need to be assessed.
- (315) The Commission is not in a position to carry out such an assessment in lieu and instead of the national regulator, and *a fortiori* in the context of a merger review procedure. In the circumstances of the present case, however, the Commission is of the view that such an outcome is at the very least uncertain, if not implausible, even if the Transaction were to be cleared without remedies.
- (316) The Commission considers that whilst it is not possible within the framework of a merger review process to carry out the type of market assessment upon which the regulatory decision would ultimately need to be based, it seems unlikely on *a priori* grounds that the elimination of a competitor whose commercial offer was based on, or derived from, regulated access to KPN's networks would lead to a situation in which the downstream retail market would as a result tend towards effective competition and therefore that there would no longer be a need for wholesale regulation. Indeed, if this were the case the grounds for the concerns expressed in the context of the proposed transaction would most likely not be present and therefore such concerns will most likely not arise. There also seem to be no sufficiently convincing grounds to believe that in such a scenario the situation regarding significant market power on the upstream wholesale market would be materially altered.¹⁹³ Whilst this cannot be entirely excluded, it does not represent an outcome which can be reasonably predicted.

Conclusion

- (317) In view of the above, the Commission considers that it is required to carry out its merger analysis on the basis of the existing regulatory conditions and that the Transaction itself cannot be reasonably predicted to have a material impact on these conditions within the timeframe of the prospective merger analysis.

¹⁹³ This conclusion is without prejudice to any possible future finding by the ACM in the context of market review about the competitive situation on the wholesale market.

7.2.2.3. Commission's assessment

- (318) The Commission considers that the proposed transaction threatens to reduce competition on the possible retail market for fixed multiple play bundles in the Netherlands. The impact of the Transaction should be assessed also in a dynamic manner in view of the potential of Vodafone, despite its current relatively modest market presence, to become an important competitive force and a major challenger of the two main players KPN and Ziggo.

Vodafone as a recent successful entrant in fixed

- (319) In the past Vodafone has attempted several times to enter the fixed markets in the Netherlands: first, using the Tiscali platform in 2007 (DSL fixed service consisting of retail fixed internet and telephony) which was terminated in 2009 after Tiscali was acquired by KPN and, second, following a commercial agreement with KPN in 2009 for WBA access to KPN's FttH infrastructure.¹⁹⁴ The first subscribers for the fibre-based fixed triple play offer of "Vodafone Thuis" (or "Vodafone at home") brand were activated in March 2012.
- (320) Vodafone was not able to introduce fixed offering based on DSL over copper until 2014. Only after the acquisition of Wiericke in May 2013 Vodafone could build its own ISP platform and introduced fixed triple play over DSL in October 2014.
- (321) In the course of less than two years Vodafone has managed to gain a nearly [0-5]% market share (on the basis of market reconstruction¹⁹⁵ data) in fixed multiple play bundles. The vast majority of Vodafone's sales in fixed are accounted for by fixed-only triple play bundles making around [90-100]% of its fixed sales, which is also reflected in its current market shares in dual play and triple play.¹⁹⁶

Table 8: Market shares by subscribers on the possible retail markets for **dual play** and **triple play** for Q1 2016

	Dual play		Triple play	
	N of subscribers	Market share	N of subscribers	Market share
Ziggo	[...]	[40-50]%	[...]	[60-70]%
Vodafone	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[40-50]%	[...]	[60-70]%
KPN	[...]	[40-50%]	[...]	[20-30%]
Tele2	[...]	[5-10%]	[...]	[0-5%]
Online.nl (M7)	[...]	[0-5%]	[...]	[0-5%]
TOTAL	[...]	[90-100]%	[...]	[90-100]%

Source: Commission market reconstruction data

¹⁹⁴ As explained above, KPN's FttH infrastructure has only a limited coverage on the Dutch territory – in 2012, when Vodafone started activating its first fixed subscribers the FttH network of KPN was covering 1.3 million homes passed (out of a total of around 7.6 million households).

¹⁹⁵ The Commission engaged in an exercise of reconstructing market shares for the dual play, triple play and quadruple play bundles. For the analysis it took operators into account that provided their services on a national level. The Commission was unable to gather data from the operator Stipte. Given that this provider operates on a small scale, the Commission is of the view that the market shares calculated still provide a good approximation of the relative positions of the providers in the market.

¹⁹⁶ Form CO, paragraph 6.85.

- (322) While a market share of [0-5]% appears modest, especially compared to the market shares of the other established players in the market, it is important to note that Vodafone's current market share in fixed needs to be put into context: the fixed markets in the Netherlands appear to be rather mature, rapid shifts in market positions are not very likely and this market share was obtained over a relatively short period of time.
- (323) In the light of the above, the quarterly growth rates of Vodafone for both dual play and triple play between Q4 2014 and Q1 2016 are quite indicative: [...]

Table 9: Quarter-by-quarter dual play growth rates

Dual play	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015	Q1 2016
Vodafone	[...]	[...]	[...]	[...]	[...]	[...]
Ziggo	[...]	[...]	[...]	[...]	[...]	[...]
KPN	[...]	[...]	[...]	[...]	[...]	[...]
Tele2	[...]	[...]	[...]	[...]	[...]	[...]
Online.nl (M7)	[...]	[...]	[...]	[...]	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

Table 10: Quarter-by-quarter triple play growth rates

Triple play	Q4 2014	Q1 2015	Q2 2015	Q3 2015	Q4 2015	Q1 2016
Vodafone	[...]	[...]	[...]	[...]	[...]	[...]
Ziggo	[...]	[...]	[...]	[...]	[...]	[...]
KPN	[...]	[...]	[...]	[...]	[...]	[...]
Tele2	[...]	[...]	[...]	[...]	[...]	[...]
Online.nl (M7)	[...]	[...]	[...]	[...]	[...]	[...]

Source: Telecompaper report "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016

- (324) Internal documents of Vodafone suggest [...] ¹⁹⁷

[...] ¹⁹⁸

[...] ¹⁹⁹

[...] ²⁰⁰

¹⁹⁷ [Reference to Vodafone internal document].

¹⁹⁸ [Reference to Vodafone internal document].

¹⁹⁹ [Reference to Vodafone internal document].

[...] ²⁰¹

(325) [...].

Vodafone's investments in fixed

(326) Vodafone is currently offering fixed telecommunications services at retail level to consumers in the Netherlands on copper (DSL) and fibre (FttH) infrastructures via a combination of commercially negotiated agreements with KPN and regulated access.

(327) For copper, Vodafone has chosen instead of using the KPN's regulated Virtual Unbundled Local Access ("VULA") offer, which requires from the access seeker to first roll out a backhaul network to the respective metro core locations i.e. to around 160 Points of Presence ("PoPs") ²⁰², to enter into a commercial agreement with KPN [...]. Under this commercial agreement [...].

(328) As regards fibre, Vodafone has deployed its own backhaul [...] to a number of area level and city level exchanges (ODF locations), where it has installed the necessary equipment to use the regulated fibre unbundled offer of KPN and accessed [...] of the KPN's FttH footprint (i.e. [...]). For the remainder of the fibre footprint of KPN (i.e. around [...]) Vodafone relies on a commercial agreement with KPN for WBA type of access to fibre.

(329) An integral part of Vodafone's investment strategy was the acquisition of Wiericke ²⁰³ in May 2013, [...] ²⁰⁴ [...]

[...] ²⁰⁵

[...] ²⁰⁶

[...] ²⁰⁷

[...] ²⁰⁸

(330) A further crucial step towards the expansion of Vodafone's presence in fixed was the rolling out of its own network to ODF locations on the KPN/Reggefiber FttH footprint to unbundle fibre. Vodafone planned [...]. ²⁰⁹

200 [Reference to Vodafone internal document].

201 [Reference to Vodafone internal document].

202 Tele2, as an established entrant has already deployed a backhaul to metro core level and is currently using the regulated VULA offer.

203 Wiericke was a provider of triple-play services over fibre, operating under the brand names GlasOperator and Wisper and was active in the provision of ICT systems for infrastructure.

204 Prior to the acquisition of Wiericke Vodafone was relying on KPN's wholesale ISP platform.

205 [Reference to Vodafone internal document].

206 [Reference to Vodafone internal document].

207 [Reference to Vodafone internal document].

208 [Reference to Vodafone internal document].

- (331) In relation to Vodafone's investment in ODF equipment rollout, Vodafone's internal documents suggest that [...] According to internal Vodafone documents [...].²¹⁰
- (332) [...] ²¹¹

[...]

- (333) [...] ²¹²
- (334) While access to FttH via ODF unbundling is indeed regulated, the Commission notes that to date Vodafone is the only operator in the Netherlands that has invested on a substantial scale in this type of wholesale access.
- (335) [...] ²¹³
- (336) The claims of the Notifying Parties that in practice ODF unbundling is of limited competitive importance, to some extent because of the lack of nationwide coverage [...]
- [...] ²¹⁴
- [...] ²¹⁵
- (337) The ODF unbundling was also perceived by Vodafone as [...] ²¹⁶:

[...]

- (338) The Commission also notes, that the market investigation did not provide any evidence to back up the Parties' claims that [...] ²¹⁷. As mentioned in paragraph (331) above [...]
- (339) From a comparative perspective, due to its own ISP platform, backhaul infrastructure and unbundled ODF access, Vodafone appears currently to be in a better position in fixed as an operator (i.e. in terms of differentiation and quality of services offered to its clients, faster broadband speeds, etc.) compared to other established or potential access seekers. Furthermore, by being the only alternative operator to have engaged

²⁰⁹ [Reference to Vodafone internal document].

²¹⁰ [Reference to Vodafone internal document].

²¹¹ [Reference to Vodafone internal document].

²¹² [Reference to Vodafone internal document].

²¹³ [Reference to Vodafone internal document].

²¹⁴ [Reference to Vodafone internal document].

²¹⁵ [Reference to Vodafone internal document].

²¹⁶ [Reference to Vodafone internal document].

²¹⁷ <https://www.acm.nl/en/publications/publication/13464/For-the-next-three-years-Dutch-telecom-company-KPN-must-continue-to-grant-its-competitors-access-to-its-network/>

in unbundling ODF FttH access, Vodafone seems to have grasped a unique strategic opportunity, as evidenced by Vodafone's internal documents:

[...] ²¹⁸

- (340) [...] This will translate into the elimination of an alternative operator who is in the position to play the role of challenger and disrupt the fixed multiple play markets moving forward.

Vodafone's projections and ambitions in fixed

- (341) Vodafone has publicly stated ²¹⁹ its intent to invest in and disrupt the Dutch fixed markets with the ambition to strengthen its position as a challenger [...] ²²⁰

[...] ²²¹

- (342) One way of achieving this target would be [...]

[...] ²²²

Aggressiveness of Vodafone

- (343) In terms of pricing, the information in the Form CO indicates that for comparable download speeds – even if Vodafone is not the most aggressive player (which appears to be Tele2), Vodafone is pricing below KPN and Ziggo. This seems to be in line with the perception of competitors expressed in the market investigation: *"Vodafone's prices for fixed services are relatively low (both FttH and DSL) and Vodafone differentiates its offers from KPN and Ziggo by offering more flexibility and symmetry in up/download speed"* and *"Vodafone has an offer on their own FttH network with which they are a serious competitor of Ziggo and KPN mostly on price. For their copper based services, they have a comparable offer to the rest of the competition."* ²²³
- (344) Vodafone might not be the most price-aggressive/cheapest provider but its prices are in general lower than the prices of both Ziggo and KPN for comparable offers. [...] ²²⁴ [...]
- (345) Vodafone is benchmarking and positioning itself mostly vis-à-vis KPN and Ziggo – being "on par" for its product offering in various aspects while seeking to

²¹⁸ [Reference to Vodafone internal document].

²¹⁹ Integrated report Vodafone Netherlands 2012-2013, available at https://www.vodafone.nl/assets/downloads/algemeen/vodafone_netherlands_integrated_report2012%202013.pdf

²²⁰ [Reference to Vodafone internal document]

²²¹ [Reference to Vodafone internal document]

²²² [Reference to Vodafone internal document].

²²³ See replies to Q1 – Retailers of 15 June 2016, question 48.

²²⁴ See Attachment G30 to the Form CO.

differentiate and improve vis-à-vis KPN and Ziggo as regards other respects of its product offering. Vodafone [...] ²²⁵

(346) During the market investigation, market participants that provided a meaningful answer to the question on how Vodafone's multiple play bundles (in general) compare to the offers of its competitors, explain that *"the pricing of Vodafone appears to be challenging compared to competitors"*, its offers have *"both some strengths (longest discount period, lowest variable price for voice, after Ziggo highest internet speed, etc.) and some weaknesses (lowest number of channels, high one-time costs, no additional free internet services)"*; and that it *"currently has an aggressive proposition on fixed services and has been decreasing prices in recent years"*. ²²⁶

(347) Internal documents, quoted in the paragraphs (329), (336) and (345) above [...]

(348) Ziggo's internal documents appear [...]

[...] ²²⁷

(349) Diversion ratios for 2015 for Ziggo ²²⁸ show that Ziggo loses customers mostly to KPN [...] and its low-cost brand Telfort [...] and then to Vodafone [...]. The Ziggo churners to Vodafone are more numerous than the churners to Tele2 for example [...] or to another KPN brand - XS4ALL [...] Similarly, most Vodafone churning customers ²²⁹ go to KPN (around [...]), then to Ziggo (around [...]) and to Tele2 (around [...]). In essence, these figures demonstrate that while both Ziggo and Vodafone are losing more shares to other competitors, they remain close competitors to each other.

(350) Vodafone is [...]

[...]

Source: Form CO, figure 6.10

Barriers to Entry

(351) As regards the likelihood of new competitors entering the possible market for fixed multiple play bundles (any combination of fixed internet access, fixed telephony and TV services into dual play and triple play), the Commission considers that such entry is unlikely due to the high barriers to entry.

(352) The majority of market participants consider entry into the retail markets for fixed internet access and fixed telephony to be difficult or very difficult ²³⁰ for a new

²²⁵ [Reference to Vodafone internal document]

²²⁶ See replies to Q1 – Retailers of 15 June 2016, question 63.

²²⁷ [Reference to Liberty Global internal document].

²²⁸ See Form CO, Figure 6.11

²²⁹ See Form CO, Figure 6.12

²³⁰ See replies to Q1 – Retailers of 15 June 2016, question 54.

entrant for a number of reasons that include: the need for high upfront investments, the requirement to offer its services at low retail rates in order to be able to acquire market share in view of the mature market (big players with their own infrastructure with substantial market position), the lack of wholesale access to the cable infrastructure in general and on regulated terms as well as concerns voiced by respondents about lifting the existing access regulation to KPN's networks.

- (353) For unbundling-based fixed access, as one respondent points out, an additional entry barrier is the timing mismatch between the necessary investment into the network, and the time it takes to reach sufficient scale in terms of a customer base to get a positive cash flow. Building an independent fixed network is also associated with large entry barriers, given the size of the investment needed to reach nationwide scale, as confirmed by the same respondent.
- (354) In view of the high penetration of triple play bundles on the Dutch market, any potential competitor at retail level offering fixed telecommunications services (telephony and internet access) would most probably need to be able to offer also fixed bundles comprising TV services in order to be competitive on the market. The results of the market investigation did not provide a clear picture in relation to this point as market participants seem to be divided as to the level of difficulties an operator already active in the provision of fixed internet access and/or fixed telephony would face in entering the market for TV services.²³¹ Certain respondents acknowledge that having in place the infrastructure that serves as a distribution channel is certainly helpful while other market players stress the difficulty of getting access to attractive content and sign agreements with TV channels (which is perceived as more challenging for new entrants with little or no scale to negotiate sufficiently favourable terms).
- (355) Market players do not expect any new operator to enter the fixed internet market in the near future (two to three years); as regards entry in fixed telephony Google is indicated as a potential entrant while for TV services respondents point only to possible unnamed entrants with OTT initiatives.²³²
- (356) As regards the current regulated wholesale access the majority of the respondents to the market investigation consider that it allows access seekers to offer competitive fixed telephony and fixed internet access services at retail level.²³³ The respondents are however divided in their opinion whether the regulated access allows for the operators taking it to offer competitive TV services.
- (357) The majority of the respondents that participated in the market investigation consider, for the same reasons as outlined above for entry into the markets for individual fixed services, that the entry into the possible fixed dual play and triple play markets is either difficult or very difficult: the only wholesale access provider for fixed is KPN;

²³¹ See replies to Q1 – Retailers of 15 June 2016, question 55.

²³² See replies to Q1 – Retailers of 15 June 2016, question 57.

²³³ See replies to Q1 – Retailers of 15 June 2016, question 58.

it is difficult for a provider that does not have any customer base; and, required investments of network level are considered prohibitive.²³⁴

- (358) The only potential new entrant in the provision of fixed multiple play bundles indicated by respondents in the market investigation is the Dutch energy company Nederlandse Energiemaatschappij ("NLE"). In April 2016, NLE announced that it will enter the markets for retail internet, TV and fixed telephony services in the Netherlands, using access to the KPN network and offering also all-in-one packages.²³⁵

7.2.2.4. Conclusion

- (359) In light of the above, and in particular the indications provided in the market investigation, including from internal documents of the Parties, that Vodafone appears to have a greater influence on the competitive process in the concentrated fixed markets than its modest market share might suggest, the Commission considers that Vodafone has the ability and incentive to further develop its presence in fixed services at retail level into an important competitive force in the market. The Commission therefore concludes that the proposed transaction eliminates an important player in the concentrated fixed markets in the Netherlands and thus raises serious doubts as to its compatibility with the internal market as regards the possible retail market for provision of fixed multiple play bundles (dual play and triple play) in the Netherlands.

7.2.3. *Possible market for retail supply of fixed-mobile multiple play bundles*

7.2.3.1. The Notifying Parties' view

- (360) First, the Notifying Parties consider that no distinct market for multiple play bundles (or for fixed-mobile multiple play bundles) separate from the individual components exists. However, if such possible markets are to exist, the Notifying Parties submit that the proposed transaction will not result in any negative effects on competition for the following reasons: the merged entity will have only a modest combined market share of [10-20]% by number of subscribers²³⁶ and will continue to face significant competitive constraint from existing competitors, notably KPN, which is the leading player in quadruple play with a [80-90]%²³⁷ market share.
- (361) In addition to KPN, according to the Notifying Parties, other players such as Tele2, Fiber Nederland (through the recently acquired company Stipte), Delta and Solcon are also in the position of offering fixed-mobile bundles and therefore imposing a competitive constraint on the merged entity in relation to fixed-mobile bundles.
- (362) Finally, the Notifying Parties claim that the merged entity will be constrained also by the threat of new entry by potential new entrants such as Online (part of the M7 Group), which is already active in fixed and can easily become an MVNO and start

²³⁴ See replies to Q1 – Retailers of 15 June 2016, question 66.

²³⁵ <http://www.nu.nl/internet/4241696/nederlandse-energie-maatschappij-wordt-internetprovider.html>

²³⁶ Market share based on Notifying Parties' estimates, see paragraph 6.250 of the Form CO.

²³⁷ Market share also based on Notifying Parties' estimates.

offering fixed-mobile bundles, or T-Mobile (currently a mobile-only player and a Mobile Virtual Operator "MNO") which was in the past active also in the provision of fixed services before it divested Online in 2014.

7.2.3.2. Commission's assessment

- (363) Vodafone has introduced fixed-mobile bundles in the Netherlands only very recently – in the last quarter of 2015. Over this extremely short period of time, it has gained a market share of [0-5%] in Q1 2016 for quadruple play bundles and appears to have been very successful in cross-selling fixed-mobile bundles to its customer base: around [...] of Vodafone's existing fixed customers are also Vodafone mobile subscribers.²³⁸
- (364) In relation to the exact market share of Vodafone for fixed-mobile bundles (which would encompass all types of fixed-mobile bundles including fixed-mobile dual play and triple play), it should be noted that given that [50-60]% of Vodafone's dual play subscribers have a dual play package that includes a mobile service and [5-10]% of its triple play subscribers have a fixed-mobile triple play package, whereas the respective proportions of Ziggo's dual play and triple play subscribers that have a fixed-mobile package are [0-5]% and [0-5]% respectively, Vodafone's actual market share in fixed-mobile bundles would probably be higher than [0-5%] and the combined market share of the merged entity in the possible market for fixed-mobile bundles would therefore be higher than its [10-20%] market share in quadruple play.

Table 11: Quadruple play market shares based on number of subscribers

	Q3 2015	Q2 2015	Q1 2016
Ziggo	[10-20%]	[10-20%]	[10-20%]
Vodafone	0%	[0-5%]	[0-5%]
Combined	[10-20%]	[10-20%]	[10-20%]
KPN	[80-90%]	[80-90%]	[80-90%]
TOTAL	100%	100%	100%

Source: Commission market reconstruction data

- (365) Whereas the growth rates data available for Vodafone quadruple play is inevitably limited in light of its very recent launch of quadruple play bundles [...] ²³⁹
- (366) Currently, there are only three retail operators in the Netherlands offering fixed-mobile multiple play bundles at national scale: KPN, Ziggo and Vodafone. The proposed transaction will lead to the reduction of the current number of players in the possible fixed-mobile multiple play market from three to two. Certain market participants (the complainants) consider also that the creation of the JV, in the absence of Vodafone as a challenger and new entrant, will accelerate significantly the transition of the retail telecommunications markets in the Netherlands to fixed-mobile bundles as the JV will actively push quadruple play bundles on the market.
- (367) For the reasons explained in detail in the preceding section 7.2.2 the Commission considers that Vodafone is geared to become an important competitive force in the

²³⁸ Form CO, paragraph 6.86.

²³⁹ Telecompaper report, "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016.

provision of fixed multiple play bundles. Vodafone's success in fixed bundles places it in a very good position to compete for the provision of fixed-mobile and quadruple play bundles given also that it is active as an MNO in the provision of retail mobile services. In a forward-looking perspective, Vodafone's presence and success in fixed are intrinsically linked to the competitive pressure it currently exerts and would have continued to exert in the possible fixed-mobile bundles market absent the Transaction.

- (368) Evidence from internal documents is indicative of Vodafone's intentions to be competitive in fixed-mobile bundles as well as of the importance of having a presence in fixed as a prerequisite for competing in quadruple play:

[...] ²⁴⁰

- (369) Convergence between fixed and mobile represents also an opportunity for Vodafone to cross-sell fixed-mobile bundles to its mobile customer base and to accelerate its overall growth:

[...] ²⁴¹

- (370) Another important factor in relation to convergence and fixed-mobile bundles is the reduced customer churn compared to the churn rates for fixed-only services or for mobile services – market participants [...] consider that churn in fixed-mobile is significantly lower and customers can be "locked in":

[...] ²⁴²

- (371) A capital markets presentation by KPN ²⁴³ (referenced above as Figure 1) suggests that the churn on quadruple play is four times lower compared to single play in fixed and two times lower compared to single play in mobile. The annual churn for 2015 (KPN brand only) stands at [...] for both fixed and mobile compared to a [...] customer churn in fixed-mobile. ²⁴⁴

- (372) The lower churn rates in fixed-mobile bundles associated with fixed-mobile bundles, reduce the opportunities for operators, other than the incumbent, to attract quadruple play customers and compete on the possible converged bundles market. According to Liberty Global's internal document, the latter considers that:

²⁴⁰ [Reference to Liberty Global internal document].

²⁴¹ [Reference to Vodafone internal document].

²⁴² [Reference to Liberty Global internal document].

²⁴³ Slide 35 of "KPN Capital Markets Day 2014", dated 19 February 2014, accessible at <https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiwyrqAkYzOAhXMKcAKHUbpDmoQFggjMAE&url=http%3A%2F%2Fphx.corporate-ir.net%2FExternal.File%3Ft%3D1%26item%3DVIHwZT0yfFBhcmVudEIEPTUxMDc0NzF8Q2hpbGRJRd01ODE5NzQ%3D&usg=AFQjCNGcvwxPCTx-x0K9Dn31g137hvVIUw&sig2=7dAPGbaaiSYhPLJVahaneA&cad=rja>

²⁴⁴ [Reference to Liberty Global internal document].

[...] ²⁴⁵

- (373) Most respondents to the market investigation also considered entry into the provision of fixed-mobile bundles (including fixed –mobile dual play and triple play) to be either difficult or very difficult basically for the same reasons for which market participants consider entry into the fixed markets to be difficult: the high investments required, the margin between wholesale price of access and the low retail pricing necessary to attract customers, etc.²⁴⁶ In addition, a market player explains that it is more likely that an already established fixed operator expands its offering into fixed-mobile bundles by adding a mobile component (which given the number of mobile players does not seem to be a particularly difficult), whereas the other way around (a mobile player expanding into fixed) however is more challenging due to the higher switching barriers and the need to obtain access to the KPN's infrastructure.
- (374) The only potential entrant in the possible market for fixed-mobile bundles that market participants indicated is Tele2.²⁴⁷ Indeed Tele2 appears to be in a position to start offering fixed-mobile bundles given that it has access to the mobile component (being a MNO on its own 4G network and a MVNO on T-Mobile's 2G and 3G network) as well as to the fixed component via regulated VULA access to KPN's copper network. However the Commission notes in this respect that, as indicated in paragraph (93) above in order to attract customers to fixed-mobile bundles a provider should offer these at competitive pricing and should incentivise customer uptake via offering either a discount or a non-price additional benefit. Tele2 has recently invested nearly EUR 430 million in its mobile network (mainly for the roll-out of 4G)²⁴⁸ and appears to be focusing on the provision of mobile services and in particular on "data-hungry" consumers therefore making it unclear whether there is likelihood or scope for further investment in its fixed business or launch of fixed-mobile bundles. Tele2's market share in fixed only multiple play has been recently stagnating (around [...]).²⁴⁹
- (375) The other hypothetical major entrant in the fixed-mobile bundles would be T-Mobile, which at present is active solely in the provision of retail mobile services and appears to have been pursuing a mobile-only strategy in the last couple of years. In the past T-Mobile has been active also in the provision of fixed services but exited in 2014 when it divested Online.²⁵⁰ The Commission acknowledges that T-Mobile could be a possible entrant in fixed-mobile bundles but also notes that there are no indications that such entry is likely to take place in the near future. Furthermore, in light of the importance of the time aspect of entry as pointed out in paragraph (371) above – and the timing mismatch between the necessary investment into network access (which as stated in paragraphs (319) and (320) took Vodafone a number of years) and the time it takes to reach sufficient scale in terms of customer base, at this point in time it

²⁴⁵ [Reference to Liberty Global internal document].

