



EUROPEAN COMMISSION

DG Competition

PUBLIC VERSION

***Case M.9545 –
NS GROEP / PON
NETHERLANDS / JV***

Only the English text is available and authentic.

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

Article 9(3)

Date: 15 January 2020

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 Where possible the information omitted has been replaced by ranges of figures or a general description.



Brussels, 15.1.2020
C(2020) 242 final

COMMISSION DECISION

of 15.1.2020

**relating to Article 9 of Regulation (EC) No 139/2004
concerning case M.9545 - NS Groep/Pon Netherlands/JV**

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relating to Article 9 of Regulation (EC) No 139/2004 concerning case M.9545 - NS Groep/Pon Netherlands/JV

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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 20.1.2004 on the control of concentrations between undertakings² (the "Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by NS Groep N.V. ("NS") and Pon Netherlands B.V. ("Pon") (together, the "Notifying Parties") on 15 November 2019, pursuant to article 4 of the said Regulation,

Having regard to the request of the Netherlands Authority for Consumers and Markets of 5 December 2019 (the "Referral Request"),

Whereas:

- (1) On 15 November 2019, the Commission received notification of a proposed concentration by which NS and Pon acquire within the meaning of Articles (3)(1)(b) and 3(4) joint control of a newly created joint venture (the "JV") by way of purchase of shares (the "Transaction"). NS and Pon are collectively referred to as the "Parties".
- (2) The Netherlands Authority for Consumers and Markets received a copy of the notification on 18 November 2019.
- (3) By letter dated 5 December 2019, the Netherlands, via the Netherlands Authority for Consumers and Markets, 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 ("the Referral Request").

1. THE PARTIES

- (4) NS is part of the NS group, which is a public transport operator in the Netherlands. It is the largest Dutch public transport operator with around 1 million travellers on an average day. It operates rail transport services and related services such as public

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.

transport bikes (OV-fiets). The Dutch Ministry of Finance holds 100% of the shares in NS.

- (5) Pon is a subsidiary of Pon Holdings B.V., which is the holding company of the Pon group, a global company with over 14 000 employees operating in 34 countries. The Pon group operates more than 80 companies in four different business clusters: Automotive, Pon Bike, Equipment & Power Systems and Industrial Mobility.

2. THE CONCENTRATION

- (6) The Transaction consists of the creation of a full-function venture by NS and Pon, bringing together the Parties' Mobility as a Service ("MaaS") services, currently operating under the names Hely (NS) and Next Urban Mobility ("Next", PON). The Parties will contribute all of the shares in the entities currently operating Next and Hely to a holding company that will be jointly controlled by the Parties.
- (7) On 18 July 2019, the Parties concluded an Investment Agreement, which includes an agreed form shareholders agreement ("SHA"), pursuant to which NS will hold [Information relating to shareholding percentage] of the shares in Hely Holdings B.V., with Pon holding the remaining [Information relating to shareholding percentage] of the shares.

2.1. Joint control

- (8) The Parties will not hold equal shareholdings in the JV. However, NS (as the minority shareholder) enjoys veto rights over decisions that are strategic to the commercial behaviour of the JV, [information relating to NS's veto right].
- (9) As a result, the Parties will acquire joint control over the newly created JV within the meaning of Article 3(1)(b) of the Merger Regulation.

2.2. Full functionality

- (10) The JV will have access to the assets and resources needed to perform on a lasting basis all the functions of an autonomous economic entity operating on a market. NS and Pon are committed to provide funding to the JV in line with the business plan, which expects funding requirements for the JV's operations by the end of 2022 of around [information relating to JV funding requirements]. The JV will not carry out specific functions for its parents, but will operate entirely independently on the market and offer a service portfolio that is different from the services offered by its parents. The Parties expect that the majority of commercial agreements of the JV will be entered into with mobility providers other than its parents. Also, the JV will conclude any (potential) agreements with the parents at arms-length. Responsibility for all operational matters relating to the day-to-day business and operations of the JV will be vested in its board of directors. The JV will operate on a lasting basis, as it is established for an indefinite period of time and the Parties both commit significant financial resources.
- (11) Consequently, the Transaction will result in the creation of a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation and of paragraph 92 of the Commission's Consolidated Jurisdictional Notice ("CJN").

3. EU DIMENSION

- (12) The undertakings concerned have a combined aggregate worldwide turnover of more than 5 000 million³ in 2018 [NS EUR [...] million; Pon: EUR [...] million]. The EU-wide turnover of each of the undertakings concerned is more than EUR 250 million [NS: EUR [...] million; Pon: EUR [...] million]. [Information relating to turnover].⁴
- (13) The notified operation therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

4. THE ARTICLE 9 REFERRAL REQUEST

- (14) By letter dated 5 December 2019, the Netherlands Authority for Consumers and Markets, on behalf of the Netherlands, requested the Transaction to be fully referred to the Netherlands Authority for Consumers and Markets with a view to assessing the effects of the Transaction in the Netherlands under national competition law, pursuant to Article 9(2)(a) of the Merger Regulation.
- (15) In its preliminary assessment, the Netherlands Authority for Consumers and Markets has identified that the Transaction threatens to significantly affect competition in the Netherlands in the markets for retail distribution of MaaS services, for bicycle sharing and for public transport by train (and possibly also for car sharing). It argues that each of those markets presents all the characteristics of a distinct market.
- (16) The Netherlands Authority for Consumers and Markets further submits that it would be the best placed authority to review the effects of the Transaction in the Netherlands, given that (i) the potential significant impact of the proposed concentration on competition relates to one or more markets that are national in scope, (ii) the Netherlands Authority for Consumers and Markets has developed extensive market intelligence in the Dutch railway and public transport sector as it is also the sector regulator for public transportation; (iii) the Netherlands Authority for Consumers and Markets has substantial case experience through transport related concentrations and its recent market study on the market for mobility services; and (iv) the Netherlands Authority for Consumers and Markets has the digital economy as one of its top priorities and has, over the years, built up experience in the digital markets.⁵

5. RELEVANT MARKETS

- (17) The Parties' activities overlap in the retail distribution of MaaS services (which will be combined in the JV post-Transaction) and in (e-)bike sharing services. The Transaction also gives rise to a vertical relationship in relation to NS's activities in the supply of (e-)bike sharing services.

