



EUROPEAN COMMISSION
DG Competition

Case M.8284 - DEUTSCHE TELEKOM / ORANGE / BUYIN

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 10/03/2017

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EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**Subject: Case M.8284 – Deutsche Telekom / Orange / BuyIn
Commission decision pursuant to Article 6(1)(b) of Council
Regulation No 139/2004¹ and Article 57 of the Agreement on the
European Economic Area²**

Dear Sir or Madam,

- (1) On 6 February 2017, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings Deutsche Telekom AG ('DT') (Germany) and Orange S.A. ('Orange') (France) convert their existing non-full-function joint venture, BuyIn SA/NV ('BuyIn') (Belgium) into a joint venture performing on a lasting basis all the functions of an autonomous economic entity, within the meaning of Article 3(4) of the Merger Regulation (the 'Transaction').³ DT and Orange are designated hereinafter as the 'Parties'.

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').

³ Publication in the Official Journal of the European Union No C 47, 14.02.2017, p. 7.

1. THE PARTIES

- (2) DT is an integrated telecommunications and information technology service provider with activities worldwide in more than 50 countries. DT offers fixed and mobile telecommunication services, Internet and IPTV products as well as IT products to consumers mainly in Europe and the US. In addition, DT provides telecommunications services to other carriers and Internet service providers ('ISPs') on wholesale level as well as information and communication technology ('ICT') solutions for medium and large-sized customers around the world.
- (3) In the European Union, DT operates companies offering fixed and mobile telecommunications services in Austria, Bulgaria, Croatia, Czech Republic, Germany, Greece, Hungary, the Netherlands, Poland, Romania and Slovakia.
- (4) Orange is a global telecommunications operator active in around 30 countries worldwide. Orange also provides telecommunications services to multinational companies under the brand Orange Business Services.
- (5) Orange provides a whole range of mobile telecommunications services in several European countries, including Belgium, France, Luxembourg, Poland, Romania, Slovakia and Spain. Orange also provides various fixed telecommunications services in Belgium, France, Poland, Romania, Spain and Slovakia.
- (6) BuyIn is an existing non-full function 50/50 joint venture between DT and Orange, set up in 2011.⁴ BuyIn is entrusted, on behalf of DT and Orange, with the task of negotiating with suppliers, framework agreements for a range of products and services used by DT and Orange in their respective telecommunications businesses. BuyIn merely handles negotiations but does not itself purchase products and services for the Parties' groups nor does BuyIn offer own activities on the downstream telecommunications markets.

2. THE CONCENTRATION

- (7) By resolution adopted on 16 December 2016,⁵ the Parties decided to extend the scope of BuyIn's activities to enable it to provide procurement-related services to third parties as well.⁶ As a result, BuyIn will fulfil all the conditions of a full-function joint venture for the reasons set out below.⁷
- (8) First, BuyIn will have sufficient resources to operate independently on the market, as it will have its own management dedicated to its day-to-day operations and access to sufficient financial means, employees (300), and other assets.

⁴ The creation of BuyIn as a non-full function joint venture was reviewed by the German Federal Cartel Office ('FCO') and the Polish Office of Competition, which unconditionally approved it respectively on 8 February 2012 and on 31 August 2011. [...].

⁵ [Internal process regarding the decision making].

⁶ The strategic rationale of the Transaction is, according to the Parties, to enlarge the scale of BuyIn's procurement activities [...].

⁷ See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

- (9) Second, BuyIn will exercise functions that go beyond one specific function for its parents, as it will (i) organise and coordinate the entire procurement process up to the final negotiations and conclusions of framework agreements with the suppliers on behalf of third-parties; and (ii) provide various studies and counselling to third-parties on telecommunications sourcing-related topics.
- (10) Third, regarding the relationship with its parents, BuyIn's business plan foresees that the revenues generated from activities with third-parties will increase over the next [coming] years to reach [>20%] of BuyIn's total revenues by [...]. The fees that BuyIn charges to its parents and to third parties are calculated according to the same methodology, [margin calculation]. [The price structure]⁸ does not put into question the fact that BuyIn will deal with the Parties at arm's length on the basis of normal commercial conditions. Moreover, BuyIn's business plan indicates that BuyIn appears truly committed to increasingly attract business from third-parties.⁹
- (11) Finally, BuyIn will be created on a lasting basis, since, with the new plans to open up BuyIn to third-parties, the Parties intend to run BuyIn beyond [...], the currently foreseen end date of the cooperation.
- (12) As a result, the Transaction constitutes the creation of a full-function joint venture and, as such, a concentration within the meaning of Article 3(4) of the Merger Regulation.

3. EU DIMENSION

- (13) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million¹⁰ (DT: EUR 69 228 million; Orange: EUR 40 232 million). Each of them has an EU-wide turnover in excess of EUR 250 million (DT: EUR [...] million; Orange: EUR [...] million), but they do not achieve 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. RELEVANT MARKETS

- (14) There is no horizontal overlap between the activities of BuyIn and the activities of the Parties.
- (15) BuyIn is active in the supply of procurement-related services for certain products, namely network technology, digital home & platform ('DHP'), customer equipment, IT products and services (together, hereinafter 'Equipment'), which are used by DT and Orange in their respective telecommunications businesses.

