EUROPEAN COMMISSION
DG Competition

Case M.8944 - Liberty Global / De Vijver Media and Liberty Global (SBS) / Mediahuis / JV

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 9(3)
Date: 23/11/2018

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN
COMMISSION

Brussels, 23.11.2018
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Public version

COMMISSION DECISION

of 23.11.2018

referring the concentration M.8944 - Liberty Global / De Vijver Media and Liberty Global (SBS) / Mediahuis / JV to the Belgian authorities, pursuant to Article 9 of Council Regulation (EC) No 139/2004

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the "TFEU")[1],

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

Having regard to Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings[2] (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by Liberty Global Plc and Mediahuis NV on 3 October 2018, pursuant to article 4 of the said Regulation,

Having regard to the request of the Deputy Prime Minister and Minister of Employment, Economy and Consumer Affairs, in charge of Foreign Trade, of Belgium of 12 October 2018, and received by the Commission on 17 October 2018 (the "Referral Request"),

Whereas:

(1) On 3 October 2018 the Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation which consists of the two following interrelated transactions within the meaning of Recital 20 of the Merger Regulation:

- the undertaking Liberty Global plc ("Liberty Global") acquires within the meaning of Article 3(1)b of the Merger Regulation sole control of the undertaking De Vijver Media NV ("DVM") by way of purchases of shares (the "DVM Transaction");

- Liberty Global and the undertaking Mediahuis NV ("Mediahuis") acquire within the meaning of Article 3(4) of the Merger Regulation joint control over a newly created joint venture (the "JV Transaction").

(2) Liberty Global and Mediahuis are collectively referred to as "Notifying Parties". Liberty Global, Mediahuis and DVM are collectively referred to as "Parties". The DVM Transaction and the JV Transaction are jointly referred to as the "Transaction".

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1 OJ C115, 9.8.2008, P.47.

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

(3) Belgium received a copy of the notification, via the Belgian Competition Authority ("BCA"), on 3 October 2018.

(4) By its Referral Request, Belgium requested the referral to its competition authority of the proposed concentration with a view to assessing it under national competition law, pursuant to Article 9(2)(a) of the Merger Regulation

1. THE PARTIES

(5) Liberty Global is an international cable operator offering television, broadband and voice telephony services worldwide and in particular in 12 Member States. Liberty Global has a controlling stake in Telenet Group Holding NV ("Telenet"), which owns and operates a cable network in Flanders and parts of Brussels.

(6) Mediahuis is an independent and diversified Belgian media group that is mainly active in the publishing of Dutch language newspapers and the print, audiovisual and advertising sector.

(7) DVM is a Belgian financial holding company of a group of companies active in free-to-air TV broadcasting and related VOD[3] services, media sale and programme production. DVM conducts its business via various subsidiaries, including:

- SBS Belgium NV ("SBS Belgium"): broadcasting company operating commercial Dutch-language free-to-air/basic pay TV channels, i.e. Vier, Vijf and Zes, and selling advertising space on these channels;

- Woestijnvis NV ("Woestijnvis"): TV programme production company;

- SBS Sales Belgium NV: intermediary selling advertising space on third party channels.

2. THE OPERATION AND THE CONCENTRATION

(8) In 2015, acting through Telenet, Liberty Global acquired joint control over DVM, together with Waterman & Waterman NV ("W&W"), a financial holding company, and Mediahuis (at that time Corelio Publishing ("Corelio")), a publisher of newspapers, online news and a seller of advertising space) (the "2015 acquisition of joint control"). In case M.7194 *Liberty Global/Corelio/W&W/De Vijver Media*, that transaction was conditionally cleared by the Commission on 24 February 2015 pursuant to Article 8(2) of the Merger Regulation (the "2015 Decision").

(9) In the present case, the Notifying Parties submit that the Transaction reflects their intention to restructure the activities of DVM and their mutual relationships.

(10) The Transaction consists of the following two transactions:

- Mediahuis and W&W will sell their shares in DVM to Telenet. As a result, Liberty Global, through Telenet, will acquire sole control over DVM within the meaning of Article 3(1)(b) of the Merger Regulation.

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3 Video On Demand.

- Telenet and Mediahuis will acquire 50/50 joint control over a newly created joint venture that will operate two businesses. First, it will function as a sales house for advertisements that are linked to digital video and made available via either (i) the SBS or Mediahuis digital video media players or (ii) the online video platform of third parties. Second, it will operate a sales team for cross-media ("360°") advertising[4] in relation to certain SBS Belgium, Mediahuis and third party inventory.

(11) The evidence on file confirms that the JV is a fully-functional JV under Article 3(4) of the Merger Regulation.[5]

(12) Both transactions are mutually linked by contractual conditions and are part of a unitary business strategy. It follows that the two transactions are interdependent and constitute a single concentration under Article 3 of the Merger Regulation.

3. EU DIMENSION

(13) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[6] (Liberty Global: EUR 17 338 million; Mediahuis: EUR […] million; DVM: EUR 134 million in 2017). Each of at least two of them has an EU-wide turnover in excess of EUR 250 million (Liberty Global: EUR […] million; Mediahuis: EUR […] million; DVM: EUR […] million in 2017). DVM achieves more than two thirds of its aggregate EU-wide turnover within one and the same Member State (Belgium) but Liberty Global and Mediahuis do not. The notified operation therefore has an EU dimension.

4. ASSESSMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

4.1. Introduction

(14) By its Referral Request, Belgium requests a referral of the Transaction to the BCA with a view to assessing it under national competition law, pursuant to Article 9(2)(a) of the Merger Regulation.

(15) Pursuant to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that Member State's competition law, if the criteria laid down in Article 9(2)(a) of the Merger Regulation are met, that is to say, if a concentration threatens to affect significantly competition in a market within the relevant Member State which presents all the characteristics of a distinct market.

(16) When the criteria laid down in Article 9(2)(a) are met, the Commission will assess whether it is appropriate to refer a given case to a national competition authority. The Commission retains a margin of discretion in deciding whether

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4 Advertising on all media, including all print and online media platforms, TV and radio.

5 The JV will (i) develop activities beyond one specific function for the parents; (ii) achieve a threshold of at least 20% of its sales with third-parties; (iii) have sufficient resources to operate independently on the market; and (iv) operate on a lasting basis.

6 Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

to refer a case or not[7]. In exercising such discretion, the Commission will take into account the need to ensure effective protection of competition in all markets affected by the Transaction[8]. The Commission exercises that discretion taking into account the criteria set out in the case law and the Referral Notice.[9]

(17) In the following sections, it will be examined, first whether the criteria of Article 9(2)(a) of the Merger Regulation are fulfilled (Section 4.2) and then, whether it would be appropriate to refer the present case to Belgium (Section 4.3).

(18) In its assessment of the Referral Request, the Commission takes into account the arguments it received from the Belgian authorities and the Notifying Parties.

4.2. The criteria of Article 9(2)(a) of the Merger Regulation

(19) In order for a referral request to be issued by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation.

(20) As to the procedural condition, the referral request must be made within 15 working days from the date on which the notification of a concentration before the Commission is received by that Member State. In this regard, the Commission notes that Belgium, via the BCA, received a copy of the notification of the Transaction on 3 October 2018. The Referral Request was made by letter sent on 12 October 2018 and received by the Commission on 17 October 2018. Therefore, the Referral Request was made within 15 working days following the receipt by Belgium of the notification of the Transaction and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.

(21) As to the substantive conditions, first, in assessing a referral request made pursuant to Article 9(2)(a) of the Merger Regulation, the Commission is required to determine whether there is a market within the Member State concerned which is affected by the notified concentration and presents all the characteristics of a distinct market. According to Article 9(3) of the Merger Regulation and the case law of the General Court[10], the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. Second, the Commission is required to verify whether the Transaction threatens to significantly affect competition in that market. Finally, Article 9(7) of the Merger Regulation gives further indications as to which area the geographically relevant market shall consist of, and which elements the Commission must take particular account of when assessing that issue. These conditions are assessed in turn in the following sections.

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7 See also Commission Notice on Case Referral in respect of concentrations (hereafter, the "Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 7.

8 Referral Notice, paragraph 8.

9 Referral Notice, paragraph 7.

10 Joined Cases T-346/02 and T-347/02 *Cableuropa SA and Others v Commission* [2003] EU:T:2003:256, paragraph 105.

4.2.1. Markets within Belgium which present all the characteristics of a distinct market

(22) As regards the criteria set out at Article 9(2)(a) of the Merger Regulation, paragraph 36 of the Referral Notice explains that the Member State is required to show that the geographic markets in which the Transaction threatens to affect competition are national or narrower than national in scope.