²⁴⁶ See replies to Q1 – Retailers of 15 June 2016, question 66.

²⁴⁷ See replies to Q1 – Retailers of 15 June 2016, questions 67 and 68.

²⁴⁸ See <http://www.telecompaper.com/commentary/tele2-nl-one-sided-investment-in-4g-destroying-value-elsewhere--1125197>

²⁴⁹ Telecompaper report, "Dutch Consumer Multiplay Market Q1 2016" from 17 June 2016.

²⁵⁰ T-Mobile has very recently launched its OTT television services under the brand "Knippr".

seems unclear to what extent such hypothetical entry could happen soon enough. The importance of the timing aspect for the fixed-mobile entry is further compounded by the low churn rates in quadruple play and the lock-in of fixed-mobile customers.

- (376) As regards other fixed players with nationwide scope of their fixed offer that could potentially be considered as possible entrants in the provision of fixed-mobile bundles, such operators would inevitably face [...] In light of [...]

7.2.3.3. Conclusion

- (377) In light of the above, and in particular the elimination of Vodafone as a provider of fixed-mobile bundles that has the potential to exert significant competitive pressure moving forward on the possible market for fixed-mobile bundles, the Commission considers that the proposed transaction raises serious doubts as to its compatibility with the internal market as regards the possible retail market for the provision of fixed-mobile multiple play bundles (quadruple play and fixed-mobile dual play and triple play bundles) in the Netherlands.

7.2.4. *Retail mobile telecommunications services*

7.2.4.1. The Notifying Parties' view

- (378) The Notifying Parties submit that the proposed transaction would not give rise to any competitive concerns in relation to the retail market for mobile telecommunications services in the Netherlands for the following reasons. First the increment brought about by the proposed transaction is minimal (around [0-5]%) in the context of a highly competitive mobile market in the Netherlands with the presence of three strong MNOs (KPN, T-Mobile and Tele2). Second, Ziggo does not have a meaningful standalone presence on this market given that it sells mobile services only to its fixed subscribers' base. Third, as suggested by diversion ratios, Ziggo is not a close competitor of Vodafone - diversion ratios from Vodafone to Ziggo stand at [...] % with KPN being by far the closest competitor to Vodafone attracting [...] % of Vodafone switchers, followed by T-Mobile which attracts [...] % of Vodafone switchers respectively. Fourth, the JV will face post-transaction strong competitive pressure from the other MNOs as well as from MVNOs (the largest being Lebara, Lycamobile and Simpel, together accounting for almost [...] % of MVNO subscribers).
- (379) Finally, the Notifying Parties submit that the JV will face also additional constraints from the threat of entry. Although barriers to entry for an MNO with its infrastructure are high, the Notifying Parties claim that the recent conversion of Tele2 from an MVNO to an MNO²⁵¹ demonstrates that these barriers are not unsurmountable, noting however that no further MNO entry is expected. The Notifying Parties further submit that the barriers for MVNO entry are low and point to recent market entrants like OpenMobile, Dekatel, Dean Mobile, Chooze, Solcon, etc.

²⁵¹ Tele2 launched its own 4G network in 2015 but still relies to T-Mobile for 2G and 3G access in the Netherlands.

7.2.4.2. Commission's assessment

- (380) The Parties and their main competitors' market shares by number of subscribers for the overall retail mobile market as well as for the possible segmentation into pre-paid and post-paid as well as into private customers and business customers are illustrated in Table 12 and Table 13 below. As shown below the increment brought about by the proposed transaction would be around [0-5]% under any possible market segmentation. Such a low increment alone would be enough to conclude that the Transaction is unlikely to affect the structure of the market.

Table 12: Market shares for the retail provision of mobile services for 2015 by number of subscribers

	All mobile		Pre-paid		Post-paid	
	Subs	%	Subs	%	Subs	%
Vodafone	[...]	[20-30]%	[...]	[10-20]%	[...]	[20-30]%
Ziggo	[...]	[0-5]%	[...]	-	[...]	[0-5]%
Combined	[...]	[20-30]%	[...]	[10-20]%	[...]	[20-30]%
KPN	[...]	[30-40]%	[...]	[20-30]%	[...]	[30-40]%
T-Mobile	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%
Tele2	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%
Lebara	[...]	[5-10]%	[...]	[10-20]%	[...]	-
Lycamobile	[...]	[0-5]%	[...]	[10-20]%	[...]	-
Others	[...]	[10-20]%	[...]	[20-30]%	[...]	[5-10]%
TOTAL	[...]	[90-100]%	[...]	[90-100]%	[...]	[90-100]%

Table 13: Market shares for the private and business segments of the retail market for mobile services for 2015 by number of subscribers

	Private		Business	
	Subs	%	Subs	%
Vodafone	[...]	[20-30]%	[...]	[30-40]%
Ziggo	[...]	[0-5]%	[...]	[0-5]%
Combined	[...]	[20-30]%	[...]	[30-40]%
KPN	[...]	[30-40]%	[...]	[40-50]%
T-Mobile	[...]	[10-20]%	[...]	[10-20]%
Tele2	[...]	[5-10]%	[...]	[0-5]%
Lebara	[...]	[5-10]%	[...]	-
Lycamobile	[...]	[0-5]%	[...]	-
Others	[...]	[10-20]%	[...]	[5-10]%
TOTAL	[...]	[90-100]%	[...]	[90-100]%

- (381) In any event, the Commission also notes that Ziggo is active on the mobile market in the Netherlands as an MVNO and post-transaction there will be four MNOs active in the country: the market leader KPN, followed by the JV, T-Mobile and Tele2. These three MNOs will continue to exert significant competitive pressure on the merged entity for the provision of mobile services at retail level post-transaction.
- (382) Given Ziggo's gross adds for the post-paid segment of the mobile market for 2015 which stand at [...], which is lower than the gross adds of all other MNOs on the

market (KPN with [...], T-Mobile with [...], Vodafone with [...] and Tele2 with [...], it does not appear that Ziggo is a particularly aggressive player in the provision of retail mobile services.

- (383) As regards closeness of competition, post-paid diversion ratios from Vodafone suggest that KPN, attracting [...] of Vodafone's churners, is the closest competitor of Vodafone whereas the diversion ratios to both T-Mobile and Tele2 are higher ([...] an [...]respectively) than the diversion ratio to Ziggo ([...]). Post-paid diversion ratios from Ziggo paint a similar picture as [...]of Ziggo's churners switch to KPN and [...]to T-Mobile compared to [...] to Vodafone.
- (384) In addition to the three MNOS, post-transaction the JV will face a competitive constraint also from a large number of MVNOs: the main ones being Lebara with a nearly [0-5]% market share on the overall mobile market and Lycamobile, the second largest MVNO with a [0-5]% market share.
- (385) The majority of respondents to the market investigation consider that the level of price competition in the retail market for mobile in the Netherlands (on the overall market as well as on the residential and business segments of it) is either high or very high and aggressive offers for both handset deals and SIM only offers are present on the market.²⁵²
- (386) The results of the market investigation also indicate that the closest competitor to Vodafone for the provision of retail mobile services is KPN, followed by T-Mobile. Respectively, the closest competitor of Ziggo indicated by the majority of respondents is also KPN.²⁵³
- (387) As to how Ziggo's mobile services offers compare with the offers of competitors, market participants explain that Ziggo is active solely in the SIM-only market, with competitive/low cost pricing and the mobile offerings of Ziggo are designed to protect its fixed customer base and are targeted at its existing customers.²⁵⁴
- (388) As to the possible existing barriers for customers to switch retail providers of mobile services, the majority of respondents consider such switching to be either easy or very easy, explaining in this respect that number portability has been established in the Netherlands for quite some time already, is facilitated by all operators and is free of charge.²⁵⁵

²⁵² See replies to Q1 – Retailers of 15 June 2016, question 29.

²⁵³ See replies to Q1 – Retailers of 15 June 2016, question 31.

²⁵⁴ See replies to Q1 – Retailers of 15 June 2016, question 32.

²⁵⁵ See replies to Q1 – Retailers of 15 June 2016, question 33.

- (389) In relation to barriers to entry into the retail mobile market in the Netherlands, the majority of the respondents consider it to be difficult or very difficult as high investments are needed (and even very high for an infrastructure player apart from the required licence) and gaining a customer base might be challenging. The main difficulties an MVNO would face are the high marketing investments versus the low margins in mobile (that is to say operating the business profitably facing the wholesale costs of access), as well as limited access to 4G at competitive rates.²⁵⁶
- (390) In 2010 Ziggo (in partnership with UPC) together acquired a mobile licence for 2x20 MHz in the 2.6 GHz band in the Auction in April 2010 with the intention to complement an MVNO set-up (allowing Ziggo to offload mobile traffic from 2G/3G via WiFi/LTE). In 2011 Ziggo signed a full MVNO agreement with Vodafone. Ziggo launched 4G services in October 2015 and by the end of 2015 Ziggo had 187 000 mobile subscribers.
- (391) To date the 2.6 GHz spectrum has been used by Ziggo [...]
- (392) The proposed transaction will combine the 2x20 MHz of Ziggo in the 2.6 GHz band with Vodafone's 2x10 MHz in the same band. Two retail competitors of the Notifying Parties on the mobile market (KPN and T-Mobile) consider that this spectrum aggregation could have anti-competitive effects. T-Mobile considers that this spectrum aggregation would place the JV in a superior position in small cells, access to which is vital for the future deployment of 5G to the detriment of other mobile players who would not be able to replicate this position.

Table 14: Spectrum holdings of the respective MNOs in the Netherlands (paired and unpaired)²⁵⁷

Spectrum	800 MHz	900 Mhz	1.8 GHz	1.9 GHz	2.1 GHz	2.6 GHz	Total
KPN	2x10	2x10	2x20	1x5	2x19.8	2 x10	2x69.8
						1x30	1x35
Vodafone	2x10	2x10	2x20	1x5.4	2x19.6	2x10	2x69.6
						1x5.4	
T-Mobile		2x15	2x30	1x24.6	2x20	2x5	2x70
						1x25	1x49.6
Tele2	2x10					2x20	2x30
						1x5	1x5
Ziggo						2x20	2x20

²⁵⁶ See replies to Q1 – Retailers of 15 June 2016, question 42.

²⁵⁷ Table 8.1, Form CO.

- (393) With respect to the spectrum aggregation resulting from the proposed transaction, the Commission notes that asymmetry in spectrum as such does not necessarily lead to anti-competitive effects but may actually stimulate competition among MNOs with differently sized spectrum holdings. The Commission notes that the proposed transaction does not have impact on the spectrum holdings of the other MNOs and assuming that the allegedly improved spectrum holding of the JV would improve the JV's mobile offering, such improvement would likely be beneficial for the end consumers. Furthermore the improved JV's mobile offering would also stimulate the other MNOs to in turn improve their offerings.
- (394) With respect to the impact of 5G in particular, the Commission notes that 5G technology is still under development. The standardisation process has just begun and 5G standards and associated technology and equipment should be available at the earliest as of 2020.²⁵⁸ Therefore, it cannot be established whether fixed-mobile players would actually have an advantage as compared to mobile only players.
- (395) Finally, the Commission notes that, beside the spectrum aggregation, the only other concern raised by complainants in connection to the retail market for mobile services is in fact related to the possible conglomerate effects of the proposed transaction which are addressed in the relevant Section 7.4 below.

7.2.4.3. Conclusion

- (396) In light of the above, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the retail market for mobile telecommunications services in the Netherlands.

7.2.5. *Retail business connectivity services*

- (397) The Transaction results in a horizontal overlap with regard to the Parties' activities in retail business connectivity services in the Netherlands as both Vodafone and Liberty Global are active in this market.
- (398) In addition, Vodafone is active in the provision of mobile business communication services to MNCs while Liberty Global focuses on the provision of fixed business connectivity services in the Netherlands and, in particular, to residential, SME and SOHO customers. According to the Notifying Parties, Liberty Global is, thus, not materially active in any cross-border business connectivity market serving MNCs.
- (399) Vodafone has a market share of 10-15% in the Dutch retail business connectivity services market and is one of a number of challengers to the incumbent KPN. Liberty Global is also active in this market, however with limited activities: its market share is 0-5%. Post-transaction, the combined market share of the Parties would range between 10-20%.²⁵⁹

²⁵⁸ See <https://ec.europa.eu/digital-single-market/news/more-smartphones-white-paper-shows-how-5g-will-transform-eu-manufacturing-health-energy>.

²⁵⁹ Source of these market share figures is the *ACM Telecom Monitor Q2 2014 and Q3 2015*. The figures provided reflect the data at the end of period Q3 of 2015. Market shares for "business communication services" are generally calculated on the basis of "seats", i.e. locations at which these services are provided. Each of the Parties submits data to the ACM regarding the number of connections offered to

- (400) KPN remains the biggest player in the Dutch retail business connectivity services market with 55-60% market share. Other players in this market are Tele2 with 10-15% market share, Eurofiber with 5-10% market share, and a number of smaller players who have a combined market share of 10-15%.
- (401) The results of the market investigation suggest that the impact of the Transaction is likely to be neutral on the retail market for business connectivity services.²⁶⁰ The majority of respondents who expressed a view consider that Vodafone and Ziggo are not close competitors in this market²⁶¹. Furthermore, most respondents do not consider Ziggo to be a significant competitor, since Ziggo's focus is on residential and SOHO customers.²⁶² A respondent to the market investigation submits that the main reason for Ziggo not being a significant competitor in this market is due to its cable network never having been rolled out to business parks. Thus, Ziggo's network provides no coverage in areas where most business users are concentrated in the Netherlands.
- (402) Furthermore, one respondent to the market investigation raised the concern that, post-transaction, the JV will be able to offer fixed-mobile bundles to business customers and render standalone fixed products unattractive, therefore, foreclosing single-product operators (fixed-only or mobile-only).
- (403) As regards the uptake of fixed-only or fixed-mobile bundled offers by large enterprise customers, the market investigation indicated that the needs of business customers vary largely and depend on each customer's sourcing strategy.²⁶³ More specifically with regard to fixed-mobile offers, uptake is not as widespread among business customers. A larger number of these customers still prefer to procure fixed and mobile services separately from different suppliers even though there are instances where mobile services are being paired with fixed services at a later stage, following an initial bid.²⁶⁴
- (404) Furthermore, the majority of participants to the market investigation submit that there is a balance in the negotiating power of business connectivity services' suppliers and business customers that is not expected to change as a result of the Transaction.²⁶⁵
- (405) As regards barriers to switching between providers of, either fixed or fixed-mobile, services offered to business customers, the results of the market investigation indicate that the answer on whether barriers to switching are high depends on the contract duration of each service offered. In this regard, several market respondents point to a recently adopted national legislation which will come into effect in the Netherlands by the end of 2016. This legislation, which is supervised by the ACM, aims at

retail customers in each quarter, for the purposes of compiling the Telecom Monitor report. Neither the Parties, ACM nor Telecompaper report the number of subscribers or revenues for this market.

²⁶⁰ Replies to questions 33 and 34 of Questionnaire 3-Business Services.

²⁶¹ Replies to question 20 of Questionnaire 3-Business Services.

²⁶² Replies to questions 16 and 20 of Questionnaire 3-Business Services.

²⁶³ Replies to questions 8 and 9 of Questionnaire 3-Business Services.

²⁶⁴ Replies to question 9 of Questionnaire 3-Business Services.

²⁶⁵ Replies to questions 25 and 26 of Questionnaire 3-Business Services.

lowering switching barriers and foresees that tacit contract extensions or renewals as well as high breach-of-contract costs will be phased out.²⁶⁶

- (406) Additional concerns were raised during the market investigation in relation to possible reduced investments for FttO footprint expansion, mainly by Eurofiber²⁶⁷, post-transaction. Eurofiber, [...] could slow down investments in FttO footprint expansion [...] However, Eurofiber does not seem to share this view. More specifically, according to Eurofiber, [...] but such development is very difficult to predict.²⁶⁸
- (407) In light of the above, the Commission considers that the JV will face significant competitive constraints from other players active in the market, notably KPN and Tele2. Moreover, as confirmed by a number of respondents to the market investigation, the JV will be in a position to make attractive fixed or fixed-mobile offers to large business customers and create a stronger competitor to KPN through the combination of Ziggo's fixed asset base with Vodafone's enterprise-facing brand and expertise in the retail mobile telecommunications market.
- (408) On that basis, the Commission concludes that the Transaction does not give rise to serious doubts as to the compatibility with the internal market with regard to retail business connectivity services.

7.2.6. *Wholesale supply and acquisition of TV channels*

- (409) Only Ziggo is active in the wholesale market for the supply of Pay TV channels, with a market share below [30-40]% under all possible market segmentations (varying between [0-5]% and [20-30]%).²⁶⁹ Vodafone is not active in the supply of Pay TV channels. Therefore the Transaction does not give rise to a horizontal overlap in relation to the supply of Pay TV channels.
- (410) Both Parties are active on the acquisition side of the market, since both acquire TV channels for inclusion in their retail TV offers. Vodafone's presence is consistently small (ranging between [0-5]% and [0-5]%) and Ziggo's market share (depending on the market segmentation) ranges between around [40-50]% and [50-60]%. The Parties' combined market share varies between [40-50]% and [50-60]%.²⁷⁰

²⁶⁶ Replies to questions 28 and 29 of Questionnaire 3-Business Services.

²⁶⁷ Eurofiber is a provider of fibre based connectivity and datacentre services in the business segment in the Netherlands (national coverage), providing backbone managed dark fibre services to telecommunication providers [...]. Besides wholesale services, Eurofiber also provides retail services to corporate clients, utilities and institutions.

²⁶⁸ Replies to question 33.1 of Questionnaire 3-Business Services.

²⁶⁹ In particular, in 2015 Ziggo's market share (including HBO) by revenue in the wholesale supply of TV channels would be equal to: [0-5]% for the overall wholesale supply of TV channels; [0-5]% for FTA channels and basic TV channels; [0-5]% for Pay TV channels; [10-20]% for Premium TV channels; [20-30]% for Premium TV film channels; [5-10]% for Premium TV sports channels. Form CO, Tables 6.73 to 6.79. Source for market shares: Ziggo's estimates.

²⁷⁰ In particular, in 2015 the Parties' combined market share (including HBO) in the wholesale acquisition of TV channels would be equal to: [50-60]% for the overall wholesale acquisition of TV channels; [50-60]% for FTA channels; [50-60]% for Pay TV channels; [50-60]% for basic TV channels; [40-50]% for Premium TV channels; [40-50]% for Premium TV film channels; [40-50]% for Premium TV sports

- (411) Therefore, the market for the wholesale supply and acquisition of Pay TV channels is horizontally affected on the demand side.
- (412) Some respondents to the market investigation²⁷¹ raised the concern that the Transaction would increase the negotiating power of the JV vis-à-vis providers of TV channels. The increase in buyer power of the JV would lead to a reduction of the fees paid to providers of TV channels, thereby causing a possible upward pressure on the prices charged to the JV's competitors thereby reducing their ability to offer new attractive channels.
- (413) The Notifying Parties submit that there is no material increase in Ziggo's buyer power, given that the addition of Vodafone's share is *de minimis*. Moreover, advancing arguments that cover both the acquisition of individual TV content and TV channels, they claim that there are no economies associated with the acquisition of rights (such that there is not cost advantage to be gained from acquiring more rights); both content providers (seeking to reach the widest possible audience) and TV services providers (looking for attractive content to offer to their customers) have an incentive to come to an agreement; TV channel providers have a strong negotiating position and can decide to distribute via the internet (when a carriage agreement cannot be concluded). In addition, the Transaction will not enable the merged entity to secure exclusivity for the acquisition of TV channels since, in the Netherlands, channels are generally supplied on a non-exclusive basis and channel providers seek a multi-platform strategy in order to distribute their channels to the widest possible audience. In any event, there would not be any increased costs for rivals and, even if this was the case, the increased costs for the acquisition of TV channels would not materially affect the retail prices of TV services.
- (414) The Commission considers that, as a result for the Transaction, there will be no increase in buyer power vis-à-vis TV channel providers.
- (415) First, Vodafone's share in the acquisition of TV channels is minimal. Therefore, its addition would not bring about a significant change in the balance of bargaining power vis-à-vis TV channels providers.
- (416) Second, market participants submitted²⁷² that, in certain instances, TV channels providers and content owners may hold a relatively strong negotiating position. Therefore, they are unlikely to agree to reduced fees post-transaction.
- (417) Third, even if *arguendo* the increase in buyer power would lead to lower fees for the JV, it is doubtful that, given their international scale, the TV channel providers would seek to recoup any losses from other retail TV service providers in the Netherlands.
- (418) Considering the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for the acquisition and supply of TV channels.

channels; and [50-60]% for other types of Premium channels. Form CO, Tables 6.80 to 6.82. Source for market shares: Notifying Parties' estimates.

²⁷¹ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, questions 36, 39 and 40.

²⁷² See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 3.

7.2.7. *Acquisition of individual audio-visual/TV content*

- (419) As stated above in Section 5.7, only Liberty Global is active on the demand side of the market for licensing/acquisition of broadcasting rights over TV content. Vodafone does not purchase or hold any content directly.
- (420) However, both Parties are active on the downstream market of retail supply of TV services and the addition of Vodafone might potentially increase the JV's buyer power vis-à-vis the holders of broadcasting rights over audio-visual/TV content.
- (421) In this respect, the Commission considers that there will be no increase in buyer power vis-à-vis owners of individual audio-visual content for the same reasons discussed in the Section 7.2.6 above.
- (422) First, the addition of Vodafone's share in the retail supply of TV services is unlikely to significantly alter the bargaining power of the JV vis-à-vis holders of broadcasting rights over individual content. Similarly to TV channel providers, many holders of individual rights over individual content may have a strong negotiating position, with the consequence that the JV is unlikely to obtain a reduction of its fees post-transaction.
- (423) Finally, even assuming *arguendo* that the transaction increases the JV's buyer power to the point of forcing their counterparties to agree to reduce their fees, it is uncertain that the owners of individual content would seek to recoup such losses from other retail TV service providers in the Netherlands.
- (424) Considering the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for licensing/acquisition of broadcasting rights over TV content.

7.3. **VERTICAL ASSESSMENT**

- (425) In this Section, the Commission will assess whether the proposed transaction would lead to either input foreclosure or customer foreclosure in any of the markets that are vertically affected by the proposed transaction.²⁷³
- (426) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit.²⁷⁴
- (427) In addition, the Non-Horizontal Merger Guidelines identify customer foreclosure as occurring where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.²⁷⁵
- (428) In order for input foreclosure to be a concern, three conditions need to be met post-merger: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the

²⁷³ See above Section 6 of this decision.

²⁷⁴ See Non-Horizontal Merger Guidelines, paragraphs 29-30.

²⁷⁵ See Non-Horizontal Merger Guidelines, paragraph 30.

merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market (input foreclosure) or on consumers (customer foreclosure). In practice, these factors are often examined together since they are closely intertwined.²⁷⁶

7.3.1. Wholesale access and call origination on mobile networks

(429) MNOs sell access to their mobile networks to MVNOs which provide retail mobile telecommunications services to end customers. Such wholesale access is necessary for MVNOs to be able to compete in the retail market.

(430) In the following paragraphs, the Commission assesses whether the proposed transaction would have any effects on the merged entity's ability to foreclose MVNOs, on its incentive to do so, and the likely impact on effective competition of a possible input foreclosure strategy.

7.3.1.1. Ability to engage in input foreclosure

(431) The Commission notes that MNOs in the Netherlands do not have a regulatory duty to provide wholesale access to their mobile networks.

(432) For input foreclosure to be a concern, the merged entity must have a significant degree of market power and a significant influence on the conditions of competition in the upstream market.²⁷⁷ The Commission therefore assesses whether the JV would have such market power.

(433) All four MNOs in the Netherlands provide wholesale access to their mobile networks. KPN and T-Mobile account for more than [90-100]% of subscribers in the wholesale market. KPN is the largest provider with [70-80]% of subscribers, hosting, among others, three of the largest independent MVNOs: Lebara, Lycamobile and AH Mobiel. T-Mobile is the second largest supplier in wholesale mobile access and call origination with [20-30]% of subscribers and hosts, among others, Simpel, which is the third largest independent MVNO. Vodafone is the third largest supplier with [5-10]% of subscribers, the majority of which are accounted for by Ziggo as Ziggo is the largest independent MVNO on the Vodafone network.

(434) The MNOs market shares in the wholesale market, by revenue and by subscribers are shown in the table below.

²⁷⁶ See also Section 7.1 of this decision.

²⁷⁷ See Non-Horizontal Merger Guidelines, paragraph 35.