⁸ [Information about margins].

⁹ [Business plan].

¹⁰ Turnover calculated in accordance with Article 5 of the Merger Regulation.

- (16) DT and Orange are both active in the upstream markets for the purchase of the different types of Equipment, which they source with the assistance of BuyIn ('upstream purchasing markets').
- (17) Moreover, DT and Orange have activities in a number of downstream markets (for the purpose of which they source Equipment through BuyIn), including but not limited to the provision of mobile and fixed telecommunications services, both at retail and wholesale level ('downstream supply markets').

4.1. Supply of procurement-related services

4.1.1. Relevant product market

4.1.1.1. Parties' view

- (18) The Parties submit that BuyIn is active in the supply of procurement-related services for certain products which are used by DT and Orange in their respective telecommunications businesses. BuyIn does not purchase the Equipment, but solely negotiates framework agreements with suppliers of Equipment, which fix the terms and conditions under which the Parties themselves can place orders directly with the suppliers. The actual supplier agreements are entered into directly by each of Orange and DT (or their respective subsidiaries in the various Member States) following a second round of bilateral negotiations with the relevant supplier.¹¹
- (19) The Parties do not take any specific view on the possible product market definition regarding the supply of procurement-related services offered by BuyIn.

4.1.1.2. Commission's assessment

- (20) There are no Commission precedents examining the potential markets for the provision of procurement-related services for products used in the downstream telecommunications markets.
- (21) During the market investigation conducted in the present case, the vast majority of telecom and IT services providers indicated that, in the EEA, they procure network equipment by using their own in-house procurement services (as opposed to an external provider or a procurement alliance similar to BuyIn).¹²
- (22) As outlined by the Parties, the Commission also notes that, similarly to the Parties, other telecommunication providers have developed joint purchasing strategies. This is for instance the case of Telefónica in the framework of the Telefónica Partner Program¹³ or of the Vodafone Procurement Company.¹⁴

¹¹ DT and Orange (or their respective subsidiaries) remain free to choose the particular products actually purchased, and to negotiate additional beneficial conditions with the supplier.

¹² See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 2.

¹³ The Telefónica Partner Program is an initiative launched by Telefónica in 2011, including joint procurement services to operators which, according to Telefónica, cover 35 markets across Europe, Latin America, Asia and the Middle East.

- (23) In light of the above, for the purpose of this Decision, the Commission considers that the exact product market definition of the supply of procurement-related services can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply of procurement-related services irrespective of the relevant product market definition.

4.1.2. Relevant geographic market

4.1.2.1. Parties' view

- (24) The Parties submit that BuyIn is active on a worldwide basis to be able to provide the best conditions to its parents and its (future) third party customers. Likewise, the sourcing process of the Parties' competitors takes place on a worldwide basis.
- (25) The Parties do not take any specific view on the possible geographic market definition of the supply of procurement-related services offered by BuyIn.

4.1.2.2. Commission's assessment

- (26) The procurement-related services are offered by BuyIn for the purpose of the acquisition of Equipment on the upstream purchasing markets. Accordingly, the geographic scope of the supply of procurement-related services is likely to be the same as the one for the upstream purchasing markets. In line with its precedents relating to the upstream purchasing markets, the Commission considers that the geographic scope of the supply of procurement-related services is likely to be at least EEA-wide if not worldwide.¹⁵
- (27) For the purpose of this Decision, the exact geographic market definition of the supply of procurement-related services can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the supply of procurement-related services under any alternative geographic market definition.

4.2. Upstream purchasing markets

4.2.1. Relevant product markets

4.2.1.1. Parties' view

- (28) The Parties submit that the relevant purchasing markets are all the markets in which the Parties procure services and/or products through BuyIn. These markets are divided into four broad categories of equipment and services: network technology; DHP; customer equipment; and IT products and services.

¹⁴ The Vodafone Procurement Company procures network equipment on behalf of the Vodafone group operating companies and also on behalf of Vodafone's partners operating in different geographies.

¹⁵ See references listed in footnote 27.