4.2.1.1. Belgium's submission

(23) In their Referral Request, the Belgian authorities consider that the Transaction threatens to significantly affect competition in the following markets within Belgium presenting all the characteristics of distinct markets:

– the market for the licensing of broadcasting rights for TV content;

– the market for the wholesale supply of TV channels in the footprint of Telenet's cable network, i.e. in Flanders and parts of Brussels;

– the market for the sale of advertising space on TV channels;

– the market for the retail provision of TV services to end users in Telenet's footprint;

– the market for TV programming and broadcasting services of national FTA channels for end users in the Flemish community.[11]

4.2.1.2. Notifying P arties' view

(24) In the Form CO the Notifying Parties share the Belgian authorities' assessment of the relevant geographic markets for the wholesale supply of TV channels, the retail provision of TV services and the sale of advertising on TV channels, where they find that markets are regional or national at most.[12] For the production and licensing of broadcasting rights for TV content, the Notifying Parties consider that the exact definition of the geographic markets can be left open, their scope possibly being national, regional or covering linguistically homogeneous areas.[13]

4.2.1.3. Commission's assessment

A. Introduction

(25) The Transaction relates to all the levels of the TV value chain. Audio-visual TV content ('TV content') comprises entertainment products (films, sports, series, shows, live events, documentaries, etc.) that can be broadcast via TV. In its past decisional practice, the Commission has distinguished different activities in the value chain for TV-related content, namely: (a) the production of TV content; (b) the licensing of broadcasting rights relating to TV content; (c) the wholesale supply of TV channels; and (d) the retail provision of TV services to end customers.[14] In addition, the Transaction relates to (e) the sale of advertising on TV channels and to (f) the sale of online and offline advertising.

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[11] Referral Request, paragraphs 16-17.

[12] Form CO, paragraphs 409, 448 and 500.

[13] Form CO, paragraphs 330-332, 357-359 and 361.

[14] See, for example, Commission decision of 21 December 2010 in case M.5932, *News Corp/BskyB*; Commission decision of 22 September 2006 in case M.4353 *Permira/All3Media Group*, Commission decision of 15 April 2013 in case M.6880 *Liberty Global/Virgin Media*; and the 2015 Decision, recital 17.

(i) Production of TV content

(26) Upstream of the value chain is the production of new TV content. TV production companies produce TV content either (a) for internal use on their own TV channels or retail TV services if they are vertically integrated in the wholesale supply of TV channels and/or in the retail provision of TV services (that is to say, captive TV production), or (b) for supply to third-party customers (that is to say, non-captive TV production). Third-party customers are typically: (i) TV channel suppliers ('TV broadcasters'), which then incorporate the TV content into linear TV channels, or (ii) content platform operators, which then retail the TV content to end users on a non-linear basis (that is to say, Pay-Per-View ('PPV') or VOD), including non-traditional platforms, that is to say so-called Over-The-Top ('OTT') that can be accessed over the Internet.[15]

(27) TV broadcasters and TV distributors who seek TV content for their TV channels or retail TV services generally have a choice between a number of sourcing models, which can be broadly categorised as follows: (a) acquiring broadcasting rights from TV production companies for pre-produced TV content (sometimes referred to as 'off-the-shelf' or 'tape sales'); (b) obtaining TV content produced on an 'ad hoc' basis (that is to say tailor-made).[16]

(28) The supply-side of this market comprises TV production companies, while the demand-side comprises third parties that commission the production of TV content or hire TV production services, typically TV broadcasters or content platform operators.[17]

(29) As regards the supply-side of the market: (a) DVM, through its subsidiaries SBS Belgium and Woestijnvis, produces TV content mainly for its own TV channels Vier, Vijf and Zes, and for Telenet and third parties; (b) Telenet is active in the production of local TV content (e.g. series "*Chaussée d'Amour*" and "*De Dag*").[18]

(30) As regards the demand-side of the market: (a) DVM commissions TV content from other producers; (b) Telenet sources TV production services from Woestijnvis for the live broadcasting of the Belgian Jupiler Pro League (football) or cyclocross races.[19]

(ii) Licensing of broadcasting rights relating to TV content

(31) This part of the value chain concerns the licensing of broadcasting rights relating to pre-existing TV content – that is to say TV content that has been previously produced and is subsequently made available 'off-the-shelf' by the rights holder (so-called pre-produced TV content) – and broadcasting rights relating to sports events.[20]

(32) The broadcasting rights relating to TV content can belong to one or more of the following: the holder of the rights to the TV format; the production company that produced the TV content; the company that commissioned the production

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15 2015 Decision, recital 19.
16 2015 Decision, recital 20.
17 2015 Decision, recital 23.
18 Form CO, paragraphs 311-312.
19 Form CO, paragraphs 313-314.
20 2015 Decision, recital 26.

of the TV content. In addition, the broadcasting rights can belong to a third-party distributor, to which they were licensed by the original owner, along with a right to sub-license. All of these categories of rights owners, which constitute the supply-side of the market, license broadcasting rights to content aggregators, which constitute the demand-side of the market, namely: (a) TV broadcasters; or (b) content platform operators.[21]

(33) As regards the supply-side of the market: (a) DVM licenses the broadcasting rights to its productions and/or formats mainly to its subsidiary SBS Belgium for use on its channels Vier, Vijf and Zes, and to a limited extent outside Belgium; (b) Telenet mainly sub-licenses broadcasting rights to the UCI Worldcup cyclocross races, to the Croky Cup (football) as well as Jupiler Pro League FTA highlights rights.[22]

(34) As regards the demand-side of the market: (a) DVM acquires broadcasting rights for its TV channels Vier, Vijf and Zes and related VOD services; (b) Telenet acquires broadcasting rights for its pay TV channels and for VOD services.[23]

(iii) Wholesale supply of TV channels

(35) 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 free-to-air ('FTA') basis or on a pay TV basis.[24]

(36) The viewer experience of TV is evolving and shifting from traditional linear viewing to non-linear viewing. The development of new forms of TV consumption as a result of new technology has made it possible to distinguish between rights relating to conventional ('linear') TV and those relating to 'non-linear' TV services. Non-linear TV services have gradually been integrated in traditional TV channels to enhance the viewer experience. TV broadcasters thus can offer viewers a vast array of functions and services as part of the experience of the TV channels, such as VOD (Subscription VOD (SVOD), Transactional VOD (TVOD), Pay Per View (PPV)), Personal Video Recorder and Catch Up TV. TV broadcasters are increasingly complementing their traditional linear TV channel offering with non-linear services.[25]

(37) As regards the supply-side of the market, DVM offers its basic pay TV channels Vier, Vijf and Zes to TV distributors in Belgium. As regards the demand-side of the market, Telenet enters into agreements with TV broadcasters for the distribution of TV channels on its cable network.[26]

(iv) Retail provision of TV services to end users

(38) TV distributors either limit themselves to 'carrying' the TV channels and making them available to end users, or also act as channel aggregators, which 'package' TV channels. The TV services supplied by TV distributors to end users consist of (a) packages of linear TV channels (which they have either

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21 2015 Decision, recitals 27-28.
22 Form CO, paragraphs 315-316.
23 Form CO, paragraphs 318-319.
24 2015 Decision, recital 31.
25 2015 Decision, recitals 33, 35-38.
26 Form CO, paragraphs 320-322.

acquired or produced themselves) and (b) content aggregated in non-linear services, such as VOD, SVOD, TVOD and PPV. TV content can be delivered to end users through a number of technical means including cable, satellite and IPTV. OTT players deliver channels and content in both a linear and non-linear fashion through the use of the internet.[27]

(39) The content offered by the TV distributor is presented in an Electronic Programme Guide (EPG), which is an application used on television sets to list current and scheduled programmes that are or will be available on each channel and a short summary or commentary for each programme. Each channel broadcast on the TV platform receives an EPG position, which is usually agreed between the TV broadcaster and the TV distributor.[28]

(40) In the retail provision of TV services to end users, Telenet offers retail services throughout Flanders and in parts of Brussels, Wallonia and Luxembourg. DVM offers the content of its channels, i.e. the TV programmes that are broadcasted on Vier, Vijf and Zes, on the websites of these channels, free-of-charge.[29]

(v) Sale of advertising on TV channels

(41) TV broadcasters sell advertising space on their TV channels. The sale of advertising space is an important source of revenues for FTA channels, while pay TV channels in general rely more on fees from TV distributors or from end users.[30]

(42) As regards the supply-side of the market, (a) DVM sells, *via* its subsidiary SBS Sales Belgium NV, advertising space on Vier, Vijf and Zes and acts as an intermediary for the sale of advertising space on third party TV channels; (b) Telenet sells limited advertising space on its Premium Pay TV channel Play Sports.[31]

(43) As regards the demand-side of the market, (a) Telenet buys advertising space on TV channels; (b) Mediahuis also buys advertising space on TV channels.[32]

(vi) Sale of online and offline advertising

Online advertising

(44) As regards the supply-side of the market, (a) DVM sells advertising space on the websites of its channels; (b) Telenet sells advertising space on several of its Dutch language websites; (c) Mediahuis sells advertising on its Dutch language websites through its sales house Mediahuis Connect.[33]

(45) As regards the demand-side of the market, (a) DVM buys advertising on Dutch language websites; (b) Telenet buys online advertising space from a variety of providers including Mediahuis and international players such as Facebook and Google. [34]

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[27] 2015 Decision, recital 42.
[28] 2015 Decision, recital 43.
[29] Form CO, paragraph 323.
[30] 2015 Decision, recital 45.
[31] Form CO, paragraphs 455 and 458.
[32] Form CO, paragraphs 456 and 463.
[33] Form CO, paragraph 462.
[34] Form CO, paragraphs 457 and 462.

Offline advertising

(46) As regards the supply-side of the market, Mediahuis, which is mainly active as a publisher of Dutch language newspapers, sells advertising space through Mediahuis Connect.[35]

(47) As regards the demand-side of the market, (a) DVM buys advertising in Dutch language newspapers; (b) Telenet advertises in national and regional Dutch language and French language newspapers; (c) Mediahuis is also a buyer of advertising space in magazines.[36]

B. Product markets

(i) Production and licensing of broadcasting rights for TV content

(48) From a demand side perspective, the production of TV content and the licensing of broadcasting rights for TV content constitute alternative ways through which TV broadcasters and TV distributors may source TV content. Therefore, for the purpose of the market definition, in the following section the Commission analyses the production and licensing of TV content together.