Table 15: Market shares of MNOs on the wholesale market in the Netherlands

Operator	Market Share by revenue	Market share by subscribers
KPN	[50-60]%	[60-70]%
T-Mobile	[30-40]%	[20-30]%
Vodafone	[10-20]%	[5-10]%
Tele2	[0-5]%	[0-5]%

Source: Form CO, Tables 6.70 and 6.71

- (435) Although all four MNOs provide wholesale access, Vodafone is the third largest supplier in the market for the provision of access and call origination services on mobile networks in the Netherlands ([10-20]% market share by revenue and [5-10]% by subscribers) while KPN ([50-60]% by revenue and [60-70]% by subscribers²⁷⁸) and T-Mobile ([30-40]% by revenue and [20-30]% by subscribers²⁷⁹) are both stronger competitors in this market. Tele2 has recently entered this market with a marginal market share in 2015 ([0-5]% by revenue and [0-5]% by subscribers).²⁸⁰
- (436) The comparative position of the four MNOs shows that this market is characterised mainly by the presence of KPN, as the principal MVNO host in the Netherlands. In addition, KPN's and T-Mobile's high market shares both by number of subscribers as well as by revenue, suggest that the merged entity would not have the ability to foreclose MVNOs since it will not have market power in the upstream market for wholesale access and call origination on mobile networks and will continue to face competition from other MVNO hosts post-merger.
- (437) Furthermore, the Commission also notes that the Transaction does not materially alter the market structure as the same number of MNOs will remain post-transaction. The JV will, therefore, not have any increased ability to foreclose.
- (438) Therefore, the Commission considers that the JV will not have the ability to foreclose MVNOs from the market for wholesale access and call origination on mobile networks in the Netherlands.

7.3.1.2. Incentive to engage in input foreclosure

- (439) Even if Vodafone would have the ability to engage in input foreclosure, the JV would not have any increased incentive to do so post-transaction. This reflects the fact that the Transaction does not change the market structure at the wholesale level and only has a very limited impact at the retail level.

²⁷⁸ Source for market shares: Parties' estimates. Form CO, Tables 6.70 and 6.71.

²⁷⁹ Source for market shares: Parties' estimates. Form CO, Tables 6.70 and 6.71.

²⁸⁰ Source for market shares: Parties' estimates. Form CO, Tables 6.70 and 6.71.

- (440) This is indicated by Ziggo's minimal market share of [0-5]% by subscribers and [0-5]% by revenue in 2015.²⁸¹ Other than Ziggo, Vodafone does not currently have any major independent MVNO relationships, and any potential foreclosure strategy against a significant MVNO competitor would likely lead to no substantial profit for Vodafone.
- (441) Therefore, the Commission considers that the JV will not have the incentive to foreclose MVNOs from the market for wholesale access and call origination on mobile networks in the Netherlands.

7.3.1.3. Effects of input foreclosure

- (442) Even if the merged entity would have the ability and incentive to engage in input foreclosure, the effects of such attempts would depend on the possibility of MVNOs to source mobile wholesale access from other providers.
- (443) As explained above, post-transaction, there will be three alternative providers of wholesale access, KPN, T-Mobile and Tele2. Among these alternative providers, KPN is by far the largest wholesale access provider in this market with a market share of [50-60]% by revenue and [60-70]% by subscribers.
- (444) Furthermore, the Transaction will neither materially alter the market structure, as the same number of MNOs will remain post-transaction, nor will it lead to an increase in Vodafone's market power.
- (445) Therefore, the Commission finds that even if the JV would have the ability and the incentive to foreclose MVNOs from accessing Vodafone's mobile network post-transaction, this would unlikely lead to significant harm to effective competition.

7.3.1.4. Conclusion regarding input foreclosure of access and call origination on mobile networks

- (446) In light of the above considerations, the Commission concludes that the proposed transaction does not give rise to serious doubts as to the compatibility with the internal market as a result of input foreclosure of wholesale access and call origination on mobile networks in the Netherlands.

7.3.2. *Wholesale internet connectivity*

- (447) As regards the Parties' ability to foreclose transit providers by restricting IP interconnection towards their own networks, the Commission notes that both of the Notifying Parties are active in the provision of wholesale internet connectivity services, though neither business will be contributed to the joint venture. On a global basis, the combined market share of the Notifying Parties would be *de minimis*.²⁸² The combined market position of the Parties on the market is, therefore, limited both in the Netherlands and globally.

²⁸¹ Form CO, Table 6.4. Source for market shares: Parties' estimates based on Telecompaper data.

²⁸² Form CO, paragraph 6.551.

- (448) In addition, a number of strong competitors will continue to be active in this market, including KPN,²⁸³ TeliaSonera,²⁸⁴ Telekom ICSS²⁸⁵ and France Telecom.²⁸⁶
- (449) Lastly, the JV will continue to be subject to the remedies adopted in the *Liberty Global/Ziggo* merger, which foresee the maintenance of at least three uncongested routes towards the network of Ziggo.²⁸⁷ According to the Parties, any provider will ultimately be able to reach the joint venture's network either directly or via peering or transit relationships.²⁸⁸
- (450) It follows from the above that the proposed transaction cannot provide the JV or its parent companies with the ability to engage in a strategy of foreclosure within the overall internet connectivity market.
- (451) As regards the Parties' incentive to foreclose transit providers by restricting interconnection towards their own networks, the Notifying Parties argue that such an incentive does not exist given that this would seriously harm their own downstream customers. They also argue [...].²⁸⁹
- (452) In this respect, the Commission notes, that this argument rests on the assumption that the retail internet access market remains competitive and that Internet Access Providers are effectively disciplined by the ability of their users to switch to alternative providers in the event of degradation in service levels.
- (453) Should the Parties allow for restrictions on traffic towards the network of the JV, such a strategy would incur a significant commercial cost for them, given the global extent and scale of this market. In this respect, as the Notifying Parties submit, the currently existing traffic relationships are more likely to benefit the JV and it would not be commercially sensible to forego them in view of a foreclosure strategy.²⁹⁰
- (454) It follows from the above that the proposed transaction will not provide the JV or its parent companies with the incentive to engage in a foreclosure strategy vis-à-vis other wholesale internet connectivity services' providers.
- (455) Lastly, even if the JV would have the ability and the incentive to engage in a foreclosure strategy, it would be unlikely that such a strategy would lead to significant harm to effective competition.

²⁸³ KPN is a global Tier 1 transit provider offering direct peering with all global Tier 1 networks.

²⁸⁴ TeliaSonera is a Tier 1 IP network providing IP transit services to content and service providers. TeliaSonera connects with 89% of major end-user networks in Europe.

²⁸⁵ Telekom ICSS is a Tier 1 transit provider and operates one of the world's largest IP networks based on Deutsche Telekom's global IP backbone, while offering connection to all worldwide domains.

²⁸⁶ Orange (formerly France Telecom) provides connectivity based on major long-distance network infrastructure.

²⁸⁷ See Commission decision of 10 October 2014 in case M.7000 – Liberty Global/Ziggo- Schedule 6 "Practicalities of ensuring three uncongested interconnection routes remain available at all times".

²⁸⁸ These remedies will remain in place until November 2022 (Form CO, paragraphs 6.533-534).

²⁸⁹ Form CO, paragraphs 6.543-544.

²⁹⁰ Form CO, paragraphs 6.546-548.

- (456) First, as explained above, post-transaction, there will be a number of alternative providers of connectivity services which connect a large proportion of major end-user networks in Europe.
- (457) Second, the Transaction will neither materially alter the market structure nor will it lead to an increase in the Parties' market power.
- (458) Therefore, the Commission finds that even if the JV would have the ability and the incentive to foreclose other wholesale internet connectivity services' providers from interconnecting with the JV's IP network post-transaction, this would unlikely lead to significant harm to effective competition.
- (459) In light of the above considerations, the Commission considers that the proposed transaction will have no material impact on competition in the market for wholesale internet connectivity and therefore does not give rise to serious doubts as to its compatibility with the internal market.

7.3.2.1. ACM's review and market participants' concerns

- (460) In its October 2015 report "IP Interconnection in the Netherlands: a regulatory assessment", the ACM concluded that "*transit is generally available as a default option for IP interconnection*" and that "*the likelihood of competition problems in the market for IP interconnection, resulting in consumer harm is currently very low in the Netherlands*".²⁹¹
- (461) During pre-notification, the Commission was approached by a market participant who is a provider of wholesale internet connectivity services, expressing concerns relating to the proposed JV. The market participant in question argued that, subsequent to the Liberty Global (UPC)/Ziggo merger,²⁹² Liberty Global had moved to change the interconnection policy of Ziggo in such a way as to align it to its own practices, which were more restrictive, and it feared that the same might happen with respect to traffic destined to Vodafone's network in the event that the proposed transaction were to proceed without a remedy.
- (462) In this respect, the Notifying Parties argue that each of them sets today its peering policy in its own best interests and that there is no merger-specific effect.²⁹³
- (463) The Commission notes that, with reference to the "termination" of traffic on their own networks, the market investigation has not provided any grounds on which to dispute the argument of the Notifying Parties that there is no merger-specific effect. In particular, the market investigation has not provided any credible grounds on which would indicate that the merged entity will necessarily align itself on the current peering policy of Liberty Global or adopt a more restrictive policy than either of the two Parties pursues presently.

²⁹¹ See, ACM, IP interconnection in the Netherlands: a regulatory assessment, October 2015.

²⁹² See Commission decision of 10 October 2014 in case M.7000 – *Liberty Global/Ziggo*- Schedule 6 "Practicalities of ensuring three uncongested interconnection routes remain available at all times".

²⁹³ Form CO, paragraph 6.553.

7.3.3. *Wholesale termination and hosting of calls to non-geographic numbers*

- (464) The Commission examined whether the merged entity would be able to leverage its position in the wholesale termination and hosting services of non-geographic numbers to foreclose access in the market for retail fixed telephony and mobile services.
- (465) First, the Commission notes that there are other strong competitors with significant market shares providing non-geographic termination and hosting services in the Netherlands. More specifically, KPN is the largest competitor with a 35-40% market share and BT has an estimated 15-20% share.²⁹⁴ In addition to these players, there is also a range of smaller operators active in the category, including Tele2, COLT, Verizon and CLWV.
- (466) Second, Ziggo's 20-25% market share in the wholesale market for non-geographic termination and hosting services is too small to provide the merged entity with the ability to foreclose the downstream mobile and fixed telephony services markets.
- (467) Furthermore, the Commission also examined whether the merged entity would be able to exert its power in fixed voice services and retail mobile telecommunications services to foreclose the upstream market for wholesale non-geographic termination and hosting.
- (468) First, in relation to retail fixed telephony services, the merged entity will have [40-50]% market share by subscribers in the fixed voice services in the Netherlands. The merged entity would continue to compete in this market with competitors such as KPN, Tele2, M7/Online, Fiber Nederland, Solcon, Stipte. KPN has over 40% of the Dutch market for retail fixed telephony services.
- (469) Second, in relation to mobile telecommunications services, the merged entity will have [20-30]% market share by subscribers. Other strong competitors in the market are KPN with [30-40]% T-Mobile with [10-20]% and Tele2 with [0-5]%
- (470) Therefore, the Commission considers that the above market shares are too low to give the merged entity the ability to foreclose either the upstream or the downstream markets.
- (471) In addition, none of the market participants raised any concerns with regard to the market of wholesale termination and hosting of calls to non-geographic numbers during the market investigation.
- (472) In view of all the above considerations, the Commission concludes that the Transaction does not give rise to serious doubts as to the compatibility with the internal market with regard to the market for wholesale non-geographic termination and hosting in the Netherlands.

²⁹⁴ Form CO, paragraph 6.480, The Parties state that precise market share data are not available. The estimates provided are based on the calling patterns Ziggo witnesses for its own retail customers (i.e. of all minutes to non-geographic numbers from Ziggo customers 35-40% go to KPN numbers).

7.3.4. *Wholesale provision of domestic call transit services on fixed networks*

- (473) The Notifying Parties submit that the largest player on the wholesale market of domestic call transit services is KPN. This is due to their historical position as the incumbent on the voice market, ensuring that all new entrants build a direct interconnection with KPN. For this reason KPN has the most interconnected voice network in the Netherlands, making them the best supplier of transit service as they can directly deliver traffic to the destination network.
- (474) According to the Parties, an additional factor that explains the strong position of KPN is the fact that all voice traffic for their mobile services must be routed through KPN's own transit service as they refuse to interconnect directly.
- (475) The Commission considers that, post-transaction, the JV will have neither the ability nor the incentive to foreclose its downstream competitors in the retail market for fixed telephony services using its position on the upstream market of domestic call transit services for the following reasons.
- (476) First, no respondent to the market investigation raised any concern related to the impact of the proposed transaction with respect to the vertical relationship in question.
- (477) Second, the JV could not exert competitive power on the upstream market due to the presence of alternative providers, such as KPN, which, according to the Parties, is the largest player on this market and Tele2, and BT which are of similar size as Ziggo.
- (478) Third, given the small current market share of Vodafone in retail fixed telephony services any input foreclosure strategy would likely not prove profitable for the JV post-transaction.
- (479) Considering the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationships between the market for wholesale domestic call transit services and the retail fixed telephony services market in the Netherlands.

7.3.5. *Wholesale international carrier services*

- (480) According to the Parties, the JV will not have the ability to foreclose access to carrier services post-transaction, since they are among many smaller providers of such access.
- (481) The Commission considers that, post-transaction, the JV will have neither the ability nor the incentive to foreclose its downstream competitors in the retail market for mobile communications services using its position on the upstream market for the supply of international carrier services for the following reasons.
- (482) First, no respondent to the market investigation raised any concern related to the impact of the proposed transaction with respect to the vertical relationship in question.
- (483) Second, the JV could not exert competitive power on the upstream market due to the presence of alternative providers in the Netherlands and in the EEA, such as (i) BT ([10-20]% market share), Orange ([10-20]% market share) and Deutsche Telecom

([5-10] % market share) in the EEA²⁹⁵ and (ii) KPN in the Netherlands.²⁹⁶ Therefore, post-transaction there will continue to be numerous wholesale providers which will compete to provide wholesale access to downstream retail players and continue to provide a competitive constraint on the Parties.

- (484) Third, given the small current market share of Ziggo in retail mobile telecommunications services in the Netherlands any input foreclosure strategy would likely not prove profitable for the JV, post-transaction. Any attempt by the Parties to foreclose access to wholesale carrier services would simply result in the Parties losing wholesale revenues without benefiting downstream at the retail level.
- (485) Considering the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationships between the market for wholesale supply of international carrier services and the retail mobile telecommunications services market in the Netherlands.

7.3.6. *Wholesale leased lines*

- (486) According to the Parties, no competition concerns arise with regard to the market for wholesale leased lines as the Parties would have neither the ability nor the incentive to foreclose access to fixed lines or customers as a result of the Transaction. Ziggo offered c. [...] leased lines to other telecommunications providers as of Q3 2015 and its market share ranges between 0-5%.²⁹⁷
- (487) The Commission considers that, post-transaction, the JV will have neither the ability nor the incentive to foreclose its downstream competitors in the retail markets for fixed telephony and mobile communications services using its position on the upstream wholesale market for leased lines for the following reasons.
- (488) First, no respondent to the market investigation raised any concern related to the impact of the proposed transaction with respect to the vertical relationships in question.
- (489) Second, the JV could not exert competitive power on the upstream market due to the presence of alternative providers active in this market, such as the market leader KPN (45-50% share), Tele2 (30-35% share) and Eurofiber (10-15% share).²⁹⁸ Therefore, post-transaction, numerous wholesale providers will continue to compete by providing wholesale access to downstream retail players and continue to pose a competitive constraint on the Parties.
- (490) Third, any input foreclosure strategy would likely not prove profitable for the JV post-transaction, as any attempt by the Parties to foreclose access to wholesale leased lines would result in the Parties losing wholesale revenues without benefiting downstream at the retail level.

²⁹⁵ Market shares source: Parties' estimates on the basis of Ovum data.

²⁹⁶ See Response to Commission Questions dated 20 July 2016, reply to Questions 3 and 4.

²⁹⁷ Form CO, paragraph 6.492.

²⁹⁸ See Response to Commission Questions dated 20 July 2016, reply to Question 5.

- (491) Considering the above, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market with respect to the vertical relationships between the market for wholesale leased lines and the retail markets for mobile telecommunications services and fixed telephony services in the Netherlands.

7.3.7. *Wholesale supply and acquisition of Pay TV channels*

- (492) In the following paragraphs, the Commission assesses whether the proposed transaction would have any effects on (i) the merged entity's ability to foreclose access to TV channels, on its incentive to do so, and the likely impact on effective competition of a possible input foreclosure strategy; (ii) the merged entity's ability to foreclose access of competing TV channel providers to a significant customer base in the downstream market of retail TV services, on its incentive to do so, and the likely impact on effective competition of a possible customer foreclosure strategy.

7.3.7.1. Input foreclosure

7.3.7.1.1. Notifying Parties' view

- (493) The Notifying Parties submit that the JV would not have the ability to engage in input foreclosure. According to the Notifying Parties, Ziggo Sport Totaal²⁹⁹ or HBO are not important inputs for players active in the retail TV sector and have only a small number of subscribers. Moreover, with respect to HBO (which is held as a part of a joint venture between Ziggo and HBO NL), Ziggo is not in position to unilaterally decide to no longer distribute the HBO NL channels to TV service providers.
- (494) In addition, the JV would also lack the incentive to engage in input foreclosure for several reasons:
- i. The losses in the upstream market for the supply of TV channels could not be recouped by a strengthened position in the downstream retail market for TV services, in light of the limited importance and market share of Ziggo Sport Totaal and HBO channels;
 - ii. Such strategy would be commercially unattractive and inconsistent with their previous strategies of enhancing overall viewership; and
 - iii. The minor increment in the downstream retail TV services market does not alter the JV's incentives post-transaction.
- (495) Finally, even if the JV would foreclose KPN (or other competitors) with respect to Ziggo Sport Totaal and/or HBO, these channels cannot be considered "must have" and there are sufficient alternatives on the market. Thus, such strategy would not have any anticompetitive effects.

²⁹⁹ As already noted, Ziggo offers its own Ziggo Sport channel exclusively to its own customers. However, Ziggo Sport Totaal (which has the same sport rights as well as additional content) is available as an additional service for everyone in the Netherlands.

7.3.7.1.2. The results of the market investigation and the Commission's assessment

- (496) During the pre-notification phase and the market investigation,³⁰⁰ some companies (competitors of the Parties in the market for retail TV services) raised the concern that the merged entity might foreclose Ziggo Sport Totaal from competing providers of retail TV services distributed in particular via mobile networks, thus making their offerings less attractive. They claim that Ziggo controls "must have" exclusive TV content (particularly sport content) and that it has already engaged in input foreclosure in the past, by imposing an excessive fee to competing downstream broadcasters for distributing Ziggo Sport Totaal. The Transaction will increase the JV's ability and incentive to extend its position in relation to TV content currently distributed via (mainly Ziggo's) fixed services also to the JV's mobile services or fixed-mobile services.
- (497) The Commission will assess the risk of input foreclosure, considering whether the Transaction would change the JV's (i) ability and (ii) incentive to grant access to Ziggo Sport Totaal and HBO channels and, (iii) if this were to have an impact on the downstream market for retail TV services.³⁰¹
- (498) In carrying out such assessment, the Commission must take into account only the changes brought about by the proposed transaction. In this respect, the Commission notes that Ziggo already controls Ziggo Sports Totaal and could therefore, in theory, already withhold the channel to downstream providers of retail TV services. The only change as a result of the Transaction is the addition of Vodafone's mobile network and customer base (which primarily comprises mobile customers). Therefore, the assessment of input foreclosure will be limited to the risk of the JV foreclosing access to Ziggo's channel over mobile networks, i.e., preventing competing providers of retail TV services over mobile networks from distributing the channel.
- i. Ability to engage in input foreclosure
- (499) The Commission notes that, for input foreclosure to be a concern, the merged entity must have a significant degree of market power, and a significant influence on the conditions of competition in the upstream market.³⁰² In the following paragraphs the Commission will assess whether the merged entity would have such a market power.

³⁰⁰ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, questions 39 and 40.

³⁰¹ As regards the possible segmentations of the downstream market, the Commission notes that, first as regards the distinction between FTA and Pay TV, as already mentioned in paragraph (55) only Pay TV retail distribution seem to be relevant in the Netherlands; second, as regards the distinction between linear and non-linear TV distribution given that Ziggo Sport Totaal is a linear TV channel and distribution rights for non-linear distribution to the end users of content/channels is usually negotiated together with the main distribution rights for the content/channel (see replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 18) looking at the overall retail TV market should capture both the linear and non-linear distribution of Ziggo Sport Totaal's content; and finally as regards different distribution infrastructures, as noted in paragraph (498) the Commission's assessment is focused on assessing the only merger-specific change brought by the Transaction in this respect which is the addition of Vodafone's mobile infrastructure.

³⁰² See Non-Horizontal Merger Guidelines, paragraph 35.

- (500) As noted above in footnote 269, Ziggo's market share by revenue in the wholesale supply of TV channels is below [10-20]% under the narrowest market segmentation possible (that is to say premium TV sport channels). With respect to sports channels, customers have access to a number of alternative premium channels, such as Fox Sports (with Fox Sports Eredivisie and Fox Sport International), and certain competitive pressure is exercised also by other major TV broadcasters' channels carried in the Netherlands which broadcast major sports events (e.g., BBC One HD, RTL and Veronica HD).
- (501) According to the majority of respondents to the market investigation, Ziggo Sport Totaal can be considered as broadcasting "must-have" content for TV retailers (e.g., Formula 1 and UEFA Champions League).³⁰³ However, they note that it is not the only channel (or even sport channel) to broadcast "must have" content.³⁰⁴ In this respect, the opinions of respondents were mixed regarding the type of content that should be considered as "must have"³⁰⁵ and which channels broadcast it, but they generally listed several different channels (Fox, NPO, RTL, SBS, etc.).
- (502) With specific regard to sport content, the majority of respondents note that Fox Sports' channels have equally or more attractive and valuable content offers than Ziggo Sport Totaal,³⁰⁶ with several respondents underlining the importance of the national football League (which is broadcast by Fox Sports). The attractiveness of Fox Sports channels is confirmed by the fact that, despite being more expensive than Ziggo Sport Totaal, they have a significant higher number of subscribers.³⁰⁷
- (503) Moreover, some respondents also mention Eurosport as a channel which is equally or even more attractive than Ziggo Sport Totaal.³⁰⁸
- (504) In addition, while the majority of respondents note that it is essential for a retailer of TV services to offer at least one or more premium film or sport channels, only a small minority believes that they should offer all premium TV channels available in the Netherlands.³⁰⁹
- (505) These findings, together with the circumstance that the overall number of subscribers to Ziggo Sport Totaal is minimal (around [...] of the total TV subscribers)³¹⁰, put into question to what extent Ziggo's sport channels are indeed a must-have in order for a retail TV distributor to compete effectively on the TV services market.
- (506) In this respect, the Commission notes that, according to Dutch law certain sport events (e.g., all World Cup matches and highlights of Dutch football league) have to

³⁰³ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 34.

³⁰⁴ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 29.

³⁰⁵ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 28.

³⁰⁶ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 37.

³⁰⁷ See submission of KPN dated 27 June 2016 and submissions of Vodafone and Liberty Global dated 22 July 2016.

³⁰⁸ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 38.

³⁰⁹ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 32.

³¹⁰ See reply of Liberty Global dated 22 July 2016.

be broadcast free-to-air in view of their importance. None of Ziggo's content falls under this mandatory free-to-air broadcasting.

- (507) Therefore, the Commission believes that, if the merged entity were to attempt to foreclose access to Ziggo Sport Totaal to competing TV retailers for mobile broadcasting, alternative TV channels with equally attractive content could be available, including Fox Sports' ones.
- (508) With regard to HBO channels, the Commission notes that the JV would lack the ability to foreclose those channels from competing retail TV providers, since Ziggo is not in position to unilaterally decide to no longer distribute the HBO NL channels to TV service providers.³¹¹
- (509) In light of the findings of this section and of the outcome of the market investigation, the Commission concludes that the merged entity would lack the ability to engage in input foreclosure with regard to Ziggo Sport Totaal and HBO channels.

ii. *Incentive to engage in input foreclosure*

- (510) The Commission considers that, if the merged entity were to engage in such a strategy with regard to Ziggo Sport Totaal and/or HBO channels, retailers of TV services would likely still have access to one or more of the alternative channels available in the market (such as Fox Sports or Film1³¹²).
- (511) Furthermore, with regards to Ziggo Sport Totaal, the incentive to pursue a foreclosure strategy depends on the extent to which such strategy would be profitable from a financial point of view. In particular, the cost to the merged entity in terms of lost sales of Ziggo Sport Totaal to competing providers of TV services (whose customers would watch it over mobile networks) would have to be lower than the benefit coming from the increased sales of Ziggo Sport Totaal's subscriptions (*i.e.*, the subscriptions that are diverted from the JV's retail TV services competitors as a result of the foreclosure strategy) and/or the increase in the JV's mobile subscriptions (triggered by the potential JV's decision to make Ziggo Sport Totaal available only via its own mobile network to its mobile subscribers).
- (512) In this respect, any increase in revenue would be entirely dependent on subscribers for whom the availability of Ziggo Sport Totaal on their mobile device would be so relevant that, when such channel stops being offered by competing operators, they switch to the JV's offer. There is no evidence that this group of customers would be sizeable. Any increase in profits (resulting from those subscribers switching) would have to be weighed against the loss of revenue from licensing of Ziggo Sport Totaal to other market players. It appears implausible that the profits would outweigh the losses.

³¹¹ Form CO, paragraph 6.448 (iii). According to the Parties, under the terms of the HBO NL/Ziggo JV, Ziggo is not in a position to unilaterally decide to no longer distribute the HBO NL channels to TV service providers that compete with Ziggo and Vodafone.

³¹² Film1 has been acquired by SONY in 2015 (<http://www.broadbandtvnews.com/2015/07/31/sony-pictures-closes-film1-deal/>).

(513) As to HBO channels, it is unlikely that HBO NL (the other parent of the joint venture holding the rights over those channels) would find it economically viable to stop providing those channels to TV retail providers competing with Ziggo, since it would not have any means to even recoup the loss of revenue from licensing of HBO channels to other market players.