³ 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).

⁴ [Information relating to turnover]

⁵ Referral Request of the Netherlands Authority for Consumers and Markets, dated 5 December 2019, paras. 81-84.

5.1. Retail distribution of (MaaS) transport/mobility services through an app

5.1.1. Product market definition

5.1.1.1. Introduction

- (18) The JV will combine the Parties' MaaS services (currently operating under the names Hely and Next) to develop and manage multimodal shared mobility concepts for both consumers and businesses. MaaS combines different mobility providers into one easily accessible service through so-called aggregator platforms that are available on smartphones as an app and establish a contact between consumers and mobility providers.
- (19) The market for the retail distribution of (MaaS) transport/mobility services is a nascent market whose main features and boundaries are still to be defined. It concerns (i) mobility and transport providers that make their services available to travellers/end-users (typically through apps), as well as (ii) MaaS providers (not necessarily mobility providers) that offer a bundle of mobility and transport services as part of an integrated MaaS service (also called multimodal / aggregator apps). MaaS providers conclude separate agreements with each mobility or transport provider that agrees to include its services through the respective aggregator app. MaaS providers then offer these services to end-user/travellers, as well as ancillary services such as account creation, travel information, booking services, payment and customer service.

5.1.1.2. The Notifying Parties' views

- (20) The Notifying Parties consider that the most meaningful way to assess competition in MaaS services is on the wider market for retail distribution of (MaaS) transport/mobility services through an app, which includes not only integrated MaaS solutions, but all transport solutions that are in one way or another provided to users using an app on their mobile device.⁶

5.1.1.3. Commission's assessment

- (21) With respect to the relevant product market where the JV will be active, the majority of MaaS providers and mobility providers responding to the market investigation confirmed the Notifying Parties' views that the retail distribution of (MaaS) transport services through an app is the appropriate product market.⁷
- (22) Indeed, the Commission finds, in particular because of the apparent supply-side substitutability of these services, that, for the purposes of addressing the question whether the concentration should be referred to the Dutch authority, the retail distribution of (MaaS) transport services through an app is the appropriate product market.

5.1.1.4. Conclusion

- (23) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, the relevant product market in this case constitutes the market for (retail) distribution of (MaaS) transport/mobility services through an app.

⁶ Form CO, paras. 101 and 102.

⁷ See replies to Q1 – Questionnaire to Competitors, question 5.

5.1.2. Geographic market definition

5.1.2.1. Introduction

- (24) The Commission has not previously assessed a market for (retail) distribution of (MaaS) transport/mobility services through an app.
- (25) In case M.8744 *Daimler/BMW/Car Sharing JV*, the Commission considered the geographic scope of an overall market for all (urban) passenger transport services to be local at city level.⁸
- (26) With regard to applications (development and access to multimodal apps), the Commission has in previous decisions considered the relevant geographic market to be at least EEA-wide.⁹ In case M.8744 *Daimler/BMW/Car Sharing JV*, however, the Commission also assessed the applications segments at national level (as the narrowest plausible geographic market definition).¹⁰

5.1.2.2. The Notifying Parties' views

- (27) With regard to the overall market for all (urban) passenger transport services, the Notifying Parties in principle agree with the Commission's view that this market is local, but also observe that some of the services that are provided at local level can have a broader scope, such as car rental services.¹¹
- (28) Similarly, with regard to applications, the Notifying Parties agree that the market is at least EEA-wide, if not worldwide, since app developers operate on a global level and businesses without appropriate in-house capabilities can easily procure such services from third parties.¹²

5.1.2.3. Commission's assessment

- (29) With regard to the geographic scope of the market for MaaS services, most respondents to the market investigation considered that MaaS providers provide MaaS services at national level.¹³
- (30) In addition, the majority of market respondents consider that, within the EEA, there are national barriers that prevent or make it difficult to provide MaaS services to a customer based in another country.¹⁴ For instance, a MaaS provider explained that “[a]s MaaS touches on public transport, there are major national differences in the legislation, roles, governance, power, influence and willingness to collaborate of [sic] public transport provider. These lead to barriers.” Another competitor added that “[a]cross countries there are several different governmental regulations when it comes to sharing systems and MaaS in general. Countries and even cities also request interoperability with an ever increasing number of API's [application programming interfaces] and systems”. Other respondents to the market investigation replied that “[g]enerally, it is more difficult to provide services in another country outside your own country, because of language, costs and cooperation from local

⁸ Case M.8744 – *Daimler/BMW Car Sharing JV*, para. 100.

⁹ Case M.7047 – *Microsoft/Nokia*, para. 81; Case M.8744 – *Daimler/BMW Car Sharing JV*, paras. 133-136.

¹⁰ Case M.8744 – *Daimler/BMW Car Sharing JV*, para. 136.

¹¹ Form CO, para. 110.

¹² Form CO, para. 111.

¹³ See replies to Q1 – Questionnaire to Competitors, question 15.