(49) In the 2015 Decision, the Commission considered that the production of TV content and the licensing of broadcasting rights for TV content constituted two separate product markets. Those markets could each be also further segmented depending on the type of TV content or exhibition window. However, for the purpose of that decision, the question whether those subsegments constituted separate product markets has been left open, as the transaction did not raise competitive concerns under any alternative market definition.[37]

(50) In the present case, the Notifying Parties submit that, as in the 2015 Decision, the question whether the market for the production of TV content and the market for the licensing of broadcasting rights should be further segmented can be left open.

(51) The information gathered during the Phase I market investigation indicated that the distinction between the market for the production of TV content on the one hand, and the market for the licensing of broadcasting rights of TV content on the other hand, made in the 2015 Decision, remains valid today.[38] One respondent pointed out that special attention should be given to local TV content which has its own specificities, linked to local culture and language.[39]

(52) A majority of the respondents consider that the market for the production of TV content should be further segmented on the basis of the type of content.[40] Besides the traditional segmentation (different genres etc.), one respondent considers that the various local contents could constitute separate markets.[41] The results of the market investigation, however, show that this market should

[35] Form CO, paragraph 460.

[36] Form CO, paragraphs 456, 459 and 462.

[37] 2015 Decision, recital 69.

[38] Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 11.

[39] One reply to Questionnaire Q1 to TV production companies and other TV content suppliers, question 11.2.

[40] Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 12.1.

[41] One reply to Questionnaire Q1 to TV production companies and other TV content suppliers, question 12.1.

not be further segmented on the basis of the type of exhibition windows.[42] A majority of the respondents consider that the market for the licensing of broadcasting rights of TV content should be further segmented on the basis of the type of content (premium vs basic content)[43] but not on the basis of the type of exhibition windows.[44]

(53) In light of the above, given the absence of new elements found during the market investigation, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the definition of the product market applied in the 2015 Decision should not be amended in the present case. The production of TV content on the one hand and the licensing of broadcasting rights for TV content on the other hand remain two separate product markets. Furthermore, the question whether these markets can be further segmented depending on the type of TV content or exhibition window can be left open as it would not change the outcome of the Commission's evaluation of the Referral Request as regardless of the product market definition the Transaction threatens to significantly affect competition in Belgium.

(ii) Wholesale supply of TV channels

(54) In the 2015 Decision, the Commission considered that the relevant product markets for the purposes of the decision were each of the markets for the wholesale supply of FTA/basic pay TV channels[45] and of premium pay TV channels. The question whether these markets should be further segmented based on the genre of the channel and/or the distribution technology was left open, as this would not change the outcome of the competitive assessment.[46]

(55) In the present case, the Notifying Parties submit, in line with the Commission's considerations in the 2015 Decision regarding the characteristics of the market in Belgium/Flanders, that the relevant product market for the wholesale supply of TV channels can be further divided into a market for FTA/basic pay TV and premium pay TV channels. According to the Notifying Parties, a further segmentation by genre, such as between general interest TV channels and thematic TV channels is not necessary, since Vier, Vijf and Zes are general interest channels and their closest competitors are other general interest channels such as those of Medialaan and VRT.[47] The Notifying Parties also consider that a further segmentation according to the type of platforms is not warranted.[48]

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42 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 12.2.

43 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 13.1.

44 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 13.2.

45 In the 2015 Decision, FTA and basic pay TV channels were treated together because in Belgium, very few households rely on an antenna to receive truly "free-to-air" channels (See 2015 Decision, recitals 86-101). Instead, the vast majority of households subscribe to a basic pay TV package. Hence, true "free-to-air" broadcasting is of limited relevance in Belgium. Conversely, basic pay TV is so widespread that many market players refer to the channels that are part of the basic pay TV package as "free-to-air" channels.

46 2015 Decision, recitals 31-41.

47 Form CO, paragraph 400.

48 Form CO, paragraph 405.

(56) The information gathered during the Phase I market investigation indicated that the distinction between the wholesale market for the supply of FTA/basic pay TV channels on the one hand, and the wholesale market for the supply of premium pay TV channels on the other hand, remains valid today[49], and that there is no need to further segment them on the basis of the distribution technology of the channel.[50] The results of the market investigation are more mixed as to whether these markets should be further segmented on the basis of the type of genre of the channel.[51]

(57) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the wholesale supply of FTA/basic pay TV channels and of premium pay TV channels remain two separate product markets and should not be further divided based on the distribution technology of the channel. The question whether these markets can be further segmented depending on the type of content can be left open, as it would not change the outcome of the Commission's evaluation of the Referral Request as regardless of the product market definition the Transaction threatens to significantly affect competition in Belgium. Indeed, if Vier, Vijf or Zes were considered to be part of a more narrow product market comprising only specific TV channels (e.g. a market comprising all general interest TV channels or all TV channels targeting a female audience), this would increase their relative importance within that market, as there would be fewer other channels in that market.[52]

(iii) Retail provision of TV services to end users

(58) In the 2015 Decision, the Commission considered that there were indications that the retail provision of FTA/basic pay TV services and the retail provision of premium pay TV services constituted two distinct product markets, but that the product market definition could be left open, as this did not change the competitive assessment in this case. The question whether further distinctions could be drawn on the basis of the type of service or distribution platform could also be left open.[53]

(59) In the present case, the Notifying Parties submit, in line with the Commission's considerations in the 2015 Decision, that the question whether the relevant market should be further segmented between basic Pay TV and premium Pay TV channels can be left open. They also submit that the relevant market should include all relevant technologies, including satellite, digital terrestrial TV and OTT and that linear and non-linear services should be regarded as part of the same relevant market. As regards multiple play bundles, the Notifying Parties consider that the question whether there is a separate market for these offers in Belgium can be left open.

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49 Replies to Questionnaire Q2 to broadcasters, question 7.

50 Replies to Questionnaire Q2 to broadcasters, questions 9.1 and 9.2.

51 Replies to Questionnaire Q2 to broadcasters, questions 8.1 and 8.2.

52 The viewer share figures provided by the Notifying Parties (Annex 2.2.b to the Form CO) suggest that, if Vier, Vijf and Zes, were considered as belonging to a market of general interest TV channels, their viewer share would be slightly higher, as some thematic channels (e.g. children's channels) would be excluded from the market. Likewise, if Vijf were considered to belong to a market of TV channels targeting a female audience, its viewer share within that market would be higher than its current viewer share, since the only other TV channel with a significant viewer share in that market would be Vitaya.

53 2015 Decision, recitals 119-120.

(60) The information gathered during the Phase I market investigation stressed that both FTA/basic pay TV services and premium pay TV services are important from a distributor's point of view.[54]

(61) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the precise product market definition can be left open, as this would not change the outcome of the evaluation by the Commission of whether to refer the matter to Belgium, given Telenet's significant market shares regardless of the precise product market definition.[55]

(iv) Sale of advertising on TV channels

(62) In the 2015 Decision, the Commission considered that there was no reason to depart from its previous approach, i.e. that the sale of advertising space on TV was part of a separate product market, and not substitutable with the sale of advertising in other forms of media[56]. The Commission also considered that in any event, the question whether TV advertising constitutes a distinct market from other forms of advertising could be left open, as the Transaction does not give rise to competition concerns with regard to the sale of TV advertising space, even if it were to be considered as a separate relevant product market.

(63) In the present case, the Notifying Parties submit that the precise market definition can be left open as the Transaction would not give rise to competition concerns under any alternative market definition.

(64) The information gathered during the Phase I market investigation indicated that the conclusion reached in the past decisional practice of the Commission should be reconsidered, given the fact that TV advertising can be substituted by other advertising media[57].

(65) In light of the above, the Commission considers that for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the sale of advertising on TV channels could either form a distinct market or form a broad market together with other advertising media and that the question can be left open as this would not change the result of the Commission's assessment of whether to refer the case to Belgium.

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54 Replies to Questionnaire Q3 to TV distributors, question 9.1.

55 See Form CO, Table 6.1.l and Table 6.1.m. According to the Notifying Parties, in 2017, Telenet's market share based on subscribers for retail provision of TV services was [60-70] % in Telenet's footprint and [30-40] % in Belgium. If retail TV services provided by free satellite (satellite TV services offered to consumers without any subscription, that is on a free-to-air basis and which does not include the channels Vier, Vijf and Zes) are excluded, Telenet's market share was [60-70] % in its footprint and [40-50] % in Belgium. Telenet's market share would remain significant if various adjustments are made to the market definition.

56 Commission decision of 21 December 2010 in case M.5932 *NewsCorp/BSkyB*, recital 262; Commission decision of 14 June 2013 in case M. 6866 *Time Warner/CME*, recital 62.

57 Replies to Questionnaire Q4 to advertisers, question 6.

(v) Sale of online and offline advertising

(66) In previous decisions, the Commission distinguished between the provisions of online and offline advertising space[58], which is not contested by the Notifying Parties.

(67) As regards online advertising, the Commission further considered whether the market for online advertising could be sub-segmented into search and non-search advertising, but ultimately left this question open.[59]

(68) As regards offline advertising, the Commission has distinguished national from local newspapers and daily newspapers from non-daily newspapers[60].