(514) Based on the above, the Commission does not have sufficient indications to conclude that the JV would have an incentive to engage in input foreclosure.

iii. *Overall impact of input foreclosure*

(515) Even if *arguendo* the merged entity were to have the ability and incentive to engage in input foreclosure, the impact of those attempts on effective competition would depend on the possibility of accessing alternative TV channels for broadcasting them over mobile networks.

(516) First, with regard to Ziggo Sport Totaal, in light of the equally valuable (if not superior) content offered by competing TV channel providers, downstream competitors would still be able to offer attractive content to the end customers, including premium sport TV channels such as Fox Sports.

(517) Second, as noted above, only a limited percentage of TV customers subscribe to Ziggo Sport Totaal (around [0-5]% of total TV subscribers).

(518) Third, although the consumption of audio-visual content on mobile devices has been increasing in recent years,³¹³ internal documents³¹⁴ show that the consumption of content over mobile devices is still minor, accounting for less than [...] of the total TV consumption. The already limited importance of such consumption is further reduced when one considers that only [...] of the customers using a mobile device watch live TV (such as live sport events broadcast by Ziggo Sport Totaal).

(519) In line with such findings, industry analyst Telecompaper reports that [...].³¹⁵

(520) Similarly, it is unlikely that the supposed foreclosure of HBO channels over mobile networks would have a significant impact on effective competition on the downstream market for retail TV services.

(521) Therefore, even if the merged entity had the ability and incentive to engage in an input foreclosure strategy for Ziggo Sport Totaal and/or HBO channels, in light of the alternative channels available and the limited importance of the consumption of live TV over mobile devices, the Commission considers it unlikely that any such conduct would result in the foreclosure or marginalisation of the JV's competitors to such an extent that competition would be negatively affected.

³¹³ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, questions 26 and 27.

³¹⁴ [Reference to Vodafone Internal Documents].

³¹⁵ Telecompaper, Video Behaviour of Dutch consumers 2015 Q4, 7 March 2016.

- (522) In light of the evidence available to it and based on the results of the market investigation, the Commission concludes that an input foreclosure strategy is unlikely.

7.3.7.2. Customer foreclosure

- (523) The Notifying Parties claim that customer foreclosure is not likely to materialise since, among other things, (i) it is essential for retail TV suppliers to offer wide-ranging bouquets of channels to their customers; and (ii) an economic incentive exists to distribute third party channels in order not to forgo the revenues deriving thereof.
- (524) During the market investigation, a TV channel provider³¹⁶ raised the concern that post-transaction Vodafone would also be less likely to buy rights from TV channel providers competing against Ziggo (or would buy them at less attractive rates), thereby affecting their revenues and ability to then purchase new rights. This would eventually result in less varied offerings for consumers.
- (525) The Commission considers that a customer foreclosure strategy would be unlikely for the following reasons.
- (526) First, with regard to ability to foreclose, according to the Non-Horizontal Merger Guidelines,³¹⁷ for customer foreclosure to be concern, the merger has to involve a company which is an important customer with a significant degree of market power in the downstream market. In this respect, Vodafone's share in the acquisition of TV channel is minimal and Ziggo's competing channel suppliers will have a sufficiently large customer base post-transaction. For the same reason, the disappearance of Vodafone as a minor customer of TV channel providers is unlikely to result in entry deterrence or have a significant impact on the revenue stream of TV channel providers.
- (527) Second, the JV would also lack the incentive to adopt such a conduct since, as stated above, even if competing TV channel providers were to stop providing Vodafone after the Transaction, they would still have access to a sufficiently large customer base. In addition, as a retailer of TV services, the JV will continue to seek offering diverse bouquets of channels to its customers.
- (528) For the same reasons, even if *arguendo* the JV would have the ability and the incentive to engage in customer foreclosure, the Commission considers it unlikely that any such conduct would result in the foreclosure or marginalisation of the JV's competing TV channel providers to such an extent that competition would be negatively affected.

³¹⁶ See Replies to questionnaire Q2 to Broadcasters and Content Owners from 15 June 2016, question 39.

³¹⁷ See Non-Horizontal Merger Guidelines, paragraph 61.

7.4. CONGLOMERATE EFFECTS

7.4.1. Introduction

- (529) The Transaction has a conglomerate dimension, as it involves products (fixed and mobile telecommunications services) belonging to related markets, that is, products that are both purchased by a significant set of consumers for a similar end use (either together in a bundle or separately).
- (530) Under the Non-Horizontal Merger Guidelines the main concerns of conglomerate mergers is foreclosure. Specifically, the combination of products in related markets may put the merged entity into a position to have the ability and the incentive to leverage its strong position in one market to another market using tying or bundling. While it is acknowledged that conglomerate mergers in the majority of circumstances do not lead to any competition problems and may entail pro-competitive effects stemming from efficiencies, in certain circumstances bundling practices could weaken actual or potential competitors' ability or incentive to compete. In turn, this would soften competition allowing the merged entity to raise prices.
- (531) In assessing the likelihood of anticompetitive effects from bundling practices, the Commission is required to assess the Parties' (i) ability and (ii) incentive to foreclose. Lastly, the Commission must analyse whether such bundling practices would have a significant effect on competition which would lead to consumer harm.³¹⁸
- (532) The Transaction brings together the fixed telecommunications services of Ziggo (broadband, telephony, TV, including bundles of these components) with the mobile telecommunications services of Vodafone. The Notifying Parties themselves have acknowledged that the main rationale of the Transaction is to combine the Parties' assets with a view to strengthen the respective standalone positions in the market for converged fixed-mobile services.³¹⁹
- (533) The Commission considered the possibility that after the Transaction, the JV could leverage the market power currently held by Ziggo in the fixed market to the fixed-mobile market, by selling bundled combinations of fixed and mobile services. In particular, the Commission assessed whether as a result of the Transaction, the JV would have an increased incentive to raise the price of its fixed stand-alone services and at the same time discount the price of the fixed-mobile bundles. In this case, the customers who prefer to mix-and-match services from different operators, i.e. source mobile services from mobile-only (or mobile-mostly) operators³²⁰ while at the same time purchasing fixed services from the JV, may be faced with an overall increased cost of the combined mix-and-match services. The JV could therefore impair the ability of mobile-only players to effectively compete for those customers who purchase fixed and mobile services separately from different operators, potentially leading to foreclosure of mobile-only players.

³¹⁸ Non-Horizontal Merger Guidelines, recital 93.

³¹⁹ See for instance the documents outlining the expected synergies from the Transaction (e.g. annexes G.142 and G.143 of the Form CO).

³²⁰ Throughout this section, reference to "mobile-only players" should be interpreted as comprising both mobile-only and mobile-mostly operators.

- (534) The Commission also considered whether the above anti-competitive conglomerate effects could be strengthened by the existence of higher switching costs for fixed-mobile bundles compared to the switching cost for standalone fixed and mobile services. The Commission assessed whether the JV could accelerate the uptake of fixed-mobile bundles in the market and convert customers into fixed-mobile bundles customers at a more rapid rate than in the absence of the JV. These customers could then potentially be "locked-in" and mobile-only players may miss the window of opportunity for capturing a share of those customers who want to purchase both fixed and mobile services. The presence of higher switching costs for fixed-mobile bundles could possibly decrease the addressable market for mobile-only players, thereby negatively affecting these players' incentives to invest in their own fixed infrastructure as Vodafone would absent the Transaction. The details of the Commission's assessment are presented in Section 7.4.4.

7.4.2. The Notifying Parties' View

- (535) The Parties are of the view that the Transaction does not give rise to any anti-competitive conglomerate effects for the following reasons.

Ability to engage in conglomerate foreclosure based on price increases of the standalone components and or by discounting bundles

- (536) First, the foreclosure strategy based on leveraging of mobile subscribers into fixed will only affect a subset of the customer base of mobile-only competitors. For instance, looking at T-Mobile, circa [...] of its customers are currently also Ziggo customers for fixed components. In turn, [...] of T-Mobile's customers would not be affected by any possible price increase of Ziggo's stand-alone fixed component.³²¹
- (537) Second, the Parties claim that given the contribution margin of approximately EUR [...] for a mobile operator, the JV would have to raise the price of fixed standalone products by an unreasonably high amount in order to marginalize mobile-only players. The Parties' view is that mobile operators' contribution margins are high enough in order for them to be able to offer attractive enough mobile prices such that customers would still be able to mix-and-match fixed and mobile products.
- (538) Third, in light of the regulated wholesale access of KPN's fixed network, mobile-only competitors would be in a position to engage in a counterstrategy to any attempted foreclosure and start offering fixed-mobile bundles themselves. Another potential counterstrategy would involve mobile-only operators to partner with standalone fixed operators to offer competitive bundles.

Incentive to engage in conglomerate foreclosure based on price increases of the standalone components and/or by discounting bundles

- (539) The Parties emphasize that a foreclosure incentive would only exist in case the profit gains from increased bundles sales (resulting from standalone Ziggo customers converging to bundles in case of a price increase) would outweigh the potential profit

³²¹ This percentage may even be lower since circa [...] of T-Mobile's customers are pre-paid and, therefore, less likely to acquire a fixed-mobile bundle.

losses as a result of standalone customers of Ziggo switching to alternative providers (when facing increased fixed prices of Ziggo).

- (540) The Parties are of the view that an increase of their prices on the fixed standalone component would not translate in a sufficient recapture of such customers via sales of bundles for a number of reasons.
- (541) First, a foreclosure strategy would jeopardize Ziggo's current profits on standalone sales of fixed products, estimated at [...] times the value of current profits from sales of bundles.
- (542) Second, Ziggo's customers would be more likely to switch to another provider of fixed services in response to a price increase in the fixed standalone component rather than opting into a fixed-mobile customer of the JV.
- (543) Third, there is no inherent demand for fixed-mobile bundles in the Netherlands, i.e. no specific demand for such product combinations at present. This would limit the amount of current mix-and-match customers that the JV would successfully convert into customers of its fixed-mobile bundles. As such, standalone rivals would retain the ability to supply customers of fixed and mobile products via mix-and-match combinations.
- (544) Fourth, standalone mobile rivals would be in a position to offer bundles by developing their own fixed products via the regulated access to KPN.
- (545) Fifth, KPN would have a strong incentive to undermine any foreclosure strategy by continuing to compete aggressively for standalone fixed customers. This would be because regulatory constraints imposed on KPN imply that KPN would not be in a position to pursue a similar hypothetical foreclosure strategy to the JV.
- (546) Finally, the Parties claim that even if the recapture rates of fixed-stand-alone towards fixed-mobile bundles would be higher, given the fact that fixed margins are much higher than mobile margins, increased bundled sales would be unlikely to compensate for the loss of sales of fixed only products.
- (547) Furthermore, while the Parties acknowledge that the JV may have an incentive to lower its bundle prices as a result of the Transaction, the JV would have no incentive to engage in the substantial bundle discounts of [...] of ARPU or more that would be needed in order to make it impossible for mobile-only rivals to profitably compete. This is because by doing so the JV would forego in the short-run annual profits of EUR [...]

No credible theory of customer "lock-in"

- (548) In the Parties' view, fixed-mobile bundles would not generate any customer lock-in effects. This would be the case for the following reasons.
- (549) First, there is a lack of evidence that customers value fixed-mobile bundles as such and the existing evidence points towards the fact that customers switch to bundles because of the discount that these generally imply.
- (550) Second, it is not realistic to believe that the JV would radically accelerate the uptake of fixed-mobile bundles. The Notifying Parties argue that currently only a limited

share of the Dutch broadband customers is in a fixed-mobile bundle (approximately 10%). In addition, after the Transaction, only [...] of the broadband customers of Ziggo will have mobile with either Ziggo or Vodafone. The Notifying Parties acknowledge that the Transaction would also allow the Notifying Parties to cross-sell fixed products to customers currently only having mobile with the JV and cross-sell mobile to those customers currently only having fixed with the JV. This, however, is not considered as giving significant scope for speeding up the convergence process.

- (551) Third, switching costs associated with unbundling a fixed-mobile offer and returning to standalone products are minimal both in the case of downgrading from 4P to 3P fixed with the current provider and in the case of downgrading from 4P to mobile only with the current provider.³²² As such, customers would be completely free to opt into a bundle and unpack the bundle should the price of standalone products become more appealing.
- (552) Fourth, it would be incorrect to equate lower churn with switching costs. Lower observed churn on multiple play fixed-mobile products could be due to customers staying longer with their supplier because of the inherent discount offered. Alternatively, it could also be due to the fact that the target market for bundles consists of customers with particularly strong brand loyalty.
- (553) The Notifying Parties also claims that it would be incorrect to equate lower churn with a lower degree of competition. Lower churn rates that are not due to underlying higher switching costs simply mean that the average lifetime of a customer is longer. Longer customer lifetimes may reduce the pool of contestable customers at each point in time but would not necessarily affect the intensity of competition for those customers.
- (554) Fifth, even if customers were less willing to switch away from fixed-mobile products, the JV would not succeed in marginalising mobile-only operators, or, in any event, certainly not in the short to medium term.

7.4.3. Results of the Market Investigation

Complaints from rival market participants

- (555) The Commission has received a number of complaints from rival market players (in particular, Tele2 and T-Mobile) that raised concerns on the existence of conglomerate effects resulting from the Transaction. These concerns are summarized in the following paragraphs.
- (556) T-Mobile's concern on conglomerate effects is that the proposed transaction would lead to the foreclosure of mobile-only players and ultimately to a marginalization of such players due to the bundling strategies pursued by the Notifying Parties and KPN.
- (557) Regarding the assessment of ability to foreclose, according to T-Mobile, Ziggo holds a significant degree of market power in each fixed internet access services, TV

³²² See Annex 18 of the Form CO.

services and fixed telephony services as well as in fixed bundles (in particular, for triple play bundles).

- (558) T-Mobile points out that the ability of Ziggo to foreclose would be strengthened by a number of elements, including: (i) the existence of switching costs and lower churn rates on triple play fixed products compared to single play fixed products; (ii) the demonstrated ability of Ziggo to raise prices of fixed products; (iii) the existence of entry barriers for potential rivals; and (iv) the inability of mobile-only players to employ effective counter-strategies against foreclosure (such as developing their own fixed telephony propositions).
- (559) T-Mobile claims that the introduction and push of fixed-mobile bundles post-transaction would lead to a very limited residual demand of mobile-only services. The down-sizing of the mobile-only market would further be exacerbated by significant switching barriers and low churn rates.
- (560) To support the argument on the incentives to foreclose and impact of the Transaction on the market, T-Mobile submitted an economic study³²³ that models the effects of the Transaction in terms of prices, profits and market shares. The paper is based on a theoretical economic model that seeks to replicate the main stylized facts of the Dutch telecom market. The model features three mobile operators (Vodafone, KPN and T-Mobile) and two fixed operators (Ziggo and KPN) and is divided into three stages. In the first stage, no market player offers fixed-mobile bundles. Consistent with market developments, in the second stage, it is only KPN that offers bundled (fixed-mobile) products, while in the third stage, after the Transaction has been concluded, also the JV starts offering fixed-mobile bundles.
- (561) T-Mobile's main findings on the basis of this model are: the initial introduction of fixed-mobile services by KPN (i.e. the counterfactual situation) leads to lower prices for customers switching to the newly introduced bundles (compared to the sum of standalone prices in stage one), and also leads to lower prices for customers that continue to mix-and-match fixed and mobile services from different providers. Overall, industry profits fall, with Vodafone and T-Mobile making the highest losses followed by Ziggo and KPN. After the introduction of fixed-mobile bundles by the JV in the third stage, however, this trend is reversed: customers buying the bundles of KPN and the JV will face a price increase, while mix-and-match customers will also face higher prices (compared to stage two). Profits of KPN and the Parties will increase, while profits of T-Mobile would decrease by over 40% (compared to stage two). The overall impact on market shares would be such that the share of customers buying bundles would increase from 44% in the counterfactual (Stage 2) to 80% post-transaction. Moreover, T-Mobile's market share would fall from [30-40]% initially to [20-30]% after the introduction of KPN's bundle and ultimately to [5-10]% after the Transaction and the introduction of bundles by the JV as well.
- (562) Similar to T-Mobile, Tele2 raised concerns regarding possible leveraging of market power from Ziggo's current strong position in fixed services to the fixed-mobile market via a bundling strategy which ultimately would lead to the marginalization of non-integrated mobile operators.

³²³ Report titled "(Anti)competitive Effects of the Vodafone-Ziggo Merger: Foreclosure through Fixed-Mobile Bundling" submitted by T-Mobile.

- (563) Specifically, Tele2 submitted an economic study³²⁴ supporting the view that the introduction of bundles³²⁵ of fixed and mobile services would likely lead to exclusionary effects in the mobile market. This would be the case in particular because of the existence of higher switching costs for bundles compared to fixed and mobile products standalone.
- (564) According to Tele2, the introduction of quadruple play bundled services may be used by the incumbent to price discriminate between different customers depending on their preferences but, as a by-product of such strategy, bundling would also have the potential to marginalize mobile-mostly rivals. Tele2 claims that the mechanism behind the exclusionary aspect of a bundling theory is that an incumbent having significant market power in 3P but facing an increasing competitive pressure from the mobile market would have an incentive to bundle its 3P services with mobile services. This in turn would shift demand for mobile services in the incumbent's direction, reducing demand and shrinking the addressable market for its rivals in the mobile market. This strategy could be intensified if this incumbent were to engage in predatory pricing to curb entry or expansion by making it unprofitable or by even inducing exit of its mobile rivals.
- (565) Tele2 seeks to illustrate the scope of the exclusionary effects of bundling and subsequent marginalization of mobile-only players by introducing a numerical example featuring an incumbent with the ability to offer 4P fixed-mobile bundles (modelled as a collusive duopoly between KPN and the JV) and a mobile rival Tele2 which can only offer mobile services.^{326 327}
- (566) In their stylized model, the counterfactual scenario (stage 1) is such that there are two products, triple play fixed services offered by KPN and the JV and mobile-only services that are offered separately by KPN, the JV, and the mobile-only player, Tele2. In this scenario, KPN and the Notifying Parties coordinate their conduct in the provision of triple play fixed services by acting as a monopolist and charging monopoly prices, while pricing in the mobile-only market would be competitive due to the presence of more market players. In stage 2, KPN and the JV coordinate to engage in mixed bundling of triple play fixed services with mobile services. In this stage of the model, it is shown that KPN and the JV can encroach on the customer base of mobile only rivals, attract customers from them and lock them into 4P fixed-mobile bundles. In stage 3, the recoupment phase, KPN and the JV can raise their prices on their bundle without losing market shares due to the existence of customer switching costs that are higher for bundled products compared to standalone products. Overall, the numerical example shows that the market share of mobile only

³²⁴ Report titled "The likely anti-competitive effects of the proposed Vodafone/Ziggo JV" submitted by Tele2.

³²⁵ The economic model put forward by Tele2 features a single firm (KPN/Ziggo) introducing a bundle. Tele2 is of the view that relaxing this assumption and allowing for a duopoly in the provision of fixed-mobile bundles would not alter (and indeed would strengthen) their results.

³²⁶ It is also assumed that Tele2 is as an efficient competitor in mobile services next to KPN and the Notifying Parties.

³²⁷ Tele2 submitted that collusion in 4P fixed-mobile bundles is simply assumed for simplicity to maintain a single operator who can offer 4P bundles. Tele2 explained that allowing for competition in fixed-mobile bundles between KPN and Ziggo would not alter the results of the model and would in fact reinforce the marginalisation result.

operators in this setting would be reduced compared to a counterfactual scenario in stage 1 where customers are able to mix-and-match triple play fixed products with mobile products of different operators.

- (567) Tele2 also stresses the lack of effective counterstrategies by mobile-only players to any bundling strategy of the Notifying Parties and KPN. Due to the fact that entry into the quadruple play market would require significant time and investment, a late entry into this market may be too costly. This would be especially so because, in Tele2's views, entering or expanding based on the existing regulated wholesale access offered by KPN would not be feasible. In this respect, Tele2 especially questions whether mobile-only players on the basis of a wholesale offer would be in a position to reach sufficient scale in order to be in a position to launch aggressive offers in a timely manner.
- (568) Tele2 concludes that the Transaction would ultimately create two symmetric fully integrated players each owning both fixed and mobile infrastructures and would result in the progressive marginalisation of mobile-only players such as Tele2.

Characteristics of the Dutch market

- (569) Before presenting the Commission's assessment of the potential conglomerate effects of this Transaction, the following paragraphs contain the results of the market investigation in relation to a number of characteristics of the Dutch market for mobile and the market for fixed telecommunications services that are relevant for the analysis of the potential conglomerate effects.

Evidence regarding switching costs and churn rates for fixed, mobile and fixed-mobile services

- (570) A number of market participants submitted that switching costs are higher for fixed products than for mobile products and higher for bundles (and in particular fixed-mobile bundles) compared to switching costs for the individual underlying standalone products.³²⁸
- (571) The Commission asked T-Mobile and Tele2 to submit their best estimates of switching costs for fixed and mobile standalone services, as well as fixed multiple play and fixed-mobile multiple play products.³²⁹
- (572) In the case of fixed products, there appears to be a wide range of switching costs' estimates.³³⁰ The main market participants report switching costs in the form of

³²⁸ See for instance the economic report "(Anti)competitive Effects of the Vodafone-Ziggo Merger: Foreclosure through Fixed-Mobile Bundling" submitted by T-Mobile.

³²⁹ See replies to question 2 of RFI of June 21, 2016. Specifically, see files "20160627_RFI_1_TO_TMOBILE_ANSWERS_TMNL_DELIVERY1_FINAL_CORR" (T-Mobile) and "Response to RFI Tele2" (Tele2).

³³⁰ In addition to non-financial switching costs such as the inconvenience of changing hardware at the customer's premises.

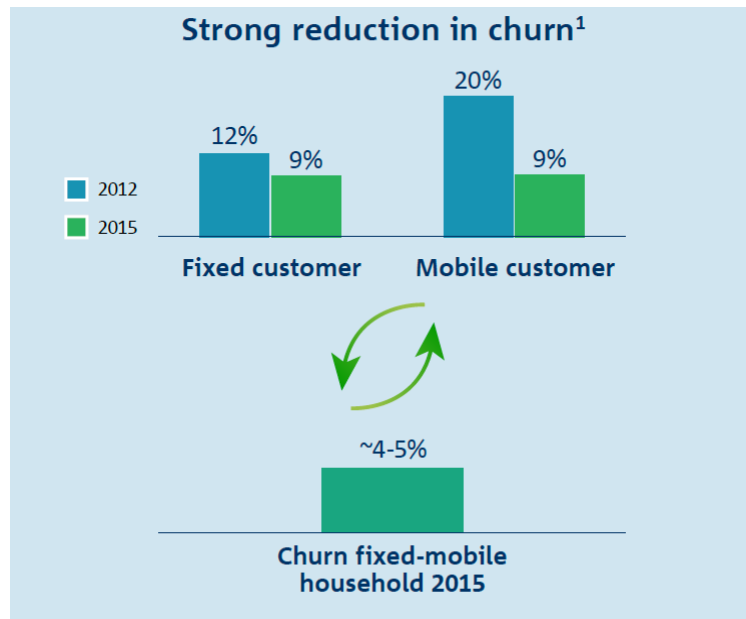
activation fees between EUR 17.5 and 35.³³¹ [Details of Ziggo and Vodafone activation costs].

- (573) In the case of mobile services, on top of non-financial barriers, market participants identified one-off switching costs of EUR 10-30.
- (574) For fixed and for mobile contracts, the evidence available also suggests that additional costs would be incurred in case the customer switches before the expiry of the contract.
- (575) As regards bundles, the evidence from the market investigation suggests that unpicking a bundle does not entail monetary costs other than foregoing any discount associated with purchasing fixed and mobile services within a single offer from the same operator. However, the respondents indicated a number of non-monetary costs, as reported in paragraph (97).
- (576) The Commission notes that switching costs are generally difficult to observe or estimate directly. Most of the claims that switching costs are higher in fixed compared to mobile and higher for bundles compared to standalone products appear to be based on evidence regarding churn. However, the Commission considers that churn is an imperfect indicator of switching costs because churn is also affected by factors other than switching costs. For instance, churn levels depend, inter alia, on the number of available alternative operators in the market and on the brand loyalty of the customer group purchasing each type of product.
- (577) Evidence from market participants³³² suggests that churn is lower on average for fixed products compared to mobile and that churn is lower on average the more products are included in the bundle (and hence particularly low for quadruple play services). In particular, KPN reports that for its customers churn rates at fixed-mobile households were around 4-5% in 2015 while they were 9% for fixed and mobile standalone services (see Figure 2 below). However, the evidence from KPN appears to suggest that while churn on fixed services has been historically lower than churn for mobile services, such difference has now levelled out.

³³¹ Certain market participants reported switching costs as high as EUR 350. These figures appear to be based on a number of cost items that have either not been identified by other market participants as relevant or have been reported as usually borne by the operator (dealers' commissions, engineer's installation costs, hardware components etc.).

³³² See paragraph (370).

Figure 2: Churn in mobile and fixed services



Source: Presentation by KPN "Capital Markets Day 2016", slide 29, accessible at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzI2NzA1fENoaWxkSUQ9LTF8VHlwZT0z&t=1&cb=6359296852366744271>

- (578) Overall, there is some evidence that, especially in the past, churn rates on fixed services are lower than for mobile services and that changing a fixed product involves more non-monetary inconveniences compared to changing a mobile provider.³³³ Overall, however, the Commission has not found conclusive evidence to support the view that switching costs are materially higher for fixed services compared to mobile services.
- (579) Similarly, as stated in paragraph (106), while there is evidence that churn rates for bundles, and in particular for fixed-mobile bundles, are lower than churn rates for the individual standalone fixed and mobile products, the Commission has not found conclusive evidence to support the view that switching costs are materially higher for multiple play bundles than for standalone products.