¹⁴ See replies to Q1 – Questionnaire to Competitors, question 16.

parties” and referred to “legal requirements and local regulations [...] which constitute barriers to starting in other countries”¹⁵

- (31) The market investigation results thus indicate that the appropriate geographic market for retail distribution of (MaaS) transport/mobility services through an app is national in scope and confirm the existence of national barriers within the EEA.

5.1.2.4. Conclusion

- (32) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, the geographic market for the retail distribution of (MaaS) transport/mobility services through an app is national in scope.

5.2. Market for (e-)bike sharing services

5.2.1. Product market definition

5.2.1.1. Introduction

- (33) The Parties’ activities overlap in (e-)bike sharing services. In addition, the JV will be active in the provision of (e-)bike sharing services in the Netherlands while NS (through its subsidiary OV-fiets) will also continue to be active in this market.
- (34) Pon recently acquired Swapfiets, a bike subscription / rental service that allows individual users to rent (personal) bikes for certain periods of time for a monthly subscription fee. Swapfiets is not [information relating to corporate strategy] offered as a MaaS or (e-)bike sharing service. As assessed below, the preliminary analysis of the Commission, for the purposes of this decision, is that the activities performed by Swapfiets do not belong to the market for (e-)bike sharing services.
- (35) Bike sharing, like car sharing, provides access to certain bikes for a short period of time and is offered in two basic forms: station-based and free-floating. Station-based bikes must be returned to either the same or another station of the same supplier. Free-floating bikes can be parked almost anywhere in a predefined business area.
- (36) In prior decisions – in particular the recent decision involving Daimler's and BMW's car sharing joint venture¹⁶ - the Commission left open whether free-floating and station-based car sharing belong to the same market. The Parties (or NS and the JV post-Transaction, since Pon will transfer its bike sharing services to the JV) are only active in station-based (e-)bike sharing services. As assessed below, it can be left open for the purpose of this decision whether station-based and free-floating services are part of the same market.
- (37) Furthermore, bike sharing can be offered on-street, in stations or spaces that are publicly available (as provided by NS through OV-fiets), or off-street, in stations or spaces (also called "hubs") within a company available to its employees or a private residence or apartment complex available to its residents, as provided by Pon through Next (and post-Transaction to be provided by the JV).

5.2.1.2. The Notifying Parties’ views

- (38) The Notifying Parties submit that the relevant product market should be defined as the market for the distribution of all passenger transport services. They consider that

¹⁵ See replies to Q1 – Questionnaire to Competitors, question 16.1.

¹⁶ Case M.8744 – Daimler / BMW / Car Sharing JV, paras. 42 and 43.

their customers use the services of different providers already today as prices are transparent and there are several transportation options available for a specific trip. In addition, smartphones and apps are widely available and therefore passengers use different means of transport especially for short and medium distance journeys.¹⁷

- (39) As regards bike sharing services, in the absence of any previous Commission decision in this area, the Notifying Parties submit that the relevant market should be defined broadly and include both bike, scooter and kick-scooter/segway sharing services, without distinction between short/long-term rental or stationary/free-floating models – despite the fact that driving scooters requires a scooter drivers' license.¹⁸

5.2.1.3. Commission's assessment

- (40) The Commission does not agree that, for the purposes of assessing whether this concentration should be referred to the Dutch authority, the appropriate product markets includes all passenger transport services, in light of the market investigation results and the apparent lack of demand-side substitutability between the different modes of transport (e.g. between bike sharing and traditional bike rental or between car sharing and kick-scooter sharing), the apparent differences in geographic scope between the different modes of transport, as well as the fact that a drivers' licence is required for some transport modes but not for others.
- (41) On the basis of the results of the market investigation, there is support for finding that bike, scooter and kick-scooter sharing services are part of the same relevant market. However, currently, there are no kick-scooter sharing services on offer in the Netherlands. There is also support for finding that station-based and free-floating bike sharing services belong to the same market as well as on- and off-street bike sharing services.
- (42) Namely, the majority of MaaS and mobility providers responding to the market investigation consider on-street and off-street (e-)bike-sharing services to be substitutable and used interchangeably by customers.¹⁹
- (43) In addition, the majority of respondents to the market investigation consider that station-based and free-floating bike sharing services are substitutable and used interchangeably.²⁰ One respondent explained that “*station-based bike sharing and free-floating bikes are fully substitutable since they target the exact same customer base (complementing intra-city trips). The only difference might reside in the maintenance costs since station-based bike sharing entail lower maintenance cost due to grouped parking and the fact that charging can be done on-site as opposed to free-floating which require off-site charging stations at warehouses. Again, from a demand-perspective, there is full substitutability among them.*”²¹ The majority of market respondents, however, did not consider these services to be substitutable with traditional bike rental (e.g. Swapfiets).²²
- (44) Furthermore, the majority of respondents to the market investigation consider that (e-)bike sharing services, (e-)scooter sharing services and (e-)kick-scooter

¹⁷ Form CO, paras. 113-115.

¹⁸ Form CO, para. 127.

¹⁹ See replies to Q1 – Questionnaire to Competitors, questions 13.1-13.3.

²⁰ See replies to Q1 – Questionnaire to Competitors, questions 13.1-13.2.

²¹ See replies to Q1 – Questionnaire to Competitors, question 13.1.

²² See replies to Q1 – Questionnaire to Competitors, question 13.1-13.2.

sharing services are substitutable and used interchangeably by customers.²³ The Commission however, is not entirely convinced of this substitutability, since a drivers' licence is required for the use of scooter sharing services and the customer must go through the process of registering their licence before they can use the scooter. Additionally, the market investigation was addressed only to MaaS and mobility providers and not to consumers, so it does not represent the views of the customers themselves.