(69) In the present case, the Notifying Parties do not comment the definition of the product markets for offline advertising.

(70) On the basis of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, there is no reason to depart from this segmentation.

C. Geographic markets

(i) Production and licensing of broadcasting rights for TV content

(71) In the 2015 Decision, the Commission pointed out that, according to the majority of the TV production companies responding to the Phase I market investigation, the geographic scope of contracts for the production of TV content and for the licensing of broadcasting rights for TV content was typically limited to the Dutch-speaking part of Belgium and that the majority of the respondents among TV broadcasters and production companies considered Dutch language content as a 'must have'. Furthermore, several TV broadcasters answered that Dutch language TV content developed for viewers in the Netherlands was not a substitute to Dutch language TV content developed for Dutch-speaking viewers in Belgium because of cultural differences.[61]

(72) The Commission concluded that, in any event, the question whether the geographic scope of the market for the production of TV content and the licensing of broadcasting rights for TV content was national or regional (the Flemish Region or the combination of the Flemish Region and the Brussels Capital Region) could be left open, as this would not change the outcome of the competitive assessment.[62]

(73) In the present case, the Notifying Parties submit that, in accordance with the Commission's position in the 2015 Decision, the question of the exact geographic market can be left open.

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58 Commission decision of 18 February 2010 in case M.5727 *Microsoft/Yahoo! Search Business*, recital 61; Commission decision of 11 March 2008 in case M.4731 *Google/DoubleClick*, recitals 45-46; 56.

59 Commission decision of 18 February 2010 in case M.5727 *Microsoft/Yahoo! Search Business*, recitals 71-75; Commission decision of 11 March 2008 in case M.4731 *Google/DoubleClick*, recitals 49-56.

60 Commission decision of 21 December 2010 in case M.5932 *News Corp/ BSkyB*, recital 265 and 266.

61 2015 Decision, recitals 73-74.

62 2015 Decision, recital 76.

(74) The information gathered during the Phase I market investigation indicated that these two markets are national (Belgium) or regional (Flemish region) in scope. No respondent considered that the Transaction concerns the Netherlands.[63]

(75) In light of the above, given the absence of new elements found during the market investigation, the Commission considers that for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the question whether the geographic scope of the market for the production of TV content and the licensing of broadcasting rights for TV content is national or regional (the Flemish Region or the combination of the Flemish Region and the Brussels Capital Region) can be left open, as this would not change the outcome of the assessment whether to refer this matter to the Belgian authorities.

(ii) Wholesale supply of TV channels

(76) In the 2015 Decision, the Commission pointed out that, according to the Phase I market investigation, agreements between TV broadcasters and TV distributors were negotiated on either a national, sub-national or linguistic basis, or for the area covered by the TV distributor's network. All Belgian TV broadcasters responding to the Phase I market investigation negotiated contracts with TV distributors on a national or sub-national basis. The Commission also noted that the viewer shares of TV channels in the Flemish Region and among the Dutch-speaking population of the Brussels Capital Region were dominated by Flemish TV channels. Indeed, all the top eight TV channels in 2013 were Flemish channels and they had a combined viewer share of approximately 80%.[64]

(77) Therefore, the Commission considered, on the basis of the results of the market investigation and in line with the decisions of the BCA, that, for purposes of the 2015 Decision, the relevant geographic market was the footprint of Telenet's cable network.

(78) In the present case, the Notifying Parties submit that, in contrast with the position adopted by the Commission in the 2015 Decision, a geographic delineation of the market by reference to the coverage area of the underlying networks is inappropriate for the following reasons: (i) Telenet would compete with several retail TV providers operating on a national scale e.g. Proximus and Orange (which uses regulated wholesale access to the cable networks of the different cable operators); and (ii) following the acquisition of Coditel Brabant (SFR), the network of Telenet would now cover larger parts of Brussels and Wallonia which are French speaking or bilingual parts of Belgium.

(79) Furthermore, the Notifying Parties stress that the regulatory framework, including the must-carry rules, is different in each of the Belgian regions (Dutch speaking, French speaking and bilingual regions) and that in 2017, viewer shares of TV channels in the Flemish Community were still dominated by Flemish TV channels. Indeed, all the top ten TV channels were Flemish channels and they had a combined viewer share of approximately 80 %.

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63 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 14.

64 2015 Decision. recitals 106-108.

(80) Therefore, the Notifying Parties submit that in Belgium, the geographic market should rather be national in scope or regional.

(81) The information gathered during the Phase I market investigation indicated that, to most respondents, the scope of the geographic markets for both FTA/basic pay TV and premium pay TV channels remains Telenet's footprint.[65]

(82) In light of the above, the Commission considers that for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the geographic market might remain the footprint of Telenet's cable network, but that it also might be enlarged to a regional or national scope. The exact geographic delineation of the market (i.e. whether it corresponds to Telenet's footprint, is regional or national) can be left open as it would not change the outcome of the Commission's evaluation of the Referral Request as regardless of the geographic market definition the Transaction threatens to significantly affect competition in Belgium.

(iii) Retail provision of TV services to end users

(83) In the 2015 Decision, the Commission considered that the relevant geographic market for the retail provision of TV services to end users is the footprint of Telenet's cable network. This finding was further supported by the decisions of the Belgian sector regulators.[66]

(84) In the present case, the Notifying Parties do not comment on the scope of the geographic market and mention that they will provide market share data for the entire territory of Belgium as well as for Telenet's footprint.

(85) The information gathered during the Phase I market investigation indicated that the conclusion reached by the Commission in the 2015 Decision remains valid.[67]

(86) In light of the above, as regards the definition of the geographic market for the retail provision of TV services to end-users, the Commission considers that for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, there is no reason to depart from the conclusion reached in the 2015 Decision.

(iv) Sale of advertising on TV channels

(87) In the 2015 Decision, the Commission considered that the geographic market for the sale of advertising space on TV was likely limited to the Flemish Region, the Flemish Region together with the Brussels Capital Region, or was at the most national in scope, and that the precise geographic market could be left open, as the Transaction did not give rise to competition concerns with regard to TV advertising under any plausible alternative geographic market definition.[68]

(88) In the present case, the Notifying Parties submit that the precise market definition can be left open as the Transaction would not give rise to competition concerns under any alternative market definition.

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65 Replies to Questionnaire Q2 to broadcasters, question 10.1.
66 2015 Decision, recital 139.
67 Replies to Questionnaire Q3 to TV distributors, question 10.1.
68 2015 Decision, recitals 147-148.

(89) The information gathered during the Phase I market investigation indicated that the geographic market for the sale of advertising space on TV could be national in scope.[69]

(90) In light of the above, the Commission considers that for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the geographic market might either be regional or national in scope and that the exact geographic delineation of the market (i.e. whether it is national or regional) can be left open as it would not change the outcome of the Commission's evaluation of the Referral Request as regardless of the geographic market definition the Transaction threatens to significantly affect competition in Belgium.

(v) Sale of online and offline advertising

(91) As regards online advertising, in its decision of 6 December 2016, adopted in case M. 8124 *Microsoft/LinkedIn*, the Commission concluded that the online advertising market and its possible sub-segments should be defined as national in scope or alongside linguistic borders within the EEA.[70]

(92) In the present case, the Notifying Parties take the view that the market is better considered national.

(93) As regards offline advertising, in past decisions, the Commission concluded that the geographic market was national in scope.[71]

(94) In the present case, the Notifying Parties do not comment on the geographic scope of the offline advertising market.

(95) On the basis of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Belgian authorities, the market for the sale of online and offline advertising should be defined as national at most.

4.2.1.4. Conclusion on the first substantive condition

(96) In light of the above, the Commission considers that the markets identified in the Referral Request present the characteristics of distinct markets in Belgium as required under Article 9(2)(a) of the Merger Regulation, also in light of Article 9(7) thereof.

4.2.2. *Markets within Belgium in which the Transaction threatens to significantly affect competition*

4.2.2.1. Belgium's submission

(97) As regards vertical issues, the Belgian authorities argue that the input foreclosure and customer foreclosure concerns raised in the decision of the Commission of 24 February 2015 merit further investigation for this Transaction. The channels Vier and Vijf continue to be of considerable importance for the provision of retail TV services. The importance of these channels hinges on, among other things, the importance of local content

69 Replies to Questionnaire Q4 to advertisers, question 7.1.

70 Commission decision of 6 December 2016 in case M.8124 *Microsoft/LinkedIn*, recital 164.

71 Commission decision of 7 April 2017 in case M.8354 *Fox/Sky*, recital 118; Commission decision of 7 March 2008 in the case M.5051 *APW/GMG/EMAP*, recital 29; Commission decision of 21 December 2010 in case M.5932 *News Corp/BskyB*, recital 269.

production for competing distributors on the one hand, and the market power of Telenet as a distributor for broadcasters, due to its [70-80] % market share on the market for the retail provision of TV services to end users on the other hand. [72]

(98) Second, the Belgian authorities consider targeted advertising to be an important feature of the Transaction.[73] Indeed, in September 2017, Telenet and SBS Belgium launched targeted advertising based on the viewing and surfing behaviour of Telenet subscribers and on what they buy in brick-and-mortar stores.[74] The Belgian authorities consider that if only the SBS Belgium channels dispose of this information, this would give them a competitive advantage over their competitors as they would not be in a position to replicate or obtain this type of information.[75]