- (29) For each product category, the Parties define the relevant product markets by referring to previous Commission decisions.¹⁶
- (30) Within **network technology**, the Parties consider that, from a purchasing perspective, the segments access networks, transport equipment, core network and network services may be distinguished.
- (31) In the segment of access networks, the Parties consider a sub-segmentation into the purchasing for the radio access networks ('RAN') – which can be further segmented by network generations (2-2.5G, 3G, 4G and the future 5G) – and the purchasing for the fixed access networks ('FAN') – in which one may distinguish between broadband access on the one side and cables and connections on the other side.
- (32) In the segment of transport equipment, the Parties make a distinction between the synchronous digital hierarchy ('SDH') technology, the wave division multiplexing ('WDM') technology and the microwave technology.
- (33) In the segment of core network, the Parties examine, from a purchasing perspective, the following possible sub-segments: packet core equipment for mobile network purposes (with a possible subdivision between 2G-3G – Traditional Packet Core and 4G – Evolved Packet Core); routers (which, from a purchasing perspective can be segmented between core routers and edge routers), mobile switching systems (with a possible split between wireless softswitch, and wireless media gateway), IP multimedia subsystems ('IMS', including the components IMS Call Session Control Function ('IMS CSCF') and IMS Home Subscriber Server ('IMS HSS')) and Core Network Accessories.
- (34) In the segment for network services, the Parties consider a possible segmentation between (i) delivery, installation and integration services; (ii) maintenance services; and (iii) managed services.
- (35) In relation to **DHP**, the Parties submit that DHP procurement markets can be subdivided into (i) real time services; (ii) messaging services; (iii) data enablers; (iv) multimedia services platforms; (v) vertical and life services; (vi) SIM cards; (vii) home gateways; (viii) set-top boxes; and (ix) fixed telephone equipment.
- (36) With regard to **customer equipment**, the Parties submit that, following the purchasing logic of BuyIn, certain pieces of customer equipment are classified under DHP. As a result, the Parties only consider under customer equipment the product markets that have not been listed above, namely cell phones – which includes smartphones and feature phones – and tablet-PCs.
- (37) Within **IT-products and services**, the Parties distinguish between standard hardware, standard software and IT-attendance. Within IT-hardware, the Parties consider the following sub-segments: storage, PCs and monitors, printers, notebooks and maintenance and support. In relation to software, the Parties consider a segmentation of the market for software in (i) infrastructure software, (ii) middleware, (iii) application software and office software, and (iv) operating/browser software. Finally, with regard to IT-attendance, the Parties

¹⁶ [Information concerning the setting-up process of BuyIn].

submit that BuyIn's sourcing activities in relation to network and other IT hardware as well as of software as described above include maintenance services. For the rest, BuyIn's activities comprise sourcing of (i) IT outsourcing, (ii) IT consulting, and (iii) custom software development and implementation.

- (38) In any event, for any of the markets and the possible segments listed above, the Parties submit that there is no need to determine the precise scope of the relevant product markets since the Transaction does not raise competition concerns on any conceivable delineation of any of these markets.

4.2.1.2. Commission's assessment

- (39) In past cases, the Commission examined the mobile telecommunication equipment markets.¹⁷ In *Nokia/Siemens* and *Nokia/Motorola*, the Commission considered that RAN and Core Network Systems ('CNS') could constitute separate product markets, given that RAN and CNS equipment can be purchased independently from one another, but ultimately left the precise product market definition open.¹⁸
- (40) In relation to RAN, in *Nokia/Alcatel-Lucent*, while the Commission considered that the RAN equipment market may be segmented by technology standards and/or between macro-cells and small-cells equipment and that the Single RAN ('SRAN') equipment may constitute a separate market segment, it ultimately left the precise product market definition open.¹⁹
- (41) With regard to CNS, in *Nokia/Alcatel-Lucent*, the Commission considered whether a distinction should be made between (i) wireless packet core, including a possible segmentation into 'traditional packet core' and 'evolved packet core' and a further sub-segmentation of these two products into 'serving GPRS support node' ('SGSN') and 'gateway GPRS support node' ('GGSN') and into 'mobility management entity' ('MME') and 'packet data node gateway' ('PGW') respectively; (ii) carrier IP telephony products, including a possible segmentation of these products into softswitch products (and their further segmentation into wireless and wireline), media gateway products (and their further segmentation into wireless and wireline), 'session border controller' ('SBC'), 'voice application server' ('VAS'), IMS Core (including further segmentation into CSCF and HSS); and (iii) 'operations support system' ('OSS') / 'business support system' ('BSS') including whether decentralised and centralized 'self-organizing network' ('SON') solutions constitute separate markets or market segments. However, the precise product market definitions were left open.²⁰

¹⁷ See Commission decision of 13 November 2006, Case M.4297 – *Nokia/Siemens*; Commission decision of 15 December 2010, in Case M.6007 – *Nokia Siemens Networks/Motorola Network Business*; Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*.

¹⁸ Commission decision of 13 November 2006, in Case M.4297 – *Nokia/Siemens*, paragraph 29; Commission decision of 15 December 2010, in Case M.6007 – *Nokia Siemens Networks/Motorola Network Business*, paragraph 14.

¹⁹ Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*, paragraph 24.

²⁰ Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*, paragraphs 48 to 59.

- (42) In its previous decisions in *Nokia/Siemens*, *Nokia/Motorola* and *Nokia/Alcatel-Lucent*, with regard to network-related services, the Commission considered a distinction between deployment, delivery and installation services and maintenance and care services, ultimately leaving the precise scope of the relevant product market open.²¹
- (43) In relation to the products enumerated by the Parties as sub-segments of the DHP procurement markets, the Commission refers to the product market definitions and the possible segmentations that were examined in its previous decisions.²²
- (44) In *Lenovo/Motorola*, the Commission examined the market for smart mobile devices and assessed whether smartphones and tablets belong to separate product markets, but ultimately left the exact product market definition open.²³ In past decisions, the Commission took the view that basic and feature phones may not fall into the same product market as smart mobile devices.²⁴
- (45) In the present case, for the purpose of defining the relevant upstream purchasing markets in IT-hardware, IT-software and IT-services, the Commission refers to its previous decisions, in which it examined the relevant product markets and their possible segmentations.²⁵
- (46) For the purposes of this Decision, the exact product market definitions for each of the upstream purchasing markets can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the upstream purchasing markets under any alternative product market definition.