Convergence to fixed-mobile bundles and trends in the mobile market

- (580) According to industry reports, the Dutch mobile telecommunications market has been growing in terms of subscribers, although it has been shrinking in terms of revenues in the last three years.³³⁴ [Projections regarding future subscriber and revenue figures]³³⁵
- (581) The demand for fixed-mobile bundles in the Netherlands is currently rather limited. Approximately [...] of the broadband connections and [...] of the mobile connections in the Netherlands are part of a fixed-mobile bundle. Fixed-mobile quadruple play

³³³ See paragraph (97).

³³⁴ See ACM, "Telecommonitor Q4 2015", p.6.

³³⁵ See Telecompaper, "Dutch Mobile Operators Q3 2015", slide 27 and 28.

bundles represented [...]of the overall bundles purchased in the Netherlands in Q3 2015, reaching [...]in Q1 2016.³³⁶

- (582) KPN has been the first to introduce these products and is currently the main proponent of fixed-mobile bundles. As a result, KPN's share in fixed-mobile quadruple play bundles in the first quarter of 2016 was [80-90]%. Currently, both Ziggo and Vodafone offer fixed-mobile quadruple play bundles to a limited share of their customers. Their market shares are [10-20]% and [0-5]%, respectively.
- (583) Respondents to the market investigation have stated that fixed-mobile bundles are expected to grow in the next two to three years.³³⁷ However, while converged offers are gaining relevance in the market, the expected medium-term uptake of fixed-mobile multiple play bundles significantly varied across responses.³³⁸
- (584) Finally, evidence on the speed and extent of fixed-mobile convergence that would result from the joint venture is unclear. While there is evidence suggesting that the Transaction would likely speed up the rate of convergence, it is unclear whether the Transaction would significantly increase the proportion of subscriptions that are acquired within a fixed-mobile bundle.
- (585) Overall, the Commission considers that converged offerings may encroach on the mobile market overall. However, it appears that there will still be after the Transaction a significant share of mobile subscriptions that are either purchased by mobile-only customers or in any case not purchased as part of a fixed-mobile bundle.

7.4.4. *The Commission's Assessment*

- (586) The following sections assess the Notifying Parties' ability to engage in foreclosure of mobile-only rivals, the incentives of doing so, and the resulting potential impacts on final retail consumers.

7.4.4.1. Ability to Foreclose

- (587) The Commission considered whether the merged entity could be able to use its market power in one market (the fixed market) to foreclose competitors in another market (the mobile market) by bundling fixed and mobile products after the Transaction.
- (588) As regards the ability to engage in bundling, the Commission notes that both Vodafone and Ziggo currently offer fixed-mobile bundles. Ziggo offers fixed-mobile bundles by relying on an MVNO contract with Vodafone and Vodafone offers fixed-mobile bundles by relying partly on its own infrastructure and partly on wholesale access to KPN's network. As such, the Notifying Parties already have prior to the proposed transaction the ability to engage in bundling. The Transaction allows the joint venture between Vodafone and Ziggo to offer fixed-mobile bundles that are based on its own fixed and mobile network infrastructure.

³³⁶ See Telecompaper, "Dutch Consumer Multiplay Market 2016 Q1, slide 13.

³³⁷ See paragraph (98).

³³⁸ See paragraph (98).

- (589) As regards the ability to foreclose mobile-only rivals, the new entity must have a significant degree of market power in one of the concerned markets. That is, at least one of the merging parties' products must be viewed by many customers as particularly important and there must be few relevant alternatives for that product.³³⁹ The Commission has therefore analyzed Ziggo's current position in the fixed market and Vodafone's current position in the mobile market. This has been done to assess to what extent the Parties could use their position in the fixed market to leverage market power onto the mobile market, and to what extent the Parties could use their position in the mobile market in order to leverage market power onto the fixed market.
- (590) In the following paragraphs, the Commission assesses the position of Ziggo in the two main segments of the fixed market, that is, the triple play and the double play segments.³⁴⁰
- (591) In the triple play fixed segment, Ziggo is the leading provider. In Q1 2016 the subscriber share of Ziggo is [60-70]%, followed by KPN ([20-30%]). The remaining market players have market shares around [0-5%].
- (592) In the double play fixed segment, Ziggo is the second largest player after KPN. The remaining market players have considerably lower market shares: while Tele2 has a market share of [5-10%], the remaining market players have market shares around [0-5%].
- (593) Regarding the distribution of Ziggo's customer base, the large majority of Ziggo's fixed customers [...] are subscribed to a multiple play fixed product, with the large majority of customers purchasing a triple play subscription and a minority of customers [...] buying a dual play subscription.³⁴¹

Table 16: Retail market shares by subscribers in the double play fixed and triple play fixed segment, Q1 2016.

Operator	Double play fixed	Triple play fixed
Ziggo	[40-50]%	[60-70]%
Vodafone	[0-5]%	[0-5]%
Combined	[40-50]%	[60-70]%
KPN	[40-50%]	[20-30%]
Tele2	[5-10%]	[0-5%]
Online nl (M7)	[0-5%]	[0-5%]

Source: Market reconstruction by the Commission.

³³⁹ Non-Horizontal merger guidelines, paragraph 99.

³⁴⁰ The term "double play fixed" includes any combination of two fixed products.

³⁴¹ See Form Co, Table 6.55, paragraph 6.245.

- (594) In light of the above, the Commission considers that Ziggo currently holds a certain degree of market power in the fixed market.³⁴²
- (595) As regards the mobile market in the Netherlands, Vodafone's market share is below 30%, which is the threshold that is considered as potentially indicative of market power according to the Commission's Non-Horizontal Merger Guidelines.

Table 17: Retail market shares by subscribers in the post-paid segment of the retail mobile communication market, 2013-2015.

Operator	2013	2014	2015
Ziggo	[0-5]%	[0-5]%	[0-5]%
Vodafone	[20-30]%	[20-30]%	[20-30]%
Combined	[20-30]%	[30-40]%	[20-30]%
KPN	[30-40]%	[30-40]%	[30-40]%
T-Mobile	[20-30]%	[20-30]%	[20-30]%
Tele2	[0-5]%	[5-10]%	[5-10]%
Others	[0-5]%	[5-10]%	[5-10]%

Source: Form CO, Table 6.25, recital 6.76.

- (596) The Commission is therefore of the view that based on their position in the respective markets, after the Transaction the Notifying Parties may have the ability to leverage their position in the fixed market onto the fixed-mobile market, while they are less likely to have the ability to leverage their position in the mobile market into the fixed-mobile market due to Vodafone's more limited market share in mobile.
- (597) The Commission notes that any effective foreclosure strategy based on leveraging market power in fixed onto the mobile market requires a sufficient share of the customer base of mobile-only competitors to be affected. This depends on (i) the extent to which the customer base of mobile-only rivals is currently subscribed to both mobile and fixed telephony as opposed to mobile telephony only and (ii) the extent to which the customer base of mobile-only rivals currently sources fixed telephony services from Ziggo.
- (598) As regards the first point, it appears that a significant share of the mobile customers will continue to source either only mobile services and no fixed services (this will most likely be the case for instance in relation to persons already living in a household where another member has a fixed subscription) or in any event mobile and fixed services separately.³⁴³
- (599) As regards the second point, it appears that approximately [...] of the T-Mobile customers are currently in a household owning a Ziggo subscription.³⁴⁴ Assuming an

³⁴² Ziggo's market share in the fixed triple play market in the period from 2013 to 2015 fluctuated between [60-70]% and [70-80]%. In the fixed double play market, Ziggo held market shares between [30-40]% and [40-50]% in the period from 2013 to 2015.

³⁴³ See discussion at paragraphs (580)-(585).

³⁴⁴ See slide 80 of annex G.79 of the form CO.

average of 1.5 SIM cards per household³⁴⁵, this means that approximately [...] of T-Mobile customers have a fixed subscription with Ziggo in their name. Alternative data from Ziggo's internal documents³⁴⁶ similarly suggests that based on a survey by McKinsey approximately [...] of the household decision markers having a T-Mobile subscription also have a Ziggo fixed subscription. Again, assuming an average of 1.5 SIM cards per households, this suggests that approximately [...] of T-Mobile's subscribers currently have also a Ziggo fixed subscription.

- (600) Similarly, it appears that [...] % of the mobile subscribers of Tele2³⁴⁷ are currently in a household owning a Ziggo subscription. Assuming an average of 1.5 SIM cards per households, this suggests that approximately [...] of Tele2's subscribers currently have also a Ziggo fixed subscription.
- (601) Based on the above, the Commission considers that the Transaction may confer to the Notifying Parties the ability to leverage their market power in fixed to strengthen their position into the mobile market at the expense of mobile-only players. However, the Commission does not consider that the Transaction would confer to the Notifying Parties the ability to impact the market share of mobile-only players to such an extent that they would be marginalised.
- (602) Indeed, the Commission notes that documents submitted by one of the complainants (T-Mobile) suggest that the Transaction would reduce the market share of T-Mobile from the current [20-30] % to [10-20] % by 2021 and would reduce the market share of Tele2 from the current [5-10] % to [5-10] % by 2021.³⁴⁸

7.4.4.2. Incentive to foreclose

- (603) The Commission has assessed whether the Parties have an incentive to engage in bundling of fixed and mobile services to foreclose mobile-only rivals from effectively competing for customers who purchase both fixed and mobile services.

Assessment of the Notifying Parties' incentive to foreclose

- (604) After the Transaction, the Parties may have an incentive to introduce a price-discrimination strategy consisting of increasing the price of the standalone products and lower the price of the bundle.
- (605) As a result of this price discrimination strategy, customers who buy fixed and mobile products separately could incur an increase in their total cost of ownership while customers who opt into the bundle are likely better-off. The overall effect of price discrimination by an operator introducing a bundle (even in case of a monopolist) is therefore a priori ambiguous and whether overall consumers benefit or are harmed will depend on the distribution of customer preferences.

³⁴⁵ This appears to be a reasonable assumption in the medium term. See for instance slide 20 of annex G.143 to the Form CO.

³⁴⁶ See slide 9 of Attachment E.45 to the Form CO.

³⁴⁷ See slide 80 of annex G.79 of the form CO and slide 9 of Attachment E.45 to the Form CO.

³⁴⁸ See Annex 7 of the submission by T-Mobile of 3 May 2016, titled "Vodafone-Ziggo Revenue Synergies - Back Calculation of Estimated Market Impact".

- (606) Price discrimination could, however, be anticompetitive if it had the (intended or unintended) consequence of marginalising mobile-only competitors. By engaging in price discrimination, the JV may be able to shift demand away from mobile-only operators and attract it to its bundles. As the price of fixed standalone products increases and bundles are introduced at a discount by the JV, a share of the mix-and-match customers who currently buy fixed products with Ziggo but mobile with another provider would switch their stand-alone mobile component and opt into a fixed-mobile bundle of the merged entity. Other mix-and-match customers instead would switch their fixed component away from the JV towards an alternative fixed provider such as KPN or Tele2 and some mix-and-match customers would simply remain with their current offer.
- (607) The incentives of the merged entity to foreclose mobile-only rivals depend, inter alia, on its ability to recapture on its bundles the mix-and-match customers who decide to change their current products in response to an increase in the price of their fixed components. These incentives are higher the more mix-and-match customers opt for switching their mobile component to join the merged entity, and the less mix-and-match customers switch their fixed components away from the merged entity to an alternative fixed provider.
- (608) As regards the price discrimination incentive for the merged entity to increase the price of the standalone fixed components after the Transaction, the Commission considers that this would be mitigated by the existence of alternative fixed offers by KPN and by the ability of mobile-only operators to respond by lowering the price of the mobile component to mitigate the increase in the total cost of ownership of mix-and-match customers.
- (609) As pointed out by complainants³⁴⁹, the ability and incentive of the JV to attract mix-and-match customers to its bundled offer may be strengthened by the presence of asymmetric switching costs, that is, higher switching costs in fixed compared to mobile. However, as discussed in paragraphs (578), while there is evidence that (especially in the past) churn rates on fixed services were lower than for mobile services and that switching fixed products may entail a number of inconveniences that are not present for mobile, the Commission has not found sufficient evidence to support the view that switching costs are materially higher for fixed compared than for mobile services.
- (610) Third parties also suggested that the incentives for the JV to foreclose mobile-only rivals may be increased by the existence of higher switching costs for fixed-mobile multiple play bundles compared to fixed or mobile services standalone. This would be because it would then be easier to convert customers from single sourcing to the JV's multiple play fixed-mobile bundles than it would be for mobile-only rivals to attract customers who are currently with a fixed-mobile bundle of the JV. As a consequence, this would decrease the market addressable by mobile-only operators and mobile-only players could be weakened to the point where competition is softened to the detriment of consumers. In this respect, as discussed in paragraph (579), the Commission does not consider that there is sufficient evidence that in the

³⁴⁹ Economic report "(Anti)competitive Effects of the Vodafone-Ziggo Merger: Foreclosure through Fixed-Mobile Bundling" submitted by T-Mobile.

Dutch market fixed-mobile bundles are characterised by inherently higher switching costs compared to the underlying standalone components.

- (611) The Commission also considered the extent to which the Transaction would accelerate the trend towards fixed-mobile convergence. A number of rival market participants pointed out that by joining a strong fixed offer with a strong mobile offer the Transaction could significantly speed up the uptake of fixed-mobile bundles. This accelerated pace of convergence, together with claims as to the existence of higher switching costs for fixed-mobile bundles, would then imply that there is a short window of time during which market players would be able to compete for mix-and-match customers, after which these customers would be locked in with the respective operators and would become significantly less contestable.
- (612) As explained above, the Commission did not find evidence that in the Dutch market the acquisition of multiple play bundles generates an inherent increase in the customers' switching costs. As such, the Commission considers that even where customers would be converted more rapidly into fixed-mobile bundles this does not in itself reduce the ability of mobile-only competitors to effectively compete for customers. In addition, while there would possibly be an increase in the price of fixed standalone services after the Transaction, this would be mitigated by the existence of competition from KPN's fixed standalone offers. The Commission considers that the JV would not increase after the Transaction the price of fixed services to such an extent that mobile-only players would be marginalised. Raising the price of fixed services too aggressively would imply a significant risk for the Notifying Parties to lose the high margins currently made on switched customers who would switch to KPN as a result of the increase in the Notifying Parties' fixed standalone prices.
- (613) Overall, the Commission is also of the view that marginalization of mobile customers will not arise from this Transaction. The move towards quadruple play bundles, which is at its early stages in the Dutch market, will possibly accelerate to a certain extent as a result of the Transaction, but not to an extent that would impede mobile-only players to effectively compete for customers.
- (614) In addition, the Commission considers that the Transaction generates a second, fully integrated player owning both a fixed and a mobile network. According to the Notifying Parties' internal documents, a main rationale of the Transaction would be to increase the Notifying Parties' ability to market fixed-mobile bundles by (i) combining Vodafone's mobile assets with Ziggo's fixed assets and (ii) combining the two operators' respective commercial strength in the fixed and mobile markets. As a result, the Commission considers that the Transaction has the potential to stimulate the Notifying Parties' ability to compete in fixed-mobile bundles with KPN.

Specific assessment of the submissions by T-Mobile and Tele2

- (615) T-Mobile has claimed that mobile-only customers would be marginalized as its market shares would significantly contract as a result of the Transaction. In particular, they claim that their market share would decrease by about 60% as a result of the Transaction.³⁵⁰ A similar claim has been made by Tele2 that illustrates the

³⁵⁰ This is based on the [20-30]% market share they claim to have in the counterfactual scenario with the [5-10]% market share T-Mobile claims to have after the Transaction. See non-confidential version of Annex 13 submitted by T-Mobile, Table 3, p.31.

exclusionary effects of the Parties' bundling strategy that leads to marginalization of mobile-only and mobile mostly players using a numerical example also based on an economic model.

- (616) The Commission notes that while some potential negative effects on competitors resulting from the Transaction are conceivable, there are also a number of pro-competitive effects that may arise from the Transaction as discussed in Section 7.4.4.2. In particular, the Commission is of the view that one of the possible effects of the Transaction is the increase in competition between KPN and the Parties that both push or intend to push fixed-mobile quadruple play products going forward.
- (617) Moreover, the Commission is of the view that the marginalization claims raised by the complainants are not sufficiently corroborated and are based on models that suffer from a number of methodological issues.
- (618) As regards the model presented by T-Mobile³⁵¹, the Commission does not consider that the underlying economic model is sufficiently reliable to conclude that anti-competitive effects may arise as a result of the Transaction.
- (619) First, T-Mobile's model seeks to characterize prices in pure strategy Nash equilibrium. But as the Notifying Parties explain³⁵², this approach is flawed. Indeed, the Parties show that no pure strategy equilibrium exists because of the way switching costs have been incorporated into the model.³⁵³ The Notifying Parties further explain that the demand functions in T-Mobile's model are not well-specified once some, but not all, players in the model introduce bundles.³⁵⁴ These two modelling flaws lead to incorrect predictions of the effect of the merger.
- (620) Second, the model does not assess the impact of the Transaction against a properly defined counterfactual, as it does not clearly disentangle the effect of the introduction of fixed-mobile bundles by KPN from the effects of the introduction of fixed-mobile bundles by the JV. The model compares prices and market shares emerging after the introduction of bundles by Ziggo with prices and market shares under a "benchmark" scenario under which the full effects of the introduction of bundles by KPN have not yet fully materialised. As such, what T-Mobile identifies as the effect of the Transaction on prices and market shares contains a combination of (i) "true" effect of

351 Economic report "(Anti)competitive Effects of the Vodafone-Ziggo Merger: Foreclosure through Fixed-Mobile Bundling" submitted by T-Mobile.

352 Report titled "Observations on Third Party Economic Submissions", submitted on 13 July 2016.

353 The Notifying Parties explain that the demand function has a kink at the price offered by competitors and the profit function is therefore different above and below the price of competitors – the first order conditions also differ above and below this price. T-Mobile's study assumes that the only equilibrium requirement is that the first order condition from price cutting is binding. However, this would only be the case if at the price characterized by this condition firms would have no incentive to deviate by raising prices. The Parties show that this is not the case in the baseline model and thus that it is not the case more generally. T-Mobile's approach therefore does not correctly characterize equilibrium.

354 The Notifying Parties explain that T-Mobile's model incorrectly treats market share parameters of the demand function as exogenously fixed, when they should be endogenous. This modelling short-cut is valid when all firms are symmetric but not so – as is the case after the incorporation of bundles into the model – when the players are asymmetric.

the Transaction and (ii) other effects arising independently from the Transaction and a consequence of the introduction of bundles by KPN.

- (621) Third, the model assumes that it is not possible for competitors to price discriminate between current customers and new customers. That is, the model assumes that the same price is charged to current customers and to new customers. However, the Commission does not consider that this is necessarily the case, as operators can offer differentiated offers to new customers, for instance by offering the first month of subscription charge to the new customers. This appears to be common practice in the Netherlands.³⁵⁵ The Commission considers that the ability to price discriminate makes the merged entity significantly more able and willing to compete against KPN by offering attractive prices for fixed-mobile bundles without compromising the revenues from the existing customer base. Therefore, by assuming away the possibility to price discriminate, the model fails to capture a fundamental aspect of the competition between KPN and the merged entity.
- (622) Fourth, the model makes a number of simplifying assumptions that likely have the potential to alter the quantitative (and possibly also qualitative) results of the model. These are the assumptions that (i) Ziggo cannot offer fixed-mobile bundles absent the Transaction, which is not factually correct; and (ii) that all mobile customers in the Dutch market also purchase a mobile subscription, which is also factually incorrect. On 26 July 2016, T-Mobile submitted an updated version of the model where these two assumptions are relaxed. It is assumed that 25% of the mobile subscribers purchase uniquely mobile services and no fixed services and it is assumed that Ziggo can offer bundles absent the Transaction, although at a higher cost. T-Mobile claims that the price increase and marginalisation results remain after these modifications. However, the Commission notes that despite these two modifications the criticisms raised in paragraph (619)-(621) above remain.
- (623) As regards the Tele2 economic submission³⁵⁶, the Commission considers that the submission does not develop a consistent and coherent model of how the marginalization of mobile-only players would work. The submission only presents a stylized model showing that the introduction of bundling by a fixed monopolist facing a competitive mobile market leads to a reduction in market share of mobile-only players. This is a standard result and the Commission considers that the fact that the introduction of bundling puts pressure on the market shares of mobile-only players does not per se represent a competition concern. Tele2 further assumes that fixed-mobile bundles present higher switching costs compared to standalone products and as such the fixed monopolist would be in a position to increase prices of bundles to the customers attracted because these customers, once locked-in, find it harder to unpick the bundle and return to separately sourcing fixed and mobile services. In this respect, the Commission notes that (i) there is no convincing evidence that the switching costs on bundles are significantly higher than on individual underlying products; (ii) absent the Transaction, there is already one fixed player offering fixed-mobile bundles in the Dutch market and the Transaction would create a second fixed-

³⁵⁵ For instance, the Commission confirmed that Vodafone currently offers free extra data and/or extra discounts to new customers for a limited number of initial months.

³⁵⁶ Report titled "The likely anti-competitive effects of the proposed Vodafone/Ziggo JV" submitted by Tele2.

mobile integrated player. As such, the model put forward by Tele2 does not address the relevant question of what is the market impact of introducing a second firm offering fixed-mobile bundles when one is already active in the fixed-mobile segment. In addition, the model put forward by Tele2 does not explicitly model the interplay between bundling and switching costs but is limited to assuming that once competition between an integrated bundling fixed operator and a standalone mobile operator has happened, switching costs materialise and allow the integrated firm to raise prices ex-post. The Commission considers that a lack of explicit links between the early stage of competition between the integrated firm and the mobile only players and the later "recoupment" stage at which switching costs materialise makes the model uninformative on the nature of competition.

- (624) In conclusion, based on the elements provided in the submissions of T-Mobile and Tele2, the Commission considers (i) that the Transaction will be unlikely to lead to material price increases on average across the Dutch fixed and mobile consumers and (ii) while the market shares of mobile-only operators will come under pressure due to the introduction of fixed-mobile bundles by the merged entity, these operators are unlikely to be marginalised as a result of this.

7.4.4.3. Overall likely impact on prices and choice

- (625) As discussed in paragraphs (603) to (614), the Commission considers that as a result of the conglomerate effects of the Transaction the merged entity may have an incentive to engage in a price discrimination strategy by increasing the price of standalone fixed services and concurrently decreasing the price of fixed-mobile bundles (either directly by offering a lower price on the bundled products or indirectly by offering additional services in the bundle).
- (626) As regards the potential increase in the price of standalone fixed products, the Commission considers that the incentive to do so for the merged entity would be mitigated by the existence of alternative fixed offers by KPN and by the ability of mobile-only operators to respond by lowering the price of the mobile component to mitigate the increase in the total cost of ownership of mix-and-match customers.
- (627) As regards the sale of bundles at a discount, the Commission considers this to be in the interest of consumers and unlikely to lead to the marginalisation of mobile-only players who will continue to compete to sell mobile services to customers who purchase both fixed and mobile services (as well as to customers who purchase exclusively mobile services).
- (628) Overall, the Commission is of the view that the effects of bundling together fixed products of Ziggo and mobile products of Vodafone after the Transaction would not make consumers worse-off compared to the scenario that would prevail absent the Transaction.

7.4.4.4. Conclusion on conglomerate effects

- (629) Based on the above considerations, the Commission is of the view that the Transaction does not give rise to anti-competitive conglomerate effects. The Commission considers that the conglomerate effects of the Transaction may lead to an accelerated shift towards fixed-mobile bundles, possibly also via a certain increase in the prices of stand-alone fixed components. However, the Commission considers that this would not lead to the marginalisation of mobile-only rivals and would not

lead to overall consumer harm. In addition, the Commission considers that consumers would benefit from increased competition in fixed-mobile bundles between the Notifying Parties and KPN as a result of Transaction.

7.5. COORDINATED EFFECTS

7.5.1. The Notifying Parties' View

- (630) The Notifying Parties are of the view that the proposed transaction does not give rise to coordinated effects in the Dutch telecommunications market.
- (631) First, the Notifying Parties claim that there is no scope for coordination in the fixed markets resulting from the Transaction. These markets are characterized by differentiated products including a number of different components, such as fixed telephony, fixed internet access services and TV services. Moreover, an analysis of product movements across operators in these markets did not indicate that coordination has occurred in the past. Furthermore, as these markets evolve very rapidly with a number of smaller players such as Tele2, Online, Fiber Nederland, Netflix and Knippr offering standalone and/or bundled services, any attempt by KPN and the Parties to coordinate would be destabilized.
- (632) Second, the Notifying Parties consider that there is no scope for coordination in the retail market for mobile services resulting from the Transaction. As mobile products contain several dimensions (voice, data, SMS) and are linked to different types of handsets, the Parties are of the view that there are a large variety of quality and price combinations that any coordination strategy would have to encompass.
- (633) Moreover, the Notifying Parties question the external stability of any potential agreement given that next to the three established MNOs (KPN, Vodafone and T-Mobile) Tele2 recently entered the market and has taken on the role of a maverick. Moreover the Notifying Parties point to the fringe of around eighty MVNOs that currently populate the Dutch mobile telecommunications market.
- (634) Resulting from the arguments above that emphasize the lack of scope for coordination in fixed and mobile markets raised in recitals (630)-(633), the Notifying Parties are of the view that there is no scope for coordination in the market for fixed-mobile bundles as a result of the Transaction. First of all, although there may prima facie be an increase in symmetry given that in addition to KPN there will be a second fully integrated fixed-mobile operator, the Parties claim that this has no bearing in an economic sense as fixed and mobile markets are still separated markets. Furthermore, asymmetries would still remain post-transaction due to differing technologies, cost structures and upgrade cycles that are critical and would undermine stable coordination.
- (635) The Parties also emphasize that the role of fixed-mobile quadruple play services would make coordination even more complicated compared to coordination in fixed or mobile markets in isolation as in these services the multi-dimensionality aspect of the products would even be greater if the product components were combined.