(99) As regards horizontal issues, the Belgian authorities consider the licensing of broadcasting rights for TV content to be a potential concern, among other things due to recent evolutions on this market. They attribute to Telenet alarming market behaviour and give the following examples to support their contention. In 2015, SBS Belgium would have handed over to Telenet, without prior market consultation, exclusive broadcasting rights of two main popular cyclocross competitions. According to the Belgian authorities, this exclusive acquisition by a dominant distributor would have potentially had exclusionary effects.. Moreover, in 2017, Telenet would have sub-licenced SBS Belgium the rights to broadcast the highlights of the Belgian football competition, immediately after having acquired those rights until then held by Medialaan, upon completion of a competitive bidding process in which it would have offered bundled bids. The Belgian authorities stress that, in 2017, Telenet would have announced it would offer the series "Twin Peaks" on its Pay-TV offer and that the consumers could expect it to be later broadcasted on FTA channel Vier, without any competitive bidding process beforehand. The Belgian authorities refer to these examples to highlight the potential competitive disruption caused by the ownership of a broadcaster by a distributor of a Pay-TV offer with financial buyer power and the resulting competitive advantage the broadcaster might hold vis-à-vis other broadcasters.[76]

(100) Lastly, the Belgian authorities point out an issue resulting from the ability to fast-forward through advertisements on cable networks, which would be problematic for FTA channels as they are mainly funded by advertisements. There would be "*rumours*" that Telenet would be the only market player refusing to solve this problem for the channels of Medialaan and other broadcasters (including SBS Belgium channels), thereby threatening the FTA market and the production sector.[77]

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72 Referral Request, paragraphs 39-44.
73 Referral Request, paragraph 48.
74 Referral Request, paragraph 56.
75 Referral Request, paragraph 58.
76 Referral Request, paragraphs 61-69.
77 Referral Request, paragraph 72.

4.2.2.2. Notifying Parties' view

(101) First, in their observations on the Referral Request, the Notifying Parties note that the Referral Request does not raise concerns regarding the JV Transaction. As regards the DVM Transaction, the Notifying Parties stress that, instead of taking into consideration the change from joint to sole control over DVM to determine whether the Transaction threatens to significantly affect competition in the relevant markets, the Referral Request only identifies concerns which would not be merger-specific.

(102) As regards the input and customer foreclosure concerns, the Notifying Parties stress that the Referral Request is referring to market developments since 2015 generally, but not pointing to new or different concerns that would result specifically from the fact that, following the Transaction, Telenet will have sole instead of joint control over DVM.

(103) The Notifying Parties add that, likewise, targeted advertising concerns are not merger-specific since targeted TV advertising by Telenet and SBS Belgium was launched before the Transaction. As regards the cooperation between Telenet and SBS Belgium in content production and acquisition, the Notifying Parties highlight the fact that the Referral Request only refers to observations of current market behaviour of Telenet and SBS Belgium, without identifying any new concerns resulting from the fact that, following the Transaction, Liberty Global will have sole instead of joint control over DVM.

(104) Second, the Notifying Parties consider that the "rumours" that Telenet would be the only market player refusing to solve the problem resulting from the ability to fast-forward TV advertisements would not be merger-specific. Moreover, they would also be unfounded [business secret].

(105) Third, the Notifying Parties claim that the other concerns raised in the Referral Request are without merit and/or based on factual inaccuracies relative to content acquisition and production, as well as to targeted advertising, because Medialaan would have been offered the possibility to launch advanced advertising at the same time as SBS Belgium.

(106) Therefore, the Notifying Parties conclude that the Referral Request does not adequately establish that the concentration threatens to significantly affect competition in one or several relevant markets in Belgium.

4.2.2.3. Commission's assessment

(107) In the following sections, the Commission will first identify the relevant markets affected by the Transaction and then carry out a preliminary assessment as to whether the Transaction threatens to significantly affect competition in the above-mentioned affected markets, wholly or in part.

A. Affected markets

(108) The Transaction gives rise to horizontal overlaps and several vertical relationships between the Parties' activities on the various markets of the TV value chain. In the following recitals, the Commission identifies these overlaps and vertical links, and determines which markets are horizontally and/or vertically affected by the Transaction for the purpose of the competitive assessment.

(109) With regard to <u>horizontal overlaps</u>, as explained above, DVM and Liberty Global are both active in the market for the production of TV content. They are

also both active in the market for the licensing of broadcasting rights for TV content, as regards both the supply and demand side of these markets.

(110) However, the market for the production of TV content is not horizontally affected, as the Parties' combined market share is below 20 %, both on the supply side[78] and the demand side.[79] The market for the licensing of broadcasting rights relating to TV content is also not horizontally affected with regard to the supply side, as the Parties' combined market share is below 20 %.[80]

(111) On the other hand, the Transaction gives rise to a horizontally affected market on the demand side of the **market for the licensing of broadcasting rights for TV content in Flanders**, since the market shares of Telenet and DVM in the acquisition of such rights calculated in expenditure in 2017 are [30-40] % and [5-10] % respectively.[81]

(112) With regard to vertical relationships between the markets of the TV value chain, the Commission notes the following:

(113) The market for the production of TV content and the market for the licensing of the broadcasting rights for TV content can be considered to be upstream to the market for the wholesale supply of FTA/basic pay TV channels, the market for the wholesale supply of premium pay TV channels and the market for the retail provision of TV services to end users, as TV content is an input for both TV broadcasters and TV distributors. In addition to producing TV content internally, TV broadcasters can commission their production or acquire the relevant licensing rights for it, in order to show it on their channels. TV distributors can also commission the production of TV content or acquire a licence for individual TV content, which they then offer to their subscribers, for instance as part of a VOD catalogue.

(114) The **markets for the production of TV content** and **for the licensing of the broadcasting rights for TV content** on the one hand and the **market for the retail provision of TV services to end users** on the other hand are vertically affected by the Transaction, given that Telenet holds a market share in excess of 30% in the market for the retail provision of TV services under any possible market definition.[82] On the other hand, the Commission notes that, given DVM's low market shares on the market for the production of TV content and on the market for the licensing of the broadcasting rights for TV content,[83] these markets and the market for the wholesale supply of TV channels are not vertically affected by the Transaction.

(115) The **market for the sale of TV advertising space on TV channels** is also vertically linked to **the market for the retail provision of TV services to end users**, since TV advertising space can be viewed as an input for TV

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78 In the Form CO, paragraph 343, the Notifying Parties estimate that, on the supply side, DVM has an estimated share of [5-10] % of the market for the production of TV content (non-captive) in 2017.

79 In the Form CO, paragraph 342, the Notifying Parties estimate that, on the demand side, their combined market share amounts to [10-20] % of the market for the production of Dutch TV content in Belgium.

80 In paragraphs 363-364 and Table 6.3.b. of the Form CO, the Notifying Parties estimate that with regard to the market for the licensing of individual TV content, Telenet had a share of [0-5] % in 2017 in Flanders, in terms of revenue, whereas DVM had a share of less than [0-5] % in terms of revenue.

81 See Form CO, Table 6.3.b.

82 See Form CO, Tables 6.1.l and 6.1 m.

83 See footnote above.

distributors, which purchase advertising space in order to promote and market their products and services. Since DVM is active in the sale of advertising space on TV channels (where its market share in 2017 was [20-30] % in Flanders and [10-20] % in Belgium[84]) and Telenet's market share in the retail provision of TV services is above 30 %, these markets are also vertically affected by the Transaction.

(116) Finally, the market for the wholesale supply of FTA/basic pay TV channels and the market for the wholesale supply of premium pay TV channels are vertically related to the market for the retail provision of TV services to end users, as TV broadcasters license their channels (and attached non-linear services) as an input to TV distributors, which then include the channels in their retail offer. Given that DVM is active in the wholesale supply of FTA/basic pay TV channels (where it offers Vier, Vijf and Zes to TV distributors) and that Telenet has a market share in excess of 30 % in the market for the retail provision of TV services, the **markets for the wholesale supply of FTA/basic pay TV channels and for the retail provision of TV services to end users** are vertically affected by the Transaction. On the other hand, the market for the wholesale supply of premium pay TV channels is not vertically affected by the Transaction, since DVM is not active in that market.

B. The 2015 Decision

(117) In the 2015 Decision, the Commission carried out its competitive assessment with regard to: (a) the horizontally affected market for the licensing of broadcasting rights for TV content on the demand side; (b) several vertically affected markets relating to individual TV content (that is to say, the market for the production of TV content and the market for the licensing of TV content on the one hand and on the other hand the markets to which they are vertically linked, namely the market for the retail provision of TV services to end users, the market for the wholesale supply of FTA/basic pay TV channels and the market for premium pay TV channels); (c) the vertically affected markets for the sale of TV advertising space on TV channels and for the retail provision of TV services to end users; and (d) the vertically affected markets for the wholesale supply of FTA/basic pay TV channels and for the retail provision of TV services to end users.[85]

(118) After a competitive assessment of the proposed transaction, the Commission retained the following concerns.