4.2.2. Relevant geographic markets

4.2.2.1. Parties' view

- (47) The Parties submit that BuyIn is active on a worldwide basis to be able to provide the best conditions to its parents and its (future) third party customers. Likewise,

²¹ Commission decision of 13 November 2006, in Case M.4297 – *Nokia/Siemens*, paragraphs 44 to 46; Commission decision of 15 December 2010, in Case M.6007 – *Nokia Siemens Networks/Motorola Network Business*, paragraph 16; Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*, paragraphs 66-67.

²² See *inter alia*, Commission decision of 23 July 2012, in Case M.6568 – *Cisco systems/NDS Group*; Commission decision of 6 November 2011, in Case M.6564 – *ARM/Giesecke & Devrient/Gemalto/JV*; Commission decision of 25 September 2008, in Case M.5303 – *Arques/SHC*.

²³ Commission decision of 26 June 2014, in Case M.7202 - *Lenovo/Motorola Mobility*, paragraphs 17 to 19.

²⁴ Commission decision of 26 June 2014, in Case M.7202 - *Lenovo/Motorola Mobility*, footnote 4; Commission decision of 13 February 2012, in Case M.6381 - *Google/Motorola Mobility*, paragraph 41.

²⁵ See *inter alia*, Commission decision of 29 February 2016, in Case M.7861 – *Dell/EMC*; Commission decision of 26 July 2011, in Case M.6196 – *Lenovo/Medion*; Commission decision of 22 December 2009, in Case M.5672 – *Canon/OCE*; Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*; Commission decision of 15 December 2014, in Case M.7458 – *IBM/INF Business of Deutsche Lufthansa*; Commission decision of 25 March 2011, in Case M.6127 – *Atos Origin/Siemens IT Solutions & Services*; Commission decision of 19 June 2004, in Case M.6921 – *IBM Italia/Ubis*.

the sourcing process of the Parties' competitors takes place on a worldwide basis. Against this background, the Parties submit that the relevant upstream purchasing markets are worldwide in scope.²⁶

4.2.2.2. Commission's assessment

- (48) In previous decisions, the Commission considered whether the geographic scope of the upstream purchasing markets at stake is at least EEA-wide if not worldwide, but ultimately left the exact market definition open.²⁷
- (49) For the purpose of this Decision, the exact geographic market definitions for each of the upstream purchasing markets can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the upstream purchasing markets under any alternative geographic market definition.

4.3. Downstream supply markets

4.3.1. *Relevant product markets*

4.3.1.1. Parties' view

- (50) The Parties identify a number of relevant downstream markets where they are active including by deploying the products and/or services that they procure through BuyIn. These markets fall within the following six product categories: (a) mobile telecommunications services, (b) fixed telecommunications services, (c) global communications services, (d) wholesale internet connectivity, (e) TV services and (f) IT services.
- (51) For each product category, the Parties define the relevant product markets by referring to previous Commission decisions.

4.3.1.2. Commission's assessment

- (52) In its past decisions, the Commission identified several relevant product markets for each of the categories of downstream supply markets in which the Parties are active. On the basis of previous Commission decisions, the following markets and possible segments can be considered to be relevant product markets for the purposes of the present case:
- (a) As regards mobile telecommunications services: (i) retail mobile communications services; (ii) retail bulk sms services; (iii) seamless pan-European mobile communications services; (iv) wholesale mobile access

²⁶ Nevertheless, the Parties also submit market shares at EEA-level.

²⁷ See for example, Commission decision of 13 November 2006, in Case M.4297 – *Nokia/Siemens*, paragraph 48, 51 and 54; Commission decision of 15 December 2010, in Case M.6007 – *Nokia Siemens Networks/Motorola Network Business*, paragraphs 20 and 21; Commission decision of 24 July 2015, in Case M.7632 – *Nokia/Alcatel-Lucent*, paragraphs 28 to 35; 62 to 64; 68-69; Commission decision of 26 June 2014, in Case M.7202 – *Lenovo/Motorola Mobility*, paragraph 29; Commission decision of 25 September 2008, in Case M.5303 – *Arques/SHC*, paragraphs 15 to 17, 22 and 26; Commission decision of 29 February 2016, in Case COMP/M.7861 – *Dell/EMC*; paragraphs 68-70.

and call origination, (v) wholesale call termination services on mobile networks; and (vi) wholesale international roaming services;²⁸

- (b) As regards fixed telecommunications services: (i) retail fixed telephony services (including Voice over Internet Protocol, "VoIP"), (ii) retail fixed internet services, (iii) retail multiple play services,²⁹ (iv) retail fixed business connectivity services, (v) wholesale call termination on fixed networks, (vi) wholesale domestic call transit services, (vii) wholesale services for termination and hosting of calls to non-geographic numbers, (viii) wholesale services for end-to-end calls, (ix) wholesale call origination services on the public telephone network at a fixed location, (x) wholesale access to fixed internet services, and (xi) wholesale access to leased lines;³⁰
- (c) global telecommunications services;³¹
- (d) wholesale internet connectivity;³²
- (e) as regards TV services: (i) retail TV services and (ii) wholesale access fixed networks for the provision of TV services;³³
- (f) as regards IT services, see paragraph (45) above.