7.5.2. Market Investigation

- (636) During the market investigation, the Commission received some negative replies about the possible anti-competitive coordinated effects arising from the proposed

transaction and a more articulated complaint from Tele2, that will be discussed in more detail in the following paragraphs. Another market player, T-Mobile, also articulated concerns related to coordinated effects along the same lines as the complaint from Tele2.

- (637) According to Tele2, eliminating Vodafone as an important competitive force will increase the likelihood of coordinated effects in the fixed triple play market. Tele2 claims that given the counterfactual of Vodafone's significant expansion plans, if it can be shown that the market is conducive to coordination absent the Transaction this amounts to showing that the proposed transaction will raise the likelihood of coordination. Tele2's main arguments on coordinated effects in the triple play market are based on the following factors that are discussed in more detail in paragraphs (638) to (642) below: (i) frequent interaction between KPN and Ziggo, (ii) historic evidence on price parallelism, (iii) high degree of concentration and stable market shares, (iv) homogeneity of triple play bundles, (v) existence of natural focal point, and (vi) JV will make it easier to enforce coordination.
- (638) According to Tele2, due to the fact that both KPN and Ziggo currently interact frequently in the market for the provision of triple play fixed bundles, an important requisite of coordinated effects is met. Moreover, Tele2 points to a number of incidences where price parallelism would have allegedly occurred, in particular, instances in the past where prices were raised either by Ziggo or KPN and then almost immediately followed by price increases of the other party.
- (639) Moreover, Tele2 emphasizes that both KPN and Ziggo have stable and relatively symmetric market shares. Furthermore, Tele2 claims that by aggregating demand for different product components (i.e. TV, fixed telephony, fixed internet access services), asymmetries of the standalone components are eliminated and cross-competition between standalone products is reduced which would in turn make coordination easier. Moreover, Tele2 claims that bundling increases transparency to the extent that it is easier to compare bundled offers as they limit the multiple combinations of fixed standalone components.
- (640) Tele2 also claims that there is a natural focal point of collusion - each player would focus on retaining its respective customer base and market share and would not actively try to steal customers from the other player.
- (641) In addition, in Tele2's view the Transaction would make coordination more likely. This is due to the fact that against a counterfactual, monitoring of coordination and punishment in case of deviation would become more effective. This is due to sufficient transparency in the market, a high degree of market saturation and disclosure of information about reasons for switching. There also seems to be no binding capacity constraints in this market. Tele2 is also of the view that the only competitor which would be able to disrupt coordination between KPN and Ziggo would be Vodafone which would be eliminated as a result of the proposed transaction.
- (642) Tele2 also states that to the extent that Vodafone would also be eliminated as an important competitive force in the fixed-mobile quadruple play market, and in light of the symmetries between KPN and the JV in the provision of this type of multiple play services, coordinated effects would also arise in the possible market for fixed-mobile quadruple play.

7.5.3. *Commission's Assessment*

- (643) To assess coordinated effects, the case law³⁵⁷ and the Horizontal Merger Guidelines³⁵⁸, require proof that the merger will make coordination more likely, more effective and more sustainable. The Commission's assessment therefore focuses on the changes in terms of these factors that the Transaction will bring about. The Commission's assessment in particular will focus on the following factors: (a) the ability to reach terms of coordination; (b) the ability to monitor deviations from the terms of coordination; (c) the existence of a credible deterrent mechanism if deviation is detected; and (d) 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
- (644) As will be shown in paragraphs (645) to (655) below the Commission concludes, on the basis of its investigation based of the current market conditions, that the proposed transaction does not significantly alter any of the factors generally considered conducive to coordination. The Commission's investigation has, furthermore, not yielded any substantial evidence of past coordination that could support a coordinated-effects theory of harm in fixed and fixed-mobile.

Ability to reach terms of coordination and focal point of coordination

- (645) The Commission notes that there are a number of factors that make the possible markets for fixed triple play and fixed-mobile quadruple play more conducive for coordination. These factors will be outlined below.
- (646) As can be seen in

³⁵⁷ Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECRI-4951; Case T-342/99, *Airtours v Commission* [2002] ECR II-2585.

³⁵⁸ Horizontal Merger Guidelines, paragraphs 39-57.

- (647) Table 18 below, on the one hand the market shares of KPN are broadly similar to market shares of Ziggo on all of the retail markets for standalone fixed services (with the share in TV services being somewhat less symmetric) and the proposed transaction will not lead to any significant increase of the symmetry between KPN and Ziggo' market shares on any of these markets. The market positions of KPN and Ziggo on the fixed triple play market are far less symmetrical (Ziggo having a considerably stronger position in fixed triple play than KPN). On the other hand the elimination of Vodafone as a fixed player would strengthen the market position of Ziggo in the fixed markets, and therefore also in the possible retail market for fixed triple play, thereby in turn strengthening the position of the two largest players KPN and Ziggo that both own their own fixed infrastructure with nationwide coverage.

Table 18: Dutch retail telecommunications markets – market shares by number of subscribers for 2015

	KPN	Ziggo	JV
Fixed telephony	[40-50]%	[40-50]%	[40-50]%
Fixed internet access	[40-50]%	[40-50]%	[40-50]%
TV services	[30-40]%	[40-50]%	[40-50]%
Fixed triple play ³⁵⁹	20-30%	60-70%	60-70%
Fixed-mobile quadruple play ³⁶⁰	80-90%	10-20%	10-20%

Table 19: Dutch retail telecommunications markets – historic evolution of market shares by number of subscribers

	KPN			Ziggo		
	2013	2014	2015	2013	2014	2015
Fixed telephony	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Fixed internet access	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
TV services	[20-30]%	[20-30]%	[30-40]%	[50-60]%	[40-50]%	[40-50]%
Fixed triple play	n/a	[20-30]%	20-30% *	n/a	[60-70]%%	60-70% *
Fixed-mobile quadruple play	n/a	[80-90]%	80-90% *	n/a	[10-20]%	10-20% *

*based on market reconstruction data

Source: Form CO and Telecompaper

- (648) As regards quadruple play in particular the symmetry between KPN and Ziggo will increase post-merger in relation to infrastructure access as the JV will be, similarly to KPN, a fully integrated fixed-mobile player with its own fixed and mobile infrastructures. This in turn, may increase the likelihood of coordinated effects in the fixed-mobile quadruple play market. The elimination of Vodafone as a player also in fixed-mobile multiple play resulting in a reduction in the number of players active in this possible market from 3 to 2 increases concentration and makes it easier to coordinate behaviour.
- (649) In order for firms to come to an effective understanding, it must be clear what the focal point for coordinated behaviour is. As KPN and Ziggo do not overlap in the provision of any single play fixed services³⁶¹ any concerns about coordination on

³⁵⁹ Market shares based on market reconstruction data.

³⁶⁰ Market shares based on market reconstruction data.

³⁶¹ Customers willing to use KPN's TV services must first subscribe to its fixed broadband offer, whereas customers wanting to purchase fixed internet access services from Ziggo, must first be subscribed to Ziggo's TV services.

prices could potentially arise only with respect to fixed bundles and fixed-mobile bundles. Notwithstanding the existence of a certain level of product differentiation (and related pricing), this does not exclude that market shares and related customer churn figures could constitute an effective focal point for possible coordination.

- (650) With regard to the stability of the possible markets for fixed and fixed-mobile bundles those respondents that provided a meaningful answer to the relevant question in the Commission's questionnaire, in general consider the fixed markets to be relatively stable as the current market shares of participants do not deviate significantly and prices do not change often.³⁶² The triple play market appears to be growing at the expense mainly of fixed standalone products. In contrast the possible market for fixed-mobile bundles is considered by market participants much less stable due to its fast growth rate (rapid increase in the number of quadruple play subscribers compared to the growth of other types of multiple play). The fixed-mobile market, although currently dominated by KPN, is still in a relatively nascent stage. In this respect the Commission notes that, given that the JV will be post-transaction better suited to compete more aggressively in the provision of fixed-mobile bundles and to grow its current market share as the market for fixed-mobile bundles is expected to expand moving forward (as already mention in paragraphs (87) and (98), it is doubtful whether the merged entity would have the incentive to establish coordination with KPN in respect to fixed-mobile bundles. Although there are factors that point at an increased ability to reach terms of coordination on fixed-mobile markets (see paragraph (648) and (649)) it is doubtful whether the merged entity would currently in this relatively nascent stage have the incentive to establish coordination with KPN in respect to fixed-mobile bundles.
- (651) Furthermore, the market investigation conducted by the Commission in the present case did not yield sufficient evidence that would point towards the existence of coordination in the past or to support the claim that plans of such coordination following the Transaction existed.

Transparency and ability to monitor deviations

- (652) Regarding the scope of monitoring of a potential deviation of an agreement to coordinate, the results of the market investigation seem to indicate that at least a certain degree of transparency exists with respect to the product offers of the different operators as prices of the offers to new customers are transparent and publically available on the websites of the respective operators. However some respondents also explain that there is no transparency as regards the loyalty offers or the retention offers that operators make to their existing customers in an effort to prevent the customer to switch to an alternative operator.³⁶³
- (653) With respect to a possible increase in cost-structure symmetries, the Commission notes that although the proposed transaction will increase the level of vertical integration of the JV (as it will own both a fixed and a mobile infrastructure), it is not clear whether such increase would be sufficient to offset any possible pre-existing asymmetries between the fixed infrastructure and associated cost-base of KPN and

³⁶² See replies to Q1 – Retailers of 15 June 2016, question 75.

³⁶³ See replies to Q1 – Retailers of 15 June 2016, questions 71 and 73.

the JV, in light of the different fixed network technologies and respective upgrade cycles.³⁶⁴

- (654) As the monitoring of product offers and prices is done by sophisticated market players (rather than end customers) with sufficient in-house capability of comparing these offers, the Commission is of the view that the market is characterized by a certain degree of transparency, which could allow the monitoring of a deviation from coordination based on price or product characteristics by the firms involved in the collusive agreement. However, there is no evidence to suggest that the proposed transaction would significantly alter the existing degree of transparency on the Dutch telecommunications markets, and therefore the Commission considers that any possible impact of the proposed transaction on transparency will not materially change the existing ability of firms to monitor deviations.

Existence of a deterrent mechanism

- (655) 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 and the scope of retaliation as no evidence was retrieved to support this. This should also be seen in relation to paragraph (651) above in which it was pointed out that the evidence on file was insufficient to infer on which terms a coordinated strategy would take place in the first place.

Reactions of outsiders

- (656) The Commission notes that several alternative operators to KPN and Ziggo are currently active on a more or less national basis in the Dutch markets for the retail provision of internet access, fixed telephony, TV services 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 and M7. Given that those alternative operators do not rely on either Vodafone 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.
- (657) Any competitive pressure that those alternative players are able to impose on KPN and Ziggo, stems from access obligations on both KPN's copper and fibre 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 fixed telephony, fixed Internet access and TV services.

³⁶⁴ Ziggo's fixed infrastructure is a coax cable network, historically built to provide broadcast services, and have since expanded to include IP-based services (broadband internet and VoIP) in the unused spectrum. With the emergence of the DOCSIS 3.0 standard advances have been made in terms of data transmission speeds and the recently announced DOCSIS 3.1 allows further upgrades offering even higher speeds (in excess of those possible with VDSL2 for example). KPN, on the other hand, operates a combined copper and fibre networks which historically was built to offer voice services and relies upon advances in DSL technology or new FttH roll-out to expand the bandwidth for internet and IP TV services. Further upgrades to the broadband speeds available via KPN's fixed infrastructure are can be made by either introducing improved DSL technologies (such as VDSL2 vectoring) or progress in FttH roll-out.

- (658) Access to KPN's fibre network is guaranteed through *ex ante* regulation. Based on that fibre access, Vodafone seems to be currently capable of offering competitive triple and quadruple play bundles.

7.5.4. Conclusion

- (659) The Commission concludes that the Dutch retail markets for fixed telecommunications services may be conducive to coordination and the proposed transaction may facilitate coordination in these markets. However, the Commission also concludes that there is not sufficient evidence to find that the proposed transaction would give rise to serious doubts as a result of coordinated effects. In addition, the Commission notes insofar as the Final Commitments offered by the Parties (discussed in detail in section 8 below) will introduce a player which would be well-placed to replicate Vodafone's current position on the markets, they will effectively address any potential risk of coordinated effects resulting from the proposed transaction.

7.6. EFFICIENCIES

- (660) The Notifying Parties claim that the Transaction will (1) reduce the marginal costs of Vodafone in the provision of fixed services, as it will eliminate the wholesale margin that Vodafone currently pays to KPN for hosting its fixed telecommunications activity; and (2) reduce the marginal costs of Ziggo in the provision of mobile services, as it will eliminate the wholesale margin that Ziggo currently pays to Vodafone for hosting its MVNO activity. These efficiency claims are based on the so-called elimination of "double marginalisation", which can be the result of mergers that bring together complementary assets.³⁶⁵
- (661) Such efficiencies would arise because the Transaction (i) allows Vodafone to no longer pay KPN for obtaining wholesale access to KPN's fixed network, as all new fixed subscribers of Vodafone and Ziggo would be hosted on Ziggo's network and (ii) would allow Ziggo to no longer pay Vodafone for obtaining wholesale access to its mobile network as an MVNO. The elimination of these payments would generate variable cost savings to the extent that (i) Ziggo's own incremental cost of serving additional fixed customers is lower than Vodafone's current incremental cost of serving additional fixed customers (which includes the wholesale access charges paid to KPN); and/or (ii) Vodafone's own incremental cost of serving additional mobile customers is lower than Ziggo's current incremental cost of serving additional mobile customers (which includes the wholesale access charges paid to Vodafone).
- (662) In this section, the Commission assesses these efficiency claims. Section 7.6.1 sets out the analytical framework for the assessment of efficiencies; Section 7.6.2 presents the Notifying Parties' claims in relation to the elimination of double marginalisation on Vodafone's fixed products; Section 7.6.3 contains the Notifying Parties' claims in relation to the elimination of double marginalisation on Ziggo's mobile products; and Section 7.6.4 concludes.

³⁶⁵ See Non-Horizontal Merger Guidelines, paragraph 55.

7.6.1. *Analytical framework*

- (663) The Commission considers any pro-competitive effects of efficiencies that benefit consumers as part of its overall assessment of the merger. For the Commission to take account of efficiency claims in its assessment of the merger, any claimed efficiencies must satisfy three cumulative criteria defined in the Horizontal Merger Guidelines:³⁶⁶
- (a) Verifiability: efficiencies have to be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialise and be substantial enough to counteract a merger's potential harm to consumers;³⁶⁷
 - (b) Merger specificity: efficiencies have to be a direct consequence of the merger and cannot be achieved to a similar extent by less anticompetitive alternatives;³⁶⁸
 - (c) Benefit to consumers: efficiencies have to benefit consumers in the sense that they should be substantial and timely and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.³⁶⁹
- (664) The Horizontal Merger Guidelines further explain that the burden of proof for showing that efficiencies fulfil the above criteria lies with the Notifying Party, as most of the information is solely in the possession of the Parties. It is therefore incumbent upon the Notifying Party to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the Notifying Party to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger and therefore benefit consumers.³⁷⁰ Furthermore, evidence relevant to the assessment of efficiency claims should include, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.³⁷¹

7.6.2. *Elimination of double marginalisation on the provision of fixed services by Vodafone*

7.6.2.1. Notifying Parties' claims

- (665) [details regarding the wholesale access contract between KPN and Vodafone].
- (666) According to the Notifying Parties, after the Transaction Ziggo would take into account the fact that raising the price for fixed wholesale access to Vodafone would lead Vodafone in turn to raise its prices to retail fixed customers and, as a

³⁶⁶ Horizontal Merger Guidelines, paragraph 78.

³⁶⁷ Horizontal Merger Guidelines, paragraph 86.

³⁶⁸ Horizontal Merger Guidelines, paragraph 85.

³⁶⁹ Horizontal Merger Guidelines, paragraph 79.

³⁷⁰ Horizontal Merger Guidelines, paragraph 87.

³⁷¹ Horizontal Merger Guidelines, paragraph 88.

consequence, demand for Vodafone fixed products would decrease.³⁷² Given that Ziggo's incremental costs of providing fixed services are claimed to be lower than Vodafone's current incremental cost of serving additional fixed customers (consisting of the wholesale charges paid to KPN and any additional incremental cost per customer incurred by Vodafone), the Transaction would result in variable cost savings for Vodafone in the provision of fixed services.

- (667) Based on the Notifying Parties' estimations, the Transaction would lead to variable cost savings for Vodafone in the provision of fixed services in the order of EUR [...] per fixed customer per month, depending on the fixed bundle. These are calculated by the Notifying Parties as the difference between the average incremental network costs of Vodafone in fixed (including the wholesale price charged by KPN) and Ziggo's average incremental network costs per customer of Vodafone.
- (668) These cost savings are claimed by the Notifying Parties to be variable with subscriber numbers and usage. As a consequence, they would benefit consumers, as they would likely be passed on to consumers (at least in part) in the form of lower retail prices for the fixed products of Vodafone.

7.6.2.2. Commission's assessment

- (669) In the following paragraphs, the Commission will assess whether the submitted efficiency claims fulfil the three criteria defined in the Horizontal Guidelines.

Verifiability

- (670) Based on the submissions by the Notifying Parties³⁷³, the Commission considers that the claimed efficiencies are not sufficiently verified for a number of reasons.
- (671) First, the efficiencies claimed by the Notifying Parties are relevant only under the assumption that the Vodafone's fixed products will be retained after the Transaction. However, the Notifying Parties have not clarified whether all products of Vodafone and Ziggo will be retained³⁷⁴ and indeed there is evidence from internal documents suggesting that [details regarding plans post-Transaction].³⁷⁵ [details regarding plans post-Transaction] the relevance of the Notifying Parties' efficiency claim would come into question. Any difference in incremental network costs to provide fixed services between Ziggo and Vodafone would become irrelevant because applied to products [details regarding plans post-Transaction] that are no longer sold.
- (672) Second, the Commission notes that the forward looking incremental costs of Vodafone in fixed could be lower than currently estimated by the Notifying Parties assuming Vodafone's current infrastructure mix. This is because the higher the investment in fixed network infrastructure by Vodafone, the lower the variable access

³⁷² In economics jargon, with the Transaction Ziggo internalises the negative externality that an increase in wholesale fees generates on Vodafone. Such externality is not taken into account by KPN when setting its wholesale fees pre-transaction.

³⁷³ See section 9 of Form CO; Annex 29 of Form CO; Notifying Parties' replies to the RFI of 21 June 2016.

³⁷⁴ See reply to question 14 of the RFI of 21 June 2016.

³⁷⁵ See page 6 of attachment G.143 to the Form CO.

charges that Vodafone must pay to KPN (as more network infrastructure allows Vodafone to reduce its degree of reliance on KPN).³⁷⁶ While the Parties claim that [details regarding plans absent the Transaction] ³⁷⁷, certain internal documents of Vodafone show that [details regarding plans absent the Transaction].³⁷⁸

- (673) Third, the Commission recognises that, as pointed out by the Notifying Parties, a number of internal documents feature expected cost savings in the provision of fixed services by Vodafone.³⁷⁹ However, the Commission notes that there are also documents presenting [...].³⁸⁰ In addition, while the internal documents to which the Notifying Parties refer may suggest that capex and opex savings in the provision of fixed services are expected to be achieved by Vodafone via the Transaction, the Commission has not been able to verify that all the claimed capex and opex savings pertain to variable costs, which are the costs most likely to be passed on to retail consumers. As an example, it is unclear whether all of the additional incremental Vodafone network costs (on top of the KPN charges) are variable in nature. For instance, logistics costs relating to the transport of customer premise equipment (handling, packing, postage) may not necessarily be directly related to volumes.

Merger Specificity

- (674) The Commission considered whether the reduction in the variable network costs for fixed services provided by Vodafone could be realistically achieved by other, less anti-competitive means. The Commission considers that at least part of the cost savings may not be merger-specific.
- (675) First, the Commission considered whether cost savings could be achieved by Vodafone by extending its fixed network infrastructure with a view to decrease the extent to which it relies on the fixed network of KPN. For instance, Vodafone could extend its fibre ODF footprint to 100% of the fibre footprint of KPN. [details regarding Vodafone's plans absent the Transaction].³⁸¹ Similarly, Vodafone could roll out a backhaul network to the respective metro core locations i.e. to around 160 Points of Presence ("PoPs") and obtain access via the KPN's regulated Virtual Unbundled Local Access ("VULA") offer, which appears to offer [details regarding Vodafone's plans absent the Transaction].³⁸² Last, there is evidence that KPN would continue its rollout of fibre in the Netherlands (although possibly at a slower pace than originally envisaged). Vodafone could therefore extend its rollout of ODF equipment to follow KPN's fibre expansions and obtain variable cost savings, since the variable costs for Vodafone based on ODF fibre access appear to be lower than both the variable costs based on Vodafone's current Wholesale Broadband Access or VULA contracts.

³⁷⁶ Presentation by the Notifying Parties at the meeting with the Commission of 24 May 2016 (slide 9).

³⁷⁷ Annex 11 of the Form CO.

³⁷⁸ See page 9 of attachment G.145 to the Form CO.

³⁷⁹ See for instance [Vodafone Internal Document].

³⁸⁰ See [Vodafone Internal Document].

³⁸¹ See page 9 of attachment G.145 to the Form CO.

³⁸² See Notifying Parties presentation "2016 05 24 Theories of harm.ppt" of 24 May 2016, slide 9.

Benefit to consumers

- (676) The Commission considered whether the cost savings claimed by the Notifying Parties in relation to Vodafone's fixed services would likely be passed on to consumers in the form of lower prices on Vodafone's fixed services.
- (677) The Commission has concluded that part of the cost savings claimed by the Notifying Parties relates to network costs that vary with the number of subscribers and subscribers' usage. Savings in any such variable network costs could in general be passed on to consumers by the JV (at least to a certain extent) in the form of lower prices for the fixed products of Vodafone. Therefore, such cost savings could in principle benefit consumers as well as Vodafone.
- (678) However, the extent to which network costs are passed on to consumers depends on how much of the overall network cost reduction claimed by the Parties is directly dependent on subscriber numbers (and hence more likely to affect Vodafone's pricing) and how much is instead fixed in nature. Thus, on the basis of the elements at its disposal the Commission is not able to establish conclusively the existence of benefit to consumers.

7.6.2.3. Conclusion

- (679) The Commission considers that the efficiencies claimed by the Notifying Parties in relation to the elimination of double marginalisation relating to fixed services provided by KPN to Vodafone do not fulfil the three cumulative criteria set out in the Horizontal Merger Guidelines.

7.6.3. Elimination of double marginalisation on the provision of mobile services by Ziggo

7.6.3.1. Notifying Parties' claims

- (680) According to the Notifying Parties [details regarding the wholesale access contract between Vodafone and Ziggo].
- (681) It is claimed that the Transaction would eliminate the wholesale margin that Vodafone currently charges to Ziggo for hosting Ziggo's MVNO activity. This is because after the Transaction Vodafone would take into account the fact that raising the price for mobile wholesale access to Ziggo would lead Ziggo to raise in turn its prices to retail mobile customers and, as a consequence, demand for Ziggo mobile products would decrease.³⁸³
- (682) Therefore, after the Transaction, Ziggo would likely access the mobile network of Vodafone at cost and this would result in variable cost savings for Ziggo in the provision of mobile services. These variable cost savings would benefit consumers, as they would likely be passed on to consumers in the form of lower retail prices for the mobile products of Ziggo.
- (683) Based on the Notifying Parties' estimations, the JV would lead to variable cost savings for Ziggo in the provision of mobile services in the order of EUR [...] per

³⁸³ In economics jargon, after the Transaction Vodafone would internalise the negative externality that an increase in its wholesale fees generates on Ziggo.

mobile customer per month (based on 2015 figures). These are calculated by the Parties as the difference between the average wholesale price charged by Vodafone to Ziggo for voice, SMS, data, 4G access and extra 4G speed (circa EUR [...] per mobile customer per month) and Vodafone's average incremental network costs per customer of Ziggo (estimated at EUR [...] per mobile customer per month).

- (684) The Notifying Parties also note that the nature of the efficiency claimed in this case is similar to the efficiency recognised by the Commission in the context of the Orange/Jazztel merger³⁸⁴, where the transaction implied that Jazztel would no longer pay a mark-up to Orange for the provision of wholesale access to the Orange network, leading to lower variable network costs for Jazztel in the provision of mobile services.

7.6.3.2. Commission's assessment

- (685) The Commission agrees with the Notifying Parties that the nature of the efficiency claimed in this case is similar to the efficiency recognised by the Commission in the context of the Orange/Jazztel merger. However, even if conceivable in principle, for the Commission to account for such efficiency in its competitive assessment, the efficiency claimed in this case must fulfil the three criteria defined in the Horizontal Guidelines, as set out below.