(119) The Commission concluded that the channels Vier and Vijf were important inputs for TV distributors and that Telenet's joint control over these inputs would give it the ability and incentive to foreclose its rivals from accessing these channels. This would result in anticompetitive effects on the market for the retail provision of TV services. Telenet had a dominant position on this market and input foreclosure would strengthen that position, therefore giving rise to a significant impediment to effective competition.[86]

(120) Furthermore, the Commission considered that partial customer foreclosure strategies were likely to weaken competition in the upstream markets of TV broadcasting and harm consumers downstream through a reduced quality of the

84 See Form CO, paragraph 502 and Tables 6.1.w and 6.3.b.
85 2015 Decision, Section 5, recitals 154-592.
86 2015 Decision, Sections 5.2 and 5.4.1.

viewer experience of rival channels, reduced choice and fewer investments in content. The Commission was therefore of the view that the Transaction would significantly impede effective competition as a result of partial customer foreclosure in the upstream market for the wholesale supply of FTA/basic pay TV channels.[87]

(121) As regards targeted advertising, considering that its development in the Belgian TV markets was still at an early stage, that the timing of such a technical development was uncertain and that the market investigation did not provide conclusive information on how targeted advertising would work from a technical or commercial standpoint, the Commission considered that the transaction would not have anticompetitive effects as regards the future development of targeted advertising.[88]

(122) In order to address the competition concerns identified by the Commission, the parties submitted a set of commitments during Phase II of the appraisal, the central element of which was the commitment to ensure that DVM would meet all reasonable requests from TV distributors to distribute the channels Vier, Vijf and any future basic pay TV channel. DVM committed to licensing its channels on fair, reasonable and non-discriminatory terms and, if the TV distributors so request, for the entire territory of Belgium.[89] The Commission considered that the commitment to license Vier, Vijf and any other basic pay TV channel, together with their ancillary rights, removed the Commission's input foreclosure concerns.[90]

(123) The Commission also considered that the commitments, in combination with the carriage agreements that Telenet has concluded with Medialaan and VRT, removed the Commission's customer foreclosure concerns. Telenet's carriage agreements with VRT and Medialaan, and Telenet's offer to amend the agreement with Medialaan as formalised in the commitments, protected VRT and Medialaan from partial customer foreclosure.[91]

C. Results from the Phase I market investigation

(124) Regardless of the question whether the Commitments signed in 2015 remain binding on the sole remaining parent Liberty Global once the Transaction is consummated, it can be noted that, the respondents to the Phase I market investigation in the present case raised input and customer foreclosure concerns beyond the foreclosure concerns addressed by the Commitments signed in 2015 by the joint parents Liberty Global, Corelio and W&W. In addition, those respondents raised concerns relating to (i) an increase in bargaining power of Telenet in negotiations vis-à-vis TV broadcasters for the wholesale supply of FTA/basic pay TV channels; and (ii) advertising on competing TV channels.

(125) Regarding the Notifying Parties' argument that the Belgian authorities' concerns are not "merger-specific", the Commission considers that, in any event, the fact that Liberty Global's control over DVM increases from joint to sole control is "merger-specific", and will or at least may change Liberty Global's incentives. While, pre-Transaction, Liberty Global in its decision

87 2015 Decision, Sections 5.2 and 5.4.2.
88 2015 Decision, Section 5.4.3.2.
89 2015 Decision, Section 7.4
90 2015 Decision, recitals 672-674.
91 2015 Decision, recital 675.

making takes into account that it benefits from 50% of DVM's profit, post-Transaction, it will take into account that it benefits from all of DVM's profits.

(i) Input foreclosure

(126) In the present case, the information gathered during the Phase I market investigation indicated that the Transaction raises input foreclosure concerns. As regards the supply of TV channels, TV distributors submit that DVM channels remain important channels in Flanders[92] and that, post-Transaction, DVM would have the ability and incentive to engage in full foreclosure of Telenet's rivals, by exclusively supplying its channels Vier, Vijf and Zes to Telenet[93], thereby inducing switching of a very large proportion of TV customers from Telenet's rivals to Telenet.[94]

(127) Respondents to the Phase I market investigation also raise concerns of a partial foreclosure strategy post-Transaction. The merged entity could offer less favourable conditions of supply for channels and non-linear services to Telenet's competitors, therefore affecting their margins or leading to price increases to end customers making it harder for Telenet's rivals to compete.[95] As regards the supply of content, in particular of Dutch-language content, Proximus (a competitor of Telenet) stresses that, given the growing importance of OTT viewing and non-linear viewing, the Transaction could constitute a significant set-back for competing providers of TV services, should the major Flemish content, which would be concentrated in the hands of Telenet post-transaction, be no longer be available to them.[96] The market investigation also raised the concern that these effects may be exacerbated in light of the increasing importance and uptake of (fixed-mobile convergent) telecommunications bundles in which telecommunications providers provide several different telecommunications services in a package together to end consumers.[97]

(128) Proximus stresses that the "*impact of the acquisition of full control - instead of joint control - is a "major" transformation of the TV landscape and not just the "mere transition from joint to sole control", mainly because Telenet will be freed from any intervention by Mediahuis, which has (totally) different interests*".[98]

(129) Based on Belgium's submission and the concerns expressed by respondents to the market investigation, the Commission considers that there is a real risk that the Transaction may lead to input foreclosure and thus requires further investigation.

(ii) Customer foreclosure

(130) The information gathered during the Phase I market investigation indicated that the Transaction also raises customer foreclosure concerns. Although most respondents to the market investigation do not consider that DVM or Telenet

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92 Replies to Questionnaire Q3 to TV distributors, question 15.
93 Replies to Questionnaire Q3 to TV distributors, questions 17 and 17.1.
94 Replies to Questionnaire Q3 to TV distributors, question 18.
95 Replies to Questionnaire Q3 to TV distributors, question 21 and 21;1.
96 Reply of Proximus to Questionnaire Q1 to TV production companies and other TV content suppliers, question 25.1.
97 Replies to Questionnaire Q3 to TV distributors, question 18.
98 Reply of Proximus to Questionnaire Q3 to TV distributors, question 31.1.

would have the ability or incentive to exclusively rely on the content provided by DVM[99], VRT considers that the Transaction would have a far-reaching vertical impact as broadcasters would be confronted with a dominant player in the TV distribution market that, as a result of the transaction, would effectively gain control over the entire value chain.[100] In particular, VRT states that the merged entity would have the ability and incentive to favour its own activities and disfavour competitors, *via inter alia* a reduction of content fees, non access to premium content, unfavourable position in the EPG[101], and degraded accessibility of Telenet's platform for linear and non-linear-services[102]. VRT also stresses that "*in case Telenet becomes the sole shareholder of De Vijver Media, Telenet has every incentive for disclosing relevant sensitive information to the De Vijver Media entities*" which "*is detrimental for the normal competitive functioning of the market and will have harmful effects on services innovation*"[103].

(131) The concerns raised by VRT are largely reflected by the concerns of Medialaan. Medialaan fears that DVM's incentive to purchase content of third party production houses will be considerably constrained and it also states that Telenet/DVM may exclusively rely on DVM's content.[104] Moreover, Medialaan raised a concern that the Parties may engage in partial customer foreclosure and favour their own FTA channels Vier, Vijf and Zes to the detriment of rivals' channels in particular with regard to FTA channels.[105] Medialaan also fears that the Parties may incentivize end customers to purchase the Parties' own pay TV services to the detriment of rivals' FTA channels.[106] In that respect, Medialaan discusses the ability of Telenet to hinder the access of rivals' FTA channels to Telenet's platform by offering discriminating conditions to such rivals, e.g. in the form of lower fees for content or by requesting higher carriage fees. Other forms of discrimination would include a lower EPG position for such rivals, giving more favourable access terms to their own channels or getting better access to individual viewer data for their own channels.[107]

(132) Based on Belgium's submission and the concerns expressed by respondents to the market investigation, the Commission considers that there is a real risk that the Transaction may lead to customer foreclosure and thus requires further investigation.

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99 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 18.

100 Reply of VRT to Questionnaire Q1 to TV production companies and other TV content suppliers, question 25.1.

101 Electronic Programming Guide.

102 Reply of VRT to Questionnaire Q1 to TV production companies and other TV content suppliers, questions 25.1 and 26.1.

103 Reply of VRT to Questionnaire Q2 to broadcasters, question 28.

104 Reply of Medialaan to Questionnaire Q1 to TV production companies and other TV content suppliers, question 18.

105 Reply of Medialaan to Questionnaire Q1 to TV production companies and other TV content suppliers, question 25.

106 Reply of Medialaan to Questionnaire Q1 to TV production companies and other TV content suppliers, question 25.

107 Reply of Medialaan to Questionnaire Q1 to TV production companies and other TV content suppliers, question 25.

(iii) Increased bargaining power

(133) The market investigation also highlighted concerns relative to an increase in bargaining power in favour of Telenet in the negotiations of fees between Telenet and TV broadcasters. A majority of the respondents to the Phase I market investigation are concerned that the ability of Telenet and DVM to negotiate licensing agreements for both VOD and pay TV windows and FTA windows would affect the possibilities for competing TV distributors or competing FTA channels to acquire content licenses for Flanders.[108] In this regard, VRT considers that the acquisition of sole control over channels Vier, Vijf and Zes gives Telenet "*the possibility to buy the linear rights in a package for both free, basic pay and premium pay services*" which would give it a substantial commercial advantage[109] and that multi-window negotiations effectively would block linear channels from proposing a competitive offer.[110] VRT adds that for Telenet, ensuring an offer of high quality local productions with a predominant Flemish component is essential to maximize the attractiveness of its platform to ensure it can extend its dominant position on the retail market for linear TV services to the retail market for on-demand services. In this regard, VRT stresses that the Transaction ensures that Telenet not only acquires full control over a high quality production firm (Woestijnvis) but also strengthens its buying power on both markets for production and licensing of content.[111]

(134) Medialaan also raised a number of concerns related to Telenet's position in this market.[112] First, Medialaan observes that the Parties would gain a competitive advantage vis-à-vis other players in this market as a result of this Transaction as they will be present both in the acquisition of content rights for pay TV channels and FTA channels. With its dominant position in the acquisition of pay TV rights, Telenet post-Transaction will be in a position to leverage this position also into the acquisition of FTA rights and bundle those rights to the detriment of players only being present in the purchase of FTA rights such as Medialaan. Moreover, Telenet will be in a position to cross subsidize their FTA channels via the revenues of their pay TV channels. Lastly, as the mother company of Telenet, Liberty Global, is active on a pan-European level, the scale effects of purchasing content rights in several European member states simultaneously will give rise to stronger bargaining position of Telenet/Liberty Global.