²⁸ See e.g. Commission decision of 4 February 2016, in Case M.7637 – *Liberty Global/BASE Belgium*, paragraphs 37, 42, 102, 119; Commission decision of 2 July 2014, in Case M.7018 – *Telefónica Deutschland/E-Plus*, paragraphs 30-55; Commission decision of 28 May 2014, in Case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, paragraphs 141-150; Commission decision of 14 April 2014, in Case M.7109 – *Deutsche Telekom/GTS*, paragraph 60; Commission decision of 4 September 2012, in Case M.6314 – *Telefónica UK/Vodafone UK/Everything Everywhere/JV*, paragraph 190; Commission decision of 24 October 2005, in Case M.3920 – *France Télécom / Amena*, paragraphs 21-22; Commission decision of 10 January 2006, in Case M.4035 – *Telefonica/O2*, paragraphs 9-10, 26.

²⁹ Retail multiple play services may also include, depending on the cases, retail mobile telecommunications services and TV services.

³⁰ See e.g. Commission decision of 4 February 2016, in Case M.7637 – *Liberty Global/Base Belgium*, paragraphs 69, 139, 146, 168; Commission decision of 29 January 2010, in Case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 6 *et seq.*; Commission decision of 19 May 2015, in Case M.7421 – *Orange/Jazztel*, paragraphs 32-34, 41 *et seq.*, 86, 91; Commission decision of 20 September 2013, in Case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 261; Commission decision of 3 July 2012, in Case M.6584 – *Vodafone/Cable & Wireless*, paragraphs 14-18, 19 *et seq.*, 26, 30, 47; Commission decision of 14 April 2014, in Case M.7109 – *Deutsche Telekom/GTS*, paragraph 29; Commission decision of 2 October 2008, in Case M.5148 – *Deutsche Telekom/OTE*, paragraph 14.

³¹ See e.g. Commission decision of 20 September 2013, in Case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 169 *et seq.*; Commission decision of 3 July 2012, in Case M.6584 – *Vodafone/Cable & Wireless*, paragraph 33.

³² See e.g. Commission decision of 7 October 2005, in Case M.3752 – *Verizon/MCI*, paragraph 24; Commission decision of 14 April 2014, in Case M.7109 – *Deutsche Telekom/GTS*, paragraph 21.

³³ See e.g. Commission decision of 4 February 2016, in Case M.7637 – *Liberty Global/BASE Belgium*, paragraphs 52, 158; Commission decision of 24 February 2015, in Case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, paragraphs 119-127; Commission decision of 18 July 2007, in Case M.4504 – *SFR/Télé2*, paragraph 45; Commission decision of 10 October 2014, in Case M.7000 – *Liberty Global/Ziggo*, paragraph 108.

- (53) In past decisions, the Commission also examined possible segmentations within the markets listed above. However, for the purposes of this Decision, the exact product market definition for each of the downstream supply markets can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the downstream supply markets under any alternative product market definition.

4.3.2. *Relevant geographic markets*

4.3.2.1. Parties' view

- (54) For each of the relevant product market identified, the Parties define the relevant geographic scope by referring to previous Commission decisions.

4.3.2.2. Commission's assessment

- (55) In its past decisions, the Commission defined the geographic scope of most of the markets listed above as national, with some exceptions.³⁴
- (56) For the purpose of this Decision, the exact geographic market definitions for each of the downstream supply markets can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the downstream supply markets under any alternative geographic market definition.

5. **COMPETITIVE ASSESSMENT**

5.1. **Supply of procurement-related services**

- (57) As neither BuyIn nor the Parties are currently active in the supply of procurement-related services to third-party customers, the Transaction does not give rise to any affected markets in this area.
- (58) The market investigation did not reveal any concerns as regards the effects of the Transaction on the supply of procurement related services. The vast majority of telecom and IT services providers indicated that, in the EEA, they procure network equipment by using their own in-house procurement services (as opposed to an external provider or a procurement alliance similar to BuyIn).³⁵ Some of the providers of telecommunications and IT services who replied to the market investigation pointed out that the Transaction will entail the entry of a new player, which will not negatively impact their own capacity to source Equipment.³⁶

³⁴ For instance, with regard to the market for global telecommunications services, the Commission considered the geographic scope to be global, but left the exact geographic market definition ultimately open. See Commission decision of 14 April 2014, in Case M.7109 – *Deutsche Telekom/GTS*, paragraph 18.

³⁵ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 2.

³⁶ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 4.5.

- (59) The Commission considers that the only change brought about by the Transaction consists of making BuyIn's procurement-related services available to interested third-party customers. These customers are likely to include telecommunication or IT services providers who need to source Equipment to be used for offering services on the downstream supply markets where they are active and who, for this purpose, may be willing to entrust BuyIn with the negotiation of framework agreements with the relevant suppliers. As a result, the Transaction has the effect of increasing the range of options available to telecom and IT services providers to source the Equipment needed for their respective downstream activities.
- (60) In light of the above, the Transaction as such is unlikely to raise competition concerns in relation to the supply of procurement-related services.