Verifiability

- (686) Based on the submissions by the Notifying Parties³⁸⁵, the Commission considers that the claimed efficiencies are not sufficiently verified for a number of reasons.
- (687) First, the Commission notes that the issue of double marginalisation affects Ziggo's mobile products only to the extent that Ziggo has an incentive to pass on to the retail mobile consumers any change in wholesale access costs implemented by Vodafone. This requires the price paid by Ziggo to Vodafone to increase proportionally with subscriber numbers. However, the Commission notes that the contracts between Ziggo and Vodafone [details regarding the wholesale access contract between Vodafone and Ziggo].³⁸⁶
- (688) Second, the Parties submitted that Ziggo paid Vodafone an average variable cost amounting to an average of EUR [...] per mobile customer per month in 2015. However, the Commission notes that over the horizon for which data is available (January 2015 to April 2016), [details regarding the wholesale access contract between Vodafone and Ziggo] .³⁸⁷ [details regarding the wholesale access contract between Vodafone and Ziggo].
- (689) In this respect, the Commission notes that it is unclear whether all Ziggo's payments included in the average variable cost calculation (see table 2.1 of annex 29 to the Form CO) could indeed be qualified as variable cost. Annex 8.2 of the reply to the

³⁸⁴ Case M.7421 Orange/Jazztel.

³⁸⁵ See section 9 of Form CO; Annex 24 of Form CO; Notifying Parties replies to the RFI of 21 June 2016.

³⁸⁶ See section [...].

³⁸⁷ See sheet [...].

RFI of 21 June³⁸⁸ contains costs for which the ultimate source is an email provided by Ziggo to the economic consultants, to which the Commission has no access. Therefore, the Commission has not been able to link the figures provided by the Notifying Parties in their submissions and the underlying charges contractually agreed between Vodafone and Ziggo. As such, the extent to which all of Ziggo's wholesale costs indicated in the Notifying Parties' submissions are variable could not be confirmed.

- (690) The Commission has asked the Parties to clearly link the cost savings figures provided in their efficiency claim with figures from their internal documents. While both Ziggo and Vodafone have pointed to a number of internal documents mentioning savings in capex and opex as a result of the Transaction, none of these documents allows to clearly separate between costs that are fixed in nature and costs that are variable with subscriber numbers.³⁸⁹
- (691) Third, as regards the calculation of the incremental network costs of Vodafone, the Notifying Parties explained that [details of Vodafone's calculations of incremental network costs]. Therefore, Vodafone has relied on the Dutch Competition Authority's LRIC model for regulation of mobile termination, modified to represent an operator Vodafone's size. The resulting estimation suggests, in the Notifying Parties' view, that Vodafone incurs an incremental cost of EUR [...] per customer per month to serve each additional Ziggo's customer.
- (692) The Commission notes that Vodafone's calculations are based on the average annual incremental capex and opex that an operator of Vodafone's size is expected to incur over the period 2011-2020. As such, there appears to be a misalignment between the timing used to estimate Vodafone incremental network costs in mobile (2011-2020) and the timing considered as the basis for Ziggo's wholesale costs (2015 only). It is unclear how the estimation of the cost savings of Ziggo would change if the calculation were made on a consistent time frame.
- (693) For the above-mentioned reasons the Commission concludes that the claimed efficiencies cannot be sufficiently verified.

Merger Specificity

- (694) The Commission considered whether the cost reduction in the variable network costs for mobile services provided by Ziggo can be realistically achieved by other, less anti-competitive means. The Commission considers that the cost savings estimated by the Notifying Parties in relation to the double mark-up applying to Ziggo's mobile products cannot be fully considered merger specific.
- (695) The Commission considered whether Ziggo could possibly re-negotiate a wholesale contract featuring lower variable rates.

³⁸⁸ Supporting calculations for annex 29 of the Form CO, submitted in response to the RFI of 21 June 2016.

³⁸⁹ See reply to question 22 of RFI of 21 June 2016.

- (696) Some evidence from internal documents suggests that this would unlikely be the case. [details of Ziggo's alternative options for wholesale access arrangements]³⁹⁰ [details of Ziggo's alternative options for wholesale access arrangements].
- (697) Ziggo explained that in the Netherlands a different wholesale agreement with Vodafone based on a larger fixed fee and lower per user fee implies a larger loss (or less profit) from the onset and, [details of Ziggo's alternative options for wholesale access arrangements].
- (698) The Commission considers that Ziggo's explanation that a different wholesale deal would be less profitable and more risky in the short term does not put into question the possibility that such agreement be a theoretically viable option to be assessed on a case by case basis. The Commission considers that Ziggo has not provided sufficient substance supporting why such a deal would not be possible and profitable in the Netherlands. Ziggo has not explained whether it has attempted to negotiate with Vodafone such a "more fixed and less variable" cost structure in the past. While recognising that such contracts are generally not a common, the Commission considers that it cannot be ruled out that at least part of the claimed efficiencies could be achieved by contractual means.
- (699) Finally [details of Ziggo's alternative options for wholesale access arrangements].³⁹¹
- (700) For the above-mentioned reasons the Commission considers, that the full elimination of the double mark-up applying to Ziggo's mobile products cannot be considered merger specific.

Benefit to consumers

- (701) The Commission notes that at least part of the savings claimed by the Notifying Parties in relation to Ziggo's mobile services may relate to costs that vary with the number of subscribers and subscriber usage. Savings in any such variable costs can possibly be passed on to consumers by the JV in the form of lower prices for the mobile products of Ziggo. Therefore, such cost savings could in principle benefit consumers as well as Ziggo.
- (702) Indeed, a number of internal documents appear to support the view that Ziggo would have an incentive to use part of the cost savings from the Transaction to offer more aggressive 4P bundles.³⁹² However, the magnitude of the network costs that are passed on to consumers depends on how much of the overall cost reduction claimed by the Parties is variable and how much is fixed. For the reasons explained above, such assessment by the Commission cannot be conclusive.

³⁹⁰ Ziggo has already acquired a mobile licence for 2x20 MHz in the 2.6 GHz band in a joint venture with UPC. See "Background to Ziggo's activities in mobile services" on page 29 of Form CO.

³⁹¹ See slide 4 of the collection of slides provided pertaining to Liberty Global's Budget Board Meeting of December 2014. [ID00803-00313]

³⁹² See slide 4 of the collection of slides provided pertaining to Liberty Global's Budget Board Meeting of December 2014.

7.6.3.3. Conclusion

- (703) The Commission considers that the efficiencies claimed by the Notifying Parties in relation to the elimination of double marginalisation relating to the mobile services provided by Vodafone to Ziggo do not fulfil the three cumulative criteria set out in the Horizontal Merger Guidelines.

7.6.4. Conclusion on the Notifying Parties efficiency claims

- (704) For the above mentioned reasons, the Commission considers that the efficiencies claimed by the Notifying Parties in relation to the elimination of double marginalisation relating to fixed services provided by KPN to Vodafone and mobile services provided by Vodafone to Ziggo do not fulfil the three cumulative criteria set out in the Horizontal Merger Guidelines. Therefore, the efficiencies claimed cannot be used to offset the loss of competition identified by the Commission and, as such, the Notifying Parties' efficiency claims do not affect the Commission's serious doubts as to the compatibility with the internal market of the proposed transaction.

7.7. POSSIBLE SPILL-OVER EFFECTS OF THE JV

- (705) Under Article 2(4) of the Merger Regulation, to the extent that the creation of a JV that constitutes a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, the Commission must assess such coordination in accordance with the criteria of Article 101(1) and (3) TFEU, with a view of establishing whether or not the operation is compatible with the common market. In making this assessment, the Commission must take into account, in particular, whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market that is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market. In addition, the Commission has to take into account whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question. A restriction of competition under Article 101(1) TFEU is established when the coordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture.
- (706) In this case, the Commission notes that the proposed transaction concerns the entire business of Vodafone and Ziggo in the Netherlands. Neither Party will retain any business that competes directly with the JV in the Netherlands therefore no spill-over effects in relation to any market in the Netherlands arise.
- (707) As regards possible spill-over effects on markets outside the Netherlands, the Commission notes that each of Vodafone and Liberty Global will retain independent their respective business activities outside of the Netherlands. The only product markets with a wider than national geographic scope where the Parties are active are the (i) wholesale internet connectivity market, the (ii) wholesale international carrier services market and the (iii) wholesale internet hosting services market.

- (708) However, given the Parties' low market share in either of these markets,³⁹³ the Commission considers it unlikely that the Transaction will increase the risk of coordination between the Parties' activities outside of the Netherlands.

8. PROPOSED REMEDIES

- (709) To address the serious doubts raised during the Phase I investigation, the Parties submitted commitments on 12 July 2016 (the "First Commitments") pursuant to Article 6(2) of the Merger Regulation.

- (710) On 27 July 2015, the Parties submitted modified commitments (the "Final Commitments").

8.1. Analytical framework

- (711) Where the Commission considers that a concentration will raise competition concerns the parties may seek to modify the concentration in order to resolve such competition concerns and thereby gain clearance of their merger.³⁹⁴

- (712) In Phase I, commitments offered by the parties can only be accepted where the competition problem is readily identifiable and can easily be remedied. The competition problem therefore needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation. Where the assessment confirms that the proposed commitments remove the grounds for serious doubts on this basis, the Commission clears the merger in Phase I.³⁹⁵

- (713) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including inter alia the type, scale and scope of the proposed commitments, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market.³⁹⁶

- (714) In order for the commitments to comply with these principles, commitments must be capable of being implemented effectively within a short period of time.³⁹⁷ Where, however, the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to

³⁹³ The combined market share of the Parties in the wholesale internet connectivity market is <5% on all possible bases. In the wholesale international carrier services market is <10% and in the wholesale internet hosting services market is 10-20%, Market shares source: Parties' estimates calculated on the basis of Ovum data (Form CO, paragraph 6.487).

³⁹⁴ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ 2008/C 267/01, Paragraph 5.

³⁹⁵ Remedies Notice, Paragraph 81.

³⁹⁶ Remedies Notice, Paragraph 12.

³⁹⁷ Remedies Notice, Paragraph 9.

maintain effective competition in the market, an authorisation decision cannot be granted.³⁹⁸

- (715) As concerns the form of acceptable commitments, the Merger Regulation leaves discretion to the Commission as long as the commitments meet the requisite standard.³⁹⁹ Structural commitments will meet the conditions set out above only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.⁴⁰⁰
- (716) Divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps, although other structural commitments, such as access remedies, may be suitable to resolve concerns if those remedies are equivalent to divestitures in their effects.⁴⁰¹
- (717) It is against this background that the Commission analysed the proposed commitments in this case.

8.2. The First Commitments

8.2.1. *Description of the First Commitments*

- (718) The Parties have offered to divest Vodafone's retail consumer fixed business in the Netherlands (the "Divestment Business").
- (719) The Divestment Business mainly includes the tangible and intangible assets supporting Vodafone's consumer fixed business, including:
- i. [...];
 - ii. [...];
 - iii. [...];
 - iv. [...];
 - v. [...];
 - vi. [...];
 - vii. [...];
 - viii. [...];
 - ix. [...];

³⁹⁸ Remedies Notice, Paragraphs 13, 14 and 61 *et seq.*

³⁹⁹ Case T-177/04 *easyJet v Commission* [2006] ECR II-1913, Paragraph 197.

⁴⁰⁰ Remedies Notice, Paragraph 10.

⁴⁰¹ Remedies Notice, Paragraph 19.

- x. [...];
 - xi. [...] ⁴⁰² [...].
- (720) The Parties also committed to transfer the following contracts as part of the Divestment Business:
- i. supplier contracts entered into for the sole benefit of the Divestment Business. [...]
- For supply contracts used by the Divestment Business which are shared with the business retained by the JV ("Shared Supply Contracts"), the divestment will only include the benefit of the portion of those contracts which relates to the Divestment Business (while the JV would continue to enjoy the other portion of the supply under the contract). Where a partial transfer or assignment of rights to the purchaser is not possible, the Notifying Parties will either (i) use reasonable endeavours to ensure that purchaser enters into an agreement on equivalent terms; or, if not possible (ii) offer to enter into a transitional arrangement for the provision of such services;
- ii. contracts with consumers for the provision of fixed services. In case of consumers buying both fixed and mobile services, only the contracts for the provision of fixed services would be transferred;
 - iii. Licences to use the IP related to the operation of the Divestment Business. ⁴⁰³
- (721) The Divestment Business does not include:
- i. some network assets (e.g., core network and datacentres) that are shared with the Vodafone business retained by the JV;
 - ii. Dense Wavelength Division Multiplexing (DWDM) transmission network, insofar as it related to the use of fibre links and DWDM equipment which are also used by the retained business;
 - iii. Vodafone brand;
 - iv. Vodafone's shops and contracts with indirect sales channels;
 - v. advertising and media contracts;
 - vi. market intelligence systems (used for reporting and customer value management);
 - vii. some support systems (for human resources, financial report, etc.) and market intelligence systems.

⁴⁰² One full-time equivalent is equal to one employee working a full-time job.

⁴⁰³ In case it is not possible to transfer such licences, the Notifying Parties agree to operate that IP on behalf of the purchaser for a period of [...] (or such longer period as may be agreed with the Purchaser and subject to the consent of the Monitoring Trustee) and/or work with the Purchaser to reach an agreement with the entity that is able to grant a licence.

- (722) The Notifying Parties committed to offer transitional services to the purchaser in relation to (i) services covered by Shared Supply Contracts, in case the purchaser is not able to enter into an agreement with the supplier on equivalent terms; (ii) datacentres and elements of the shared DWDM transmission networks; and (iii) some of the shared systems that are not included in the Divestment Business.
- (723) The First Commitments include an upfront buyer clause, that is to say that the Notifying Parties are not allowed to close the proposed transaction before having entered into a legally binding agreement with a purchaser for the Divestment Business, approved by the Commission. Moreover, the First Commitments provide that, in order to be approved by the Commission, the purchaser should have, *inter alia*, proven expertise in the telecommunication business.
- (724) The Parties have committed to divest the Divestment Business by way of a statutory demerger process under Dutch law.⁴⁰⁴ According to the Parties, this process would avoid the need for consent by contractual counterparties to the transferring of relevant contracts to the Divestment Business and allow the splitting of Shared Supply Contracts between the Divestment Business and the retained business.
- (725) For some contracts [details of certain Vodafone contracts]..
- (726) The Notifying Parties indicated that the First Commitments would eliminate the entire overlap between their activities in the supply of retail fixed services in the Netherlands and, therefore, that they would remove, in a clear-cut manner, any competition concerns raised by the Commission in relation to both retail fixed and fixed-mobile markets.
- (727) The Commission launched a market test of the First Commitments on 14 July 2016. Questionnaires were sent to providers of telecommunications services in the Netherlands. ACM provided its views on 18 July 2016.

8.2.2. *Results of the market test*

- (728) The majority of the respondents to the market test considered that the First Commitments would not be sufficient to remedy the competition concerns raised by the proposed transaction, especially insofar as they failed to address the non-horizontal anti-competitive effects stemming from the Transaction.⁴⁰⁵ Some respondents also pointed out that the First Commitments did not address the risk that post-merger the JV would stop providing Ziggo's TV channels at a reasonable price.⁴⁰⁶
- (729) Furthermore, according to some respondents,⁴⁰⁷ there would be a risk that the Divestment Business would lose access to KPN's copper and fibre network either as a result of the de-regulation of KPN post-transaction or in light of a successful appeal against ACM's current regulation imposing access obligations on KPN. Therefore, in

⁴⁰⁴ Under this process, the assets will be demerged into a separate company by universal succession of title. The shares in that company would then be sold to the purchaser.

⁴⁰⁵ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 1.

⁴⁰⁶ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 1.

⁴⁰⁷ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 19.

order to guarantee the viability of the Divestment Business, the First Commitments had to include also an obligation to give access to the JV's cable infrastructure.⁴⁰⁸

- (730) In addition, some respondents criticized the unclear and limited scope of the Divestment Business and one respondent⁴⁰⁹ provided a detailed list of information on assets and personnel that would have been necessary to thoroughly assess the First Commitments.
- (731) [...].⁴¹⁰
- (732) The specific flaws identified by the respondents are described in more detail below.
- (733) First, the majority of respondents⁴¹¹ indicated that there was a risk of churn associated with the transfer of customer contracts, especially with regards to customers of both Vodafone's fixed and mobile offers. In particular, those customers would be likely to churn, since only their contract for the provision of fixed services would be transferred to the Divestment Business, while their mobile subscription would be kept by the JV.⁴¹²
- (734) Second, the majority of respondents noted that [details of certain Vodafone contracts],⁴¹³ [...].
- (735) Third, with regard to the Shared Supply Contracts, some respondents indicated that the outcome of the splitting process was unclear,⁴¹⁴ and that the sharing mechanism would allow the JV to have access to confidential information about the Divestment Business in the future, which would seriously endanger the Divestment Business's market potential.

8.2.3. *Comments from ACM*

- (736) In its comments dated 18 July 2016, ACM noted that the First Commitments did not address the potential unilateral effects in fixed-mobile markets as well as the potential conglomerate and coordinated effects.
- (737) Moreover, in light of the risk of churn identified also by some respondents, ACM recommended that Divestment Business should include not only the mobile contracts for those customers to be affected by the divestiture (i.e., customers of Vodafone's fixed and mobile services), but also the Shared Supply Contracts.
- (738) [...].

⁴⁰⁸ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Questions 24 and 25.

⁴⁰⁹ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Questions 1, 2 and 3.

⁴¹⁰ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 17.

⁴¹¹ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 6.

⁴¹² See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 25.

⁴¹³ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 3.

⁴¹⁴ See Commission questionnaire "Remedies market test" of 12 July 2016, replies to Question 7.

- (739) Finally, ACM submitted that, in light of the uncertainties surrounding the suitability of a purchaser, a fix-it-first commitment (in which the purchaser is identified) should be included in the remedy package.

8.2.4. *Assessment of the First Commitments*

- (740) In the present case, the commitments should aim at replicating the competitive pressure exerted by Vodafone as a player in possible retail markets for the provision of fixed multiple play bundles and fixed-mobile multiple play bundles in the Netherlands, which would be lost with the proposed transaction. Accordingly, the Notifying Parties committed to divest Vodafone's fixed business in the Netherlands.

(741) [...]

(742) [...].

(743) [...].

- (744) In light of this, the Commission considered that the First Commitments were insufficient to eliminate the competition concerns raised by the proposed transaction

8.3. The Final Commitments

8.3.1. *Description of the Final Commitments*

- (745) Following the communication to the Notifying Parties of the results of the market test and the Commission's own assessment of the First Commitments, on 26 July 2016 the Notifying Parties submitted a revised commitment package, aimed at improving the First Commitments.

- (746) In particular, the Notifying Parties proposed to:

- i. [...];
- ii. [...];
- iii. put in place ring-fencing arrangements (or other safeguards as appropriate) regarding any commercially sensitive information that is exchanged with the purchaser regarding Shared Supply Contracts;
- iv. with respect to one of the Shared Supply Contracts [...], arrange for [...] to enter into a separate contract in relation to the Divestment Business or, if not possible, transfer the contract in its entirety to the purchaser.

8.3.2. *Assessment of the Final Commitments*

- (747) The Commission considers that the Final Commitments offered by the Notifying Parties are sufficient to remove the serious doubts regarding the compatibility of the Transaction with the internal market in relation to the possible retail markets for the provision of fixed multiple play bundles and fixed-mobile multiple play bundles in the Netherlands.

- (748) In particular, the Commission believes that the Final Commitments enable the purchaser to enter the abovementioned markets thanks to a viable and standalone

business, thereby replicating the competitive pressure that is lost due to the Transaction, for the following reasons.

- (749) First, the Final Commitments consist in the divestiture of Vodafone's fixed business in the Netherlands and therefore constitute structural remedies, which – as mentioned – are generally the best way to eliminate competition concerns resulting from horizontal overlaps.
- (750) Second, the Final Commitments will entirely remove the overlap between the Parties' activities in the horizontally affected possible markets for the provision of fixed multiple play bundles and fixed-mobile multiple play bundles in the Netherlands, thereby dispelling the serious doubts identified by the Commission in Sections 7.2.2 and 7.2.3 above. Since the Transaction does not give rise to conglomerate or coordinated effects (see Sections 7.4 and 7.5 above), the Final Commitments do not need to foresee any measures to address such effects.
- (751) Third, the Final Commitments can be implemented effectively and within a short space of time thanks to the fact that the divestment will be implemented by way of a statutory demerger process under Dutch law. Through this process all assets will be demerged into a separate company by universal succession of title, solving the issues raised by market participants regarding the delays and obstacles to the transfer and splitting of contracts.
- (752) In particular, as regards the transfer of contracts, since the demerger is effective by operation of law, counterparty consent is not required for the transfer of the contracts to the Divestment Business and, thus, the majority of contracts (including customer contracts) will be transferred in a straightforward manner to the Purchaser.
- (753) [details regarding transfer of certain Vodafone contracts].⁴¹⁵;
- (754) The demerger process also allows the splitting of contracts, thereby facilitating the operations of the Divestment Business as a standalone business. Accordingly, the Final Commitments provide specific safeguards so that the portion of the benefit of the Shared Supply Contracts which relates to the Divestment Business will be transferred to it or alternative arrangements are put into place. [details of the transfer of certain Vodafone contracts].
- (755) In order to avoid the risk that the sharing of contracts leads to the exchange of commercially sensitive information, which was mentioned by some respondents to the market test, the Parties have introduced ring-fencing agreements, which represent a sufficient guarantee against such risk.
- (756) In addition, the Notifying Parties offered to enter into transitional agreements to replicate the essential functions in place at closing, which are necessary to ensure the viability of the Divestment Business. Such transitional agreement will have a duration of maximum two years, which the Commission considers largely sufficient period of time based on the information provided by the respondents to the market test and the Notifying Parties.

⁴¹⁵ [details of certain Vodafone contracts].

- (757) For these reasons, the Commission considers that the Final Commitments contain all necessary safeguards to ensure the successful transfer of the Divestment Business to a suitable purchaser within a short period of time.
- (758) [...]
- (759) [...].
- (760) Fifth, the Divestment Business also includes Vodafone's entire fixed consumer customer base, thus allowing the purchaser to immediately establish itself and effectively compete in the market. Moreover, the Final Commitments allow the purchaser to approach the Vodafone's fixed-mobile customers, without any contractual obstacles or win-back attempts from the JV. This provision effectively addresses the concerns voiced by some respondents to the market test and by ACM that, by having different fixed and mobile providers post-transaction, the [...] could churn away and re-join the customer base of the JV.
- (761) [...] ⁴¹⁶, [...] ⁴¹⁷ [...].
- (762) Finally, with respect to the lack of detailed information on specific assets and contracts voiced by some respondents to the market test, the Commission notes that the essential assets and contracts included in the Divestment Business were listed in the non-confidential version of the commitments, which was shared with respondents during the market test. The non-confidential version also included the schedule to the commitments which lists all assets and contracts included in the Divestment Business. This gave the respondents to the market test an opportunity to comment on the viability of the Divestment Business.
- (763) For the reasons outlined above, the Commission concludes that the Final Commitments entered into by the undertakings concerned are sufficient to eliminate the serious doubts as to the compatibility of the Transaction with the internal market.

9. CONDITIONS AND OBLIGATIONS

- (764) Pursuant to the second subparagraph of Article 6(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.
- (765) The fulfilment of the measures that give 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 6(3) of the Merger Regulation. The undertakings concerned may also be

⁴¹⁶ See Commission Notice on remedies, paragraph 57.

⁴¹⁷ See submissions dated 22 and 26 July 2016.

subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

- (766) In accordance with the described distinction as regards conditions and obligations, the commitments in section B constitute conditions attached to this Decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the Annex constitute obligations as they concern implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market. Accordingly, the decision not to raise objections is made conditional on full compliance by the Notifying Parties with the requirements set out in Section B of the Final Commitments, which constitute conditions and with the remaining sections of the Final Commitments which constitute obligations on the Notifying Parties.
- (767) The full text of the commitments is an integral part of and is attached as Annex 1 to this Decision.

10. CONCLUSION

- (768) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B of the Final Commitments annexed to the present decision and to the fulfilment of the obligations contained in the other sections and paragraphs of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

*Vera JOUROVÁ
Member of the Commission*

Case M. 7978 –

LIBERTY GLOBAL / VODAFONE / DUTCH JV

COMMITMENTS TO THE EUROPEAN COMMISSION

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Case M. 7978 – LIBERTY GLOBAL / VODAFONE / DUTCH JV

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), Vodafone Group plc (“**Vodafone**”) and Liberty Global Europe Holding B.V. (“**Liberty Global**”) (the “**Notifying Parties**”) hereby enter into the following Commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering the creation of a 50/50 joint venture which will combine the businesses of the Notifying Parties in the Netherlands (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 6(1)(b) 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**”).

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, including the joint venture, whereby the notion of control shall be interpreted pursuant to Article 3 of the 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 which are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 17.1.1 and described more in detail in the Schedule.

Closing: the transfer of the legal title to the 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 secrets, 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.

Divestment Business: the business or businesses as defined in Section B and in the Schedule which the Notifying Parties commit to divest.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Parties and who has/have received from the Notifying Parties the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

Excluded Personnel: The personnel described in Annex 3 who will not transfer with the Divestment Business.

First Divestiture Period: the period of [...] from the Effective Date.

Hold Separate Manager: the person appointed by the Notifying Parties for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: the Personnel listed in Annex 3, including the Hold Separate Manager.

Liberty Global: Liberty Global Europe Holding B.V., a company incorporated under the laws of the Netherlands, with its corporate seat at Boeing Avenue 53, 1119 PE Schiphol-Rijk, The Netherlands.

[details of commercial arrangements with the purchaser of the Divestment Business].

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Parties, and who has/have the duty to monitor the Notifying Parties' compliance with the conditions and obligations attached to the Decision.

Personnel: all staff currently employed by the Divestment Business including staff seconded to the Divestment Business, shared personnel as well as the additional personnel described in the Schedule.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

Purchaser Criteria: the criteria laid down in paragraph 31 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

Schedule: the schedule to these Commitments describing more in detail the Divestment Business.

Specified Contracts: [details regarding certain existing Vodafone contracts].

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.

Vodafone: Vodafone Group plc, a company incorporated under the laws of the United Kingdom, with its registered office at Vodafone House, The Connection, Newbury, Berkshire RG14 2FN.

B. THE COMMITMENT TO DIVEST AND THE DIVESTMENT BUSINESS

Commitment to divest

11. In order to maintain effective competition, the Notifying Parties commit to divest, or procure the divestiture of the 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 32 of these Commitments. To carry out the divestiture, the Notifying Parties commit to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If the Notifying Parties have not entered into such an agreement at the end of the First Divestiture Period, the Notifying Parties shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 44 in the Trustee Divestiture Period.

12. The divestiture of the Divestment Business shall be implemented by way of a statutory demerger (which will be combined with a subsequent share sale). The effect of the statutory demerger process is universal succession of title under operation of Dutch law, such that for the majority of agreements counterparty consent will not be required. Where nonetheless consent is still required to the transfer of any agreement, the Notifying Parties will use best efforts to obtain such consent.
13. The proposed concentration shall not be implemented before:
 - 13.1.1. the Notifying Parties or the Divestiture Trustee has entered into a final binding sale and purchase agreement for the sale of the Divestment Business and the Commission has approved the purchaser and the terms of sale in accordance with paragraph 32; and
 - 13.1.2. [...].
14. The Notifying Parties shall be deemed to have complied with this commitment if:
 - 14.1.1. by the end of the Trustee Divestiture Period, the Notifying Parties or one of their Affiliated Undertakings or the Divestiture Trustee has entered into a final binding sale and purchase agreement 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 paragraph 32; and
 - 14.1.2. the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
15. In order to maintain the structural effect of the Commitments, the Notifying Parties shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the 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 (as provided in paragraph 58 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market.

Structure and definition of the Divestment Business

16. The Divestment Business consists of Vodafone's consumer fixed telecommunications business in the Netherlands, save for certain excluded contracts, assets and personnel as described in the Schedule.
17. The Divestment Business, described in more detail in the Schedule, includes all assets and staff which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business, including in particular:
 - 17.1.1. all tangible and intangible assets (including intellectual property ("IP") rights but excluding certain excluded assets as described in the Schedule) which

contribute to the current operation of the Divestment Business or are necessary to ensure the viability and competitiveness of the Divestment Business;

17.1.2. all licences, permits and authorisations issued by any governmental organisation or other body for the benefit of the Divestment Business;

17.1.3. all customer contracts, agreements, commitments, understandings and orders of the Divestment Business;

17.1.4. all customer, credit and other records of the Divestment Business, recognising that the Notifying Parties may retain a copy of such records to the extent that these are required for legal compliance purposes, but that the Notifying Parties may not use customer information which is obtained through such retained copies to specifically target those customers for the marketing of fixed or mobile services (whether provided on a standalone basis or within a bundled offer of fixed and mobile services).

For the avoidance of doubt, this does not preclude the Notifying Parties from marketing to such customers to the extent that they form part of a wider customer base that is the subject of a broader marketing strategy;

17.1.5. all supplier contracts, agreements, commitments, understandings and orders (or portions thereof) of the Divestment Business as at Closing, in the case of any contracts which are shared with the business(es) retained by the Notifying Parties through the process described in paragraph 59.1.8 of the Schedule; and

17.1.6. the Personnel (excluding certain excluded personnel as described in the Schedule).

18. In addition, the Divestment Business includes the benefit, for a transitional period of up to [...]after Closing and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which the Notifying Parties or their Affiliated Undertakings supply products or services to the Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the relevant business unit/division providing the product/service.
19. If there is any asset or personnel which is not covered by paragraph 1 of the Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.
20. [details of commercial arrangements with the purchaser of the Divestment Business].

C. RELATED COMMITMENTS

Preservation of viability, marketability and competitiveness

21. From the Effective Date until Closing, the Notifying Parties shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular the Notifying Parties undertake:
 - 21.1.1. not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
 - 21.1.2. to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
 - 21.1.3. 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 Divestment Business, and not to solicit or move any Personnel to the Notifying Parties' remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, the Notifying Parties shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. The Notifying Parties 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.
22. The Notifying Parties will put in place ring-fencing arrangements (or other safeguards as appropriate) regarding any commercially sensitive information that is exchanged with the Purchaser regarding Shared Supply Contracts.

Hold-separate obligations

23. The Notifying Parties commit, from the Effective Date until Closing, to procure that the Divestment Business is kept separate from the business(es) that the Notifying Parties will be retaining and, after closing of the notified transaction to keep the Divestment Business separate from the business that the Notifying Parties are retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by the Notifying Parties have no involvement in the Divestment Business; (ii) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by the Notifying Parties and do not report to any individual outside the Divestment Business.
24. Until Closing, the Notifying Parties shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the

business(es) which the Notifying Parties are retaining. Immediately after the adoption of the Decision, the Notifying Parties shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the 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 the Notifying Parties. 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 21.1.3 of these Commitments. The Commission may, after having heard the Notifying Parties, require the Notifying Parties to replace the Hold Separate Manager.

25. To ensure that the Divestment Business is held and managed as a separate entity the Monitoring Trustee shall exercise any rights of the Notifying Parties (or any of their Affiliated Undertakings) as shareholder in the legal entity or entities that constitute the Divestment Business or any part thereof (except for its rights in respect of dividends that are due before Closing), with the aim of acting in the best interest of the business, which shall be determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling the Notifying Parties' obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of the Notifying Parties. Upon request of the Monitoring Trustee, the Notifying Parties shall cause such members of the boards to resign.

Ring-fencing

26. The Notifying Parties shall implement, or procure to implement, all necessary measures to ensure that they do not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by the Notifying Parties before the Effective Date will be eliminated and not be used by the Notifying Parties. This includes measures vis-à-vis the Notifying Parties' appointees on the supervisory board and/or board of directors of the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. The Notifying Parties may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to the Notifying Parties is required by law.

Non-solicitation clause

27. The Notifying Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [...] after Closing.

Due diligence

28. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, the Notifying Parties shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

28.1.1. provide to potential purchasers sufficient information as regards the Divestment Business;

28.1.2. provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

29. The Notifying Parties shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). The Notifying Parties shall submit a list of all potential purchasers having expressed interest in acquiring the 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 days of their receipt.

30. The Notifying Parties 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.

D. THE PURCHASER

31. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:

31.1.1. The Purchaser shall be independent of and unconnected to the Notifying Parties and their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).

31.1.2. The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors; [...];

31.1.3. The acquisition of the 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 Divestment Business.

32. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval. When the Notifying Parties have reached an agreement with a purchaser, they 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. The Notifying Parties must be able to demonstrate to the Commission that:

32.1.1. the purchaser fulfils the Purchaser Criteria;

32.1.2. the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments; and

32.1.3. as regards the Specified Contracts:

[additional criteria in relation to certain existing Vodafone contracts].

For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the 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 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 Divestment Business after the sale, taking account of the proposed purchaser.

E. TRUSTEE

I. Appointment procedure

33. The Notifying Parties shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Parties commit not to close the Concentration before the appointment of a Monitoring Trustee.

34. If the Notifying Parties have not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by the Notifying Parties at that time or thereafter, the Notifying Parties shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

35. The Trustee shall:

35.1.1. at the time of appointment, be independent of the Notifying Parties and their Affiliated Undertakings;

35.1.2. possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and

35.1.3. neither have nor become exposed to a Conflict of Interest.

36. The Trustee shall be remunerated by the Notifying Parties 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 Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by the Notifying Parties

37. No later than two weeks after the Effective Date, the Notifying Parties shall submit the names of three natural or legal persons whom the Notifying Parties propose to appoint as the Monitoring 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, the Notifying Parties shall submit a list of one or more persons whom the Notifying Parties propose to appoint as Divestiture Trustee to the Commission for approval. 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 35 and shall include:
- 37.1.1. the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - 37.1.2. the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
 - 37.1.3. 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

38. 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, the Notifying Parties shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Notifying Parties 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 the Notifying Parties

39. If all the proposed Trustees are rejected, the Notifying Parties 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 paragraphs 33 and 38 of these Commitments.

Trustee nominated by the Commission

40. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Notifying Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

41. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the

request of the Trustee or the Notifying Parties, 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

42. The Monitoring Trustee shall:

42.1.1. 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.

42.1.2. oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Notifying Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

42.1.2.1. monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Notifying Parties, in accordance with paragraphs 21 and 23 of these Commitments;

42.1.2.2. supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 24 of these Commitments;

42.1.2.3. with respect to Confidential Information:

- determine all necessary measures to ensure that the Notifying Parties do not after the Effective Date obtain any Confidential Information relating to the Divestment Business,
- in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business,
- make sure that any Confidential Information relating to the Divestment Business obtained by the Notifying Parties before the Effective Date is eliminated and will not be used by the Notifying Parties and
- decide whether such information may be disclosed to or kept by the Notifying Parties as the disclosure is reasonably necessary to allow the Notifying Parties to carry out the divestiture or as the disclosure is required by law;

- 42.1.2.4. monitor the splitting of assets and the allocation of Personnel between the Divestment Business and Vodafone or Affiliated Undertakings;
- 42.1.3. propose to the Notifying Parties such measures as the Monitoring Trustee considers necessary to ensure the Notifying Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- 42.1.4. 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:
 - 42.1.4.1. potential purchasers receive sufficient and correct information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and
 - 42.1.4.2. potential purchasers are granted reasonable access to the Personnel;
- 42.1.5. act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
- 42.1.6. provide to the Commission, sending the Notifying Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the 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;
- 42.1.7. promptly report in writing to the Commission, sending the Notifying Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Notifying Parties are failing to comply with these Commitments;
- 42.1.8. within one week after receipt of the documented proposal referred to in paragraph 32 of these Commitments, submit to the Commission, sending the Notifying Parties a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the 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 Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;

42.1.9. assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

43. If the Monitoring and Divestiture Trustee are not the same legal or natural persons, 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

44. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the 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 31 and 32 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) 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 the Notifying Parties, subject to the Notifying Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
45. 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 the Notifying Parties.

III. Duties and obligations of the Parties

46. The Notifying Parties 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 the Notifying Parties' or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Notifying Parties and the Divestment Business shall provide the Trustee upon request with copies of any document. The Notifying Parties and the 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.
47. The Notifying Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. The Notifying Parties 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. The Notifying Parties 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.

48. The Notifying Parties shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), 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, the Notifying Parties shall cause the documents required for effecting the sale and the Closing to be duly executed.
49. The Notifying Parties 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 the Notifying Parties 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.
50. At the expense of the Notifying Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Notifying Parties' 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 the Notifying Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Notifying Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 49 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Notifying Parties during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
51. The Notifying Parties agree that the Commission may share Confidential Information proprietary to the Notifying Parties 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*.
52. The Notifying Parties agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
53. For a period of 10 years from the Effective Date the Commission may request all information from the Notifying Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Trustee

54. 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:
- 54.1.1. the Commission may, after hearing the Trustee and the Notifying Parties, require the Notifying Parties to replace the Trustee; or
- 54.1.2. the Notifying Parties may, with the prior approval of the Commission, replace the Trustee.
55. If the Trustee is removed according to paragraph 54 of these Commitments, 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 33 to 40 of these Commitments.
56. Unless removed according to paragraph 54 of these Commitments, 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. 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.

F. THE REVIEW CLAUSE

57. The Commission may extend the time periods foreseen in the Commitments in response to a request from the Notifying Parties or, in appropriate cases, on its own initiative. Where the Notifying Parties request an extension of a time period, they 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 the Notifying Parties. Only in exceptional circumstances shall the Notifying Parties be entitled to request an extension within the last month of any period.
58. The Commission may further, in response to a reasoned request from the Notifying Parties 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 the Notifying Parties. 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.

G. ENTRY INTO FORCE

59. The Commitments shall take effect upon the date of adoption of the Decision.

(Signed)

.....
duly authorised for and on behalf of
Vodafone Group plc

.....
duly authorised for and on behalf of
Liberty Global Europe Holding B.V.

SCHEDULE

1. The Divestment Business constitutes Vodafone's consumer fixed business in the Netherlands save for the excluded contracts, assets and personnel as described in this Schedule. In accordance with paragraph 17 of these Commitments, the Divestment Business includes, but is not limited to:

59.1.1. The following main tangible assets:

- 59.1.1.1. [details of the Divestment Business].
- 59.1.1.2. [details of the Divestment Business].
- 59.1.1.3. [details of the Divestment Business].
- 59.1.1.4. [details of the Divestment Business].
- 59.1.1.5. [details of the Divestment Business].
- 59.1.1.6. [details of the Divestment Business].
 - 59.1.1.6.1. [details of the Divestment Business].
 - 59.1.1.6.2. [details of the Divestment Business].
 - 59.1.1.6.3. [details of the Divestment Business].
- 59.1.1.7. [details of the Divestment Business]. [details of the Divestment Business].
- 59.1.1.8. [details of the Divestment Business].

59.1.2. the following main intangible assets (whether owned or licensed):

- 59.1.2.1. [details of the Divestment Business].
 - 59.1.2.1.1. [details of the Divestment Business].
 - 59.1.2.1.2. [details of the Divestment Business].
 - 59.1.2.1.3. [details of the Divestment Business]
 - 59.1.2.1.4. [details of the Divestment Business].
- 59.1.2.2. [details of the Divestment Business].
- 59.1.2.3. [details of the Divestment Business].
- 59.1.2.4. [details of the Divestment Business]. [details of the Divestment Business].

- 59.1.2.5. [details of the Divestment Business
- 59.1.2.6. [details of the Divestment Business].
- 59.1.2.7. [details of the Divestment Business].
- 59.1.2.8. [details of the Divestment Business].
- 59.1.2.9. any IP (including software) related to the operation of the Divestment Business which is owned by a Vodafone entity;
- 59.1.2.10. in respect of any IP (including software) related to the operation of the Divestment Business which is not owned by a Vodafone entity:
 - 59.1.2.10.1. licences to the software embedded in hardware and equipment will transfer with the ownership of the requisite hardware and equipment;
 - 59.1.2.10.2. for all other such IP:
 - 59.1.2.10.2.1. subject to relevant consent where necessary, all licences owned by the Divestment Business for the use of the IP; or
 - 59.1.2.10.2.2. if it is not possible to transfer the licence to use the IP, where required by the purchaser and subject to relevant consent where necessary or any other restriction contained in agreements or licences retained by the Notifying Parties, until such time as the Purchaser is able to reach an agreement with the owner of the IP, the Notifying Parties agree to operate that IP on behalf of the Purchaser for a period of [...]. (or such longer period as may be agreed with the Purchaser and subject to the consent of the Monitoring Trustee) and/or work with the Purchaser to reach an agreement with the entity that is able to grant a licence;
- 59.1.3. all licences, permits and authorisations issued by any governmental organisation or other body for the benefit of the Divestment Business, to the extent transferable under applicable law;
- 59.1.4. all customer contracts, agreements, commitments, understandings and orders of the Divestment Business;
- 59.1.5. all customer, credit and other records of the Divestment Business, recognising that the Notifying Parties may retain a copy of such records to the extent that these are required for legal compliance purposes, but that the Notifying Parties may not use customer information which is obtained through such retained copies to specifically target those customers for the marketing of fixed or

mobile services (whether provided on a standalone basis or within a bundled offer of fixed and mobile services).

For the avoidance of doubt, this does not preclude the Notifying Parties from marketing to such customers to the extent that they form part of a wider customer base that is the subject of a broader marketing strategy;

59.1.6. a copy of the data from Vodafone's market intelligence systems and other support systems to the extent that such data relates solely to fixed services provided by the Divestment Business;

59.1.7. all contracts, agreements commitments, understandings and orders relating to suppliers that supply the Divestment Business as at Closing and have been entered into solely for the benefit of the Divestment Business (a list of the key contracts is contained in Annex 1);

59.1.8. in respect of any supply contracts, agreements, commitments, understandings and orders used by the Divestment Business as at Closing which are shared with the business(es) retained by the Notifying Parties (a list of key contracts is contained in Annex 2) ("**Shared Supply Contracts**"), other than the agreement listed in Annex 2 between Vodafone Libertel B.V. and [details of the Divestment Business]. the benefit of the portion of those contracts which relates to the Divestment Business on terms and conditions equivalent to those at present afforded to the Divestment Business as follows:

59.1.8.1. through transfer or assignment to the Purchaser of the rights and obligations in the Shared Supply Contracts that relate to the Divestment Business; or

59.1.8.2. where this is not possible, the Notifying Parties agree to use best efforts to ensure that the relevant suppliers (or suitable alternative suppliers) offer to enter into a contract with the Purchaser in relation to the Divestment Business in the Netherlands on terms and conditions equivalent to those at present afforded to the Divestment Business; or

59.1.8.3. where this is not possible, or otherwise at the option of the Purchaser and subject to relevant consent where necessary, the Notifying Parties shall offer to enter into a transitional arrangement as outlined at paragraph 62 of the Schedule; and

59.1.9. [details of the Divestment Business

59.1.9.1. [details of the Divestment Business

59.1.9.2. [details of the Divestment Business

59.1.9.3. [details of the Divestment Business].

59.1.10. in line with applicable employment laws, contractual provisions and other relevant legislation, the Personnel (as further described in Annex 3) (or an

adequate substitute) by transfer, secondment or transitional services arrangements. [details of the Divestment Business].

60. The Divestment Business shall not include the following assets which it currently owns or uses, but which are not necessary to ensure its viability and competitiveness:

60.1.1. the Vodafone core network and datacentres that are used by the business(es) to be retained by the Notifying Parties, including those datacentres located in:

60.1.1.1. [details of the Divestment Business].;

60.1.1.2. [details of the Divestment Business].

60.1.1.3. [details of the Divestment Business].;

60.1.1.4. [details of the Divestment Business].

60.1.1.5. [details of the Divestment Business].

60.1.2. the DWDM transmission network, including equipment and underlying dark fibre links insofar as it relates to the use of fibre links and DWDM equipment which are also used by the retained business [details of the Divestment Business].

60.1.3. the shops owned or leased by Vodafone in the Netherlands;

60.1.4. Vodafone's contracts with indirect sales channels in the Netherlands (unless dedicated to the Divestment Business);

60.1.5. Vodafone's advertising and media contracts (unless dedicated to the Divestment Business);

60.1.6. the interactive voice response helpdesk systems and equipment that are shared with the business(es) retained by the Notifying Parties;

60.1.7. the support systems for human resources, financial reporting and other "back office" functions that are shared with the business(es) retained by the Notifying Parties;

60.1.8. the market intelligence systems used for reporting and customer value management that store data relating to both fixed and mobile services and is shared with the business(es) retained by the Notifying Parties;

60.1.9. the systems and equipment needed for legal intercept that are shared with the business(es) retained by the Notifying Parties;

60.1.10. Vodafone's centralised network operations centre located in [details of the Divestment Business].;

60.1.11.any brands or logos currently held, as owner or licensee, by Vodafone or their Affiliated Undertakings or any rights to the Vodafone names or rights to sell products or services with the Vodafone names, other than the licence outlined in paragraph 59.1.2.7 of this Schedule;

60.1.12.any rights to the www.vodafone.nl websites or domain names; however, the Notifying Parties will ensure that, for a transitional period of at least one year after Closing, the Divestment Business' customers whose e-mail address contains the Vodafone domain name can continue to use their e-mail address;

60.1.13.general books of account and books of original entry that comprise Vodafone's or an Affiliated Undertaking's permanent accounting or tax records;

60.1.14.customer or supplier contracts, commitments, orders and volumes (or portions thereof) not related to the Divestment Business;

60.1.15.those Shared Supply Contracts (a list of key Shared Supply Contracts is contained in Annex 2) where it is not possible to transfer or assign to the Purchaser the rights and obligations in the Shared Supply Contract that relate to the Divestment Business under paragraph 59.1.8.1 of this Schedule, in which case the Notifying parties will take the steps described in paragraphs 59.1.8(b) and (c) of this Schedule;

60.1.16.the Excluded Personnel described in Annex 3; and

60.1.17.any other asset or contract that is used primarily in respect of the business(es) retained by the Notifying Parties and which is not necessary for the viability and competitiveness of the Divestment Business.

61. If there is any asset or personnel which is not covered by paragraph 1 of this Schedule but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

62. The Notifying Parties propose to offer the Purchaser of the Divestment Business the benefit of transitional services to replicate the essential functions in place as at Closing which are necessary in order to ensure the viability of the Divestment Business. In particular, where required by the Purchaser, the Notifying Parties will:

62.1.1. Enter into transitional arrangements on terms and conditions equivalent to those at present afforded to the Divestment Business for the continuation of the benefit of the portion of the Shared Supply Contracts which relate to the Divestment Business (a list of key Shared Supply Contracts is contained in Annex 2) for a period determined by the Purchaser but limited to a maximum period of [...]from the date of Closing. However, the Notifying Parties will not enter into transitional arrangements for the continuation of the benefit of the Shared Supply Contracts with [details of the Divestment Business]. or for the indirect sales channels referred to at paragraph 60.1.4 of the Schedule which are shared with the retained business (all of which are commercially available from the relevant third parties);

- 62.1.2. Enter into transitional arrangements on commercially agreed rates with the Purchaser for the benefit of the datacentres and elements of the shared DWDM transmission network that are currently used by the Divestment Business and that Vodafone will be retaining, as well as assisting the purchaser to migrate all equipment included in the Divestment Business to the Purchaser's own datacentres and transmission network, for a period determined by the Purchaser but limited to a maximum period of [...].from the date of Closing.
- 62.1.3. Enter into transitional arrangements on commercially agreed rates with the Purchaser for the benefit of the shared systems described in paragraphs 60.1.6, 60.1.7, 60.1.8 and 60.1.9 of this Schedule (or for the provision of equivalent functions) for a period determined by the Purchaser but limited to a maximum period of [...].from the date of Closing.
63. The scope and terms of the transitional agreements referred to in the above paragraphs will have to be negotiated with the Purchaser, as this will largely depend on the requirements of the Purchaser. These agreements shall include appropriate provisions to ensure that the Notifying Parties provide the services to the Purchaser expeditiously. The Notifying Parties shall carry out these services in accordance with good industry practice including as regards the timing and responsiveness with which this assistance is provided through the different stages of the transfer.

Annex 1

List of key supply contracts entered into solely for benefit of the Divestment Business

[details of the Divestment Business].

[illegible]

Annex 2

[details of the Divestment Business].

[details of the Divestment Business].

[illegible]

[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].
Divestment Business].	Divestment Business].	Divestment Business].	Divestment Business].	Business].	Business].
[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].	[details of the Divestment Business].

Annex 3

Personnel in the Divestment Business

The Notifying Parties will transfer the Personnel to the Purchaser.

Key Personnel

FUNCTION	NAME
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].
[details of the Divestment Business].	[details of the Divestment Business].

The following table shows, by function, the Personnel that will transfer to the Divestment Business

Personnel

SERVICE DESCRIPTION	FUNCTION	NO. OF FTE THAT WILL TRANSFER TO THE DIVESTMENT BUSINESS (AS OF 30 JUNE 2016)	NUMBER OF PERSONNEL THAT WILL TRANSFER TO THE DIVESTMENT BUSINESS (AS OF 30 JUNE 2016)
Commercial Business	General management (including PA)	[details of the Divestment Business].	[details of the Divestment Business].
	Distribution	[details of the Divestment Business].	[details of the Divestment Business].
	Marketing	[details of the Divestment Business].	[details of the Divestment Business].
	Commercial strategy and planning	[details of the Divestment Business].	[details of the Divestment Business].
Technology	General management (including PA)	[details of the Divestment Business].	[details of the Divestment Business].

SERVICE DESCRIPTION	FUNCTION	NO. OF FTE THAT WILL TRANSFER TO THE DIVESTMENT BUSINESS (AS OF 30 JUNE 2016)	NUMBER OF PERSONNEL THAT WILL TRANSFER TO THE DIVESTMENT BUSINESS (AS OF 30 JUNE 2016)
	Technical Product Management	[details of the Divestment Business].	[details of the Divestment Business].
	IPTV and Development	[details of the Divestment Business].	[details of the Divestment Business].
	IT, Process and Network Development	[details of the Divestment Business].	[details of the Divestment Business].
	Network and IT Operations	[details of the Divestment Business].	[details of the Divestment Business].
	Customer Operations	[details of the Divestment Business].	[details of the Divestment Business].
	Contractors	[details of the Divestment Business].	[details of the Divestment Business].
Commercial Operations	Management	[details of the Divestment Business].	[details of the Divestment Business].
	Customer Operations Fixed	[details of the Divestment Business].	[details of the Divestment Business].
Customer Service	Management	[details of the Divestment Business].	[details of the Divestment Business].
	Senior Advisor	[details of the Divestment Business].	[details of the Divestment Business].
	Customer services agents (permanent)	[details of the Divestment Business].	[details of the Divestment Business].
	Customer services agents (temporary)	[details of the Divestment Business].	[details of the Divestment Business].
	Total	[details of the Divestment Business].	[details of the Divestment Business].

Note: This table includes inactive, temporary and contracted personnel. The Notifying Parties will transfer as part of the Divestment Business all relevant and appropriate personnel working in the Divestment Business at the date of the Decision. To the extent that these personnel numbers change between the date of the Decision and Closing, the Notifying Parties shall explain such changes to the Commission.

Excluded Personnel

The Divestment Business shall not include any additional personnel who do not spend the majority of their time working for the Divestment Business and/or who are shared with the retained business, and who are not necessary for the viability and competitiveness of the Divestment Business, including the Excluded Personnel described below.

The following shall be Excluded Personnel:

1. [details of the Divestment Business].
2. [details of the Divestment Business]
3. [details of the Divestment Business].
4. [details of the Divestment Business].
5. [details of the Divestment Business].
6. [details of the Divestment Business].
7. [details of the Divestment Business]..
8. [details of the Divestment Business].
9. [details of the Divestment Business]..