(135) Based on Belgium's submission and the concerns expressed by respondents to the market investigation, the Commission considers that there is a real risk that the Transaction may lead to anti-competitive effects based on increased bargaining power and thus requires further investigation.

(iv) Advertising on competing TV channels

(136) The information gathered during the Phase I market investigation indicated that the Transaction may make advertising on DVM's TV channels more attractive

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108 Replies to Questionnaire Q1 to TV production companies and other TV content suppliers, question 24.

109 Reply of VRT to Questionnaire Q2 to broadcasters, question 16.3.

110 Reply of VRT to Questionnaire Q2 to broadcasters, question 17.

111 Reply of VRT to Questionnaire Q1 to TV production companies and other TV content suppliers, question 15.

112 Reply of Medialaan to Questionnaire Q1 to TV production companies and other TV content suppliers, question 24 which is discussed in this paragraph.

for advertisers to the detriment of competing TV channels. This is because Telenet would be able to give advertisers in-depth knowledge about the viewer behaviour on DVM's channels.[113]

(137) The Phase I market investigation confirmed that TV remains the medium with the largest share in media spend both in Flanders and in Belgium and that this remains stable due to an important daily time of TV consumption.[114] Some respondents to the Phase I market investigation pointed to the recent consolidation of TV sales houses (notably De Persgroep/Medialaan), as well as the development of 360° approach (i.e. a combination of media channels).[115] For most of the respondents to the Phase I market investigation, targeted advertising has been a major change in the market in the past years. Targeted TV advertising is still in its early days in Flanders and Belgium as a whole. At the same time, respondents expect it to represent an increasing part and going forward even a major part of media budgets in the coming years.[116]

(138) Some respondents raised concerns regarding adverse effects on competition in the advertising market resulting from this Transaction. Medialaan is concerned (i) about the exchange of confidential information of competing FTA channels to Telenet's own channels Vier, Vijf and Zes, (ii) the favouring of Vier, Vijf and Zes via targeted advertising as Telenet gathers and controls the data necessary for targeted advertising via its ownership of the set top box, and (iii) Telenet's dominant position in the pay TV market which has a direct consequence on the market for (targeted) advertising.[117]

(139) In particular, Medialaan is concerned that Telenet would discriminate against rival FTA channels by refusing to distribute a rival's FTA channel or new service as Telenet collects sensitive information of rival FTA channels regarding (i) commercial strategies, new (ii) services and (iii) business models due to Telenet's position as a TV distributor. This type of information and the insights gleaned on competitors' strategies and innovative services could be used by Telenet to disfavour rival FTA channels. Second, Medialaan fears that Telenet, which would become a gatekeeper of detailed personalized viewer data gathered via its set top box, and without an agreement, would either exclude Medialaan altogether from accessing such viewer data or would make it difficult for Medialaan to access such data. According to Medialaan this could be implemented by Telenet by (i) refusing Medialaan to access data about their own viewers while at the same time allowing SBS to access this data (ii) using data and information of rival Medialaan channels for its own channels. Overall, Medialaan fears that Telenet post-Transaction would exchange more relevant user data within its own organisation than with third party television channels. This would create an unfair advantage to Telenet's

113 Reply of Medialaan to Questionnaire Q4 to Advertisers, question 11, 13, 20 which is discussed in this paragraph.
114 Replies to Questionnaire Q4 to advertisers, question 12.
115 Replies to Questionnaire Q4 to Advertisers, question 11.
116 Replies to Questionnaire Q4 to Advertisers, question 13.
117 Reply of Medialaan to Questionnaire Q4 to Advertisers, question 13 and 20 which is discussed in this paragraph.

channels as it would enable it to create better and more targeted advertising compared to other channels that do not have access to such data.[118]

(140) Based on Belgium's submission and the concerns expressed by respondents to the market investigation, the Commission considers that there is a real risk that the Transaction may lead to anti-competitive effects in the possible market for the sale of TV advertising space on TV channels in Belgium. This aspect therefore requires further investigation.

D. Conclusion

(141) Based on the results from the Phase I market investigation presented above and Belgium's submission, the Commission considers that the Transaction threatens to significantly affect competition at least in the possible markets for the wholesale supply of TV channels, the retail supply of TV content to end-users and the sale of TV advertising space on TV channels in Belgium. The Commission considers that the concerns expressed by market participants in response to the Phase I market investigation regarding (i) input foreclosure; (ii) customer foreclosure; (iii) increased bargaining power; and (iv) advertising on competing TV channels require further investigation.

4.2.2.4. Conclusion on the second substantive condition

(142) In light of the above considerations, following the Commission's preliminary assessment,[119] the Commission concludes that the Transaction threatens to significantly affect competition at least in the possible markets for the wholesale supply of TV channels, the retail supply of TV content to end-users and the sale of TV advertising space on TV channels in Belgium.

4.2.3. *Conclusion on the criteria of Article 9(2)(a) of the Merger Regulation*

(143) In light of the above, the Commission considers that the criteria for a referral provided for in Article 9(2)(a) of the Merger Regulation are fulfilled with regard to the Transaction.

4.3. The Commission's discretion in deciding whether to refer

(144) Pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) are fulfilled with regard to a proposed transaction, the Commission has discretion whether to refer a given case to a national competition authority.

(145) In the following, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.

4.3.1. Belgium’s submission

(146) According to the Belgian authorities, the BCA would be the best placed authority to review the competition effects of the Transaction in Belgium, for the following reasons.

(147) First, the Transaction entails the following specific Belgian and Flemish aspects:

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118 Reply of Medialaan to Questionnaire Q4 to Advertisers, question 13 and 20 which is discussed in this paragraph.

119 Cf. Commission Notice on Case Referral in respect of concentrations, para. 35.

(1) the origins of cable distribution in Flanders (from cable as a municipality project to the government backed creation of Telenet) have led to Telenet's monopolistic position in Flanders as a cable operator in what remains to date possibly the most densely cabled region in the world, with a penetration of cable of around 95%;

(2) the markets concerned and the possible resulting effects (such as price increases or a reduction of quality and diversity of content) are regional and at most national: Telenet owns the cable network. With a [70-80] % market share of the Flemish distribution market, it is the dominant TV distributor. Moreover, it is the dominant supplier of Pay-TV services and holds considerable market shares in the markets for internet broadband, fixed and mobile telephony;

(3) the Flemish media sector is considered to be its own 'ecosystem' in which companies are heavily interrelated and the functioning of the system determines its output notably in terms of quality, diversity, and pluralism;

(4) Belgium being divided in linguistic areas, each of them has its cultural particularities. In Flanders, consumers repeatedly indicate their desire for locally produced content; which is demonstrated by the list of the most watched programmes which next to sports consists of 'Flemish' productions;

(5) account must be taken of the particular Belgian political framework, divided between the federal level, communities and regions. As media is a regional competence, legislation in the media sector is regional, including specific regulation on cable networks;

(6) the competitive process around - and impact on - certain content, like cyclo-cross and Flemish content, is purely local.[120]

(148) Second, the Transaction could lead to significant competitive concerns which could lead to the foreclosure of competitors and which could harm consumers in Belgium.[121]

(149) Third, the BCA has extensive experience reviewing transactions in the Flemish media sector. As underlined in the Referral Request, over the past few years, the BCA has reviewed a significant number of transactions in this sector.[122]

4.3.2. Notifying Parties' views

(150) The Notifying Parties consider that there are no compelling reasons that justify a referral of the Transaction to Belgium. Moreover, according to Notifying

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120 Referral Request, paragraphs 33 and 75.

121 Referral Request, paragraph 76.

122 According to the Referral Request (paragraph 77), the BCA reviewed the following transactions: in 2018, the transaction by which De Persgroep sold its 50% stake in Mediafin (newspapers' business) to Roularta; in 2017, the internal reorganisation of Mediahuis; in 2016, the transaction by which Medialaan acquired the Jim Mobile client base and Mobile Vikings of BASE Company; in 2015, the transaction by which De Persgroep acquired several magazines from Sanoma; in 2013, the JV Mediahuis, regrouping several newspapers; in 2011, the concentration by which Mediahuis, W&W and Sanoma obtained joint control over DVM; Although, possibly not limited to Flanders, in 2008, the BCA reviewed a merger between Walloon cable companies Tecteo and Brutélé; and in 2003, the transaction by which Telenet acquired pay TV channel Canal+, now Play Sports (follow-up decisions in 2008 and 2010).

Parties the European Commission is best placed to review the Transaction for the reasons set out below.[123]

(151) First, the Notifying Parties refers to the specific characteristics of the Transaction and considers that a referral may therefore create the risk of incoherent treatment and decision making. The Notifying Parties argue that:

(1) This Transaction constitutes a direct successor to and extension of the transaction by which Liberty Global initially acquired control of DVM (jointly with Mediahuis and W&W).[124] As such, it raises the same or very similar substantive issues.