- (45) Finally, the majority of respondents also consider that consumers do not regard (e-)bike sharing services as substitutable with traditional bike rental.²⁴
- (46) Consequently, the Commission considers that the market for (e-)bike sharing services includes both on-street and off-street (e-)bike sharing services. It can, however, be left open whether the market for (e-)bike sharing services includes (kick) scooters and whether station-based and free-floating (e-)bike sharing belong to the same market definition, as the Transaction threatens to significantly affect competition under either market definition, as will be demonstrated below.

5.2.1.4. Conclusion

- (47) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, the relevant product market comprises (e-)bike sharing services, including on- and off-street bike sharing services.
- (48) The Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, it can be left open whether scooter and kick-scooter sharing services are included and whether free-floating and station-based (e-)bike sharing services belong to the same product market or not, since, as demonstrated below, the Transaction threatens to significantly affect competition under either market definition.

5.2.2. *Geographic market definition*

5.2.2.1. Introduction

- (49) The Commission has defined the geographic market for an overall market or all (urban) passenger transport as local at city level.²⁵ However, it has not previously defined a geographic scope for the market for (e-)bike sharing.

5.2.2.2. The Notifying Parties' views

- (50) The Notifying Parties submit that the overall market for the distribution of passenger transport services should be at least national, in particular since providers of passenger transport services typically operate at national level and consumers request services that are available nationally.²⁶
- (51) With respect to a market for bike and scooter rental, the Notifying Parties submit²⁷ that the relevant geographic market can be defined at national or local level.

²³ See replies to Q1 – Questionnaire to Competitors, question 13.1.

²⁴ See replies to Q1 – Questionnaire to Competitors, question 13.1-13.5.

²⁵ Case M.8744 – *Daimler/BMW Car Sharing JV*, para. 101.

²⁶ Form CO, para. 151.

²⁷ Form CO, paras. 157 and 158.

- (52) According to the Notifying Parties, suppliers of (e-)bike and/or (e-)scooter rentals that offer their services through apps on users' mobile devices are active on the national market or could at least relatively easily and quickly expand their offer to cover additional cities/regions. Similarly, users of those services expect providers to be active nationally to enable them to use their services when travelling.
- (53) The Notifying Parties acknowledge, however, that similarly to car sharing services, the relevant geographic market could also be defined at local (city) level and that the exact geographic market definition can be left open.

5.2.2.3. Commission's assessment

- (54) With respect to the geographic scope of the market for (e-)bike sharing services, the results of the market investigation were mixed, with an equal number of respondents indicating that (e-)bike sharing services are provided at local, national and EEA-wide level.²⁸
- (55) One mobility provider, however, explained that “[i]n the EEA, the presence of mobility providers varies on a country-by-country basis due to specific national, regional or local barriers. As such, the exact geographic scope of [the respondent] as a mobility provider varies notably according to (i) national regulations restricting access/enabling [it] to operate mobility services (ii) local public restrictions (e.g. access to public space) and (iii) the existing presence of historical players providing public transport services”.²⁹ In this respect, the Netherlands Authority for Consumers and Markets noted that, in the Netherlands, there is no country-wide bicycle sharing policy but rather each city adopts individual regulations (e.g. licence requirements, bans etc.) and that bike sharing services are predominantly offered in big and middle sized cities. It explained that some cities such as Amsterdam are more restrictive in this area than others like Rotterdam, leading to differences in the conditions of competition between different cities.³⁰
- (56) In addition, with respect to barriers to entry, the majority of respondents replied that it is (very) difficult to enter the market for (e-)bike sharing services in the Netherlands. Notably, one respondent considered that *“in the Netherlands, some cities have very strict regulations in place which do not allow private bike sharing or only up to a certain fleet cap. This is the case in Amsterdam which banned free floating bikes. By contrast, Rotterdam allows bike sharing provided that license requirements are met. Other cities do not have local regulations in place yet or are preparing potential licence based restrictions.”*³¹
- (57) The market investigation thus indicates that the market for (e-)bike sharing services is local (at city level) in scope. Although the results of the market investigation are mixed with respect to the geographic scope of the supply of (e-)bike sharing services, market respondents recognise that there are, within the EEA, local barriers for providers of (e-)bike sharing services, notably legal requirements and local regulations which vary from one city to another. This is supported by the

²⁸ See replies to Q1 – Questionnaire to Competitors, question 17.

²⁹ See replies to Q1 – Questionnaire to Competitors, question 17.1.

³⁰ Referral Request of the Netherlands Authority for Consumers and Markets, dated 5 December 2019, para. 42.

³¹ See replies to Q1 – Questionnaire to Competitors, questions 31 and 31.1.

Netherlands Authority for Consumers and Markets, which considers that the market for bicycle sharing can be defined at city level.³²

5.2.2.4. Conclusion

- (58) In light of the above, the Commission considers that, for the purpose of this decision and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, the relevant geographic market for (e-)bike sharing services is local (at city level) in scope.

6. COMPETITION ASSESSMENT

- (59) The concentration gives rise to horizontal overlaps between the Parties' activities in the national market for retail distribution of (MaaS) transport/mobility services through an app³³ and with respect to the Parties' activities in the local city markets for (e-)bike sharing services. Moreover, the concentration gives rise to vertically affected markets between (e-)bike sharing and the retail distribution of (MaaS) transport/mobility services through an app.

6.1. Horizontal overlaps

6.1.1. Retail distribution of (MaaS) transport/mobility services through an app

- (60) The Transaction gives rise to a horizontal overlap in the market for retail distribution of (MaaS) transport/mobility services through an app, as the JV will combine NS's and Pon's respective activities as MaaS providers.

6.1.1.1. Notifying Parties' views

- (61) The Notifying Parties consider that MaaS providers such as Next and Hely are exposed to competitive pressure not only from other integrated solutions, but actually from a broad variety of mobility providers (including their mobile apps), and door-to-door travel planners (such as Google Maps or 9292).
- (62) The JV's combined share in this market would be negligible according to the Notifying Parties. Taking into account that it faces competition not only from large, established players such as public mobility providers and taxi companies, but also from newer shared mobility solutions such as car sharing, bike sharing, as well as ride-hailing and planning apps, the Notifying Parties emphasize that the JV's combined share is extremely small.³⁴

6.1.1.2. Commission's assessment

- (63) On a possible market for retail distribution of (MaaS) transport services through an app, the JV's combined share in 2018 (by turnover) would be less than [10-20]% at city-level and less than [0-5]% at the national level.
- (64) Another possible indicator for the JV's low market share is the number of downloads of Hely's and Next's respective apps via the Google Play and the Apple App stores. The Notifying Parties estimate that both Next and Hely's apps only have

³² Referral Request of the Netherlands Authority for Consumers and Markets, dated 5 December 2019, para. 43.

³³ With combined market shares (based on 2018 turnover) of less than 20% at city level and less than [0-5]% at national level.

³⁴ Form CO, paras. 188-191.

approximately 2 000 downloads to date, which confirms their small position on this market.

6.1.1.3. Conclusion

(65) Therefore, at this stage, based on its preliminary analysis and without prejudice to further investigation by the Netherlands Authority for Consumers and Markets, the Commission considers that the Transaction would not give rise to horizontal competition concerns with respect to the market for retail distribution of (MaaS) transport/mobility services through an app.

6.1.2. (e-)Bike sharing services

(66) The Transaction also gives rise to a horizontal overlap between NS's and the JV's (e-)bike sharing services. NS will be active as an (e-)bike sharing provider through OV-fiets, while Pon will transfer its (e-)bike sharing services (provided through Next) to the JV.

6.1.2.1. Notifying Parties' views

(67) The Notifying Parties submit that, following the Transaction, the JV will still face sufficient competition from other transport/mobility providers, especially at city-level, where the JV will be heavily constrained by the bus, metro, and tram services operated by local public transport companies such as GVB (Gemeentelijk Vervoersbedrijf, the municipal public transport operator for Amsterdam), HTM Personenvervoer (a public transport company operator in The Hague) and RET (Rotterdamse Elektrische Tram, the main public transport operator in Rotterdam).³⁵

(68) The Notifying Parties further consider that the combination of Hely's and Next's businesses also represents a small amount of rides and their combined market shares would constitute an insignificant addition to NS's bike sharing activities through OV-fiets.

(69) In addition, the Notifying Parties emphasize that OV-fiets and Next operate fundamentally different business models. OV-fiets is designed for customers travelling short distances from (and back to) a specific train station, while Next focusses on shared bike solutions for customers who want to travel short distances to and from their homes (B2C), or from their offices (B2B).

6.1.2.2. Commission's assessment

(70) The Commission, based on its preliminary analysis, identified a number of factors indicating that the Transaction would threaten to significantly affect competition in the market for (e-)bike sharing services in certain cities in the Netherlands.

(71) The Table below includes the market shares of the Parties in the Dutch city markets for the broader market including both free-floating and station-based (e-)bike sharing services. It is possible to observe that the combined market shares are high, leading to monopolies in certain cities. The Parties' market shares for the market comprising only station-based (e-)bike sharing services are identical (or higher, *e.g.* in The Hague, [40-50]%) to those listed in the Table below.

³⁵ Form CO, paras. 201-207.

Table 1: Market shares for (e-)bike sharing services at city level in the Netherlands

Bike sharing, city level (based on cities in which Next/Hely and OV-fiets are active), as of October 2019									
	Amsterdam	The Hague	Haarlem	Utrecht	Alkmaar	Amersfoort	Rosmalen	Breda	Diemen
OV-fiets	[70-80]%	[30-40]%	[90-100]%	[70-80]%	[30-40]%	[90-100]%	[70-80]%	[90-100]%	[30-40]%
Hello Bike	[10-20]%	-	-	-	-	-	-	-	-
Donkey Republic	-	-	-	[20-30]%	-	-	-	-	-
Next	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[60-70]%	[0-5]%	[20-30]%	[0-5]%	[60-70]%
Hely	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Combined	[80-90]%	[30-40]%	[90-100]%	[70-80]%	[90-100]%	[90-100]%	[90-100]%	[90-100]%	[90-100]%

Source: Form CO, para. 297, Table 15.

- (72) The Parties' market shares in a broader market comprising bike, scooter and kick-scooter sharing services would still amount to [70-80]% for free-floating and station-based sharing services and to [90-100]% for only station-based sharing services in the Netherlands. At city level, the market shares of the Parties would be the same as in the narrower market for (e-)bike sharing services only (see Table 1 above), except (assuming that scooter sharing belong to the same market as the services which the Parties provide) for Amsterdam, The Hague and Rotterdam, where Felyx and Go provide scooter sharing services. No kick-scooter sharing providers are currently active in the Netherlands.

Table 2: Market shares for (e-)bike, (e-)scooter and (e-)kick-scooter sharing at national level in the Netherlands

Bike and scooter sharing, national, as of October 2019		
	Free-floating and station-based	Station-based only
NS	[70-80]%	[80-90]%
Next	[0-5]%	[0-5]%
Hely	[0-5]%	[0-5]%
Combined	[70-80]%	[90-100]%

Source: Form CO, para. 297, Table 13.

Table 3: Market shares for (e-)bike, (e-)scooter and (e-)kick-scooter sharing at city level in the Netherlands

Bike and scooter sharing, city level, s of October 2019			
	Amsterdam	The Hague	Rotterdam
OV-fiets	[70-80]%	[30-40]%	[10-20]%
Hello Bike	[10-20]%		
Donkey Republic			[10-20]%
Felyx	[0-5]%	[5-10]%	[5-10]%
Go			[10-20]%
Next	[0-5]%		[0-5]%
Hely	[0-5]%		[0-5]%
Combined	[70-80]%	[30-40]%	[10-20]%

Source: Response to RFI 4 of 8 January 2020.

- (73) The majority of respondents to the market investigation indicated, however, that the Parties are not close competitors with respect to their bike sharing services. One respondent explained that “*they are very different in size and approach*” and another added that “*OV-fiets is a day rental as last mile. Next will probably more be a first-mile solution and short usage*”.³⁶
- (74) Notwithstanding the different business models between the Parties’ bike-sharing activities, the combination of NS’s OV-fiets (and Hely) and Pon’s Next bike sharing services gives rise to high market shares at city level in the Netherlands, as indicated in the Table above, even leading to monopolies with relatively high increments in e.g. Alkmaar (OV-fiets [30-40]%; Next [60-70]%), in Rosmalen (OV-fiets [70-80]%; Next [20-30]%) and in Diemen (OV-fiets [30-40]%; Next [60-70]%).

6.1.2.3. Conclusion

- (75) Based on its preliminary analysis, therefore, the Commission considers that the Transaction would threaten to significantly affect competition in the markets for (station-based) (e-)bike sharing services in certain cities in the Netherlands, which present all the characteristics of distinct markets.

6.2. Vertical relationships

- (76) The Transaction gives rise to a vertical relationship between NS’s activities in the supply of (e-)bike sharing services (through OV-fiets) and the JV’s retail distribution of (MaaS) transport/mobility services through an app.

6.2.1. The Notifying Parties’ views

- (77) The Notifying Parties argue that, despite high combined market shares for the market for (e-)bike sharing at both national and city-level, NS will not have the ability or

³⁶ See replies to Q1 – Questionnaire to Competitors, questions 28 and 28.1.

incentive to foreclose access to the OV-fiets post-Transaction (bike sharing as an input), nor will the Parties have the ability or the incentive to restrict access by other bike sharing initiatives to its MaaS offer (MaaS as an input).³⁷

- (78) With respect to foreclosure of access to the Parties' bike sharing services, the Notifying Parties submit that (i) NS' public service obligations render foreclosure of OV-fiets practically impossible, (ii) OV-fiets is not an essential input and operates a fundamentally different business model from that of the JV and other bike sharing services and (iii) that there is no economic incentive to foreclose access to the OV-fiets or to the JV's app.³⁸
- (79) With respect to foreclosure of access to the JV's MaaS services, the Notifying Parties submit that there is no risk notably because of the limited position of the Parties' combined (JV) MaaS offer.³⁹
- (80) Overall, the Notifying Parties also argue that there will be other significant competitive constraints, notably because of low entry barriers, which further constrain their ability and incentive to adopt a foreclosure strategy.⁴⁰

6.2.2. *Commission's assessment*

- (81) The replies to the market investigation have revealed a number of concerns arising in connection with the Transaction. The majority of MaaS and mobility providers responding to the market investigation believe that the Parties would have, post-Transaction, the ability and incentive to prevent/restrict access to their mobility services or to the JV's app or to favour their own mobility services over others in the app (so-called "self-preferencing"), by e.g. displaying their own mobility services at the top of the search list on the app or displaying those itineraries first that include their own mobility services.⁴¹
- (82) In particular, the majority of market respondents indicated that it may be desirable for a MaaS service provider to discriminate or prevent/hamper a competing mobility provider from accessing its app if it is also active as a mobility provider for the same mobility solution itself (e.g. either bikes, public transport, cars or other options). The majority of market respondents claim to have already experienced such discrimination, including by Hely and NS.⁴²
- (83) According to the majority of respondents to the market investigation, it is (very) difficult for a mobility provider to switch to another MaaS app in the Netherlands.⁴³ In addition, the majority of respondents consider that that it is (very) difficult to enter the markets for MaaS services in the Netherlands (amongst others due to negotiations with public incumbents, city councils and local regulations) and for (e-)bike sharing services in the Netherlands (amongst others due to city-specific regulations).⁴⁴
- (84) Finally, the majority of MaaS and mobility providers responding to the market investigation believe that the Transaction will have a negative impact on their

³⁷ Form CO, para. 303.

³⁸ Form CO, paras. 304-320.

³⁹ Form CO, paras. 321-326.

⁴⁰ Form CO, paras. 327-331.

⁴¹ See replies to Q1 – Questionnaire to Competitors, questions 22-25.

⁴² See replies to Q1 – Questionnaire to Competitors, questions 22 and 22.1.

⁴³ See replies to Q1 – Questionnaire to Competitors, question 26.

⁴⁴ See replies to Q1 – Questionnaire to Competitors, questions 29 and 31.

company as well as on the markets for MaaS services and for (e-)bike sharing services in the Netherlands.⁴⁵

- (85) The Commission considers that these responses from MaaS providers and mobility providers (including from the Netherlands) are well substantiated and indicate that the Transaction threatens to significantly affect competition in the markets for MaaS services and for (e-)bike sharing services in the Netherlands.

6.2.3. *Conclusion*

- (86) Based on its preliminary analysis, therefore, the Commission considers that the Transaction would threaten to significantly affect competition in the markets for retail distribution of (Maas) transport/mobility services through an app and for (e-)bike sharing services, in the Netherlands, which present all the characteristics of distinct markets.

7. ASSESSEMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

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

- (87) According to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of the case to the competent authorities of the Member State concerned with a view to applying the Member State's national competition law if, following a request for referral by that Member State pursuant to Article 9(2) of the Merger Regulation, the Commission considers that the Transaction threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market.
- (88) Therefore, in order for a referral request to be made to a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 9(2)(a) of the Merger Regulation.
- (89) Firstly, regarding the procedural condition, although the Notifying Parties consider that the Transaction does not threaten to significantly affect competition and is not an appropriate case for referral, they do not seem to contest that the Referral Request meets the procedural requirements laid down in Article 9(2)(a) of the Merger Regulation.⁴⁶
- (90) Indeed, regarding the procedural condition, the referral request must be made within 15 working days from the date on which a copy of the notification of a concentration to the Commission is received by that Member State. In this regard, the Commission notes that the Netherlands, via the Netherlands Authority for Consumers and Markets, received a copy of the notification of the Transaction on 18 November 2019. The referral request was made by letter received by the Commission on 5 December 2019. Therefore, the Referral Request was made within 15 working days following the receipt by the Netherlands of the notification of the Transaction, and, consequently, within the deadline provided for in Article 9(2) of the Merger Regulation.
- (91) As to the substantive conditions, first, the requesting Member State is required to demonstrate that, based on a preliminary analysis, there is a real risk that the

⁴⁵ See replies to Q1 – Questionnaire to Competitors, questions 33-35.

⁴⁶ Email of the Notifying Parties' external counsel dated 10 December 2019, (the "Notifying Parties' submission dated 10 December 2019").

transaction may have a significant adverse impact on competition, and thus that it deserves scrutiny. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.⁴⁷ Second, the requesting Member State is required to show that the geographic market(s) in which competition is affected by the transaction is (are) national or narrower than national in scope and present(s) all the characteristics of (a) distinct market(s).⁴⁸

7.1.1. Markets within the Netherlands which present all the characteristics of distinct markets

- (92) The Netherlands Authority for Consumers and Markets considers that the geographic market for the retail distribution of MaaS services is likely to be national in scope, notably because MaaS providers generally offer their MaaS services to end-users in the Netherlands and because the underlying transport services of the mobility providers are also offered in the Netherlands.⁴⁹ With regard to the market for bicycle sharing services, the Netherlands Authority for Consumers and Markets considers that the geographic scope can be defined at city level, as explained in Section 5.2.2 above.⁵⁰
- (93) The Netherlands Authority for Consumers and Market's findings with regard to the geographic scope of the markets for retail distribution of MaaS services and for (e-)bike sharing services are consistent with the results of the Commission's market investigation (see Sections 5.1.2.3 and 5.2.2.3). Therefore, as well as for the reasons mentioned by the Commission in Sections 5.1.2.3 and 5.2.2.3 above, it can be concluded that that the markets for the retail distribution of MaaS services and for (e-)bike sharing services in the Netherlands are distinct from other geographical areas.
- (94) In light of the above, the Commission considers that the markets identified in the Referral Request (namely the markets for the retail distribution of MaaS services (through an app) and for (e-)bike sharing services present the characteristics of distinct markets in the Netherlands, as required under Article 9(2)(a) of the Merger Regulation.

7.1.2. Markets within the Netherlands in which the Transaction threatens to significantly affect competition

- (95) The Netherlands Authority for Consumers and Markets' Referral Request is based on the concerns that the Transaction threatens to significantly affect competition in the Netherlands, in the markets for retail distribution of MaaS services, for public transport by rail, for (e-) bike sharing and possibly also in the market for car sharing.⁵¹
- (96) In its Referral Request, the Netherlands Authority for Consumers and Markets noted that the Parties might have the possibility and incentive post-Transaction to use a strategy to foreclose other (potential) MaaS initiatives, considering the strong positions of the Parties on the possible input markets for public transport by train and

⁴⁷ Commission Notice on Case Referral in respect of concentrations ("Referral Notice"), OJ C 56, 05.03.2005, p. 2, paragraph 35.

⁴⁸ Referral Notice, paragraph 36.

⁴⁹ Referral Request, para. 36.

⁵⁰ Referral Request, paras. 42 and 43.

⁵¹ Referral Request, paras. 77 and 78.

for bicycle sharing (OV-fiets and possibly Swapfiets). In this respect, the Netherlands Authority for Consumers and Markets stressed the high market shares in the market for bicycle sharing of NS/OV-fiets in a number of cities (where both OV-fiets and Hely or Next are present), as well as the high market share of NS in the national market for public transport.⁵² This indicates, in the Authority's view, that the Transaction will have a significant impact on competition in the Dutch markets.

- (97) In light of the above, the Netherlands Authority for Consumers and Markets *prima facie* considers that the Transaction is likely to have significant effects in the Netherlands.
- (98) The Commission notes that the *prima facie* competition concerns of the Netherlands Authority for Consumers and Markets are, without prejudice to the Dutch Authority's further investigation, consistent with the results of the Commission's market investigation and preliminary assessment with respect to the market for (e-)bike sharing services and the vertical relation between (e-)bike sharing services and the retail distribution of transport/mobility services through an app (or so-called MaaS services), as set out in Sections 6.1.2.2 and 6.2.2 above.
- (99) In light of the above, following the Commission's preliminary assessment, the Commission concludes that the Transaction threatens to significantly affect competition in the markets for retail distribution of (MaaS) transport/mobility services through an app in the Netherlands and for (e-)bike sharing services in certain cities in the Netherlands, as required under Article 9(2)(a) of the Merger Regulation.

7.1.3. Conclusion

- (100) In light of the above, the Commission considers that the legal requirements laid down in Article 9(2)(a) of the Merger Regulation are fulfilled, as the Transaction threatens to significantly affect competition in the markets for retail distribution of (MaaS) transport/mobility services through an app in the Netherlands and for (e-)bike sharing services in certain cities in the Netherlands, which present all the characteristics of distinct markets.

7.2. The Commission's discretion whether to refer

- (101) 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 retains a margin of discretion in deciding whether to refer a given case to a national competition authority.⁵³
- (102) The Notifying Parties consider that the Commission is better placed to review the Transaction, for the following reasons:
- (a) The Parties consider that there are important transnational effects that go beyond a strict geographic limitation to the Netherlands, since the Commission has previously defined some of the markets at EEA-level (e.g. the applications market in case M.8744 *Daimler/BMW/Car Sharing JV*, para. 136).
 - (b) The Commission has developed market knowledge through the *Daimler/BMW/Car Sharing JV* case, which involved very similar markets, as

⁵² Referral Request of the Netherlands Authority for Consumers and Markets, dated 5 December 2019, paras. 49. The Commission, however, does not consider, without prejudice to the Dutch Authority's investigation, the vertical link with NS's public transport activities to be merger-specific.

⁵³ Referral Notice, paragraph 7.

well as merger and antitrust cases in digital markets which are at least equivalent to the Netherlands Authority for Consumers and Markets's experience.

- (c) A re-notification and market investigation by the Netherlands Authority for Consumers and Markets would add to the Parties' administrative burden, as the Commission has already conducted and finalised its market investigation. In addition, conducting a second investigation would unnecessarily add to the administrative burden of the market players and reduce the quality of their input. This would run counter to the one-stop-shop principle.⁵⁴
- (103) In the following recitals, the Commission assesses the appropriateness of a referral in the present case in light of the principles set out in the Referral Notice.
- (104) According to paragraph 9 of the Referral Notice, “[i]n principle, 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”.
- (105) 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”.
- (106) Contrary to the Notifying Parties' view,⁵⁵ the Commission considers that there are compelling reasons for departing from the original jurisdiction over the present case, by referring the Transaction to the Netherlands.
- (107) First, considering that the geographic scope of the relevant markets is likely to be national and even local (see Sections 5.1.2 and 5.2.2 above), and that the Transaction is likely to significantly threaten competition in those markets, the Netherlands Authority for Consumers and Markets is better placed to evaluate any submissions of the Parties in relation to these markets. In particular, the JV would be active in the Netherlands and the majority of respondents to the market investigation have indicated that, in their view, the Transaction would have a negative impact on these markets in the Netherlands.⁵⁶
- (108) As to the point raised by the Notifying Parties in relation to the Commission's experience in the relevant markets impacted by the case, it should be noted that the Netherlands Authority for Consumers and Markets has also gained relevant knowledge in relation to the Dutch mobility markets, through transport related concentrations,⁵⁷ the antitrust investigation of NS and its recent market study into the

⁵⁴ Notifying Parties' submission dated 10 December 2019.

⁵⁵ Notifying Parties' submission dated 10 December 2019.

⁵⁶ See replies to Q1 – Questionnaire to Competitors, questions 34-35.

⁵⁷ See decision of the Netherlands Authority for Consumers and Markets of 3 October 2012 in case 7436/NS *Reizigers – Reisinformatie Prorail*, decision of Dutch Authority of 31 October 2011 in case 7273/HTM – *Qbuzz – HTM Buzz* and decision of the Dutch Authority of 9 December 2010 in case 6957/Veolia – *CDC – Transdev*.

market for mobility services.⁵⁸ Moreover, as a sector regulator, it is responsible for sector-specific regulation in *inter alia* the Dutch transport markets.⁵⁹

- (109) In addition, the Netherlands Authority for Consumers and Markets has the digital economy as one of its top priorities and holds a particular interest in the successful development of platform economy and MaaS in the Netherlands. In this respect, the Dutch government has developed a nationwide platform open to all players and, to this end, has sponsored seven regional MaaS pilots in the Netherlands.
- (110) Lastly, it appears likely that any additional administrative effort for the Parties due to a referral will not be disproportionate. The Netherlands Authority for Consumers and Markets has already formed a broad picture of the main characteristics of the case and potential competition concerns prior to the filing of its referral request. The Netherlands Authority for Consumers and Markets indicated that its market investigation could be launched upon the adoption of this referral decision by the Commission.⁶⁰
- (111) In light of the above, the Commission considers that the Netherlands Authority for Consumers and Markets is in the best position to investigate the effects of the Transaction in the Netherlands.

7.3. Conclusion

- (112) In light of the above, the Commission considers that (i) the legal requirements to request a referral under Article 9(2)(a) of the Merger Regulation are met and (ii) the Netherlands Authority for Consumers and Markets is best placed to carry out a thorough investigation of the effects of the Transaction in the Netherlands.
- (113) It is therefore appropriate for the Commission to exercise its discretion under Article 9(3) of the Merger Regulation and refer the case in its entirety to the Netherlands.

8. CONCLUSION

- (114) 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 and national scopes of the markets affected by the transaction, the Netherlands Authority for Consumers and Markets is 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 the Netherlands, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

⁵⁸ In this 2018 study, the the Netherlands Authority for Consumers and Markets concluded that there is a risk that providers of mobility services do not get access to essential inputs to introduce and further develop MaaS services. It was considered that regulation could help to create equal opportunities for MaaS providers, thereby stimulating the development of innovative mobility services for travellers.

⁵⁹ Referral Request, paras. 81-84.

⁶⁰ Referral Request, paras. 86 and 87.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 15.1.2020

For the Commission

(Signed)

Margrethe VESTAGER

Executive Vice-President