5.2. Upstream purchasing markets

5.2.1. Parties' view

- (61) Given that DT and Orange are integrated telecommunications and information technology service providers, the Parties submit that their activities overlap in all relevant purchasing markets in which BuyIn offers its procurement-related services.
- (62) However, DT's and Orange's combined market shares on the telecommunication procurement markets are low in almost all markets/segments, with the exception of (i) the purchasing market for SDH technology and (ii) the purchasing market for SIM cards. In both purchasing markets, the Parties' combined market shares exceeded 20% in the EEA in 2015. The Parties submit that at a worldwide level, their combined market shares are very low, namely [0-5]% (DT: [0-5]%; Orange: [0-5]%) in the purchasing market for SDH technology and [0-5]% (DT: [0-5]%; Orange: [0-5]%; EE:³⁷ [0-5]%) in the purchasing market for SIM cards.
- (63) In addition, the Parties submit that both the SDH and the SIM card are fading technologies: the end of service of the SDH will take place in [...] ³⁸ and the Parties expect the introduction of the eSIM technology to change the SIM market. ³⁹

³⁷ EE Ltd., formerly Everything Everywhere Ltd., former joint venture of the Parties (cf. Commission Decision of 1 March 2010, in case M.5650 – T-Mobile/Orange); sold to BT-Group in 2016. Without EE, the Parties' combined market shares will be even lower.

³⁸ This announcement of "end of service" was made by [the supplier of the parties].

³⁹ The Parties also submit that the Transaction will not result in any market foreclosure. In particular, according to the Parties, there are numerous customers other than the Parties to which suppliers can sell their products. Likewise, the suppliers to the Parties do supply their products to numerous customers other than the Parties since there is no legal or de facto exclusivity to the benefit of the Parties. Accordingly, competitors of the Parties are not precluded from relying on the Parties' supplies. Further, the Parties would also have no incentive to limit their procurement from other suppliers.

5.2.2. *Commission's assessment*

- (64) Given the overlap in the Parties' activities on the upstream purchasing markets, there are two horizontally affected markets, namely the purchasing market for SDH technology and the purchasing market for SIM cards.
- (65) That said, the market investigation sought to obtain the views of telecom and IT services providers' and of equipment suppliers' as to the impact of the Transaction on each product category of equipment for which BuyIn offers its procurement-related services (namely network technology, DHP, customer equipment, and IT products and services).
- (66) As regards telecom/IT services providers, the results of the market investigation revealed that the vast majority of these respondents expect the Transaction to have a neutral impact on the following upstream purchasing markets: (i) purchase of network equipment;⁴⁰ (ii) purchase of DHP;⁴¹ (iii) purchase of customer equipment⁴² and (iv) purchase of IT products.⁴³ Moreover, a few market participants indicated that the impact of the Transaction would be positive on the upstream purchasing markets for DHP, customer equipment and IT products since, through the creation of a new player on these markets, BuyIn may be able to generate higher pricing pressure on OEM suppliers and to obtain lower prices.⁴⁴ Only a minority of respondents among the telecom/IT services providers considered that the impact of the Transaction would be negative on the upstream purchasing markets for network equipment, DHP and customer equipment.⁴⁵
- (67) As regards the equipment suppliers, around half of the respondents to the market investigation considered that the impact of the Transaction on suppliers in the upstream markets would generally be either neutral or uncertain at this stage. According to these market participants, the impact of the Transaction will largely depend on BuyIn's ability to successfully attract a significant number of third-party customers in the future. These equipment suppliers also acknowledged that they do not have any insight into BuyIn's potential to succeed in attracting third-party customers.⁴⁶

⁴⁰ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.1.

⁴¹ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.2.

⁴² See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.3.

⁴³ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.4.

⁴⁴ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.2 to 4.5.

⁴⁵ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, questions 4.1, 4.2, 4.3 and 4.5.

⁴⁶ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, questions 3.1 to 3.5.

- (68) With regard more specifically to the supply of customer equipment⁴⁷ and of IT products,⁴⁸ more than half of the equipment suppliers who responded to the Commission's market investigation expect the impact of the Transaction to be neutral or uncertain.
- (69) With particular regard to the impact of the Transaction on the supply of network technology⁴⁹ and on the supply of DHP,⁵⁰ approximately half of the equipment suppliers who responded to the market investigation expressed concerns that, for the supply of some products, the Transaction would result in a large number of telecom operators sourcing equipment jointly through BuyIn, thus increasing the telecom/IT operators' bargaining power vis-à-vis suppliers and exposing suppliers to stronger pricing pressure and ultimately margin erosions.⁵¹
- (70) However, for the reasons set out below, the Commission considers that the concerns put forward in the market investigation are not merger-specific.
- (71) Inasmuch as the Transaction simply consists of making available BuyIn's procurement-related services to interested third-party customers, the Transaction as such is unlikely to have an impact on any upstream purchasing markets. Indeed, the Transaction in itself does not add any new assets or other activities to the benefit of BuyIn or to the Parties. Accordingly, it does not create any new horizontal overlaps between the Parties' activities or between any of the Parties' and BuyIn's activities on any of the upstream purchasing markets, nor does it strengthen any existing horizontal relationships between them involving any of those markets.
- (72) While post-Transaction BuyIn may enter into agreements with third parties that could potentially influence the bargaining power of the telecom/IT operators – party to any such agreements vis-à-vis suppliers – these agreements would not be a structural consequence of the conversion of BuyIn into full-function joint venture. While, to the extent that these agreements would amount to cooperation agreements between competitors, they could give rise to competition concerns on the upstream purchasing markets,⁵² whether or not any such agreements will actually raise competition concerns will depend on the specific circumstances of each case, which are unknown at this stage. In any event, any such agreements will be subject to Article 101 TFEU and will therefore have to be assessed on a case-by-case basis.

⁴⁷ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, questions 3.3 and 3.5.

⁴⁸ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, questions 3.4 and 3.5.

⁴⁹ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, question 3.1.

⁵⁰ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, question 3.2.

⁵¹ See replies to Commission questionnaire to equipment suppliers Q2 of 7 February 2017, questions 3.1 and 3.2.

⁵² For instance, competition concerns may arise in the event of exercise of buyer power vis-à-vis suppliers leading to reduced product quality or to foreclosure of other buyers.

5.3. Downstream supply markets

5.3.1. Parties' view

- (73) On the basis of the DT's and Orange's current activities in the downstream supply markets, the Parties identify a number markets in which DT and Orange have an individual or combined market share of at least 30%, i.e. which are vertically affected markets. Moreover, the Parties identify a limited number of additional markets in which they have combined market shares of at least 20%.⁵³
- (74) The markets identified by the Parties pursuant to the previous paragraph include the following: retail mobile telecommunication services,⁵⁴ retail bulk SMS services,⁵⁵ wholesale mobile access and call origination services on mobile networks,⁵⁶ wholesale mobile call termination services,⁵⁷ wholesale international roaming,⁵⁸ retail fixed telephony,⁵⁹ retail fixed business connectivity,⁶⁰ retail fixed internet services,⁶¹ retail multiple play services,⁶² wholesale call termination on fixed networks,⁶³ wholesale domestic call transit services on fixed networks,⁶⁴ wholesale services for termination and hosting of calls to non-geographic numbers,⁶⁵ wholesale end-to-end calls,⁶⁶ wholesale call origination at a fixed location,⁶⁷ wholesale access to leased lines,⁶⁸ wholesale access to fixed internet services,⁶⁹ retail TV services,⁷⁰ wholesale access to TV services.⁷¹

⁵³ According to the Parties, these markets cannot be considered horizontally or vertically affected markets, since BuyIn is not active in these markets and the Parties' combined markets shares do not exceed 30%.

⁵⁴ In Croatia, Czech Republic, France, Germany, Greece, Hungary, Poland, Romania and Slovakia.

⁵⁵ In Austria, Croatia, Czech Republic, Germany, Poland and Slovakia.

⁵⁶ In Austria, Croatia, Czech Republic, Germany, Greece, Poland, Romania and Slovakia.

⁵⁷ In Austria, Belgium, Croatia, Czech Republic, France, Germany, Greece, Hungary, Netherlands, Poland, Romania and Slovakia.

⁵⁸ In Austria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Poland, Romania and Slovakia.

⁵⁹ In Croatia, France, Germany, Greece, Hungary, Poland, Romania and Slovakia.

⁶⁰ In Croatia, Germany, Greece, Hungary, Poland, Romania and Slovakia. Moreover, affected markets/segments also exist in potential markets/segments within retail fixed business connectivity in Czech Republic (retail fixed broadband access to large business customers).

⁶¹ In Croatia, France, Germany, Greece, Hungary, Poland, Slovakia and Spain.

⁶² In Croatia, France, Germany, Greece, Hungary, Poland, Romania and Spain. However, the specific type of multiple play services segments that are affected (e.g. double play fixed Internet/fixed TV, double-play fixed telephony/fixed TV, triple play, etc.) vary depending on the Member States.

⁶³ In Croatia, Czech Republic, France, Germany, Greece, Hungary, Poland, Romania and Slovakia.

⁶⁴ In Czech Republic, France, Greece, Hungary, Poland, Romania and Slovakia.

⁶⁵ In Croatia, Czech Republic, France, Germany, Greece, Poland, and Slovakia.

⁶⁶ In France.

⁶⁷ In Croatia, France, Germany, Greece, Hungary, Poland, Romania and Slovakia.

- (75) The Parties argue that the Transaction does not constitute a horizontal merger but a mere procurement cooperation without any negative effects on competition in the downstream supply markets.
- (76) In particular, the Parties submit that the creation of BuyIn has not led and will not lead to any risk of coordination of the Parties' activities on any of the affected downstream supply markets. In support of their claim, the Parties put forward the following arguments. First, BuyIn negotiates framework agreements only, so that DT and Orange remain free to choose the particular products they actually want to purchase and to negotiate additional beneficial conditions with the supplier. Second, the telecommunications industry is a fixed cost sector, and pricing decisions are therefore not driven by variable costs so that concerns based on variable costs commonality are unlikely. Third, the equipment resold to customers is often subsidized (i.e. DT and Orange decide at what price level the products, such as terminals or boxes, are offered to the end-customers). As a result, even if the purchase price is the same for both Parties, such price does not constitute an indication conducive to collusion, since the Parties are still left with the discretionary decision as to the level of subsidy of the equipment. Finally, the Parties' antitrust guidelines (which, according to the Parties, will also apply to future customers of BuyIn) limit any exchange of information between them to the fulfilment of BuyIn's functions as a joint strategic purchasing company, pursuant to the so-called "need to know" principle.

5.3.2. Commission's assessment

- (77) The results of the market investigation conducted in the present case reveal that the vast majority of telecom/IT services providers expect the Transaction to have a neutral impact on the following downstream supply markets: (i) mobile telecommunications services;⁷² (ii) fixed telecommunications services;⁷³

⁶⁸ In Croatia, Germany, Greece, Hungary, Poland, Romania and Slovakia. Moreover, affected markets/segments also exist in potential markets/segments within wholesale access to leased lines in France (termination segment).

⁶⁹ Affected markets/segments exist in the following Member States when looking at certain potential markets/segments within wholesale access to fixed internet services: Croatia (unbundled local loop, overall bitstream access, bitstream access at national (IP) level, bitstream access at regional (ATM/Ethernet) level); Czech Republic (overall bitstream access, bitstream access at national (IP) level); France (unbundled local loop, overall bitstream access); Germany (unbundled local loop, overall bitstream access, bitstream access at national (IP) level); Greece (unbundled local loop, overall bitstream access, bitstream access at national (IP) level); Hungary (unbundled local loop, overall bitstream access, bitstream access at national (IP) level, bitstream access at regional (ATM/Ethernet) level); Poland (unbundled local loop, overall bitstream access, bitstream access at national (IP) level, bitstream access at regional (ATM/Ethernet) level); Romania (unbundled local loop, overall bitstream access, bitstream access at national (IP) level); Slovakia (unbundled local loop, overall bitstream access, bitstream access at national (IP) level, bitstream access at regional (ATM/Ethernet) level).

⁷⁰ In Croatia, Greece, Hungary, Romania and Slovakia.

⁷¹ In Croatia.

⁷² Including i.a. retail mobile telecommunications services and retail bulk SMS services to end customers, seamless pan-European mobile telecommunications services, wholesale access and call origination and termination services, wholesale international roaming services. See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.1.

(iii) global telecommunication services;⁷⁴ (iv) wholesale internet connectivity;⁷⁵ (v) IT services;⁷⁶ and (vi) TV services.⁷⁷

- (78) Only one respondent to the market investigation stated that it expects the Transaction to have a negative impact on these markets, without however clearly substantiating its claims. A limited number of respondents also pointed out that the Transaction may have positive effects insofar as it could lead to lower prices on the downstream supply markets. Some respondents also stressed the need for BuyIn to put in place ring-fencing measures in order to avoid the exchange of competitively sensitive information between (current and future) customers of BuyIn.⁷⁸ Moreover, one respondent noted that, from a theoretical perspective and depending on the specific circumstances, joint purchase through BuyIn may lead to risks of cost alignment and exchange of sensitive information between competitors.
- (79) The Commission considers that – for similar reasons as those set out in paragraphs (71)-(72) above in relation to the upstream purchasing markets – it is not necessary to assess in detail the effects of the Transaction on any of the downstream supply markets, since the Transaction as such is unlikely to have an impact on any of these markets. Indeed, the Transaction in itself does not add any new assets or other activities to the benefit of either BuyIn or the Parties. Accordingly, it does not create any new horizontal or vertical relationship between the Parties or between any of the Parties and BuyIn on any of the downstream supply markets, nor does it strengthen any existing horizontal or vertical relationships between them involving any of those markets.
- (80) The Commission notes that any potential future effect on the downstream supply markets would not stem from the Transaction itself, but from the actual agreements that BuyIn may enter into after the Transaction with third-parties active on the downstream supply markets. While to the extent that these agreements would amount to cooperation agreements between competitors, they could potentially give rise to competition concerns on the downstream supply

⁷³ Including i.a. retail fixed telephony and Internet services to end customers, retail multiple play and retail business connectivity services, wholesale call origination and termination services; wholesale domestic call transit services and for end-to-end calls; wholesale access to fixed internet services and to leased lines. See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.2.

⁷⁴ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.3.

⁷⁵ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.4.

⁷⁶ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.5.

⁷⁷ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 5.6.

⁷⁸ See replies to Commission questionnaire to telecom and IT services providers Q1 of 7 February 2017, question 3.1.

markets,⁷⁹ whether or not any such agreements will actually raise competition concerns will depend on the specific circumstances of each case,⁸⁰ which are unknown at this stage. In any event, any such agreements will be subject to Article 101 TFEU and will therefore have to be assessed on a case-by-case basis.

6. CONCLUSION

- (81) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Tibor NAVRACSICS
Member of the Commission

⁷⁹ For instance, competition concerns may arise in the event of significant commonality of variable costs between the parties to the agreement, or the exchange of commercially sensitive information between them.

⁸⁰ These circumstances include, among other things, the identity and market position of the third party, the type of products covered by the agreement, the existence of overlapping activities in the downstream supply markets, the type of measures put in place to prevent the exchange of sensitive information, etc.