(2) As part of its phase II investigation in the 2015 Decision, the Commission has already made an in-depth analysis of most of the affected markets and has analysed most of the theories of harm of relevance.

(3) The Commission has a clear and up-to-date view of market developments and the impact and effectiveness of the commitments of the 2015 Decision as a result of the quarterly reports submitted to the Commission on the implementation of the commitments of the 2015 Decision by the Monitoring Trustee.

(4) The Commission has extensive experience in the drafting, negotiation and monitoring of the commitments obtained in the context of the 2015 Decision.

(152) Second, the Notifying Parties claim that the Commission has the necessary tools and expertise to review the Transaction:

(1) The Commission has developed significant sector specific expertise in TV-audio-visual, media and advertising markets as it has assessed numerous merger cases affecting several EU Member States with the most recent one in the Commission Decision *M.8665: Discovery/Scripps*. Moreover, the Commission is also currently reviewing other concentrations in TV, media and advertising.

(2) The sectoral knowledge acquired in these cases has enabled the Commission to acquire an extensive and thorough understanding of the legal and economic issues raised by this type of cases.

(3) While the various TV audio-visual markets in the EEA have different national characteristics, the majority of the competition issues raised in these markets are similar across all Member States.

(153) Third, the Notifying Parties argue that a decision to refer the case to the BCA would void the efforts made so far by the Notifying Parties and the Commission and would not ensure legal certainty. Both the Notifying Parties and the Commission have engaged at an early stage to establish the Commission's jurisdiction. They have devoted significant time and resources to this process. Several exchanges involving the Notifying Parties and the Commission took place between 7 March 2018 and 3 May 2018, specifically to confirm that the Commission had jurisdiction over the Concentration. At the

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123 See submission of the Notifying Parties "2018.06.14 Submission on jurisdiction" from 14 June, 2018.

124 The 2015 Decision.

end of this process, the Commission confirmed that the Transaction is within its jurisdiction. A decision to refer this case to the BCA would void these efforts and be inconsistent with the objective to ensure legal certainty. Moreover, a referral would also create a risk of incoherent treatment and even conflicting decisions.

(154) Fourth, the Notifying Parties argue that, if the case were to be referred, they would incur a heavy administrative burden and significant delays. In case of a referral, the Parties will need to provide a Dutch translation of the notification currently drafted only in English to the BCA. Further adjustments may be necessary, *inter alia*, in light of the fact that the definition of affected markets used by the BCA differs from the definition used by the Commission. Additional loss of time can be expected as a direct result of the need to run through the referral procedure with the Commission and subsequent clearance procedure with the BCA. The resulting uncertainty will be detrimental to the undertakings concerned, to competition on the affected markets and ultimately to consumers.

(155) Fifth, the Notifying Parties argue that, in recent years, the Commission has repeatedly rejected referral requests from Member States in the telecom and media sectors on the grounds that it has a particular interest in ensuring that competition is preserved in sectors such as the media sectors that are of crucial importance for the economic development of the Union. TV-audio-visual markets in the Union are characterised by common trends such as the development of Over-The-Top ('OTT') platforms for the distribution of audio-visual content and channels. There is a strong interest in ensuring consistency in the way the different mergers falling into the Commission's competence in this sector are assessed throughout the Union. These considerations also clearly apply in this case.

4.3.3. Commission's assessment

(156) According to paragraph 9 of the Referral Notice "[…] *jurisdiction should only be reattributed to another competition authority in circumstances where the latter is more appropriate for dealing with the merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority*". The Referral Notice also states that "*particular regard should be had to the likely locus of any impact on competition resulting from the merger"* and that "*[r]egard may also be had to the implications, in terms of administrative effort, of any contemplated referral*".

(157) Moreover, paragraph 13 of the Referral Notice states that "*referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question, particularly at the post-notification stage*".

(158) The Commission considers that there are compelling reasons for departing from original jurisdiction over the present case, by referring the Transaction to Belgium.

(159) First, given that the geographic scope of the relevant markets is likely to be at most national or narrower, the case may require further investigative efforts at regional or local level, for which the BCA is the best placed. The wholesale supply of TV channels as well as the retail supply of TV channels has strong characteristics of local markets and could be confined to the footprint of

Telenet. The remaining markets affected, such as the production and licensing of TV broadcasting rights, show regional and at most national characteristics. This is also the case for the market for the sale of advertising for TV channels that also has a regional and at most national character.

(160) Second, the BCA has extensive expertise reviewing transactions in the Belgian media and telecoms sector, including several transactions specifically dealing with the Flemish media sector. It has been dealing with nine transactions in the media and telecommunications sector between 2003 and today including but not limited to: (i) the transaction by which Telenet acquired Pay-TV channel Canal+ (now Play Sports) that has been investigated in 2003, with follow-up decisions in 2008 and 2010[125]; (ii) the concentration by which Mediahuis, W&W and Sanoma obtained joint control over DVM which was analysed by the BCA in 2011[126]; (iii) the transaction by which Medialaan acquired the Jim Mobile client base and Mobile Vikings of BASE Company which was approved by the BCA in 2016[127]; (iv) the internal reorganization of Mediahuis which was cleared by the BCA in 2017[128]; and (v) the transaction by which De Persgroep sold its 50% stake in Mediafin (business newspapers) to Roularta which was cleared by the BCA in 2018[129]. Given this extensive and recent experience the BCA is well placed to deal with the Transaction. The experience gained and accumulated over these past cases have enabled the BCA to acquire an extensive, thorough and up-to-date knowledge and a sound understanding of the local characteristics and competitive issues encountered.

(161) Third, at this point of the review of the Transaction, any additional administrative effort for the Notifying Parties due to a referral would not be disproportionate. While the Commission has engaged with the Notifying Parties during the pre- and post-notification phase of the Transaction, the interaction did not entail very resource intensive work streams, such as requests of data to engage in quantitative analyses or internal document requests that would have required the Notifying Parties to retrieve and review large amounts of internal business data or internal documents, that had to be compiled and managed with a view of transferring them to the Commission.

(162) Fourth, as regards the Notifying Parties argument that the present case is a direct successor to and extension of the 2015 acquisition of joint control, the Commission notes that there was very close cooperation between the BCA and the Commission throughout the review of the 2015 acquisition of joint control. The Notifying Parties and the Commission can share the Monitoring Trustee reports with the BCA. Moreover, the BCA can build on this precedent.

(163) Fifth, regarding the Notifying Parties' argument that the Commission has repeatedly rejected referral requests from Member States in the telecom and media sectors, the Commission notes that the present case relates to the media sector and that, in the recent past, the Commission has referred a number of media-related cases including (i) the appraisal of the proposed acquisition of Kabel Baden-Württemberg ("KBW") by Liberty Global Inc. ("LGI") in 2011 to

125 Competition Council, decision nr. 2003-C/C-89, 12 November 2003, decision nr. 2008-C/C-11, 25 March 2008 and decision nr. 2010-C/C-48, 29 November 2010.

126 Competition Council, decision nr. 2011-C/C-24, 7 September 2011.

127 Competition College, decision BMA-2016-C/C-03, 28 January 2016.

128 Competition College, decision BMA-2017-C/C-14, 26 April 2017.

129 Competition College, decision BMA-2018-C/C-07, 6 March 2018.

the German competition authority;[130] (ii) the assessment of a planned joint venture between the German private broadcasters ProSiebenSat.1 and RTL in 2010 to the competition authorities of Austria and Germany;[131] (iii) the review of the proposed acquisition of DTS by Telefónica in 2014 to the Spanish competition authority which was a referral under Article 4(4) at the request of the Notifying Party.[132]

(164) Sixth, regarding the Notifying Parties' argument that the Belgian authorities' concerns are not "merger-specific", firstly, the Commission considers that, in any event, the fact that Liberty Global's control over DVM increases from joint to sole control is "merger-specific", and will or at least may change Liberty Global's incentives. While, pre-Transaction, Liberty Global in its decision making takes into account that it benefits from 50% of DVM's profit, post-Transaction, it will take into account that it benefits from all of DVM's profits. Secondly, the Commission notes that the Transaction also includes the JV Transaction on which the Belgian authorities and the Phase I market investigation raised concerns.[133]

(165) Finally, the Commission notes that, in 2015, no referral request was made by the Belgian authorities. Therefore there was no need, at that time, to assess which authority would be better placed to carry out the investigation.

5. CONCLUSION

(166) From the above it follows that the conditions to request a referral under Article 9(2)(a) Merger Regulation are met. The Commission also considers that, given the local scope of the markets affected by the Transaction and the BCA's extensive experience with transactions in the Flemish media sector, the competent authorities of Belgium are better placed to carry out a thorough investigation of the whole case, and that it is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) Merger Regulation so as to grant the referral.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration is referred in its entirety to the competition authority of Belgium, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

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130 Commission decision of 16 June 2011 in case M.5900 *LGI/KBW.*

131 Commission decision of 24 September 2010 in case M.5881 *ProSienbenSat.1 Media/RTL Interactive/JV.*

132 Commission decision of 22 August 2014 in case M.7313 *Telefonica/DTS.*

133 See paragraph 98 and paragraph 133-136.

Article 2

This Decision is addressed to Kingdom of Belgium.

Done at Brussels, 23.11.2018

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission