EUROPEAN COMMISSION
DG Competition

Case M.10515 - ILIAD / UPC POLSKA

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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EUROPEAN COMMISSION

Brussels, 10.3.2022
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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Iliad S.A.
Rue de l'Evêque 16
75008, Paris
France

Subject: **Case M.10515 – ILIAD / UPC POLSKA**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 3 February 2022, the European Commission (the "Commission") received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Iliad S.A. ("Iliad", France) intends to acquire indirect sole control of UPC Polska sp. z o.o. ("UPC Polska", Poland) within the meaning of Article 3(1)(b) of the Merger Regulation (the "Transaction"). Iliad is designated hereinafter as the "Notifying Party", while Iliad and UPC Polska are jointly referred to as the "Parties".

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

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

1. THE PARTIES

(2) Iliad is the parent company of the Iliad group, which is ultimately controlled by Mr. Xavier Niel (together with Iliad; the "Xavier Niel Group" or "XNG"). XNG is active in telecoms, media, IT services, start-up businesses and real estate. In the sector of telecommunications, XNG is active in Ireland, Malta, Cyprus, France, Italy and Poland. In Poland, since the acquisition of Play Communications S.A. ("Play") in 2020,[3] Iliad is mainly active as a provider of retail mobile telecommunications services (including mobile internet access services) and, since 2020,[4] of fixed internet access services and pay audio-visual services ("Pay AV" or "pay-TV" services). Play's subsidiary P4 sp. z o. o. ("P4"), is one of the four Mobile Network Operators ("MNOs") present on the Polish retail mobile market.

(3) UPC Polska is a subsidiary of Liberty Global Inc. (through the holding UPC Poland Holding B.V.[5]), exclusively active in Poland as a provider of retail fixed internet services, retail pay-TV services and retail fixed telephony services.[6] UPC Polska is also active in business connectivity and mobile telecommunication services as a Mobile Virtual Network Operator ("MVNO"), hosted on P4's mobile network.

2. THE OPERATION

(4) On 22 September 2021, UPC Poland Holding B.V., P4, Iliad and Liberty Global plc entered into a share purchase agreement, whereby P4 will acquire 100% of the share capital and voting rights of UPC Polska from UPC Poland Holding B.V. Xavier Niel holds […] of the share capital and voting rights of Iliad indirectly through its subsidiaries Iliad Holding S.A.S. and HoldCo II S.A.S. The rest of the share capital of Iliad is held by employees and managers of the Iliad Group.

(5) The Transaction therefore consists in the acquisition of sole control over UPC Polska by Iliad within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(6) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 billion[7] (Xavier Niel Group: EUR […] in 2020; UPC Polska: EUR […] in 2020). Each of them has an EU-wide turnover in excess of EUR 250 million (Xavier Niel Group: EUR […] in 2020; UPC Polska: EUR […] in 2020), but they did not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

(7) Therefore, the Transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

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3 Commission decision of 26 October 2020, in case M.9963 – Iliad/Play Communications.

4 Form CO, paragraph 270.

5 UPC Poland Holding B.V. holds 100% of the share capital and voting rights of UPC Polska.

6 At the wholesale level, UPC Polska is also active in Poland on the market for the supply of wholesale call termination services on individual fixed networks.

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

4. RELEVANT MARKETS

(8) The Transaction will combine the complementary mobile telecommunications business of Iliad's subsidiary P4 and the fixed telecommunications business of UPC Polska in Poland.

(9) P4 is predominantly a mobile player. It does not have any fixed network infrastructure in Poland and has only very limited presence in fixed telecommunications services, based on a wholesale agreement with the cable operator Vectra.

(10) To the contrary, UPC Polska owns cable infrastructure and focusses on fixed internet and pay-TV services, with a very limited presence in the retail mobile market. UPC Polska operates as a light MVNO[8] based on a wholesale agreement with P4.

(11) The Parties' activities overlap in the following markets in Poland: (i) retail supply of mobile telecommunications services; (ii) retail supply of fixed telephony services; (iii) retail supply of fixed internet access services; (iv) retail supply of audio-visual services; (v) retail supply of multiple-play services; (vi) retail supply of business connectivity; (vii) wholesale supply of leased lines; (viii) wholesale acquisition of TV channels; and (ix) wholesale acquisition of TV content.

(12) In addition, the Transaction gives rise to vertical relationships in the EEA countries in which the Parties are present (*i.e.*, Cyprus, France, Ireland, Italy, Malta and Poland for XNG, and Poland for UPC Polska) in connection to:

<u>At the upstream level</u>:

- The wholesale market for mobile call termination services on XNG's mobile networks in Cyprus, France, Ireland, Italy, Malta, and Poland;
- The wholesale market for fixed call termination services on (i) XNG's networks in Cyprus, France, Ireland, and Malta, and on (ii) UPC Polska's network in Poland; and
- The wholesale access and call origination services on XNG's mobile network in Poland.

<u>At the downstream level</u>:

- The retail market for mobile telecommunication services in (i) Cyprus, France, Ireland, Italy, Malta, and Poland (XNG), and (ii) Poland (UPC Polska); and
- The retail market for fixed telephony services in (i) Cyprus, France, Ireland, Malta and Poland (XNG) and (ii) Poland (UPC Polska).

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8 Unlike "full" MVNOs, "light" MVNOs do not have their own infrastructure and rely entirely on the infrastructure of an MNO.

4.1. Retail supply of mobile telecommunications services

(13) Retail mobile telecommunications services include services for national and international voice calls, SMS (including MMS and other messages), mobile internet with data services, access to content via the mobile network and retail international roaming services.

4.1.1. Product market definition

4.1.1.1. Previous Commission's decisions

(14) In previous decisions, the Commission has identified an overall retail market for mobile telecommunications services, distinct from retail fixed telecommunications services. The Commission considered that the retail mobile telecommunications market does not need to be further segmented based on the type of service (voice calls, SMS, MMS, mobile Internet data services), or the type of network technology (2G, 3G, 4G).[9] The Commission has considered a number of possible segmentations of the overall retail market for mobile telecommunication services (pre-paid vs post-paid services;[10] private customers vs. business customers;[11] high-value vs low-value customers;[12] sim-card only ("SIMO") and handset subscriptions;[13] different distribution channels[14]), and has taken the view that they do not constitute separate product markets but rather segments of the same market.

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9 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 66; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 207; Commission decision of 1 September 2016 in case M.7758, *Hutchison 3G Italy/Wind/JV*, recitals 135 to 140; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 74; Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 259 to 265 and 287; Commission decision of 02 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31 to55; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 141; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 43 to 58.

10 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 64 to 67; Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recital 202; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 200 to 207; Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recitals 146 to 149; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 72 to 74; Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 266 to 270 and 287; Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 37 to 39 and 65 to 71; Commission decision of 28 May 2014 I case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recitals 141 to 143; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 38 to 41 and 58.

11 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 64 to 67; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 200 to 207; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 72 to 74; Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 276 to 279; Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 30 to 36; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recitals 141, 149 and 150; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 32 to 35.

12 Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 40 to 44.

13 Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 271 to 275.

14 In Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 280 to 286, the Commission also took into account the segmentation between direct distribution and independent specialist retailers in view of the important role played in the retail market by independent specialist retailers and since direct distribution and independent specialist retailers account for the largest part of the market.

(15) The Commission has considered that Over-the-top ("OTT")[15] services, whether provided over Wi-Fi or via mobile telecommunications data networks, are not part of the market for retail mobile telecommunications services, as OTT rely on mobile telecommunications (data) services and/or fixed broadband services to function.[16] Finally, the Commission has excluded Machine-to-Machine ("M2M", such as energy metering or burglar alarm) services from the overall retail mobile telecommunications market, due to the particular characteristics of the demand and supply of these services.[17]

4.1.1.2. The Notifying Party's view

(16) The Notifying Party identifies the overall market for the retail supply of mobile telecommunication services as the appropriate relevant product market in this case, without any further segmentations.

4.1.1.3. The Commission's assessment

(17) The results of the market investigation confirm that the conclusions adopted by the Commission in previous cases are also applicable to the Polish market. In fact, a majority of MNOs and a vast majority of MVNOs agree that there is a separate market for retail mobile telecommunications services.[18] The majority of respondents also considers that M2M[19] services are not part of the market for retail mobile telecommunications services.[20] As to OTT services, the replies to the market investigation did not provide enough elements to make a conclusion as to whether they belong to the market of retail mobile telecommunications services or not.[21]

(18) In light of the above and for the purpose of this Decision, the Commission considers the relevant product market to be the market for the retail supply of mobile telecommunication services, excluding M2M services. The question whether such product market should include OTT services can be left open, as neither party is active in the provision of OTT services and the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any plausible product market definition.

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15 In the present context OTT services are understood to be telecommunications services that rely on an internet connection to function, such as instant messaging (e.g. WhatsApp, Facebook Messenger, Apple iMessage) and voice over IP ("VoIP" e.g. WhatsApp, Skype, Apple FaceTime).

16 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 65 to 66; Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 168 to 169;; Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/WIND/JV*, recitals 138 to 145 and 162, Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 262 to 265 and 286s.

17 Commission decision of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraphs 39 to 42; Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 223 and 224.

18 Replies to Q1 to Competitors MNOs, question 3 and to Q2 to competitors MVNOs, question 3.

19 Replies to Q1 to Competitors MNOs, question 4 and to Q2 to competitors MVNOs, question 4.

20 These allow machines, devices and appliances to connect wirelessly to the internet via mobile networks, or other technologies, permitting the transmission and receipt of data to a central server

21 Replies to Q1 to Competitors MNOs, questions 5 and 5.1. Replies to Q2 to competitors MVNOs, questions 5 and 5.1.

4.1.2. Geographic market definition

(19) In previous decisions, the Commission found that the market for the retail supply of mobile telecommunications services is national in scope.[22]

(20) The Notifying Party considers that the overall market for the retail supply of mobile telecommunications services is national in scope. Indeed, the telecommunications infrastructure of Poland is independent from that of other Member States and mobile telecommunications services in Poland (as well as in other Member States) are subject to a national regulatory regime. Licenses and general authorisations are granted on a national basis and all four MNOs and the main MVNOs provide mobile telecommunications services at national level. Moreover, marketing and pricing policies are also developed at national level.

(21) A majority of the respondents to the market investigation indicated that it would be appropriate to consider that the geographic scope of the market for the retail supply of mobile telecommunications services is national in scope and encompasses Poland.[23]

(22) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographic market for the retail supply of mobile telecommunications services is Poland.

4.2. Retail supply of fixed telephony services

(23) Fixed telephony services to end customers comprise the provision of subscriptions enabling access to public telephone networks at a fixed location for the purpose of making and/or receiving calls and related services.[24]

4.2.1. Product market definition

4.2.1.1. Previous Commission's decisions

(24) The Commission has considered distinguishing between local/national and international calls, as well as between residential and non-residential customers in the market for the retail supply of fixed telephony services,[25] but ultimately leaving the exact product market definition open.[26]

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22 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 70; Commission decision of 2 October 2008 in case M.5148 – *Deutsche Telekom/OTE*, paragraphs 18 to 20.

23 Replies to Q1 to Competitors MNOs, questions 6 and 6.1. and Replies to Q2 to competitors MVNOs, questions 6 and 6.1.

24 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 33; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraph 47; of 30 May 2018 in case M.7000, *Liberty Global/Ziggo*, paragraph 147;of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 21; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 69; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 131.

25 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* recitals 35 to 40; Commission decision of 8 October 2018 in case M.8842 – *Tele2/Com Hem Holding*, paragraphs 14 to 17.

26 Commission decisions of 18 July 2019 in case M.8864, *Vodafone/Certain Liberty Global Assets*, paragraph 40; of 15 July 2019 in case M.9370, *Telenor/DNA*, paragraph 52; of 29 January 2010 in case M.5730, *Telefónica/Hansenet Telekommunikation*, paragraphs 16-17; of 29 June 2009 in case M.5532, *Carphone Warehouse/Tiscali UK*, paragraphs 35 and 39; of 7 September 2005 in case M.3914, *Tele2/Versatel*, paragraph 10.

(25) The Commission also recently considered that managed Voice over Internet Protocol ("VoIP") services[27] and traditional fixed telephony are interchangeable and therefore belong to the same market.[28] However, in *Liberty Global/Ziggo* the Commission left the exact market definition open.[29]

4.2.1.2. The Notifying Party's view

(26) The Notifying Party identifies the overall market for the retail supply of fixed telephony services, including VoIP services, as the appropriate relevant product market. The Notifying Party considers that it is not appropriate to segment this market between local/national and international calls or between residential and non-residential customers.[30] According to the Notifying Party, customers do not choose a particular fixed telephony provider based on whether its international call fees are competitive, and all providers are able to, and routinely do, serve both residential and non-residential customers.[31]

4.2.1.3. The Commission's assessment

(27) A majority of respondents to the market investigation indicated that an overall market for the retail supply of fixed telephony services, through both fixed telephony lines and VoIP is the relevant product market.[32]

(28) With respect to a distinction between local/national and international calls, the results of the market investigation were mixed. While some competitors suggested that such distinction would be appropriate due to the often significantly higher international termination rates vis-à-vis national interconnection rates, other respondents indicated that there would be no significant distinctions between such calls from an end-user perspective and that both types of calls are covered by the same contract and technology.[33]

(29) With respect to a segmentation between residential and non-residential customers, the results of the market investigation were also inconclusive. Certain competitors suggested that such a distinction is warranted as the provision of services to non-residential customers implies higher network infrastructure costs, and because fixed telephony services are provided under different service parameters depending on the type of customer. However, a number of respondents considered that, despite some differences between the two types of customers, the suppliers often provide similar fixed telephony services to both residential and non-residential customers.[34]

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27 VoIP is a technology that allows users to make voice calls using a broadband internet connection instead of a regular (or analogue) phone line.

28 Commission decision of 3 August 2016 in case M.7978, Vodafone/Liberty Global/Dutch JV, paragraph 26; Commission decision of 4 February 2016 in case M.7637, Liberty Global/BASE Belgium, paragraph 69; Commission decision of 20 September 2013 in case M.6990, Vodafone/Kabel Deutschland, paragraphs 130- 131.

29 Commission decision of 30 May 2018 in case M.7000, Liberty Global/Ziggo, paragraph 147;

30 Form CO, paragraph 83.

31 Form CO, paragraph 83.

32 Replies to Q1 to Competitors MNOs and Replies to Q2 to Competitors MVNOs, questions 7 and 7.1.

33 Replies to Q1 to Competitors MNOs and Replies to Q2 to Competitors MVNOs, questions 8 and 8.1

34 Replies to Q1 to Competitors MNOs and Replies to Q2 to Competitors MVNOs, questions 9 and 9.1.

(30) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the retail supply of fixed telephony services including VoIP services. The question whether the market should be segmented (i) between local/national calls on the one hand, and international calls on the other or (ii) by customer type (residential and non-residential) can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.

4.2.2. Geographic market definition

(31) In its decisional practice, the Commission left the geographic market open, considering that the market for the retail provision of fixed telephony services could be national in scope or narrower (i.e. regional or limited to the coverage area of each operator).[35] In some decisions, the Commission concluded that the retail market for the provision of fixed telephony services is national due to the importance of national regulation in the telecommunications sector, the supply of upstream wholesale services that work on a national basis, and the fact that the pricing policies of telecommunications providers are predominantly national. [36] In relation to recent transactions taking place in Poland, the Commission has also found that such market was national in scope and consisted of Poland.[37]

(32) The Notifying Party considers that the relevant geographic market for the retail supply of fixed telephony services is Poland, as fixed telephony services are provided in its entire territory and are becoming increasingly obsolete at the same rate across the national territory.[38] In addition, in reference to *Discovery/Polsat/JV*[39], the Notifying Party notes that the importance of national regulation in the telecommunications sector, the supply of upstream wholesale services on a national basis, and the fact that the pricing policies of telecommunications providers are predominantly national, support the argument that the retail market for fixed telephony services is national in scope.[40]

(33) Certain respondents to the market investigation noted that the geographic scope could be regional because of the unequal fixed network coverage in Poland, and because the levels of competition vary throughout Poland.[41] Namely, as one respondent noted, denser city areas in Poland have better network coverage and higher level of competition. While fierce competition exists in the urban centres, some regions (particularly rural areas) have a lower network coverage (or lack access to the fixed network infrastructure), and therefore fewer operators providing

35 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/*JV, paragraph 65; Commission decision of 18 October 2019 in case M.9433 – *MEIF 6 Fiber/KCOM Group*, paragraphs 24-25; and Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, paragraph 73;

36 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* recital 46; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 150; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 29; Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 37; Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 13..

37 Commission decision of 26 October 2020 in case M. 9963 – *Iliad/Play Communications*, paragraph 26; Commission decision of 26 August 2020 in case M.9299 – *Discovery/Polsat/JV*, paragraph 102.

38 Form CO, paragraph 85.

39 Commission decision of 26 August 2020 in case M.9299 – *Discovery/Polsat/JV*, paragraph 101.

40 Notifying Party's response to RFI 5, question 5.

41 Replies to Q1 to Competitors MNOs and Replies to Q2 to Competitors MVNOs, question 10.

fixed telephony services. In effect, "*the same competitors are not active throughout the whole of the territory of Poland and their strength varies strongly by regions*."[42] However, a majority of respondents indicated that it is appropriate to consider that the geographic scope of the market for the retail supply of fixed telephony services in the present case is Poland.[43]

(34) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographic market for the retail supply of fixed telephony services is national in scope, covering Poland.

4.3. Retail supply of fixed internet access services

(35) Internet access services consist of the provision of a telecommunications link enabling customers to access the internet. Internet access may be provided as dial-up ("narrowband") access, as higher bandwidth ("broadband") access via xDSL, as a cable modem or mobile broadband technology, or in the form of dedicated access involving leased lines linking one point to the internet and guaranteeing higher levels of performance and security.[44]

4.3.1. Product market definition

4.3.1.1. Previous Commission's decisions

(36) In its recent decisions, the Commission considered but ultimately left open possible segmentations according to (i) product type (distinguishing between narrowband, broadband, and dedicated access), and (ii) distribution technology (distinguishing between xDSL, fibre, cable, and fixed-wireless-access ("FWA"), and it took the view that the retail market for fixed internet access services should not be segmented according to download speed.[45]

(37) The Commission also considered, but ultimately left open, possible segmentations as to customer type, distinguishing between residential and small business customers, on the one hand, and larger business customers and public authorities, on the other hand.[46] As for large business customers and public authorities, the Commission indicated that they belong to a separate market for the retail supply of business connectivity services.[47]

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42 Replies to Q1 to Competitors MNOs, question 10.

43 Replies to Q1 to Competitors MNOs and Replies to Q2 to Competitors MVNOs, question 10.

44 Commission decision of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 7.

45 Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 218; of 8 October 2018 in case M.8842 – *Tele2/Com Hem*, paragraph 26; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 38; of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland*, recital 194.

46 Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 42; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 165; Commission decision of 7 October 2016 in case M.8131 – *Tele2 Sverige/TDC Sverige*, paragraph 32.

47 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* recitals 50 to 56; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 165 seq.; In Commission decision of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraphs 39, 41, the Commission left the exact product market definition open in that regard; Commission decision of 26 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 21 to 27.

(38) Finally, the Commission previously considered that fixed internet access services provided through mobile network infrastructure (so-called FWA services) do not form part of the retail fixed internet access market.[48]

4.3.1.2. The Notifying Party's view

(39) The Notifying Party considers that it is appropriate to define an overall market for the retail supply of fixed internet services (excluding FWA services), without further segmentations according to (i) product type, (ii) distribution technology or (iii) customer type. The Notifying Party submits that the distinction according to product type is irrelevant as the difference between standard broadband and dedicated lines is captured in the distinction by certain categories of customers (only large business and government customers use dedicated lines), and that narrowband is virtually non-existent in Poland. The Notifying Party also considers that the distinction by distribution technology is not appropriate, as consumers tend to select fixed internet services primarily based on price, speed and similar performance characteristics, while the distribution technology is not the determining factor.[49]

4.3.1.3. The Commission's assessment

(40) A majority of respondents to the market investigation[50] indicated that it would be appropriate to consider an overall retail market for the supply of fixed internet access services to residential and small business customers, including all product types, distribution technologies and speeds/bandwidths, but excluding FWA services.

(41) With regard to FWA services, the market investigation results confirmed that FWA services do not form part of the retail fixed internet access market given the differences in their respective capacity and pricing models, different speeds and different uses.[51] In particular, FWA services have a lower connection quality and speed in comparison to a fixed line, resulting from the significant sensitivity of mobile technology to specific external factors (weather conditions, terrain/type of development, number of users within the range of the same transmitting/receiving station, amount of data sent/received by the user, distance between the user's terminal and the transmitting/receiving unit, mobility of users or data transfer limitation).[52] As one market respondent observed "*Higher bitrates offered by the fixed network make this service priced differently (no data caps) and more stable than the service provided in the mobile network. It is not possible to replace the fixed service, at the current stage of technological development, with the mobile service while retaining some of the features of comfort of use of the service*".[53] In addition, the Polish Office of Electronic Communications (Urząd Komunikacji Elektronicznej; "UKE") reported that "*67% of individual users prefer to use fixed-line access due to better connection quality and stability*"[54] as well as that the penetration of fixed-line access services has been growing: "*In 2020, 56.7% of*

48 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, paragraph 56.

49 Form CO, paragraphs 90-93.

50 Replies to Questionnaire Q1 to competitors, question 11.

51 Replies to Questionnaire Q1 to competitors, question 12 and Replies to Q2 to Competitors MVNOs, question 11.

52 Form CO, paragraph 102.

53 Replies to Q2 to Competitors MVNOs, question 11.1.

54 UKE Report 2020, page 8.

households used fixed-line internet".[55] A number of respondents consider that a limited substitution does exist between the two services given the unequal distribution of the fixed network coverage throughout Poland ("*there is some and asymmetric competitive pressure exerted on providers of fixed Internet access services from mobile Internet access services providers via a router or modem*").[56] However, the Commission notes that the availability of fixed-line internet services is limited mainly to urban areas, while in the outside areas, fixed-line internet services are offered only to a limited extent. Moreover, large parts of Poland are not covered by any fixed network, or only have access to ADSL networks relying on extended copper lines providing single digit downloading speeds.[57] Therefore, FWA services are typically used for locations where wireless internet is the only option for internet access due to Poland's low urbanization level and relatively underdeveloped fixed-line infrastructure.[58] In conclusion, it appears that FWA services are likely to be complements rather than substitutes to internet services provided through fixed infrastructure.

(42) With respect to a possible distinction by customer type, the responses to the market investigation were mixed. A number of respondents confirmed that fixed internet access services provided to residential and small business customers, on the one hand, and large business and government customers, on the other hand, belong to separate markets, given significant differences in demand. In particular, the respondents noted that large business and government customers require a dedicated infrastructure and specialized services, which are rarely used by residential and small business customers, and therefore *"[...] large business and government customers have different needs; they usually need internal networks and specialized services large business and government customers needs better QoS level,.*"[59] However, an equal number of respondents considered that a distinction between different customer types might not be warranted: "*Although, there are some differences between these type of customers and hence the offered commercial terms for services provided, the supplied services are similar and may be provided by a similar range of suppliers*".[60]

(43) When considering the supply-side substitutability, half of the market participants considered that switching from residential and small business customers to supplying large business and government customers, and vice versa, is possible within a short timeframe and without significant costs, noting that many suppliers cater to both customer categories. However, some market participants remarked that supplying a non-standard fixed internet offer, customized to satisfy a business customer's needs, requires significant time and investment. One respondent stated that "*It seems to be quite impossible that supplier that is only active in the segment of residential and SOHO customers can provide services to B2B segment in a short timeframe*" in particular as "*large business and governmental customers have*

55 Ibid.

56 Replies to Q2 to Competitors MVNOs, question 11.1.

57 Form CO, paragraph 104.

58 See Cyfrowy Polsat, Annual Consolidated Report for the financial year ended December 31, 2020, https://grupapolsatplus.pl/sites/default/files/documents/2021/polsat_group_report_2020.pdf, page 59.

59 Replies to Questionnaire Q1 to competitors, question 13.1.

60 Replies to Q2 to Competitors MVNOs, questions 12 and 12.1.

different needs and services which are generally not available at B2C portfolio."[61] Also, some respondents noted that switching from large business and government customers to residential and small business customers may even be more challenging, in particular as the competitive conditions are different in each customer category. For instance, according to one respondent, the market for retail fixed internet supply to residential and small business customers is characterized by lower margins and higher price competition.[62] Accordingly, as per prior Commission practice, large business customers and public authorities are considered part of a different market for business connectivity.[63]

(44) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the retail supply of fixed internet access services, including all product types, distribution modes, and speeds/bandwidth, excluding FWA. The question whether the market should be segmented by customer type (residential and small business customers, on the one hand, and large business and government customers, on the other) can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.

4.3.2. Geographic market definition

(45) In previous decisions, the Commission has found the market for the retail supply of fixed internet access services to be national in scope,[64] including for Poland. [65] In *Liberty Global/BASE Belgium*, the Commission considered whether the geographic scope of the market should be defined on a regional basis or by reference to the footprint of the operators' networks, but ultimately left the question open.[66]

(46) The Notifying Party considers that the relevant geographic market for the retail supply of fixed internet access services is national in scope for the following reasons.[67] First, the Notifying Party submits that the regulatory conditions for the retail supply of fixed internet services are the same in the entire country. Second, the Notifying Party submits that all major providers of fixed internet services are active across the major urban centres throughout Poland. Third, the Notifying Party submits that the general pricing policy and commercial strategy of fixed internet services providers (including price lists, main promotions and marketing campaigns) is uniform throughout the national territory. The Notifying Party notes that some operators may run targeted, special promotions limited to certain local areas.[68]

61 Replies to Q1 to Competitors MNOs, question 14 and 14.1.

62 Replies to Q2 to Competitors MVNOs, question 14 and 14.1.

63 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 50 to 56; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 165 seq.; In Commission decision of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraphs 39, 41, the Commission left the exact product market definition open in that regard; Commission decision of 26 June 2009 in case M.5532 – Carphone Warehouse/Tiscali UK, paragraphs 21 to 27.

64 Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, paragraph 218; of 8 October 2018 in case M.8842 – *Tele2/Com Hem*, paragraph 26; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 38; of 20 September 2013 in case M.6990 - *Vodafone/Kabel Deutschland*, paragraph 194.

65 Commission decision of 26 August 2020 in case M.9299 – *Discovery/Polsat/JV*, paragraph 109.

66 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, paragraph 62-64

67 Notifying Party's response to RFI 5, question 3.

68 Notifying Party's response to RFI 5, question 3.

Fourth, the Notifying Party submits that while the coverage of fixed internet infrastructure in Poland is currently fragmented, there is a continuous fixed infrastructure development process aimed at harmonizing the infrastructure levels in Poland. In particular, the EU funded infrastructure is rapidly being deployed in Poland,[69] and in line with these broader rollout efforts, individual operators continue to upgrade their fixed infrastructures with the view of increasing their top services levels. According to the Notifying Party, while there remain some discrepancies in the quality of access offered to customers in different regions, it would be reasonable to predict that geographic differences in fixed network coverage will dissipate within the next 3 to 5 years.

(47) As for the geographic scope of the market for retail fixed internet services, the responses to the market investigation were mixed. An equal number of respondents considered that the geographic scope is either national or regional, or limited to the footprint of the services provider. Some respondents noted that it would be more appropriate to treat the market as national, in particular given that "*there are important national regulations that govern the telecommunications sector*" and that "*The pricing policies of telecommunication providers are predominantly national in scope in Poland.*"[70] Other respondents argued that the geographic market is narrower in scope (i.e. regional or limited to the footprint of the service provider) given that levels of competition vary depending on the local area ("*The same competitors are not active throughout the whole of the country and their strength varies strongly by regions*"), because of the fragmented coverage of fixed infrastructure in Poland, with some rural areas lacking access to broadband telecommunications infrastructure.[71] In consequence, while the levels of competition are high in urban areas, only a few players are present outside of large cities.

(48) In addition, the Commission observes that the Polish Competition Authority (Office of Competition and Consumer Protection, "UOKiK") has previously analysed the market for retail fixed internet services at a local level (e.g. in individual municipalities or in the local footprint of the service provider).[72]

(49) In light of the above, the Commission considers that, for the purpose of this Decision, the question whether the geographic market should be defined as national or narrower (i.e. regional or limited to the footprint of the services provider) can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

69 Subsidies from European Union funds stimulate investments in fiber optic technologies under the governmental program "Operating Program Digital Poland" (Program Operacyjny Polska Cyfrowa – POPC). One of the priorities is to eliminate differences in access to fast broadband networks between rural and urban areas, resulting in obtaining access to fast broadband connection by all Polish households. Orange Polska and Inea, among others, executed investments in broadband networks under the POPC program. Form CO, footnote 45. The Notifying Party submits that already ca. 700,000 households in Poland have been reached by the fiber networks rolled out within the POPC program since 2015, and the aim is to reach ca. 2 million households by the end of 2022. See Notifying Party's response to RFI 5, question 3.

70 Replies to Q2 to Competitors MVNOs, question 15.1.

71 Form CO, paragraph 104.

72 Decision of the President of UOKiK of 5 September 2011, DKK2-421/52/10/AI.

4.4. Retail supply of audio-visual services

(50) In the retail supply of audio-visual services, retail providers distribute to end-users linear TV channels or other audio-visual content that they have purchased in the wholesale upstream market for TV channels or from holders of broadcasting rights. In some cases, retail providers of audio-visual services produce in-house the channels or content they distribute to their audience.

4.4.1. Product market definition

4.4.1.1. Previous Commission decisions

(51) The Commission has previously identified a relevant product market for the retail supply of audio-visual ("AV") services, including suppliers of linear and non-linear AV services and AV content to end customers. The Commission considered possible segmentations between (i) Free-to-Air ("FTA") and Pay AV services; (ii) within Pay AV services, between linear and non-linear services (Pay-Per-View ("PPV"), Video-on-Demand ("VOD"), Subscription Video-on-Demand ("SVOD"), Transactional Video-On-Demand ("TVOD")); (iii) between distribution technologies (cable, satellite, digital terrestrial television ("DTTV") and Internet Protocol Television ("IPTV")); and (iv) premium and basic Pay AV services, ultimately leaving the exact product market definition open. [73]

4.4.1.2. The Notifying Party's views

(52) The Notifying Party submits that the relevant market is the national market for the retail supply of AV services encompassing all distribution technologies, as there is little to no differentiation between providers, and that all operators have access to similar contents. The Notifying Party considers that the question of whether the market for the retail supply of AV services should be further segmented can be left open given the Parties' moderate combined share and P4's marginal position on this market.[74]

4.4.1.3. The Commission's assessment

(53) The majority of respondents to the market investigation indicated that Pay AV services fall into a separate product market from FTA AV services. For instance, one respondent noted that FTA and Pay AV services have different content sales strategies, and different revenue sources. Also, the content is usually made available first on a Pay AV service and aired only subsequently through FTA AV services. Another respondent considered that "*Although both services meet similar customer expectations, they differ in the content offered*", in particular as "*FTA channels are the most popular, but also most common and most basic channels. Pay-TV offers*

[73] Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* recitals 76 to 83; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 70 to 79; Commission decision of 6 February 2018 in case M.8665 – *Discovery/Scripps,* paragraphs 31 to 33; Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraphs 97 to 102; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 55 to 62; Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recitals 117 to 127; In Commission decision of 25 June 2008 in case M.5121 – *News Corp/Premiere*, paragraphs 21 to 22, the Commission only distinguished between FTA TV on the one hand and Pay TV on the other; Commission decision as of 18 July 2007 in case M.4504 – *SFR/Télé 2 France*, recitals 37 to 44.

[74] Form CO, paragraphs 127-129.

basic, extended basic and premium content, not present in FTA form".[75] However, some respondents noted that Pay AV and FTA services are substitutable from a customer's perspective as well as that customers in Poland usually receive FTA channels as part of the pay AV packages.[76]

(54) With respect to a possible distinction between linear and non-linear AV services, the majority of respondents considered that such a distinction was not warranted. In particular, the respondents noted that "*All kind of services delivering content compete for viewers attention and time. Linear or non-linear is just a method, in which content is made available to clients*" and that "*Non-linear services exert a significant competitive pressure against other audio-visual services, especially pay TV. […] The non-linear services are becoming more and more often the additional element of pay TV offer.*"[77] One respondent also noted that non-linear AV services can be an alternative to linear AV services only in some cases, e.g., when the content from linear channels is available simultaneously on OTT platforms on a non-linear basis.[78]

(55) With respect to distribution technologies, from a demand-side perspective, the majority of AV service operators responded that that there is substitutability for end-customers between all technical forms of AV distribution.[79] For instance, one respondent noted that "*From the customer's perspective, the most important is service availability, quality and content, not the technology by which services are delivered*".[80]

(56) Finally, the majority of respondents considered that, in line with the Commission's findings in *Telia Company/Bonnier Broadcasting Holding*[81], SVOD over-the-top ("OTT") services exert significant competition pressure on linear premium Pay TV films and series channels and are complementary to FTA and basic Pay TV channels. [82]

(57) In light of the above, the Commission considers that the relevant product market for the purpose of this Decision is the market for the retail supply of AV services encompassing all distribution technologies. Moreover, the Commission considers that, in any event, the question whether the retail supply of AV services should be further segmented between (i) FTA and Pay AV services, as well as the question whether in turn the retail supply of Pay AV services should be segmented according to (ii) linear and non-linear Pay AV services, and (iii) premium and basic Pay AV services can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.

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75 Replies to Q2 to Competitors MVNOs, questions 17 and 17.1.

76 Replies to Q2 to Competitors MVNOs, question 17.1.

77 Replies to Q2 to Competitors MVNOs, questions 18 and 18.1.

78 Reply to Questionnaire Q1, question 19.

79 Replies to Q1 to Competitors MNOs, questions 20 and 20.1.

80 Reply to Questionnaire Q2, question 29.

81 Commission decision of 12 November 2019 in case M.9064 - *Telia Company/Bonnier Broadcasting Holding*, paragraph 192.

82 Replies to Q2 to Competitors MVNOs, questions 20 and 20.1 and Replies to Q1 to competitors, questions 21 and 21.1.

4.4.2. *Geographic market definition*

(58) In its previous decisions, the Commission concluded that the market for the retail supply of AV services is national in scope or at most corresponds to linguistically homogenous areas.[83] Moreover, in a previous case, the Commission has concluded that the national market for the retail supply of AV services constitutes Poland.[84] In other recent cases, the Commission has also considered the coverage of a service provider's (cable) network as the potentially appropriate geographical scope of the market but ultimately left the exact geographic market definition open.[85]

(59) The Notifying Party considers that the relevant geographic market for the retail supply of AV services is national in scope for the following reasons.[86] First, the Notifying Party submits that the general pricing policy in the markets for the retail supply of AV services is determined at the national level. The commercial strategy and in particular major marketing campaigns, are executed at the national level. Second, the Notifying Party submits that all major retail suppliers of AV services are active at the national level, and the activity of the main market players covers almost the entire territory of Poland. According to the Notifying Party, in areas where there is no reliable fixed infrastructure, at least two satellite operators are available.[87] Therefore, in view of the continued presence of multiple technologies and operators at the national level, the Notifying Party considers that the geographic market for the retail provision of AV services to end-customers is national in scope.

(60) While some respondents noted that in some cases, the market could be considered regional, due to the fragmented cable network coverage in Poland and levels of competition that vary throughout individual regions in Poland,[88] a majority of respondents to the market investigation indicated that the geographic scope of the

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83 Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 89; Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 139; In Commission decision of 15 April 2013 in case M.6880 – *Liberty Global/Virgin Media*, paragraphs 51 to 54, the Commission found a respective geographic market to be national in scope or, at most, to comprise the United Kingdom and Ireland; Commission decision of 21 December 2011 in case M.6369 – *HBO/Ziggo/HBO Nederland*, paragraph 42; Commission decision of 21 December 2010 in case M.5932 – *NewsCorp/BSkyB*, paragraph 110; In Commission decision of 25 January 2010 in case M.5734 – *Liberty Global Europe/Unitymedia*, paragraph 40, the Commission found the market for the retail supply of Pay TV services to be national in scope; In Commission decision of 25 June 2008 in case M.5121 – *News Corp/Premiere*, paragraph 27, the Commission found the respective markets for the retail supply of Pay TV to be national in scope; In Commission decision of 26 February 2007 in case M.4521 – *LGI/Telenet*, paragraph 25, the Commission considered the respective market for the retail supply of audio-visual services to be either limited to the coverage of each cable operator and national in case other platforms are included but ultimately left the exact geographic market definition open.

84 Commission decision of 26 August 2020 in case M.9299 – *Discovery/Polsat/JV*, paragraph 86.

85 Commission decisions of 6 November 2019 in case M.8785 - *Disney/Fox*, recital 100; of 6 February 2018 in case M.8665 - *Discovery/Scripps*, paragraph 21; of 15 June 2018 in case M. 8861 - *Comcast/Sky*, paragraph 63; of 7 April 2017 in case M.8354 - *Fox/Sky*, paragraph 106; of 24 February 2015 in case M.7194 - *Liberty Global/Corelio/W&W/De Vijver Media*, paragraph 139; Commission decision of 26 February 2007 in case M.4521 – *LGI/Telenet*, paragraph 25; Commission decision of 15 June 2004 in case M.3355 – *Apollo/JPMorgan/Primacom*, paragraph 10.

86 Notifying Party's response to RFI 5, question 5.

87 Form CO, paragraph 128. In response RFI 5, question 5, the Notifying Party explained that "*Cyfrowy Polsat and Canal+ […] provide TV services based on satellite technology, which by its very nature is not subject to any territorial limitations. There are also no territorial limitation to the activities of the actively growing OTT players (Netflix, Amazon Prime, Viaplay) and IPTV operators (including Orange, the incumbent, and Netia, which are increasingly active in this field, as well as P4).*" In addition, "*all major cable-TV operators, including UPC, Vectra, and Inea operate at the national level and have operations in most major metropolitan areas throughout Poland.*"

88 Replies to Q2 to Competitors MVNOs, question 22.

market for the retail supply of AV services in the present case is national, in particular given that the pricing policies of AV service providers are predominantly national.[89]

(61) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographic market for the retail supply of AV services is national in scope, covering Poland.

4.5. Retail supply of multiple play services

(62) The term "multiple play" relates to product offerings comprising two or more of the following services provided to retail consumers on the basis of a single or multiple contracts by the same provider: mobile telecommunications services, fixed telephony services, fixed internet access, and audio-visual services. Multiple play offers comprising two, three or four of these services are referred to as dual play ("2P"), triple play ("3P") and quadruple play ("4P") respectively.[90]

(63) Three of the four services, namely fixed telephony services, fixed internet access, and AV services, are fixed services as they are provided over a fixed network such as cable, copper or fibre infrastructure. Multiple play offers comprising any combination of two or more of these fixed services without a mobile component are referred to as "fixed multiple play" products. Multiple play offers comprising one or more of these fixed services in combination with a mobile component are referred to as "fixed-mobile multiple play" or "fixed-mobile convergence" ("FMC") products. FMC products may involve a single mobile subscription or more than one mobile subscription combined with the fixed services.[91]

4.5.1. Product market definition

4.5.1.1. Previous Commission decisions

(64) In its previous decisions, the Commission considered, but ultimately left open, the question whether there exist one or more multiple play markets which are distinct from each of the underlying individual telecommunications services.[92] Due to different services being delivered over different infrastructures (fixed for 2P and 3P or fixed and mobile for 4P), that can be included in the different multiple play bundles, the Commission also noted that instead of one possible market for multiple play, there could be several multiple play markets: a market for fixed bundles (dual play and triple play) and another separate market for FMC bundles. The possibility

89 Replies to Q1 to Competitors MNOs, questions 22, 22.1 and 23; and Replies to Q2 to Competitors MVNOs, questions 21, 21.1 and 22.

90 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 146.

91 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 147.

92 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 152 to 161; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 108; Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 74 to 98; Commission decision of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recitals 72 to 86; Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recitals 130 to 132.

for several mobile subscriptions to be included in an FMC bundle provides for potential additional differentiation.[93]

4.5.1.2. The Notifying Party's view

(65) The Notifying Party submits that no separate markets exist for multiple play bundles (whether fixed-mobile or fixed only), notably due to demand-side substitutability between multiple play offerings and their separate component services. Indeed, the Notifying Party argues that customers are able to "unbundle" their purchases and do regularly purchase communications services that can be included in a multiple play bundles on a standalone basis. The Notifying Party notes that the take up of fixed-mobile bundles in Poland is in any event relatively limited (17% in 2019) – in particular compared with certain other European markets (e.g., 44% in Belgium, 39% in the Netherlands, 45% in Portugal and 76% in Spain).[94]

(66) In light of the Parties' respective bundle portfolios and of the rationale of the Transaction, the Notifying Party submits that, should a multiple-play market be defined as a separate market, the relevant segmentation would be between (i) fixed bundles, and (ii) fixed-mobile bundles.[95]

(67) In any event, the Notifying Party considers that in light of the Parties' limited presence on this market, the exact product market definition can be left open in the present case, as the Transaction cannot raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.5.1.3. The Commission's assessment

(68) The majority of the respondents to the market investigation have indicated that Polish customers favour multiple-play offers over standalone services[96], mainly due to the lower price of bundled offers.[97] Some respondents have indicated that contracts signed with providers of multiple-play services may represent a barrier to switching to standalone services.[98] At the same time, one of the main factors in selecting services on the telecommunications market in Poland is the price and, considering that bundled services are generally cheaper than stand-alone services, customers may be reluctant to switch from a bundle to a standalone offer, regardless of any existing barrier.[99] The replies provided to the market investigation, however, remain mixed.

(69) In fact, respondents to the market investigation have also indicated that bundled offers are sold both as "hard" and as "soft" bundles, depending on the providers.[100]

93 Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 107.

94 Form CO, paragraph 135 and Annex 6.3.5, page 19.

95 Form CO, paragraph 138.

96 Replies to Q1 to Competitors MNOs, question 24 and Replies to Q2 to Competitors MVNOs, question 23.

97 Replies to Q2 to Competitors MVNOs, question 23.1.

98 Replies to Q1 to Competitors MNOs, question 25.1. and Replies to Q2 to Competitors MVNOs, question 24.1.

99 Replies to Q1 to Competitors MNOs, question 25.1.

100 Replies to Q1 to Competitors MNOs, question 26 andReplies to Q2 to Competitors MVNOs, question 25. Multiple play services can be sold as "soft bundles", where a discount is offered to consumers only when they subscribe to multiple eligible services, and therefore where customers are entirely free to discontinue part of the bundle but

Soft bundles leave customers free to choose any set of services, including standalone solutions, with no additional restriction, but considering only the most favourable price. The market investigation, therefore, is not conclusive as to whether there are separate markets for standalone services and multiple-play service or, rather, a single market exists.

(70) In light of the above, the Commission considers that the question whether there is a separate product market(s) for the retail supply of multiple-play services, as opposed to a single market including both bundled offers and standalone services, and whether there are separate markets for fixed bundles and FMC bundles can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market under any possible product market definition.

4.5.2. Geographic market definition

(71) In its previous decisions, the Commission considered that the geographic scope of any possible retail market for multiple-play services would be (either regional or) at most national in scope.[101] In a recent decision concerning Poland, the Commission concluded that the retail market for multiple-play services is national in scope.[102]

(72) The Notifying Party considers that this market and its potential segments would be national in scope.[103]

(73) Some respondents to the market investigation have indicated that, although the major providers are active nation-wide, there are some providers who are market leaders only at local level and that, in some cases, competition takes place within the geographic scope of a given infrastructure.[104] The majority of the respondents to the market investigation, however, has indicated that the hypothetical market for multiple-play services is indeed national.[105]

(74) In particular, a MVNO has explained "*(...) the same competitors are active throughout the whole of the country and they account for the vast majority of the market. The pricing policies of providers are predominantly national. Operators' offers usually are not addressed per region (...). Entities wishing to conduct telecommunications activities, both standalone and via multiple play services, are*

might lose the discount. Multiple play services can also be sold as "hard bundles", where customers cannot opt-out of one service of the bundle and must terminate the entire multiple-play offer and re-subscribe to another offer.

101 In Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 232, Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 109 to 112 and Commission decision of 19 May 2015 in Case M.7421 – *Orange/Jazztel*, recitals 89 to 90, the respective market investigation suggested such possible markets would be national in scope; In Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 132, the Commission found the geographic market to be the footprint of the operator in question; In Commission decision of 20 September 2013 in Case M.6990 - *Vodafone/Kabel Deutschland*, paragraphs 263 to 265, the Commission considered such possible markets for bundles would be national in scope; In Commission decision of 16 June 2011 in Case M.5900 - *LGI/KBW*, paragraphs 183-186, the Commission considered such possible markets to be at most national in scope.

102 Case M.9299 – *Discovery/Polsat/JV*, paragraph 117.

103 Form CO, paragraph 138.

104 Replies to Q1 to Competitors MNOs, question 28.1. and Replies to Q2 to Competitors MVNOs, question 27.1.

105 Replies to Q1 to Competitors MNOs, question 27. and Replies to Q2 to Competitors MVNOs, question 26.

required to obtain a number of permits authorizing them to take up and conduct business activities only in the territory of Poland".[106]

(75) In light of the above, the Commission considers that, for the purpose of this Decision, any potential market for multiple-play services could be considered national in scope.

4.6. Wholesale provision of TV channels (acquisition side)

4.6.1. Product market definition

(76) In the wholesale market for TV channels, TV broadcasters supply linear channels that retail TV providers either purchase or carry in order to provide audio-visual services to end-users. In particular, TV broadcasters package the TV content that they have acquired or produced in-house in order to create linear TV channels. Subsequently, retailers of TV services incorporate those TV channels in their TV offerings to final viewers.[107]

4.6.1.1. Previous Commission decisions

(77) In its previous decisions, the Commission has identified a market for the wholesale supply and acquisition of TV channels.[108] Within that market, the Commission has identified separate product markets for: (i) FTA TV channels; and (ii) Pay TV channels[109] and more recently left the exact product market definition open.[110]

(78) In addition, the Commission has found that within the Pay TV channels market, there are different segments[111] or, more recently, product markets[112] for (i) premium Pay TV channels and (ii) basic Pay TV channels. In certain cases, the Commission has considered FTA channels to be part of the market for basic Pay TV channels.[113]

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106 Replies to Q2 to Competitors MVNOs, question 27.1.

107 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 267.

108 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 269 to 276; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraphs 99 to 115; Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraphs 76 to 85; Commission decision of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraphs 30 to 41.

109 Commission decision of 24 February 2015 in case M.7194 - *Liberty Global/Corelio/W&W/De Vijver Media*, recital 101; Commission decision of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 41.

110 Commission decision of 6 October 2020 – *PPF Group/Central European Media Enterprises*, paragraph 39; Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 273; In Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 111, the Commission left open the question as to whether FTA and Pay TV belong to separate markets, because of peculiarities of the Dutch TV market; In Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraph 85, the Commission left open the question whether the market for the wholesale supply of TV channels should be further segmented among FTA, basic Pay TV and premium Pay TV. In Commission decision of 18 August 2014 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 91, the Commission considered that wholesale supply of premium Pay TV constitutes a product market that is separate from the wholesale supply of basic Pay TV/FTA channels.

111 Commission decision of 18 August 2014 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 89.

112 Commission decision of 12 November 2019 in case M.9064 - *Telia Company/Bonnier Broadcasting Holding*, recital 157; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 113.

113 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 273; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 111; Commission

(79) Further, the Commission has also examined a number of other potential segmentations, including: (i) by genre or thematic content (such as films, sports, news, youth, and others);[114] (ii) between linear and non-linear;[115] and (iii) between the different means of infrastructure used to deliver channels to the viewer (cable, satellite, terrestrial or IPTV),[116] but ultimately left the exact market definition open. In the recent *Discovery/Polsat/JV* decision involving the Polish market,[117] the Commission left the market definition open.

4.6.1.2. Notifying Party's views

(80) The Notifying Party considers that, in line with the Commission's findings in *Discovery/Polsat/JV* decision, the definition of this market and its potential sub-segments can be left open, as, regardless of the market definition ultimately retained, the Transaction cannot give rise to competition concerns in relation to the wholesale market for the supply of TV channels (and all the more so as the Parties are only active on the demand side of the market and hold a very limited purchase position).[118]

4.6.1.3. The Commission's assessment

(81) In light of the findings as set out in the recent Commission decision *Discovery/Polsat/JV*,[119] and in line with the Notifying Party's arguments, the Commission considers that the relevant product market, for the purposes of this Decision, is the market for wholesale TV channels (including ancillary services, such as catch-up services, and covering all types of distribution infrastructures).

(82) In addition, the Commission considers that the questions whether FTA channels belong to a market distinct from that for pay TV channels, whether pay TV channels should be divided in basic pay TV channels and premium pay TV channels or further divided by genre can be left open in the present case, as the Transaction does not

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decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraph 80, 81 and 85; Commission decision of 18 August 2014 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recitals 90 and 91.

114 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 273; Commission decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 112; Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraphs 82 to 85; Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 92; Commission decision of 21 December 2010 in case M.5932 – News Corp/BskyB, paragraph 81; Commission decision of 26 August 2008 in case M.5121 – *News Corp/Premiere*, paragraph 35; Commission decision of 18 July 2007 in case M.4504 – *SFR/Télé 2 France*, recitals 41 and 42; Commission decision of 2 April 2003 in case M.2876 – *Newscorp/Telepiù*, recitals 74 to 76.

115 Commission decision of 18 August 2014 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 94.

116 In Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 273, the Commission left such question open for Romania and discussed it further for Germany in section VIII.2.11; In Commission decision of 30 May 2018 in case M.7000, *Liberty Global/Ziggo*, paragraph 114, the Commission considered that at least cable, IPTV over DSL, fiber and possibly satellite (DTH) are part of the same product market; In Commission decision of 7 April 2017 in case M.8354 – *Fox/Sky*, paragraphs 84 and 85 Commission decision of 24 February 2015 in case M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media*, recital 98 and Commission decision of 18 July 2007 in case M.4504 – *SFR/Télé 2 France*, recital 44, the Commission left a segmentation by infrastructure open.

117 Commission decision of 26 August 2020, in case M.9299, *Discovery/Polsat/JV*, paragraph 67.

118 Notifying Party's response to RFI 4, question 6.

119 Commission decision of 26 August 2020, in case M.9299, *Discovery/Polsat/JV*, paragraph 67

raise serious doubts as to its compatibility with the internal market, under any plausible market definition.

4.6.2. Geographic market definition

(83) In its previous decisions, the Commission considered that the wholesale supply and acquisition of TV channels is either national in scope or comprises a broader (or narrower) linguistically homogeneous area.[120]

(84) The Notifying Party argues that the definition can be left open, as, regardless of the market definition ultimately retained, the Transaction cannot give rise to competition concerns in relation to the wholesale market for the supply of TV channels.[121]

(85) In light of the findings as set out in the recent Commission decision *Discovery/Polsat/JV*,[122] and in line with the Notifying Party's arguments, the Commission considers that the geographic scope of the market for the purposes of this decision is national.

4.7. Wholesale supply of access and call origination services on mobile networks

(86) MNOs provide wholesale access and call origination services which enable operators without their own network, namely MVNOs, to have access to one or more of the MNOs' networks in order to provide mobile telecommunications services to end customers. "Full" MVNOs maintain their own core infrastructure and use MNOs only for access to a radio network. By contrast, "light" MVNOs do not have their own infrastructure and rely entirely on the infrastructure of an MNO.

4.7.1. Product market definition

(87) In its previous decisions,[123] the Commission considered network access and call origination to be part of the same product market as both services are considered as key elements required for non-MNOs to be able to provide retail mobile telecommunications services and are generally supplied together.

(88) The Notifying Party considers that the relevant product market to be taken into account is the market for the wholesale supply of access and call origination services on mobile networks.[124]

(89) In light of the findings as set out in the recent Commission decision *Orange/Telekom Romania Communications*,[125] and in line with the Notifying Party's arguments, the

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120 Commission decision of 21 December 2010 in case M.5932 – *NewsCorp/BSkyB*, paragraphs 72 to 75; Commission decision of 2 April 2003 in case M.2876 – *Newscorp/Telepiù*, recitals 62 and 63.

121 Notifying Party's response to RFI 4, question 6.

122 Paragraphs 70-71.

123 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 248; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 185 to 187; Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 296 to 300; Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 77 to 79; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 156; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 61 to 63; Commission decision of 1 March 2010 in case M.5650 – *T Mobile/Orange UK*, paragraphs 27 to 30; Commission decision of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 15.

124 Form CO, paragraph 157.

Commission considers, for the purpose of this Decision, the relevant product market to be the market for the wholesale supply of access and call origination services on mobile networks.

4.7.2. *Geographic market definition*

(90) In its previous decisions,[126] the Commission has concluded that the geographic scope of the market for the wholesale supply of access and call origination services on mobile networks is national due to regulatory barriers.

(91) The Notifying Party considers that the relevant geographic market for the wholesale supply of access and call origination services on mobile networks corresponds to the territory of Poland.

(92) The results of the market investigation did not provide reasons to depart from the Commission's decisional practice.

(93) In light of the findings as set out in the recent Commission decision *Orange/Telekom Romania Communications*,[127] and in line with the Notifying Party's arguments, the Commission considers, for the purpose of this Decision, the relevant geographic market for the wholesale supply of access and call origination services on mobile networks to be national in scope, covering Poland.

4.8. Wholesale market for mobile and fixed call termination services

(94) Call termination is the service provided by a network operator on the supply side to other network operators on the demand side, whereby a call originating in a demand side operator's network is delivered to a user in the supply side operator's network. This service is required by every originating operator, as it is necessary for its customers to be able to communicate with the customers located on other networks. Call termination is therefore a wholesale service that is resold or used as an input for the provision of downstream retail telephony and mobile services.[128] In previous decisions, the Commission has identified relevant markets for the provision of wholesale call termination on mobile and fixed networks.[129]

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125 Commission decision on 28 July 2021, in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 197.

126 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 249 to 251; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 188 to 190; Commission decision of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 302 to 305; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 74 to 77.

127 Commission decision on 28 July 2021, in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 201.

128 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 35 to 36.

129 Accordingly, the 2003 Commission's Recommendation on the relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services) has distinguished call termination on individual networks, mobile or fixed as separate markets. A distinction between termination on these networks is further justified by the characteristics of the terminals themselves such as the different functionalities and the mobility guaranteed by the mobile service.

4.8.1. Wholesale market for mobile call termination services

4.8.1.1.Product market definition

(95) In previous decisions, the Commission has concluded that each individual network (both in mobile and in fixed networks) constitutes a separate market for termination, as there is no substitute for call termination in each individual network as the intended recipient can only be reached by the operator transmitting the outbound call through the operator of the network to which the recipient is connected.[130] Therefore, each individual network, either fixed or mobile, constitutes a separate market. [131]

(96) The Notifying Party, in accordance with the Commission's decisional practice, does not object to this product market definition.[132]

(97) In light of the findings as set out in *Iliad / Play Communications*[133], and in line with the Notifying Party's arguments, the Commission considers for the purposes of this Decision that wholesale call termination services on each individual mobile network constitutes a separate product market.

4.8.1.2.Geographic market definition

(98) In previous decisions, the Commission considered that the market for wholesale mobile call termination services is national in scope, as each wholesale market for call termination corresponds to the dimensions of the operator's network and is limited to the national territory of the operator's network.[134] This is primarily due to regulatory barriers as the geographic scope of a network licence is, in principle, limited to areas that do not extend beyond the borders of a Member State.

(99) The Notifying Party does not object to this geographic market definition.[135]

(100) In light of the findings as set out in *Iliad / Play Communications*[136], and in line with the Notifying Party's arguments,., the Commission considers for the purposes of this Decision that the geographic market for wholesale mobile call termination services is national in scope.

130 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 42 to 44; Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 190 to 193; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 206 to 208; Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraphs 47 to 48; Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraphs 36 and 37.

131 Commission decision of 27 November 2018 in case M.8792, *T-Mobile NL/Tele2 NL*, para. 259; Commission decision of 15 July 2019 in case M.9370, *Telenor/DNA*; Commission decision of 27 July 2018 in case M.8883, *PPF/Telenor Target Companies*; Commission decision of 12 December 2012 in case M.6497, *Hutchison 3G Austria/Orange Austria*, para. 68.

132 Form CO, paragraph 149.

133 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47

134 Commission decisions: of 27 November 2018 in case M.8792, *T-Mobile NL/Tele2 NL*, para. 263; of 15July 2019 in case M.9370, *Telenor/DNA*, para. 73; of 27 July 2018 in case M.8883, *PPF/Telenor Target Companies,* para. 28; of 3 August 2016 in case M.7978, *Vodafone/Liberty Global/Dutch JV*, para 196.

135 Form CO, paragraph 148.

136 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47.

4.8.2. *Wholesale market for fixed call termination services*

4.8.2.1.Product market definition

(101) As in the case of wholesale mobile call termination services, in past decisions, the Commission has established that there are no potential substitutes for call termination on each fixed network since the operator transmitting the call can reach the intended recipient only through the operator of the network to which the recipient is connected.[137]

(102) Further, in previous decisions, the Commission considered wholesale call termination services on fixed network to be a distinct market from the market for the wholesale supply of international voice carrier services.[138]

(103) The Notifying Party, in accordance with the Commission's decisional practice, does not object to this product market definition.[139]

(104) In light of the findings as set out in *Iliad / Play Communications*[140], and in line with the Notifying Party's arguments, the Commission considers for the purposes of this Decision that the relevant product market is the market for wholesale supply of call termination services on fixed networks, distinct from the market for the wholesale supply of call termination services on mobile networks. Consequently, for the purposes of this Decision, as regards wholesale call termination services, termination on each individual fixed network constitutes a separate product market.

4.8.2.2.Geographic market definition

(105) In previous decisions, the Commission considered that the geographic market for the wholesale supply call termination services in fixed networks is national in scope.[141]

(106) The Notifying Party does not object to this geographic market definition.[142]

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137 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 42 to 44; Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 190 to 193; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 206 to 208; Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraphs 47 to 48; Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraphs 36 and 37.

138 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets,* recitals 217 to 219, Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 131 to 133; Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 26. In Commission decision of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, paragraphs 75 to77, the Commission considered that, in the specific circumstances of the case, the exact definition of the relevant market for the provision of wholesale domestic call transit services of fixed networks could be left open, as the transaction did not give rise to competition concerns on the basis of any alternative plausible market definitions.

139 Form CO, paragraph 153.

140 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47

141 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47; Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 195; Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 210; Commission decision of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 121; Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 128; Commission decision of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 48; Commission decision of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraph 38.

142 Form CO, paragraph 152.

(107) In light of the findings as set out in *Iliad / Play Communications*[143], and in line with the Notifying Party's arguments, the Commission considers for the purposes of this Decision that the geographic market for wholesale fixed call termination services is national in scope.

5. COMPETITIVE ASSESSMENT

5.1. Identification of affected markets

5.1.1. Horizontally affected markets

(108) The Transaction gives rise to the following horizontally affected markets:

- Retail market for mobile telecommunication services in Poland;
- Retail market for fixed telephony services in Poland, with respect to the segment for residential customers;
- Retail market for fixed internet access services: (i) on UPC Polska's network footprint; (ii) on regional markets (Małopolskie, Mazowieckie and Pomorskie); and (iii) in Poland with respect to (a) the segment for larger business and government customers and (b) the segment for cable as distribution technology;
- Retail market for AV services: (i) on UPC Polska's network footprint; and (ii) on regional markets (Mazowieckie, Pomorskie and Śląskie);
- Potential market for multiple play services in Poland, with respect to the segment for fixed bundles;
- Wholesale provision of TV channels (acquisition side) in Poland, with respect to the segment for premium pay TV sports channels.

5.1.2. Vertically affected markets

(109) In addition, the Transaction gives rise to the following vertically affected markets:

- Upstream market for wholesale supply of access and origination services on mobile networks in Poland (Iliad/P4) with the downstream market for retail supply of mobile telecommunication services in Poland (UPC Polska);
- The upstream market for wholesale provision of call termination services on its fixed network in Poland (UPC Polska) with the downstream markets for retail provision of mobile telecommunications services in Cyprus, France, Italy, Ireland, Malta, and Poland (XNG);
- The upstream markets for wholesale provision of call termination services on its fixed network in (i) Poland (UPC Polska), and (ii) in Cyprus, France, Ireland, and Malta (XNG) with the downstream markets for retail provision of fixed

143 Commission decision of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47

telephony services (i) in Cyprus, France, Ireland, and Malta (XNG); and (ii) in Poland (both UPC Polska and XNG).

- The upstream market for wholesale provision of call termination services on mobile networks in Cyprus, France, Ireland, Italy, Malta and Poland (XNG) with the downstream markets for retail provision of fixed telephony services in Poland (UPC Polska).

(110) The Commission considers that there are no new conglomerate effects resulting from the Transaction.[144] The Commission notes that both Parties already offer all telecommunications and AV services that are typically offered in bundles to end-customers and the Parties already offer fixed-mobile convergent bundles:

- P4 relies on Vectra's fixed network to offer all three components of the fixed part of a fixed-mobile bundle (fixed telephony, fixed internet and TV) and on its own mobile network to provide the mobile part.

- UPC Polska relies on its own fixed network to offer all three components of the fixed part of a fixed-mobile bundle (fixed telephony, fixed internet and TV) and on P4's mobile network to provide the mobile part.

5.2. Assessment of horizontal non-coordinated effects

5.2.1. Introduction

(111) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. In this respect, a merger may entail horizontal and/or vertical effects.[145]

(112) Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. The Commission appraises such effects in accordance with the Horizontal Merger Guidelines.[146]

(113) The Horizontal Merger Guidelines describe horizontal non-coordinated effects as follows: "*A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive*

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144 The Transaction does not result in affected conglomerate relationships between the Parties. The Parties' combined market shares are below 30% in all closely related markets (retail mobile telecommunication services, retail fixed telephony, retail fixed internet access and retail AV services).

145 Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. A concentration may involve both types of effects.

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

pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market".[147]

(114) Generally, a merger that gives rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening of the dominant position of a single firm post-merger.

(115) However, under the substantive test set out in Article 2(2) and (3) of the Merger Regulation, mergers that do not lead to the creation or the strengthening the dominant position of a single firm may create competition concerns in oligopolistic markets. Indeed, the Merger Regulation recognises that in oligopolistic markets, it is all the more necessary to maintain effective competition.[148] This is in view of the more significant consequences that mergers may have on such markets. For this reason, the Merger Regulation provides that: "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.*"[149]

(116) Paragraph 24 of the Horizontal Merger Guidelines, which sets out the economic rationale underlying non-coordinated anti-competitive effects in horizontal mergers, states that a merger may significantly impede effective competition in a market by removing important competitive constraints on one or more firms. This paragraph furthermore clarifies that the most direct effect of the merger will be the loss of competition between the merging firms. In order to assess whether a notified merger will result in a significant impediment of effective competition on the basis of non-coordinated effects, the Commission therefore needs to analyse primarily the extent of the competitive constraint imposed pre-merger by each of the merging parties on each other. Paragraph 24 of the Horizontal Merger Guidelines also clarifies that the removal of the rivalry between the parties may have consequences on the other players, who may find it profitable to increase their prices. The ultimate effect would thus typically be price increases by the merging parties but also by competitors in the relevant market.

(117) The Commission carries out an overall assessment of the likely effects of the Transaction arising from the elimination of important competitive constraints, taking into consideration the overall body of evidence in its file. The conclusion that a transaction leads to a significant impediment of effective competition is reached taking into account the degree to which all the relevant factors, including the ones listed in paragraphs 27 - 38 of the Horizontal Merger Guidelines, are present in the case under consideration.

147 Horizontal Merger Guidelines, paragraph 24.

148 Merger Regulation, recital 25.

149 Merger Regulation, recital 25. Similar wording is also found in paragraph 25 of the Horizontal Merger Guidelines. See also Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 113; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 179; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 88.

(118) The Horizontal Merger Guidelines list a number of factors, which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger. However, not all of these factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list.[150]

(119) Among the factors listed in the Horizontal Merger Guidelines are: the large market shares of the merging firms; the fact that the merging firms are close competitors; the limited possibilities for customers to switch suppliers; the fact that the merged entity would be able to hinder expansion by competitors; and the fact that the merger would eliminate an important competitive force.[151]

(120) As regards the elimination of an important competitive force, according to the Horizontal Merger Guidelines, some firms have more of an influence on the competitive process than their market share would suggest. A merger involving such a firm may change the competitive dynamics in a significant anticompetitive way, in particular in a market that is already concentrated.[152] In this respect, paragraph 37 of the Horizontal Merger Guidelines refers to the example of a firm that is a recent entrant on the market, and is expected to exert significant competitive pressure in the future. However, there may be other situations where a merger may also lead to significant non-coordinated effects by removing an important competitive force.

(121) Finally, the Horizontal Merger Guidelines describe a number of factors, which could counteract the harmful non-coordinated effects of the merger on competition, that is, the likelihood of buyer power, entry, efficiencies and the fact that one of the merging parties is a failing firm ("failing firm defence").[153]

5.2.2. *Horizontal non-coordinated effects in the market for the retail supply of mobile telecommunication services*

5.2.2.1. The Notifying Party’s view

(122) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the retail market for the supply of mobile telecommunication services in Poland for the following reasons.[154]

(123) First, the Notifying Party submits that the market share increment resulting from the Transaction is extremely limited ([0-5]% at most, regardless of the segment considered), as UPC Polska has only a *de minimis* presence in the mobile retail market.

(124) Second, the Notifying Party argues that UPC Polska does not own any mobile infrastructure or spectrum and is one of the smallest Polish MVNOs currently active on the market. UPC Polska is predominantly a fixed player, and is active on the market for retail mobile telecommunications services as a light MVNO, dependent on P4 for wholesale access. UPC Polska’s business focuses on marketing mobile

150 Horizontal Merger Guidelines, paragraph 26.

151 Horizontal Merger Guidelines, paragraphs 27 et seq.

152 Horizontal Merger Guidelines, paragraph 37.

153 Horizontal Merger Guidelines, paragraphs 64-91.

154 Form CO, paragraphs 206-223.

services to its fixed customer base, and has until recently[155] been offering mobile subscriptions only as an add-on to its fixed-mobile multiple play bundle, *i.e.*, only to its existing or new customers of fixed services.[156]

(125) The Notifying Party further argues that the Parties are not close competitors, because P4 is an established MNO, with its own network infrastructure, while UPC Polska is a small MVNO hosted on such network. For the same reason, UPC Polska has less autonomy in controlling the quality of its services,[157] as it has to rely on P4, as its wholesale network provider, for any network-related issues.

(126) Finally, the Notifying Party argues that Polish mobile users are very price sensitive. The Polish market for retail supply of mobile telecommunications services is characterised by a very high level of price competition resulting in prices in Poland being among the lowest in the European Union.[158]

5.2.2.2.The Commission's assessment

(127) The Commission considers that the Transaction does not raise horizontal competition concerns in the market for retail supply of mobile telecommunications services in Poland for the following reasons.

(128) First, while both Parties are active in the retail market for mobile telecommunications services, the Commission observes that the increment brought about by UPC Polska to P4 is negligible ([0-5]% on the overall market for retail mobile services and [0-5]% at most, regardless of the market segment considered).

(129) Second, the Parties' combined market shares on the retail mobile telecommunications market and its potential segments will be limited. The Parties will have a combined market share of slightly above 25% ([20-30]% in volume or value in 2020) on the overall retail market and its potential segments (i) for private customers (approx. [20-30]% in volume and value) and (ii) post-paid customers ([20-30]% in volume and approx. [20-30]% in value).[159] [160] The Parties' combined share on a potential segment for business customers will be below 25%. On a retail supply of mobile telecommunications services at the network level, Iliad's P4 market

155 UPC Polska launched a stand-alone mobile offer on 5 November 2021, i.e., on the date when UPC Polska introduced 5G (NSA) plans. The details of the plans offered by UPC Polska are set out at: https://www.upc.pl/telefon/uslugi-komorkowe/. UPC Polska's stand-alone mobile services are available only in UPC Polska's fixed footprint.

156 At the end of 2020, UPC Polska had […] mobile subscribers, among which only […] had subscribed to standalone offers. Form CO, paragraph 667. In addition, the Notifying Party submits that mobile stand-alone services are available only in UPC Polska's fixed footprint.

157 Form CO, paragraph 211.

158 See Annex 4 of the Form CO, slide 3; Orange Polska's Integrated report for 2020, page 48 (available at https://www.orange-ir.pl/wp-content/uploads/2021/06/Raport-zintegrowany-2020-en.pdf); and Cyfrowy Polsat Annual Consolidated Report for the financial year ended December 31, 2020, page 55 (available at https://grupapolsatplus.pl/sites/default/files/documents/2021/polsat_group_report_2020.pdf).

159 The Parties' activities do not overlap with respect to the potential segment for pre-paid customers, as UPC Polska does not offer any pre-paid mobile services.

160 The Notifying Party submitted that it is unable to provide market share estimates on the following retail supply of mobile telecommunication services market segments: (i) high-value vs low-value customers; and (ii) SIM-only v. handset segments. However, the Notifying Party considered that shares for these segments should correspond to more or less [0-5]% of the market shares on the overall market for the retail supply of mobile telecommunication services.

share is slightly above 25%.[161] In all cases, therefore, the Parties' combined market share is either around or slightly above the 25% threshold which presumes that the Transaction is compatible with the internal market.[162]

(130) Third, the Transaction will not affect the number of MNOs active on the market, which will remain four (Orange, Polkomtel, T-Mobile and P4).[163] The market shares of the merged entity's three main competitors will be around or in excess of 20%, both in volume and in value: Orange ([20-30]% by volume, [20-30]% by value); Polkomtel ([20-30]% by volume, [20-30]% by value); and T-Mobile ([10-20]% by volume, [20-30]% by value) and approximately 80 MVNOs will continue to compete with the Parties.[164]

(131) Fourth, based on the results of the market investigation, the Commission considers that the Parties do not compete closely on the market. When asked to rank the best mobile services providers on a number of parameters, none of the respondents has ranked the Parties close to each other.[165] The Commission considers that, in general, the perceived distance between the Parties reflects the general difference existing between MNOs and MVNOs, which excludes close competition between the Parties, but not the fact that MVNOs compete with MNOs.[166] In fact, the results of the market investigation indicate that the Polish market is defined as "*very competitive*", where "*prices are the cheapest in Europe*".[167] In addition, the market investigation further indicates that the MVNOs, present in a large number in Poland, are able to compete with the MNOs,[168] and that Premium Mobile, Viking Mobile, Inea, and Vectra are the most successful MVNOs in recent years.[169]

(132) Fifth, the market investigation indicates that Polish users of retail mobile telecommunications services are very price sensitive.[170] Respondents to the market investigation, in fact, point out that Poland has one of the lowest mobile average revenue per user (ARPU) in the European Union as users' price sensitivity was and is still very high.[171] Users usually focus on price level and actively seek best offers in terms of costs.[172] A MVNO explained that "*Any information on a planned change in price, especially price increases, results in an increase in all types of contact from dissatisfied customers to the operator and a multitude of negative opinions on various forums and under articles in industry portals; for some subscribers, this*

161 The Notifying Party is unable to provide market shares estimates, based on a split between A-brand and B-brand for the four MNOs.

162 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), recital 32.

163 Although Aero2 owns spectrum and therefore qualifies as a MNO, Aero2 is controlled by Cyfrowy Polsat, the mother company of Polkomtel, and cannot therefore be considered an independent MNO.

164 In that respect, the global telecoms media and technology consultancy Analysys Mason reports that "*The mobile telecoms market is very competitive; each of the key operators surpasses 20% connection share.*", and that "*Four of them (Orange, Play, Polkomtel and T-Mobile) compete intensely, also with 80 virtual network operators (MVNOs)*". See Analysis Mason, Poland telecoms market report 2020 (Form CO, Annex 5.4.E), slide 3.

165 Reply to Q2 to Competitors MVNOs, question 28.

166 Reply to Q2 to Competitors MVNOs, questions 30 and 30.1.

167 Reply of a competitor to Q2 to Competitors MVNOs, question 29.

168 Reply to Q1 to Competitors MNOs, question 32. Reply to Q2 to Competitors MVNOs, question 30.

169 Reply of a competitor to Q2 to Competitors MVNOs, question 30.1.

170 Reply to Q1 to Competitors MNOs, question 33. Reply to Q2 to Competitors MVNOs, question 31.

171 Reply to Q1 to Competitors MNOs, question 33.1 and 37.1.

172 Reply to Q1 to Competitors MNOs, question 33.1.

accelerates the decision to change operator".[173] As a consequence, users frequently switch operators[174], with price being the main reason for switching.[175] The majority of the respondents to the market investigation has not identified any barriers to switching.[176]

(133) Sixth, while one of the respondents to the market investigation has raised a concern that the Transaction will result in growth of the market for multiple play services, at the expense of the solo services market, which will consequently shrink/decrease[177], the Commission considers that such concern is not merger-specific and ultimately amounts to an efficiency offense.

(134) According to that respondent, the Transaction will lead to a situation where 3 out of 4 MNOs would focus on convergent offers sales. They would then increase the prices of standalone services (in particular retail mobile services, retail fixed internet access services and retail audio-visual services) as a strategy to steer customers towards converged offers.[178]

(135) However, as the market investigation has indicated, Polish customers are already transitioning from standalone services to multiple-play services as the latter are already more convenient and cheaper than the former.[179] If anything, the Transaction might improve the economic efficiency of P4 and UPC Polska which, instead of offering multiple-play services based on wholesale access agreements (to fixed and mobile infrastructure respectively), will become a full-fledged convergent operator, with its own infrastructure and all the associated benefits, in terms of greater commercial flexibility and dynamism and direct control of quality and performance of the network.

(136) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a consequence of horizontal non-coordinated effects in the retail market for mobile telecommunications services.

5.2.3. *Horizontal non-coordinated effects in the market for the retail supply of fixed telephony services*

5.2.3.1. The Notifying Party's view

(137) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the retail market for the supply of fixed telephony services in Poland for the following reasons.

173 Reply by a MVNO to Q2 to Competitors MVNOs, question 31.1.

174 Reply to Q2 to Competitors MVNOs, questions 32 and 32.1.

175 Reply to Q2 to Competitors MVNOs, question 33.

176 Reply to Q1 to MNOs, question 36. Reply to Q2 to Competitors MVNOs, question 34.

177 Reply to Q1 to Competitors MNOs, question 66.

178 Reply to Q1 to Competitors MNOs, questions 67.1.1, 67.3.1 and 67.4.1.

179 Reply to Q2 to Competitors MVNOs, question 23.1. According to a respondent: "*Services purchased in bundles are preferred by customers mainly because of payment facilities (one invoice, one payment term) and price discounts compared to services purchased separately. Also important from the customer's point of view is the uniform termination date of contracts, enabling a possible change of supplier. An additional benefit is the ability to control the amount of tax credits or deductions for Internet access, telephone and non-deductible services.*"

(138) First, the Notifying Party argues that the Parties are not each other's closest competitors. UPC Polska focusses on the fixed telecommunication services, while P4 is predominantly a mobile player. P4 does not have any fixed network infrastructure in Poland and has only very limited presence in the fixed telecommunication services, based on a wholesale agreement with the cable operator Vectra.[180]

(139) Second, the Notifying Party argues that the importance and customer base of fixed telephony services in Poland is shrinking. Referencing recent reports of the UKE, the Notifying Party notes that the fixed telecommunications penetration rate has been declining steadily since 2016, with an average yearly drop above 10% between 2016 and 2020.[181] In 2020, the market decreased by 12% in volume (number of subscribers) and by 11% in value compared to the previous year.[182]

5.2.3.2.The Commission's assessment

(140) The Commission considers that the Transaction does not raise horizontal concerns in the market for retail supply of fixed telephony services for the following reasons.

(141) First, the Parties' combined market share on the overall market for the retail provision of fixed telephony services is low ([10-20]% in volume and [5-10]% in value in 2020, with marginal increments by P4). The Parties' combined market share will exceed 20% only in the segment of retail fixed telephony services for residential customers.[183] In any event, the Parties' combined market share on that potential market segment will remain modest ([20-30]%) in volume, or even lower when considering market shares in value ([10-20]%). Therefore, regardless of the market segmentation, the merged entity's combined market share is below the 25% threshold, which provides an indication that the Transaction is compatible with the internal market.[184]

(142) Second, in all market segments, the increment brought about by P4 is very limited (less than [0-5]% at most), due to P4's focus on the mobile telecommunications market.

(143) Third, on the overall market for fixed telephony services, as well as on the potential market segment for residential customers, Orange will remain the leading

180 Form CO, paragraph 236.

181 UKE, Report on the state of the telecommunications market in Poland in 2020 (Form CO, Annex 7.5.1.) (the "UKE 2020 report"), Chart 25. Form CO, paragraph 257.

182 UKE 2020 report (page 33) and UKE 2019 report (page 42).

183 On a potential segment for business customers, the Parties will have [0-5]% by volume and [0-5]% by value. The Notifying Party submitted that it was unable to provide market share estimates for the potential segments: local/national vs international fixed telephony services. However, in alternative to market shares, the Notifying Party provided the number of minutes for international calls with respect to (i) the outgoing fixed international calls in Poland (the Parties' combined share is [0-5]%) and (ii) the total outgoing fixed calls in Poland (the Parties' combined share is [10-20]%).

184 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, paragraph 18.

competitor, with market shares around or in excess of [50-60]% in volume and value (market shares in the range of [45-55]% in volume, [50-60]% in value).[185]

(144) Furthermore, the Commission notes that UKE has found that "*Fixed-line telephony services are becoming less popular among users of telecommunication services in Poland year on year.*"[186]; that "*In 2020, more than 3.1 million subscribers used fixed-line telephony services, 12% less than in the previous year.*"[187]; and that the penetration of fixed-line telephony services declines with each year.[188] In addition, UKE recognizes that Orange is a strong competitor on the market noting that, "*In 2020, almost half (46.9%) of the fixed-line telephony market, in terms of numbers of users, was still in the hands of Orange Polska*".[189]

(145) Finally, the Commission notes that it has not received any competition related complaints from the respondents to the market investigation regarding the market for the retail supply of fixed telephony services. In addition, a number of competing operators confirmed that the fixed telephony market in Poland and particularly its segment for residential customers is declining.[190]

(146) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a consequence of horizontal non-coordinated effects in the retail market for the supply of fixed telephony services.[191]

5.2.4. Horizontal non-coordinated effects in the market for retail supply of fixed internet services

5.2.4.1.The Notifying Party's view

(147) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the retail market for the supply of fixed internet services in Poland for the following reasons.

(148) First, the Notifying Party argues that P4 is a marginal supplier of fixed internet services ([0-5]% market share at most, when considering all plausible product markets) and that the market share increment on the market for the retail supply of fixed internet services is negligible. While UPC Polska is an established cable operator in Poland, P4 has only recently (2020) entered the market and serves a

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185 The Notifying Party estimates that competitors' market shares on the residential segment of the retail fixed telephony services deviate [0-5]% of the market shares for the overall market for the retail supply of fixed telephony services. Form CO, paragraph 249.

186 UKE 2020 report, page 33.

187 Ibid.

188 Ibid., page 34.

189 Ibid.

190 Replies to Q1 to Competitors MNOs, question 67.2. Replies to Q2 to Competitors MVNOs, question 67.2.

191 As to coordinated effects, the Commission considers that a number of factors make coordination unsustainable, and therefore unlikely. First, the market shares of the Parties and of the competitors remaining on the market are asymmetric, which makes it difficult for them to align their interests and reach a common strategy. In particular, Orange currently leads the Polish market for the retail supply of fixed telephony services with market share of [50-60]% (volume) and the Parties including the competing operators Netia, Vectra/Multimedia have strong incentives to challenge Orange's incumbent position. The cost structures and the commercial strategies of the market players therefore are likely to diverge. In addition, customers are price-sensitive and willing to switch and there are no significant barriers that would prevent them from switching operator.

limited amount of customers, through a wholesale agreement with the fixed operator Vectra.[192] The Notifying Party notes that, at the end of 2021, P4 provided fixed internet services to only approximately […] subscribers through its partnership with Vectra.[193] P4 thus remains a marginal supplier of fixed internet services. Given that P4 is dependent on the wholesale agreement with Vectra, it does not enjoy the same flexibility in relation to pricing of its fixed internet services as its competitors owning a fixed internet infrastructure. The Notifying Party considers that this hampers P4's ability to effectively compete on the retail market, execute promotions and more generally, respond to competitive challenges.[194]

(149) Second, the Parties do not compete closely. The Notifying Party submits that UPC Polska's and Vectra's networks through which P4 provides its services are largely complementary, as Vectra is present in a number of areas that UPC Polska is unable to serve.[195] In particular, the Notifying Party estimates that […] of Vectra's network is not overlapping with UPC Polska's network.[196]

(150) Furthermore, the Notifying Party refers to UKE's 2020 report, which notes that the market for fixed internet services in Poland is highly competitive and steadily growing.[197] In addition, the Notifying Party notes that the Polish fixed internet services market is one of the three national markets of fixed internet access services with the lowest prices in the EU in 2020.[198]

5.2.4.2. The Commission's assessment

(151) The Commission considers that the Transaction does not raise horizontal concerns in the market for retail supply of fixed internet services for the following reasons.

(152) First, the overall market for retail internet access in Poland is not affected by the Transaction, as the Parties' combined market shares are low ([10-20]% in volume and [10-20]% in value). The overlap between the Parties' activities leads to an affected market only if a distinct market segment for larger business and government customers in Poland is considered, where the Parties' combined market share in value exceeds 20% but remains modest ([20-30]%), while the market share in volume in 2020 is significantly lower ([10-20]%).[199] In any event, the increment

192 Form CO, paragraph 305.

193 For a revenue of approximately EUR […]. Form CO, paragraph 271.

194 Form CO, paragraph 272.

195 Form CO, paragraph 307.

196 Notifying Party's response to RFI 5, question 8.

197 UKE 2020 Report, page 8.

198 UKE 2020 Report, page 22.

199 In line with the Commission decision of 18 July 2019, case M.8864 – *Vodafone / Certain Liberty Global Assets*, paragraph 49, the Notifying Party's market share estimate for fixed internet services covers only the provision of subscriptions enabling customers to access the internet through a fixed telecommunications connection. (Notifying Party's response to RFI 7, question 1) As per prior Commission practice, a separate market for retail business connectivity exists that comprises large business and government customers. The retail market for business connectivity includes fixed telecommunications services purchased by large businesses, enterprises and public sector customers in order to provide data connectivity between multiple sites. The market for business connectivity in Poland is not affected by the Transaction, as the Parties' combined shares are well below 20% ([0-5]% in volume, [0-5]% in value). The discrepancy between the Parties' market shares in fixed internet services to large business and government customers, and business connectivity relates to the differences in the types of services provided to large business customers in these two markets. Business connectivity services include in particular: (i) broadband access for large business customers; (ii) retail leased lines; and (iii) VPN services. In addition,

brought about by P4 is negligible and well below [0-5]% in both value and volume. This assessment would not change if the market were segmented by distribution technology, notwithstanding UPC Polska's significant market share in the segment of internet access via cable ([40-50]% in volume and [30-40]% in value in 2020), where P4 has [0-5]% at most in volume and value.

(153) Second, the Parties are not close competitors. P4 is a recent entrant with a limited amount of customers and operating through a wholesale agreement with the fixed operator Vectra, while UPC Polska is an established cable operator focused on fixed internet and Pay AV services. The results of the market investigation confirmed that the Polish market for fixed internet services is fragmented and that the Parties' main competitors include the leading operator Orange, as well as other larger players (Vectra and Netia) and a number of smaller providers (the largest of which are Inea, Toya, Plus, and T-Mobile).[200] [201]

(154) Third, the overall market for fixed internet services, as well as the potential market segment for larger business customers and public authorities, hosts credible competitors in Poland, such as Orange ([20-30]% in volume and [20-30]% in value in 2020) and Multimedia/Vectra ([10-20]% in volume and [10-20]% in value in 2020).[202] Furthermore, the Commission notes that UKE reports that "*The internet access market in Poland is a highly competitive one, with a wide range of entrepreneurs and provided services*".[203] The assessment does not change, even when considering the market segment of internet access via cable, where Multimedia/Vectra is a significant competitor following closely behind the merged entity ([30-40]% in volume and [20-30]% in value in 2020). Moreover, as noted in paragraph 149 above, UPC's and Vectra's networks are largely complementary, and Vectra is present in a number of areas that UPC is unable to serve.[204] Post-Transaction, Vectra would thus remain a strong competitor to the merged entity, as well as any other operator that would have wholesale access to Vectra's fixed network in the future.[205]

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according to the Notifying Party, a very large number of internet service providers in Poland do not supply retail business connectivity services, while many operators active on the retail market for business connectivity services are not active on the market for the retail supply of fixed internet services (e.g., Exatel, ATM, TK Telekom or Emitel.). Similarly, only P4's subsidiary 3S offers business connectivity services, and [Description of P4's activity in the provision of fixed internet and retail business connectivity services.]. (Notifying Party's response to RFI 7, question 1)

200 Replies to Q1 to Competitors MNOs, question 39. Replies to Q2 to Competitors MVNOs, question 37.

201 Some respondents to the market investigation expressed concerns that the merged entity would restrict wholesale access to UPC Polska's fixed infrastructure to the detriment of UPC Polska's competitors. However, UPC Polska is currently not providing wholesale access to its fixed network. Therefore, any concerns regarding UPC Polska's wholesale access are not merger-specific. In addition, the Notifying Party confirmed it is considering (following the closing of the Transaction) [Iliad's post-transaction plan as regards UPC Polska's network.]. See Notifying Party's response to RFI 5, question 10.

202 The Notifying Party estimates that competitors' market shares on the business segment of the retail fixed internet services deviate [0-5]% of the market shares for the overall market for the retail supply of fixed internet services. Form CO, paragraph 288.

203 UKE 2020 Report, page 8.

204 Form CO, paragraph 307.

205 The Notifying Party confirms that the terms of P4's wholesale agreement with Vectra [Description of certain rights and obligations of P4 and Vectra under their wholesale agreement]. In addition, the agreement with Vectra [Description of certain rights and obligations of P4 and Vectra under their wholesale agreement]. The acquisition of UPC Polska [Impact of the Transaction on certain rights and obligations of P4 and Vectra under their wholesale agreement]. The Notifying Party's response to RFI 5, question 7.

(155) In addition, the footprint of UPC Polska and Vectra (through which P4 provides fixed internet services) is limited compared to the coverage of the two largest fixed telecommunication providers Orange and Polsat's Netia. Orange's network footprint reaches a large majority of Polish households (approximately […], i.e., […] households), while Netia's network covers approximately […] of Polish households (approximately […] households).

Table 1: Reach of UPC Polska's and its competitors' respective networks[206]

Operator	# of HH reached by own network (in mil.)	% of Polish HH reached by network
UPC	[…]	[…]%
Vectra	[…]	[…]%
Orange	[…]	[…]%
Netia	[…]	[…]%
Other	[…]	[…]%
TOTAL	[…]	-

Source UPC's internal data

(156) In this respect, the Commission notes a concern raised by a market respondent that the merged entity's combined use of Vectra's and UPC Polska's network (fixed infrastructure which is yet unavailable to the Parties' competitors on a wholesale basis) will result in high entry barriers to the retail fixed internet market.[207] However, the Commission has assessed P4's market position through its wholesale access to Vectra's network and found that P4 remains a marginal competitor in the retail fixed internet services market and any segments thereof ([0-5]% market share at most, irrespective of the product market concerned). Therefore, the Transaction will not result in a significant increase in market power on this market. As shown in paragraphs 160-161 below, this conclusion would not change irrespective of the geographic scope of the market for fixed internet services.

(157) Fourth, a majority of respondents to the market investigation confirmed that fixed internet services customers in Poland are moderately to very price sensitive. As one operator noted, the main reason for customer switching is "*Better price offered by other operator or a significant price increase by the operator during the contract renewal*."[208] In addition, UKE reports that the Polish fixed internet services market is one of the three EU markets with the lowest prices in 2019 and 2020 (EUR 16.91 lower than the EU average).[209] Therefore, customers can and do consider switching to a more competitive offer at the end of the contract period with their current supplier.[210]

(158) Finally, one respondent to the market investigation considered that the Transaction would deter investments in the deployment of fibre infrastructure ("Fibre To The

206 Form CO, Table 47. "HH" stands for households.
207 Replies to Q1 to Competitors MNOs, question 67.3.1.; Replies to Q2 to Competitors MVNOs, question 68.
208 Replies to Q2 to Competitors MVNOs, question 41.
209 UKE 2020 report, page 22.
210 Replies to Q1 to Competitors MNOs, question 41.1. Replies to Q2 to Competitors MVNOs, questions 40 and 41.

Home"; "FTTH") particularly in specific local Polish areas where the merged entity would be a single provider of fixed internet access via its cable network.[211] However, the Commission first notes the UKE report for 2020 according to which the majority of revenues in retail market for the provision of fixed internet services (26.7% in 2020) is generated from services provided via FTTH. Moreover, UKE reports that FTTH has been steadily growing over the past few years, and is expected to further grow, on average by 13% per year in the future.[212] Also, some respondents to the market investigation confirmed that retail fixed internet market in Poland is characterized by "*fast expansion of FTTH coverage via commercial and EU sponsored investments*" and that "*(t)hese factors are generating strong growth as users are migrating from mobile solutions or copper based services to FTTH.*".[213] In particular, Orange is currently the main company active in the deployment of FTTH network in Poland and is likely to continue to lead on FTTH deployment in the future.[214] In addition, EU funded infrastructure is rapidly being deployed in Poland, which is expected to lead to a significant increase in FTTH connections in Poland (from approx. 2.4 million in 2020 to approx. 4.2 million in 2025). [215]

(159) The Transaction does not raise serious concerns, even if the geographic market for retail internet access would be defined as narrower than national.

(160) First, when considering a geographic market consisting of single regions, the market share increment brought about by the Transaction on an overall market for retail internet access is marginal (i.e. less than [0-5]%, in volume and value, in all regions where the combined market share exceeds 20%) or UPC Polska's network footprint (P4 has a market share of [0-5]% in volume and [0-5]% in value).[216]

(161) Second, the Parties' combined market shares are modest.[217] At regional level, the Parties' combined market shares would exceed 20% in only three regions: Małopolskie ([20-30]% in volume and [10-20]% in value), Mazowieckie ([30-40]%

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211 Replies to Q1 to Competitors MNOs, questions 67.3.1. and 66.

212 UKE 2020 report, page 10 and 13, citing Analysys Mason.

213 Replies to Q1 to Competitors MNOs, question 46.1.

214 Orange announced a partnership with APG to deploy FTTH network to additional 1.7 million households over the next five years in 2021. The JV established by Orange and APG will offer wholesale access to third party operators. Notifying's Party response to RFI 4, question 31

215 Notifying's Party response to RFI 4, question 31, referencing the 2020 UKE report, page 13.

216 As to possible coordinated effects, the Commission considers that a number of factors make coordination unsustainable, and therefore unlikely. First, the market shares of the Parties and of the competitors remaining on the market are asymmetric, which makes it difficult for them to align their interests and reach a common strategy. In particular, P4 and UPC have a combined market share of [10-20]%% in volume in 2020 and P4's position as a supplier of fixed internet services is marginal ([0-5]% in volume in 2020 at most). Many significant players are also active on this market (in particular, Orange which market share is [20-30]% (in volume), Vectra/Multimedia, which market share is [10-20]% (volume), Netia, at [5-10]% (in volume), Inea at [0-5]% (in volume) and Toya at [0-5]% (in volume)). The cost structures and the commercial strategies of the market players therefore are likely to diverge. In addition, customers are price-sensitive and willing to switch and there are no significant barriers that would prevent them from switching operator. In addition, in its most recent report, the UKE noted that the market for fixed internet services in Poland is highly competitive and steadily growing. Even though the penetration rate of the fixed internet services in Poland is increasing, it remains to date at the lowest level among EU countries and amounted to 20.8% in 2020, i.e. 13.5 points below the EU average rate. (See 2020 UKE report, pages 8 and 21).

217 Even if the geographic market would be limited to individual cities in Poland, the Transaction would not raise serious doubts. The increment resulting from the Transaction would be minimal in any individual city in Poland where the Parties overlap ([0-5]% in volume and value at most). See Notifying Party's response to RFI 5, Annex 5. In individual cities where the Parties' combined share would exceed 20% in volume and/or value, P4's share is even lower ([0-5]% in volume and [0-5]% in value, at most). See Notifying Party's response to RFI 6.

in volume and [20-30]% in value) and Pomorskie ([30-40]% in volume and [20-30]% in value). At the level of UPC Polska's network footprint, the Parties' combined market share in value is [20-30]% in volume and significantly lower in value ([10-20]%).

(162) For the above reasons, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a consequence of horizontal non-coordinated effects in the retail market for fixed internet access.

5.2.5. *Horizontal non-coordinated effects in the market for retail provision of audio-visual services*

5.2.5.1. The Notifying Party's view

(163) The Notifying Party submits that the Transaction would not give rise to any competitive concerns in relation to the retail market for the supply of AV services in Poland for the following reasons.

(164) First, the Notifying Party argues that the Parties are not close competitors as P4's position on the overall market for AV services and any potential segment thereof is negligible. P4's supplied less than […] subscribers in 2020 and generated EUR […], a fraction compared to the total market size (EUR […]).[218]

(165) In addition, the Notifying Party submits that P4 and UPC Polska are not active on a potential segment of FTA AV services, given that they do not supply FTA AV services on a standalone basis, but distribute some FTA services as part of their respective Pay AV packages (i.e. against payment of the subscription fee). In Poland, FTA channels are distributed free of charge through DTTV.[219]

(166) Second, the Notifying Party considers that the new merged entity will face competitive pressure from numerous operators, including Cyfrowy Polsat, the market leader, CANAL+, Orange, Vectra, etc. [220]

5.2.5.2. The Commission's assessment

(167) The Commission considers that the Transaction does not raise horizontal concerns in the market for retail supply AV services for the following reasons.

(168) The Parties' overlap in the overall market for the retail provision of AV services on the national territory in Poland does not lead to an affected market (the Parties' combined share is [10-20]% in value, and even lower in volume – [10-20]%). This conclusion does not change even if retail AV services were further segmented to Pay AV services or, more narrowly, linear Pay AV services.[221] According to the best estimates of the Notifying Party, the Parties' combined market shares would also

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218 Notifying Party's response to RFI 4, question 31.

219 Form CO, paragraph 339.

220 Form CO, paragraph 356.

221 The Parties' combined market share in linear Pay AV services is [10-20]% in volume and [10-20]% in value. The Parties do not overlap on a potential market for non-linear AV services. While UPC Polska includes SVOD/ TVOD offerings as part of its cable TV packages, UPC Polska is only active in the linear pay AV segment and does not market IPTV/ SVOD services on a stand-alone basis, i.e., without a cable TV subscription. See Notifying Party's response to RFI 4, question 19.

remain below the threshold of 20% even on potential markets for basic and premium Pay AV services.[222]

(169) In Poland, the Parties are only active in the retail provision of Pay AV services. The Parties do not supply FTA AV services on a stand-alone basis as these FTA services are only available as part of a subscription for a pay AV package (against payment of the subscription fee). Therefore, irrespective of whether retail FTA offerings are considered part of the same market as Pay AV services, the outcome of the assessment would not change, as in an overall market, the Parties would compete with a number of FTA retail services and their combined market share would be diluted.

(170) The Transaction would not raise concerns even if the geographic market was defined more narrowly than national in scope.

(171) First, if a geographic market definition consisted of UPC Polska's network footprint, the overall market for AV services would be affected. However, even when following a conservative approach pursuant to which all P4's subscribers and revenues are attributed to the footprint of UPC Polska's network, the overlap between the Parties is minor. The Parties' combined market share would amount to [10-20]% in volume and the Transaction would result in a negligible increment ([0-5]%). In addition, while UPC Polska holds significant market share of [40-50]% in value, the Transaction will have a negligible impact due to a limited increment resulting from P4's market share of [0-5]%. Moreover, the merged entity will continue to face meaningful competitive pressure from the leading operator Polsat ([30-40]% in volume, [10-20]% in value), and other notable competitors such as Canal+ ([10-20]% in volume, [10-20]% in value), and Vectra ([10-20]% in volume, [5-10]% in value). The competitive assessment does not significantly differ if retail AV services were further segmented to Pay AV services. The Parties' market share is modest in volume ([20-30]%) and, while the combined market share in value is substantial ([40-50]%), the increment resulting from the Transaction minor ([0-5]% in volume and [0-5]% in value). In addition, the Notifying Party confirms that it is reasonable to assume that the Parties' market shares in any other plausible overlapping sub-segments (basic and premium AV services, linear AV services) in volume and value on the network footprint level would not significantly depart from their share in such segments on a national level,[223] i.e. below 20%.

(172) Second, if a geographic market for AV services was defined as regional in scope, the Parties' combined shares on the overall market for AV services would lead to three regionally affected markets in Poland: Mazowieckie ([20-30]% in volume and [30-40]% in value), Pomorskie (exceeding 20% in value only, [20-30]%) and Slaskie (exceeding 20% in value only, [20-30]%). However, the Transaction will have a negligible impact through P4's activity ([0-5]% in volume and [0-5]% in value).[224]

222 The Notifying Party assumes that the Parties' combined market share in premium Pay AV and basic Pay AV (in volume and value) to be broadly in line with the shares on the overall Pay AV market segment on a national level, i.e. [10-20]% in volume and [10-20]% in value. Notifying Party's response to RFI 4, question 17.

223 Notifying Party's response to RFI 4, question 22.

224 The Notifying Party estimates that P4's regional shares in volume and value would not significantly depart from its share in the overall AV market on a national level. P4's audio-visual services offer is not linked to a particular geographic area and can be used anywhere in Poland, in combination with a fixed internet connection, often belonging to a third party. Even assuming that all of P4's subscribers/revenues are achieved within UPC Polska's

The competitive landscape on a regional level does not significantly differ from the one described for on the network footprint level. In all three affected regions, Polsat is the leading operator in volume, and is competing closely with the Parties in value ([30-40]% in volume, [20-30]% in value), while Canal+ holds higher market shares than the Parties in volume ([10-20]% in volume, [20-30]% in value). The competitive assessment does not significantly differ if retail AV services were further segmented to Pay AV services. The same regions are affected also when considering the Parties' combined shares in Pay AV services: Mazowieckie ([20-30]% in volume and [30-40]% in value), Pomorskie (exceeding 20% in value only, [20-30]%) and Slaskie (exceeding 20% in value only, [20-30]%), and the increment resulting from the Transaction is negligible ([0-5]% in volume and value). In addition, the Notifying Party confirms that it is reasonable to assume that the Parties' market shares in any other plausible overlapping sub-segments (basic and premium AV services, linear AV services) in volume and value on the regional level would not significantly depart from their share in such segments on a national level[225], i.e. below 20%.

(173) Third, the Parties do not appear to be close competitors. The Parties overlap in the provision of retail Pay AV services, although UPC Polska and P4 use different technologies to distribute the services to their customers (UPC Polska through cable and P4 via IPTV). In addition, the market investigation results have confirmed that the Parties do not compete closely. Indeed, none of the respondents to the market investigation considered UPC Polska and P4 as close competitors, but two of many already competing in this space, together with Orange, Canal+, Polsat, T-Mobile, Toya, Netia and others. Also, when ranking providers of AV services according to various criteria (i.e. price, quality of network, quality of content, discounts and availability of bundled offers), none of the respondents ranked the Parties close to each other. In fact, UPC Polska usually ranks high for prices, discounts, availability of content and channels and availability of bundled offers. In that respect, it was considered to be competing closely with Orange, Polsat (Plus) and Canal +. To the contrary, only one respondent ranked P4 high for price, discounts and availability of bundled offers, and as competing close with Vectra.[226]

(174) Fourth, global OTT platforms such as Netflix, Amazon Prime, HBO GO or Viaplay have gained significant traction in the market, and the market investigation confirmed that OTT players exert significant competitive pressure on AV service providers in Poland.[227] One respondent noted that "*Customers are looking for new price, quality and recently product offers (such services as Netflix, YouTube, HBO, Viaplay, and own VOD services are becoming more and more important).*"[228] In addition, the majority of market respondents perceived OTT providers as aggressive

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network, resulting in conservative estimates, the increment remains extremely limited ([0-5]%). Notifying Party's response to RFI 4, question 20.

225 Notifying Party's response to RFI 4, question 22. The Notifying Party submitted that UPC Polska's market shares in the overall pay AV market vary from region to region and, thus, are not necessarily in line with UPC Polska's market share at the national level. However, according to the Notifying Party, UPC Polska's relative strength (i.e., accounting for the differences in the shares in the overall Pay AV market at the regional/ network footprint level) in the relevant segments of the Pay AV markets at the regional level roughly corresponds with UPC Polska's position in those segments at the national level.

226 Replies to Q1 to Competitors MNOs, question 45; Q2 to Competitors MVNOs, question 48.

227 Replies to Q2 to Competitors MVNOs, question 48.

228 Replies to Q2 to Competitors MVNOs, question 48.1.

competitors that have been persistently growing their customer base, and that will continue expanding together with the growing fibre network coverage. [229]

(175) Therefore, for the reasons set out above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of horizontal non-coordinated effects in the retail market for AV services.[230]

5.2.6. Horizontal non-coordinated effects in the potential market for retail provision of multiple-play services

5.2.6.1. The Notifying Party's view

(176) The Notifying Party argues that the Transaction does not raise competition concerns in the market for multiple-play services.

(177) The Notifying Party argues that P4 has been providing fixed internet access services since 2020 and audio-visual services since 2019. Consequently, P4 entered the potential market for the retail supply of multiple play bundles only in 2019. Since 2019, P4's position on the market for the retail supply of multiple play services, at national level, has been negligible, between 0-5% (volume), on all the sub-segments considered. P4's highest market share is on the FMC segment where it amounted to [0-5]% (volume) in 2020. Therefore, P4 does not play a significant role on the market for multiple play services and as such, the Transaction does not result in an overall change in the structure of the market.

5.2.6.2. The Commission's assessment

(178) The Commission considers that the Transaction does not raise competition concerns in the retail market for multiple-play services, for the following reasons.

(179) First, the market for multiple-play services is affected mainly due to the established position of UPC Polska in retail fixed internet access and in cable TV which, when sold in bundles, increases UPC Polska's market share. P4 entered the market only in 2019. Its market shares, in the various market segments are close to negligible. In fact, its market share in the provision of overall bundled offers is [0-5]% in volume in 2020. Its market share in the provision of fixed bundles is just [0-5]% in volume in 2020 (UPC Polska has approx. [40-50]% in volume in 2020). P4's market share in the provision of all 3P bundles is [0-5]% in volume in 2020 (UPC Polska has approx. [60-70]% in volume in 2020). Its market share in the provision of the 3P bundle including mobile telephony, fixed internet and AV services is a mere [0-5]% in volume in 2020 (UPC Polska has approx. [50-60]% in volume in 2020). If the market segment for 2P (fixed internet and AV services) is considered, P4 has a market share of [0-5]% in volume in 2020 (UPC Polska has approx. [30-40]% in

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229 Replies to Q2 to Competitors MVNOs, question 48; Q1 to Competitors MNOs, questions 49.1 and 52.1.

230 As to possible coordinated effects, the Commission considers that a number of factors make coordination unsustainable, and therefore unlikely. First, as mentioned in the UKE's report, the market for the retail provision of audio-visual services to end customers in Poland is highly competitive and the Parties face competitive pressure from numerous operators, including Cyfrowy Polsat, the market leader, CANAL+, Orange, Vectra/Multimedia, Netia, Inea and Toya. The cost structures and the commercial strategies of the market players therefore are likely to diverge. In addition, P4's position on this market is marginal, at [0-5]% in volume in 2020, and the Transaction will have a negligible impact on the structure of the market.

volume in 2020). The Commission therefore considers that the market share increment brought about by the Transaction is not sufficient to alter the market structure and competition in the retail market for multiple-play services.

(180) Second, P4 is not a growing competitor or an important competitive force, whose removal would hinder competition. In fact, with the majority of respondents to the market investigation has not identified P4 has an aggressive market player.[231] In addition, with very limited exceptions, namely in relation to the quality of its mobile network, P4 is not ranked among the top providers of multiple play services on any parameter.[232]

(181) Third, the Commission considers that P4 is currently mainly a mobile operator. It does not own a fixed infrastructure and is only able to provide multiple-play services due to a wholesale agreement entered into in 2019 with fixed operator Vectra. Such business arrangement puts P4 at disadvantage, compared to other providers of multiple play services. In fact, the Commission considers that, due to this dependence on the wholesale agreement for having access to the fixed network, P4 is not in a position to quickly react to a change in market conditions, launch aggressive commercial offers, improve the quality of the fixed services included in the bundle or even just address quality issues arising in connection to the fixed infrastructure.

(182) Fourth, the Commission considers that the Transaction might have a pro-competitive impact on the growing market for multiple-play services, by favouring the emergence of a third provider (in addition to Polsat/Polkomtel and Orange) which owns its mobile infrastructure and therefore, will be able to compete more dynamically. Such potential pro-competitive development was acknowledged also by one respondent to the market investigation, according to whom "(…) *the potential merger between P4 and UPC will strengthen the multiple-play market, which can quickly result in a large number of customers transferring to cross-subsidized bundled offers or bundled offers with aggressive promotions for the initial months* (…)".[233]

(183) The Commission acknowledges that the combination of P4's mobile network and UPC Polska's fixed network has raised some concerns among competitors active in the retail market for multiple-play services. Such concerns, however, do not appear substantiated from a competition standpoint, but rather reflect the fact that the merged entity will have a greater ability to compete, due to network ownership. Only one respondent to the market investigation has expressed a substantiated concern that the merged entity will no longer have an interest in granting wholesale access to P4's mobile network, in order to protect its multiple-play business.[234] The Commission considers that such concern is unfounded, as it is explained in detail in the dedicated section of the vertical assessment (section 5.3.2. below).

(184) In light of the foregoing considerations, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market in the retail market for multiple-play services.

231 Replies to Q1 to Competitors MNOs, question 55.1. Replies to Q2 to Competitors MVNOs, question 53.1.

232 Replies to Q1 to Competitors MNOs, question 54. Replies to Q2 to Competitors MVNOs, question 52.

233 Reply to Q2 to Competitors MVNOs, question 53.1.

234 Replies to Q2 to Competitors MVNOs, questions 67.1, 67.5.1 and 67.6.1.

5.2.7. Horizontal non-coordinated effects in the wholesale provision of TV channels (acquisition side)

5.2.7.1.The Notifying Party's view

(185) The Notifying Party argues that the market for the wholesale supply of TV channels, acquisition side, is in principle not affected, except for the segment for the wholesale acquisition of premium Pay TV sports channels. In fact, in such segment, both parties are active with a combined market share in excess of 20%, but P4 has a very limited position (not exceeding [0-5]% in value in 2020), due to the limited size of its business in the retail market for audio-visual services (approx. [0-5]% by volume and [0-5]% by value in 2020).[235] For the same reason – the small size of P4's business at retail level – the Notifying Party argues that the Transaction does not raise any competition concerns in the wholesale market for the acquisition of premium Pay TV sports channels.

5.2.7.2.The Commission's assessment

(186) The overall market for the wholesale acquisition of TV channels is not affected as the Parties' combined market share on such market, as well as on any segment thereof is below 20%.[236]

(187) Only if the specific segment for the wholesale acquisition of premium pay TV sports channels is taken into consideration, the combined market share of the Parties exceeds 20%, although, even in such case, the market share increment brought about by P4 remains extremely limited (below [0-5]% in the overall market and in any segment thereof)[237].

(188) The Commission considers that the Transaction does not raise competition concerns in the wholesale market for the acquisition of premium Pay TV sports channels for the following reasons.

(189) First, both Parties are active in the market for the acquisition of premium Pay TV sports channels, but while UPC Polska has a market share of approximately [20-30]% in value in 2020, P4's market share does not exceed [0-5]%. Therefore, the market share increment brought about by the Transaction is negligible.

(190) Second, the wholesale market for the acquisition of premium Pay TV sports channels, on the acquisition side, is rather fragmented. In fact, while two large channels acquirers, Polsat and Canal+, account for [50-60]% of the market, the remaining [50-60]% of the market is split between numerous players, including Orange, Vectra, UPC Polska, Inea, Toya, P4 and other operators active in the retail audio-visual market.[238]

(191) Third, both Polsat and Canal+ are vertically integrated and not only purchase premium (and basic) Pay TV channels on a wholesale market, but also produce such channels in-house and offer them to other TV operators (including P4 and UPC

235 Notifying Party's response to RFI 5, question 14, paragraph 13(b).

236 Notifying Party's response to RFI 4, Annex Q4.

237 Notifying Party's response to RFI 5, question 14, paragraph 13(a).

238 Notifying Party's response to RFI 5, question 14, paragraph 13(a).

Polska). Polsat and Canal+ are present at both the demand and supply side of the market. Therefore, Polsat and Canal+ competitive strength is even greater in comparison to other Pay TV operators active at the wholesale level only as purchasers. With respect to premium Pay TV sports channels specifically, Polsat produces a wide range of sport channels, including Polsat Sport Extra, Polsat Sport News, Polsat Sport Fight, Polsat Sport Premium 1 and Polsat Sport Premium 2.[239] Canal+ offers four in-house sport channels, including CANAL+ SPORT, CANAL+ SPORT 2, CANAL+ SPORT 3 HD, and CANAL+ SPORT 4 HD. Additionally, it purchases premium Pay TV sports channels from other content providers and offers these channels to Canal+ users.[240]

(192) Fourth, all Pay TV sports channels are provided on a non-exclusive basis in Poland.[241] As a consequence, even if the merged entity attempted to exercise buyer power vis-à-vis providers of such channels, the Commission considers that such attempt would be defeated by the business practice of licencing such channels on a non-exclusive basis.

(193) Canal+, which currently has business relations with P4 and UPC Polska for the distribution of its channels, has expressed concern that, after the Transaction, the new entity may use its stronger position in negotiations with Canal+ Polska.[242]

(194) The Commission does not consider that, after the Transaction, the merged entity will be in a position to exercise buyer power in its negotiations for the acquisition of TV channels. In the first place, the addition of P4 to UPC Polska in terms of market share (approx. [0-5]%) does not support the conclusion that the merged entity would be in a stronger position than that enjoyed by the two Parties before the Transaction. Second, in addition to the merged entity, there would be a sufficient number of alternative providers of retail audio-visual services to whom Canal+ could sell its channels, should the negotiations with the merged entity have a negative outcome. Third, Canal+ is vertically integrated on the upstream wholesale market for the provision of TV channels, as it produces sports channels in-house, and on the downstream market, where it is the second largest provider of retail Pay TV in Poland (with a market share of approx. [20-30]% in volume and approx. [20-30]% in value in 2020).[243] Therefore, the Commission considers that Canal+ would have an advantage, in terms of both channels production and distribution, should the merged entity seek to apply any pressure to the negotiations.

(195) In light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market, in relation to non-coordinated horizontal effects in the wholesale market for the provision of TV channels.

239 Notifying Party's response to RFI 5, question 14, paragraph 13(a).

240 Notifying Party's response to RFI 5, question 14, paragraph 13(a).

241 Notifying Party's response to RFI 5, question 14, paragraph 13(a).

242 Notifying Party's response by Canal+ to Q2 to Competitors MVNOs, question 66.

243 Form CO, tables 79 and 80.

5.3. Assessment of vertical effects

5.3.1. Introduction

(196) In this Section, the Commission will assess whether the Transaction would give rise to foreclosure in any of the markets that are vertically affected. A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete.[244]

(197) Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to result in foreclosure of upstream rivals by restricting their access to a sufficiently large customer base (customer foreclosure).

(198) Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete.[245]

(199) In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines the three following cumulative elements: first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals; second, whether it would have the incentive to reduce its purchases upstream; and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market intertwined.[246]

5.3.2. Wholesale provision of mobile network access and the downstream market for retail mobile telecommunications services

(200) As mentioned in the horizontal assessment of the retail market for multiple-play services (section 5.2.6 above), a MVNO has raised concerns as to the fact that, post-transaction, the merged entity might, in order to consolidate its position on the retail market for multiple-play services, decide to terminate or degrade wholesale access to its mobile network, which third parties use in order to provide retail mobile telecommunications services they include in their offer of multiple-play services .

(201) The vertical relationship between the upstream market for the wholesale supply of mobile network access and call origination services and the downstream market for retail mobile telecommunications services is not affected by the Transaction, because P4's market share on the upstream market is below the threshold of 30% ([20-30]% in volume, [20-30]% in value in 2020)[247] and UPC Polska is not active upstream.[248] The Parties' combined market share on the downstream market is also below 30%.

244 Non-Horizontal Merger Guidelines, paragraph 29.

245 Non-Horizontal Merger Guidelines, paragraph 58.

246 Non-Horizontal Merger Guidelines, paragraph 59.

247 Form CO, Table 113.

248 Form CO, Table 113.

For completeness, however, the Commission assesses the merged entity's ability and incentive to foreclose wholesale access to its mobile network. For the reasons explained below, the Commission considers that the merged entity will have neither the ability nor the incentive to engage into a foreclosure strategy of that kind.

(202) As regards the ability to foreclose wholesale access to its mobile network, the Commission considers that P4 does not have market power in the upstream market. First, only P4 and Polkomtel provide wholesale access to their mobile network. In such market, P4 has less than 30% ([20-30]% in volume and [20-30]% in value in 2020) of the market and Polkomtel has [70-80]% in volume and [70-80]% in value in 2020.[249] While there is a large number of MVNOs active in Poland (between 70 and 80), only approximately […] are currently hosted by P4. The fact that, Polkomtel hosts many more MVNOs than P4 seems to indicate that Polkomtel has a large hosting capacity and that P4's infrastructure is not necessarily an important input. This aspect was acknowledged by a respondent to the market investigation: "*due to the (...) competitive access offered by Polkomtel, we do not foresee significant changes in ability of P4 to host additional MVNOs in Poland.*"[250] In addition, while only P4 and Polkomtel currently offer wholesale mobile access, a third MNO, Orange, has already publicly announced its intention to start offering wholesale mobile network access.[251] The Commission therefore considers that, in addition to P4's network not being an important input or a source of market power, the offer of wholesale network access will increase in the future.

(203) As regarding the merged entity's incentive to engaging in a foreclosure strategy, the Commission considers that P4 is already providing wholesale network access to a number of MVNOs, including UPC Polska (which provides wholesale fixed access to P4) and some respondents to the market investigation indicated that, so far, the partnership between P4 and UPC Polska has not affected P4's willingness to provide wholesale access to other MVNOs.[252] Concerning the post-merger scenario, respondents to the market investigation considered that the Transaction will not negatively affect P4's incentive to provide wholesale access to its network. A competitor submitted, in this respect, that P4 already hosts approx. […] MVNOs and that MVNO hosting remains one of the possible business areas for P4.[253]

(204) While MVNOs have provided mixed replies in this respect, most MNOs agree that P4's incentive to provide wholesale access to its network will not change.[254] Concerning replies from MVNOs, the Commission observes that one of the largest MVNOs has expressed the view that the merged entity's incentive to provide wholesale access will not change after the Transaction.[255] The Commission therefore considers that P4 would not have the incentive to engage in a foreclosure strategy after the Transaction.

249 Form CO, Table 113. The Notifying Party also mentions that T-Mobile is hosting a single MVNO (Move Telecom, accounting for 20 000-30 000 retail customers), see paragraph 543 of the Form CO.

250 Replies to Q2 to Competitors MVNOs, question 61.1.

251 Replies to Q2 to Competitors MVNOs, question 63.1. Replies to Q1 to Competitors MNOs, question 65 and 65.1.

252 Replies to Q1 to Competitors MNOs, question 61. Replies to Q2 to Competitors MVNOs, question 60.1.

253 Reply to Q1 to Competitors MNOs, question 61.1.

254 Replies to Q1 to Competitors MNOs, question 63. Replies to Q2 to Competitors MVNOs, question 62.

255 Replies to Q2 to Competitors MVNOs, question 62.

(205) In light of the above considerations, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to a possible foreclosure of wholesale mobile network access and call origination services.

5.3.3. Wholesale call termination on fixed network

5.3.3.1. Wholesale markets for fixed call termination services – Retail market for mobile telecommunication services

(206) The wholesale markets for termination services on fixed networks are upstream to the markets for the retail supply of mobile telecommunication services. UPC Polska is active on the upstream market for termination services on its individual fixed network in Poland.[256] XNG is active on the market for the retail supply for mobile telecommunication services in Cyprus, France, Italy, Ireland, Malta and Poland.

(207) The vertical relationship between the Parties consists, upstream, of UPC Polska's wholesale provision of call termination services on its fixed network (where UPC Polska has a market share of 100% on its own network)[257] and, downstream, of XNG's activities on the market for retail mobile telecommunications services in France (17.7%), Italy (9.3%), Ireland (21.8%), Malta (36.9%), Cyprus (35.3%) and Poland ([20-30]%).[258] This vertical relationship is affected within the meaning of the Merger Regulation, as the Parties exceed the 30% threshold on the upstream market for the wholesale provision of call termination services on UPC Polska's fixed network.

(a) The Notifying Party's view

(208) The Notifying Party submits that the Transaction will not result in any anticompetitive foreclosure concerns for the reasons set out below.

(209) First, the Notifying Party submits that the Transaction does not raise any concerns in these markets because they are heavily regulated and termination rates are capped by EU regulation.

(210) The market for provision of wholesale fixed call termination services is subject to *ex ante* regulation in Poland through both non-tariff and price control obligations for the call termination on their respective fixed networks.[259] These regulatory obligations include access to specific network facilities, transparency (including publication of draft interconnection agreements on the network operator's website), non-discrimination and price control.[260]

(211) Moreover, on 18 December 2020, the Commission adopted a regulation, setting the maximum termination rate that operators are allowed to charge each other for mobile

256 UPC Polska does not purchase fixed call termination services. Form CO, paragraph 476.

257 P4 does not provide termination services on fixed networks even though P4 is active on the market for retail fixed telecommunication services in Poland, because P4 operates on this market as a Fixed Virtual Network Operator ("FVNO"). Form CO, paragraph 511.

258 All in volume. Form CO, Table 107.

259 As regards UPC Polska, see UKE decision of 4 March 2009, DART-SMP-6043-6/08 (8). Form CO, paragraph 485.

260 Case M.8883 – *PPF Group/Telenor Target Companies*, paras. 50 and 56. Form CO, paragraph 485.

and fixed termination services (the "Delegated Regulation"),[261] already applicable in Poland since 1 July 2021. The Delegated Regulation sets maximum termination rates, directly applicable to EU operators. Therefore, the rates set out in the Delegated Regulation supersede the maximum termination rates applicable in Poland.[262] Accordingly, the Notifying Party explains, the new merged entity would not have the ability to discriminate against the Parties' competitors for access to fixed call termination services in Poland.[263]

(212) Second, the Notifying Party asserts that in essence, any attempt by the merged entity to foreclose XNG's competitors in Cyprus, France, Italy, Ireland, Malta and Poland is unlikely to be effective, since neither Party can influence the cost structure of XNG companies' downstream competitors in a significant manner.[264] The Notifying Party considers that the costs of fixed call termination services in question are well below […] of the total costs incurred for the provision of retail mobile telecommunications services in Cyprus, France, Italy, Ireland and Malta, and around […] of that total cost in Poland.[265] Third, the Notifying Party argues that fixed call termination in Poland is only of minor importance to XNG and their competitors in the respective countries.[266] International mobile-to-fixed voice calls between Cyprus, France, Italy, Ireland, Malta and Poland represent extremely limited traffic flows, according to the Notifying Party.[267] The same is true for domestic mobile to fixed voice traffic flows in Poland, which represent only about […] of all domestic traffic.[268]

(213) In addition, the Notifying Party considers that the Parties represent less than […] of the overall demand on the upstream market for fixed call termination services in Poland.[269] Any attempt, therefore, by the Parties to increase their termination charges would only have little or no impact on the cost structure of their competitors in Cyprus, France, Italy, Ireland, Malta and Poland.

(214) Therefore, the Notifying Party considers that any risk of foreclosure can be ruled out.

(b) The Commission's assessment

(206) In the first place, the Commission considers that the Transaction does not raise any input foreclosure concerns in the market for the retail supply of mobile communication services in Cyprus, France, Ireland, Italy, Malta and Poland by means of discrimination against the Parties' competitors for access to fixed call termination services in Poland or by degrading terms and conditions for access to these services, for the following reasons.

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261 Commission Delegated Regulation (EU) 2021/654 of 18 December 2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, OJEU L 137, 22.4.2021, page 1-9.

262 Delegated Regulation, Art. 5.

263 Form CO, paragraphs 487 and 488.

264 Form CO, paragraph 489.

265 Form CO, paragraph 496.

266 Form CO, paragraph 501.

267 Form CO, paragraph 490. The same is true for domestic mobile to fixed voice traffic flows in Poland, which represent only about […] of all domestic traffic. Form CO, paragraph 495.

268 Form CO, paragraph 499.

269 Form CO, paragraph 500.

(207) First, the Commission notes that on 18 December 2020, the Commission adopted the delegated act Delegated Regulation, setting single maximum EU-wide voice termination rates,[270] already applicable in Poland since 1 July 2021. As a result, the upstream market for the provision of wholesale call termination services on fixed network in Poland will be subject to *ex ante* regulation. The merged entity therefore will have to comply with such rates and will be limited in its ability to raise the prices for the wholesale call termination services to XNG's competitors in Cyprus, France, Ireland, Italy, Malta and Poland. In addition, the Commission notes that the upstream market for wholesale fixed call termination services in Poland is subject to *ex ante* regulation through both non-tariff and price control obligations for the call termination on their respective fixed networks, which include access to specific network facilities, transparency (including publication of draft interconnection agreements on the network operator's website), non-discrimination and price control.[271] Accordingly, the Commission also considers that the merged entity will not have significant ability to otherwise degrade terms and conditions for the provision of wholesale fixed call termination services.

(208) Second, the Commission considers that the provision of wholesale fixed call termination services, originating from Cyprus, France, Ireland, Italy, Malta and Poland (mobile networks) and terminating in Poland are limited, in comparison to the traffic flow originating on XNG's mobile networks in the respective countries and terminating on any international fixed network.[272] In addition, the Notifying Party estimates that the domestic mobile to fixed voice traffic flows in Poland represent only about […] of all domestic traffic.[273] In this regard, the Commission considers that any potential increase by the merged entity of its termination charges would have only a limited impact on the cost structure of XNG's competitors in Cyprus, France, Ireland, Italy, Malta and Poland.

(209) In view of the small traffic volume, the Transaction is not expected to have a detrimental effect on competition in the downstream market for the supply of retail mobile telecommunication services in Cyprus, France, Ireland, Italy, Malta and Poland.

(210) Therefore, the Commission concludes that the merged entity is unlikely to have the ability and the incentive to engage in an input foreclosure strategy, and even if it did, there would be no significant detrimental effect on competition on the markets concerned.

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270 Commission Delegated Regulation (EU) 2021/654 of 18.12.2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate (C(2020)8703).

271 Form CO, paragraph 485.

272 In line with the Notifying Party's submission, the traffic flow originating from Cyprus, France, Ireland, Italy and Malta (XNG) and terminating in Poland (UPC) represented (in million of minutes): […] (Cyprus), […] (France), […] (Ireland), […] (Italy) and […] (Malta) (Form CO, paragraphs 491-494). The Notifying Party estimates that in 2020, the volume of traffic originating on the XNG's French mobile network and terminating on a fixed network in Poland amounted to around […] of the traffic volume originating on XNG's French mobile network and terminating on any international fixed network (Form CO, paragraph 492). Similarly, in 2020, the volume of traffic originating on the XNG's Italian mobile network and terminating on a fixed network in Poland amounted to less than […] of the traffic volume originating on XNG's Italian mobile network and terminating on any international fixed network. (Form CO, paragraph 493)

273 Form CO, paragraph 495.

(211) In the second place, the Commission considers that the Transaction does not lead to any customer foreclosure concerns in the market for the provision of wholesale fixed call termination services in Poland where UPC Polska operates for the following reasons.

(212) First, XNG's presence on the downstream market for retail mobile telecommunication services is relatively limited ([20-30]% in Poland, and even lower 17.07% in France, 21.8% in Ireland, and 9.3% in Italy, all in volume) and only exceeding 30% in volume in Malta and Cyprus.

(213) Second, the Commission considers that to the extent that each network operator holds a 100% market share in its individual network in the upstream market for wholesale fixed call termination services, and regulatory obligations will exist in Poland as explained above, foreclosure of rivals in the upstream market cannot be effective. Additional obligations such as non-discrimination or price control are likely to reduce the merged entity's incentive to reduce purchases from UPC's rivals in the upstream Polish market, since the merged entity will not have the possibility to benefit from higher prices in the upstream market.

(214) Therefore, the Commission concludes that the merged entity is unlikely to have the ability or the incentive to engage in a customer foreclosure strategy, and even if they did, there would be no significant detrimental effect on competition on the markets concerned.

5.3.3.2. Wholesale markets for fixed call termination services – Retail market for fixed telephony services

(215) The wholesale markets for termination services on fixed networks are upstream to the markets for the retail supply of fixed telephony services. XNG is active on the market for wholesale fixed call termination services on its own network in Cyprus, France, Ireland and Malta. UPC Polska is also active on the market for wholesale fixed call termination services on its own network in Poland.[274] XNG is active on the downstream market for the retail supply of fixed telephony services in Cyprus, France, Ireland, Malta and Poland. UPC Polska is also active on the downstream market for the retail supply of fixed telephony services in Poland.

(216) The vertical relationship between the Parties consists, upstream (i) of UPC Polska's wholesale provision of call termination services on its fixed network in Poland (where UPC Polska has a market share of 100% on its own network); and (ii) XNG's wholesale provision of call termination services on its fixed network in Cyprus, France, Ireland and Malta (with respect to which XNG holds a market share of 100% on its own network), and, downstream, (i) of XNG's activities in the retail market for fixed telephony in France (18.3%), Ireland (40.3%), Malta (4.1%), Cyprus (7.7%)[275] and (ii) of Parties' activities in Poland ([10-20]% in volume and [5-10]% in value). This vertical relationship is affected within the meaning of the Merger Regulation, as the Parties exceed the 30% threshold on the upstream market

274 P4 does not provide termination services on fixed networks even though P4 is active on the market for retail fixed telecommunication services in Poland, because P4 operates on this market as a FVNO.

275 All in volume. Form CO, Table 109.

for the wholesale provision of call termination services on UPC Polska's fixed network in Poland and XNG's fixed networks in Cyprus, France, Ireland and Malta.

(a) The Notifying Party's views

(217) The Notifying Party submits that the Transaction will not result in any anticompetitive foreclosure concerns for the reasons set out below.

(218) First, in addition to the arguments in paragraphs 206-207 above,[276] the Notifying Party explained that the markets for fixed call termination services in Cyprus, France, Ireland, and Malta are subject to an *ex ante* regulation, which makes it technically impossible to refuse access to (or price discriminate against) other network operators. Network operators are subject to *ex ante* regulations through both non-tariff and price control obligations for the call termination on their respective fixed networks. Therefore, the new merged entity would not have the ability to discriminate against the Parties' competitors for access to fixed call termination services.[277]

(219) Second, the Notifying Party further submits that any attempt by the merged entity to foreclose XNG's and UPC's competitors in Cyprus, France, Ireland, Malta and Poland is unlikely to be effective, since neither Party can influence the cost structure of XNG and UPC's companies' downstream competitors in a significant manner.[278] By reference to several Commission's precedents[279], the Notifying Party argues that fixed call termination for fixed-to-fixed calls in Cyprus, France, Ireland, Malta and Poland is only of minor importance to respective downstream competitors.[280] By reference to *Iliad / Play Communications*[281], the Notifying Party explains that the provision of wholesale fixed call termination services in Cyprus, France, Ireland, Malta to Poland (fixed networks) is limited.[282] The same remains valid for domestic fixed traffic flows in Poland (fixed networks). The Notifying Party notes that the vertical relationship between P4 and UPC Polska represents less than […] of the overall demand on UPC Polska's fixed network in Poland.[283] Therefore, the Parties cannot influence the cost structure of their competitors and would not have the incentive to discriminate against the Parties' competitors for access to fixed call termination services in Cyprus, France, Ireland, France or Poland.

(220) Therefore, the Notifying Party considers that any risk of foreclosure can be ruled out.

(b) The Commission's assessment

(221) In the first place, the Commission considers that the Transaction does not raise any input foreclosure concerns in the market for the retail supply of fixed telephony services in Cyprus, France, Ireland, Malta and Poland by means of discrimination

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276 Form CO, paragraph 523.

277 Form CO, paragraph 521.

278 Form CO, paragraph 526.

279 Case M.9963 – *Iliad/Play Communications*, para. 116 and Case M.8883 – *PPF Group/Telenor Target Companies* with respect to fixed call termination services in Czech Republic, Slovakia, Hungary and Bulgaria, see para. 57.

280 Form CO, paragraph 526.

281 Case M.9963 – *Iliad/Play Communications*, para. 136

282 Form CO, paragraph 528.

283 Form CO, paragraph 531.

against the Parties' competitors for access to fixed call termination services in Cyprus, France, Ireland, Malta and Poland or by degrading terms and conditions for access to these services, for the following reasons.

(222) First, in line with what has been discussed in paragraphs 206-207 above, the merged entity will not have the ability to discriminate against (i) XNG's competitors in Cyprus, France, Ireland, Malta and Poland, for access to fixed call termination services in Poland and (ii) UPC Polska's competitors in Poland, for access to fixed call termination services in Cyprus, France, Ireland and Malta. The Delegated Regulation is already applicable in France, Ireland, Malta, Cyprus and Poland. In addition, national regulators, in each of Cyprus, France, Ireland, Malta and Poland have imposed a number of regulatory obligations,[284] including access to specific network facilities, transparency (including publication of draft interconnection agreements on the network operator's website), non-discrimination and price control.[285] Accordingly, the Commission also considers that the merged entity will not have the ability to degrade terms and conditions for the provision of wholesale fixed call termination services.

(223) Second, the Commission observes that the provision of wholesale fixed call termination services in Cyprus, France, Ireland and Malta to Poland (fixed networks) is limited, when comparing the Parties' fixed-to-fixed traffic volumes against the overall market size for fixed termination services in Cyprus, France, Ireland, Malta and Poland.[286] In this regard, the Commission considers that any increase by the

284 For fixed termination services see : Décision n°2017-1453 de l'Autorité de régulation des communications électroniques et des postes en date du 12 décembre 2017 portant sur la détermination des marchés pertinents relatifs à la terminaison d'appel vocal sur les réseaux fixes en France et à la terminaison d'appel vocal sur les réseaux mobiles en France, la désignation d'opérateurs exerçant une influence significative sur ces marchés et les obligations imposées à ce titre pour la période 2017-2020 (**France**), Commission for Communications Regulation, Decision D11/19 of 23 May 2019, Price Control Obligations for Fixed and Mobile Call Termination Rates, supplemented by Commission for Communications Regulation, Decision D09/20 of 15 October 2020, Market Review - Fixed Voice Call Termination Markets Further Review concerning 0818 Numbers and Additional Fixed Service Providers (**Ireland**), Malta Communications Authority, 18 December 2018, decision MCA/D/18- 3411, The provision of call termination on individual public telephone networks at a fixed location in Malta - Definition, assessment of SMP & regulation of relevant markets (**Malta**). For **Poland**, the relevant decision as regards UPC is UKE decision of 4 March 2009, DART-SMP-6043-6/08 (8). For **Cyprus**, the relevant decisions are: ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της Primetel PLC και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτήν, ως Οργανισμό με Σημαντική ισχύ στη σχετική (Αγορά 1 της Σύστασης της 9ης Οκτωβρίου 2014), ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της MTN (Cyprus) Ltd και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτήν ως Οργανισμό με Σημαντική Ισχύ στην σχετική Αγορά (Αγορά 1 της Σύστασης της 9ης Οκτωβρίου 2014), ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της ΑΤΗΚ και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτή ως Οργανισμό με Σημαντική Ισχύ στην σχετική Αγορά (Αγορά 1 της Σύστασης της 9 ης Οκτωβρίου 2014), ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της Callsat International Telecommunications Ltd και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτήν ως Οργανισμό με Σημαντική ισχύ στην σχετική Αγορά (Αγορά 1 της Σύστασης της 9ης Οκτωβρίου 2014), ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της Cablenet Communications Systems Ltd και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτήν ως Οργανισμό με Σημαντική ισχύ στη σχετική Αγορά (Αγορά 1 της Σύστασης της 9ης Οκτωβρίου 2014), ΓΕΡΗΕΤ, Απόφαση αναφορικά με την εξέταση της Αγοράς χονδρικής παροχής σε σταθερή θέση τερματισμού κλήσεων στο μεμονωμένο δημόσιο τηλεφωνικό δίκτυο της MYTELCO Ltd και την επιβολή ρυθμιστικών υποχρεώσεων σε αυτήν, ως Οργανισμό με Σημαντική ισχύ στην σχετική Αγορά (Αγορά 1 της Σύστασης της 9ης Οκτωβρίου 2014).

285 Case M.8883 – *PPF Group / Telenor Target Companies*, paras. 50 and 56.

286 By way of proxy, the Notifying Party provides a ratio between the Parties' respective outbound fixed telephony traffic to the Member States where the other party provides fixed termination services and the overall market size for termination services on fixed networks in the Member States concerned. UPC Polska's fixed to fixed traffic

merged entity of its termination charges would have only a limited impact on the cost structure of the merged entity's competitors in these countries. Therefore, a possible input foreclosure strategy is unlikely to be profitable for the merged entity. In addition, in view of the small traffic volume, the Transaction is not expected to have a detrimental effect on the downstream retail market for fixed telephony services in Poland.

(224) Therefore, the Commission concludes that the merged entity is unlikely to have the ability or the incentive to engage in an input foreclosure strategy, and even if they did, there would be no significant detrimental effect on competition on the markets concerned.

(225) In the second place, the Commission considers that the Transaction does not lead to any customer foreclosure concerns in the market for the provision of wholesale fixed call termination services in the countries where XNG (Cyprus, France, Ireland and Malta) and UPC Polska (Poland) operate for the following reasons.

(226) First, the Parties' presence in the downstream markets for the retail supply of fixed telephony services is limited and well below 30% in Cyprus, France, Poland and Malta. Only in Ireland will the merged entity have a sizable market share (40.3%). Based on the Commission's findings in *Iliad/Play Communications* and information provided by the Notifying Party, the merged entity will continue competing with a number of similarly sized or stronger alternative operators in the downstream markets for the retail supply of fixed telephony services in Cyprus, France, Malta, Ireland and Poland.[287] In particular, two strong competitors are active in Ireland (Vodafone: 38.3%, Three Ireland: 35.3%).[288]

(227) Second, the Commission considers that, to the extent that each network operator holds a 100% market share in its individual network in the upstream market for wholesale fixed call termination services and that regulatory obligations applicable to the upstream market for wholesale fixed call termination services exist in Cyprus, France, Ireland, Malta and Poland as explained in paragraph 222 above, foreclosure of rivals in the upstream market would not be effective. Additional obligations such as non-discrimination or price control are therefore likely to reduce the merged entity's incentive to reduce purchases from the Parties' rivals in the upstream Cypriot, French, Irish, Maltese or Polish market, since the merged entity will not have the possibility to benefit from higher prices in the upstream market.

originating in Poland and terminating in France and Ireland amounted to […] and […] of the overall market for fixed termination services on fixed networks in France and Ireland, respectively. XNG's fixed to fixed traffic originating in France, Ireland, Malta and Cyprus, and terminating in Poland amounted to respectively […], […], […], and […] of the overall market for fixed termination services on fixed networks in Poland. Percentages derived from Form CO, Table 111. See also Commission decision of 26 October 2020 in Case M.9963 – *Iliad / Play Communications*, paragraph 116, where the Commission found that the provision of wholesale fixed call termination services in Cyprus, France, Ireland and Malta to Poland (fixed networks) is limited, when comparing the incoming traffic flow to France, Ireland and Malta originating from Poland against total international traffic which terminates in XNG's networks in Cyprus, France, Ireland and Malta.

287 See Commission's findings in case M.9963 – *Iliad / Play Communications*, paragraph 88: "*in 2019 in volume, in France, Orange: [30-40]%, SFR: [20-30]%, Bouygues Tel.: [10-20]%; (...); in Ireland, Vodafone: 38.3%, Three Ireland: 35.3%; in Malta, GO: 37%; in Cyprus, Cytamobile-Vodafone: [40-50]%, in Poland, Orange: [20-30]%, Polkomtel (Plus): [20-30]%*".

288 Ibid. The Notifying Party also considers Virgin Media and Sky Ireland as notable competitors in Ireland. Form CO, paragraph 535.

(228) Therefore, the Commission concludes that the merged entity is unlikely to have the ability and the incentive to engage in a customer foreclosure strategy, and even if it did, there would be no significant detrimental effect on competition on the markets concerned.

5.3.4. Wholesale call termination on mobile network

5.3.4.1. Wholesale markets for mobile call termination services – Retail market for fixed telephony services

(229) The wholesale markets for termination services on mobile networks are upstream to the markets for the retail supply of fixed telephony services. XNG is active on the upstream markets for termination services on its individual mobile networks in Cyprus, France, Italy, Ireland, Malta and Poland. UPC Polska is active in Poland on the market for the retail supply of fixed telephony services.[289]

(230) The vertical relationship between the Parties consists, upstream, of XNG's wholesale provision of call termination services on its mobile networks in Cyprus, France, Ireland, Italy, Malta and Poland (where XNG holds 100% on each of its networks); and, downstream, of UPC Polska's activities in the retail market for the provision of fixed telephony services in Poland (where the Parties' combined share is [10-20]% in volume and [5-10]% in value). This vertical relationship is affected within the meaning of the Merger Regulation, as the Parties exceed the 30% threshold on the upstream market for the wholesale provision of call termination services on XNG's mobile networks in Cyprus, France, Ireland, Italy, Malta and Poland.

(a) The Notifying Party's view

(231) The Notifying Party submits that the Transaction will not result in any anticompetitive foreclosure concerns for the reasons set out below.

(232) First, in addition to the arguments in paragraphs 206-207 above, the Notifying Party explained that the markets for mobile termination services in Cyprus, France, Ireland, Italy, Malta and Poland are subject to an *ex ante* regulation, which makes it technically impossible to refuse access to (or price discriminate against) other network operators.[290] The rates set out in the Delegated Regulation supersede the maximum termination rates previously defined by the national regulators. For mobile calls, the single maximum termination rate provided for by the Delegated Regulation is EUR 0.2 per minute and will be achieved gradually by 2024.[291] Therefore, in the Notifying Party's view, the merged entity would not have the ability to discriminate against the Parties' competitors for access to mobile call termination services in Cyprus, France, Ireland, Italy, Malta and Poland.

289 Even though UPC Polska is active on the market for the retail supply of mobile services in Poland, UPC Polska does not provide termination services on mobile networks. Form CO, paragraph 451. Also, the Notifying Party explained that the Transaction does not result in a vertical link between the wholesale provision of call termination services on mobile network in Poland (where P4 is present) and the retail mobile telecommunication services market in Poland (in which UPC is present through its MVNO business). In the current light MVNO model, UPC relies on its host network operator P4 to conduct the interconnection handling and the practical settlement of termination revenues and costs. However, both termination revenues and costs are ultimately borne by UPC. Form CO, paragraph 18.

290 Form CO, paragraph 459.

291 Form CO, paragraph 461.

(233) The Notifying Party further submits that, like the market for wholesale call termination on fixed networks, the markets for provision of wholesale call termination services on mobile networks are subject to *ex ante* regulation in the Member States through both non-tariff and price control obligations for the call termination on their respective networks.[292] This national regulation imposes on each network operator an obligation to provide termination services to competing operators. It also ensures that access to call termination is granted on reasonable conditions and that rates remain reasonable and non-discriminatory. Therefore, the new merged entity would not have the ability to discriminate against the Parties' competitors for access to mobile call termination services.

(234) Second, the Notifying Party asserts, in essence, that any attempt by the Parties to foreclose their competitors in Cyprus, France, Ireland, Italy and Poland, by means of wholesale mobile call termination services is unlikely to be effective, since neither XNG or UPC can influence the cost structure of their competitors in a significant manner.[293] Furthermore, according to the Notifying Party, this vertical relationship concerns mainly international fixed calls to mobile voice calls originating in Poland, which are extremely limited traffic flows.[294] In addition, the Notifying Party submits that traffic flows originating from UPC Polska's fixed network and terminating in France, Italy, Ireland, Malta and Cyprus are limited ([…] million of minutes in 2020).[295] Any attempt, therefore, by the Parties to increase their termination charges

292 For mobile termination services see : Décision n°2017-1453 de l'Autorité de régulation des communications électroniques et des postes en date du 12 décembre 2017 portant sur la détermination des marchés pertinents relatifs à la terminaison d'appel vocal sur les réseaux fixes en France et à la terminaison d'appel vocal sur les réseaux mobiles en France, la désignation d'opérateurs exerçant une influence significative sur ces marchés et les obligations imposées à ce titre pour la période 2017-2020 (**France**), AGCOM, delibera n°599/18/CONS, Identificazione e analisi dei mercati dei servizi della terminazione delle chiamate vocali su singola rete mobile (mercato n°2/2014) (**Italy**), Commission for Communications Regulation, Decision D11/19 of 23 May 2019, Price Control Obligations for Fixed and Mobile Call Termination Rates (**Ireland**), Malta Communications Authority, decision MCA/D/18- 3409, 19 December 2018, Wholesale voice call termination on individual mobile networks in Malta - Definition, assessment of SMP & regulation of relevant markets (**Malta**). For **Cyprus**, the relevant individual decisions are: ΓΕΡΗΕΤ, Α.Δ.Π. 598/2015, ΕΕ. 4684, 25 Σεπτεμβρίου 2015, Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (MTN), Α.Δ.Π. 598/2015, ΓΕΡΗΕΤ, Α.Δ.Π. 597/2015, Ε.Ε. 4684, 25 Σεπτεμβρίου 2015, Παράρτημα Τρίτο Μέρος Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (ATHK), Α.Δ.Π. 597/2015, ΓΕΡΗΕΤ, Α.Δ.Π. 596/2015, Ε.Ε. 4684, 25 Σεπτεμβρίου 2015, Παράρτημα Τρίτο Μέρος II Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (CABLENET), Α.Δ.Π. 596/2015 and ΓΕΡΗΕΤ, Α.Δ.Π 595/2015, ΕΕ 4684, 25 Σεπτεμβρίου 2015, ΠΑΡΑΡΤΗΜΑ ΤΡΙΤΟ ΜΕΡΟΣ II Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (PRIMETEL), Α.Δ.Π. 595/2015. For **Poland**, the relevant decisions are: UKE, 14 grudnia 2012, No. DART–SMP-6040-4/12(34) (Aero2 sp. z o.o.), Decision No. DART-SMP-6040-10/11(49) (P4 sp. z o.o.), Decision No. DART-SMP-6040-8/11(65) (Polkomtel sp. z o.o.), Decision No. DART–SMP–6040-7/11(82) (T-Mobile Polska S.A.), Decision No. DART-SMP-6040-9/11(58) (Orange Polska S.A.)

293 Form CO, paragraph 463.

294 The Notifying Party further submitted that, in 2019, the volume of international fixed to mobile traffic originating in Poland represented less than […] of the total fixed to mobile traffic volume originating in Poland. Form CO, paragraph 464 and footnote 228.

295 UPC Polska considers that the traffic originating from its fixed network and terminating on mobile networks in France, Italy, Ireland, Malta and Cyprus is extremely limited (it amounted to […] million of minutes in 2020). This figure includes both the volume of fixed traffic originating on UPC Polska's fixed network and terminating on mobile networks in Poland and includes fixed calls terminating on foreign mobile networks. Form CO, paragraph 466.

would only have little or no impact on the cost structure of their competitors. Therefore, the Parties cannot influence the cost structure of their competitors and would not have the incentive to discriminate against the Parties' competitors for access to mobile call termination services in Poland, France, Italy, Ireland, Malta and Cyprus.[296]

(235) Therefore, the Notifying Party considers that any risk of foreclosure can be ruled out.

(b) The Commission's assessment

(236) In the first place, the Commission considers that the Transaction does not raise any input foreclosure concerns in the market for the retail supply of fixed telephony services Poland by means of discrimination against the Parties' competitors for access to mobile call termination services in Cyprus, France, Ireland, Italy, Malta and Poland or by degrading terms and conditions for access to these services, for the following reasons.

(237) First, in line with paragraphs 206-207, the merged entity will not have the ability to discriminate against the Parties' competitors in Poland, for access to mobile call termination services in Cyprus, France, Ireland, Italy, Malta and Poland. In addition, national regulators, in each of Cyprus, France, Ireland, Malta and Poland have imposed a number of regulatory obligations,[297] including access to specific network facilities, transparency (including publication of draft interconnection agreements on the network operator's website), non-discrimination and price control.[298] Therefore, the merged entity will not have the ability to discriminate against XNG's competitors in France, Ireland, Malta and Cyprus, as well as against the Parties'

296 Form CO, paragraph 467.

297 For mobile termination services see: Décision n°2017-1453 de l'Autorité de régulation des communications électroniques et des postes en date du 12 décembre 2017 portant sur la détermination des marchés pertinents relatifs à la terminaison d'appel vocal sur les réseaux fixes en France et à la terminaison d'appel vocal sur les réseaux mobiles en France, la désignation d'opérateurs exerçant une influence significative sur ces marchés et les obligations imposées à ce titre pour la période 2017-2020 (**France**), AGCOM, delibera n°599/18/CONS, Identificazione e analisi dei mercati dei servizi della terminazione delle chiamate vocali su singola rete mobile (mercato n°2/2014) (**Italy**), Commission for Communications Regulation, Decision D11/19 of 23 May 2019, Price Control Obligations for Fixed and Mobile Call Termination Rates (**Ireland**), Malta Communications Authority, decision MCA/D/18- 3409, 19 December 2018, Wholesale voice call termination on individual mobile networks in Malta - Definition, assessment of SMP & regulation of relevant markets (**Malta**). For **Cyprus**, the relevant individual decisions are: ΓΕΡΗΕΤ, Α.Δ.Π. 598/2015, ΕΕ. 4684, 25 Σεπτεμβρίου 2015, Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (MTN), Α.Δ.Π. 598/2015, ΓΕΡΗΕΤ, Α.Δ.Π. 597/2015, Ε.Ε. 4684, 25 Σεπτεμβρίου 2015, Παράρτημα Τρίτο Μέρος Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (ATHK), Α.Δ.Π. 597/2015, ΓΕΡΗΕΤ, Α.Δ.Π. 596/2015, Ε.Ε. 4684, 25 Σεπτεμβρίου 2015, Παράρτημα Τρίτο Μέρος ΙΙ Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (CABLENET), Α.Δ.Π. 596/2015 and ΓΕΡΗΕΤ, Α.Δ.Π 595/2015, ΕΕ 4684, 25 Σεπτεμβρίου 2015, ΠΑΡΑΡΤΗΜΑ ΤΡΙΤΟ ΜΕΡΟΣ ΙΙ Απόφαση αναφορικά με την εξέταση της Αγοράς (Απόληξης) Τερματισμός φωνητικών κλήσεων σε μεμονωμένα δίκτυα κινητής τηλεφωνίας σε επίπεδο χονδρικής, και την επιβολή Ρυθμιστικών Υποχρεώσεων στον οργανισμό με ΣΙΑ (PRIMETEL), Α.Δ.Π. 595/2015. For **Poland**, the relevant decisions are: UKE, 14 grudnia 2012, No. DART–SMP-6040-4/12(34) (Aero2 sp. z o.o.), Decision No. DART-SMP-6040-10/11(49) (P4 sp. z o.o.), Decision No. DART-SMP-6040-8/11(65) (Polkomtel sp. z o.o.), Decision No. DART–SMP–6040-7/11(82) (T-Mobile Polska S.A.), Decision No. DART-SMP-6040-9/11(58) (Orange Polska S.A.).

298 Case M.8883 – *PPF Group / Telenor Target Companies*, paras. 50 and 56.

competitors in Poland for access to mobile call termination services in Cyprus, France, Ireland, Malta and Poland.

(238) Second, the Commission observes that the provision of wholesale mobile call termination services originating from Poland and terminating in Cyprus, France, Ireland, Italy or Malta, to XNG's competitors are limited.[299] [300] In particular, the proportion of the fixed to mobile traffic originating on UPC Polska's fixed network in the total market for mobile termination services in Poland is small (approximately […] of the total fixed to mobile traffic volume originating in Poland).[301] In this regard, the Commission considers that any increase by the merged entity of its termination charges upstream would have only a limited impact on the cost structure of the merged entities' competitors in the relevant countries. Therefore, a possible input foreclosure strategy is unlikely to be profitable for the merged entity.

(239) Third, in view of the small traffic volume of mobile calls originating from Poland and terminating in Cyprus, France, Ireland, Italy or Malta[302], the Transaction is not expected to have a detrimental effect on competition in the downstream market for the retail supply of fixed telephony services in Poland.

(240) Therefore, the Commission concludes that the merged entity is unlikely to have the ability and the incentive to engage in an input foreclosure strategy, and even if it did, there would be no significant detrimental effect on competition on the markets concerned.

(241) In the second place, the Commission considers that the Transaction does not lead to any customer foreclosure concerns in XNG's mobile networks in Cyprus, France, Ireland, Italy, Malta and Poland.

(242) First, the Commission observes that the Parties' presence in the downstream market for the retail supply of fixed telecommunication services is limited (estimated below 20% in Poland: [10-20]% in volume and [5-10]% in value.)

(243) Second, in view of the regulatory obligations applicable to the upstream market for the wholesale mobile call termination services, described in paragraphs 232-233

299 According to the Notifying Party, this vertical relationship concerns mainly international fixed calls to mobile voice calls originating in Poland. The Notifying Party submits that in 2019, the volume of international fixed to mobile traffic originating in Poland represented less than […] of the total fixed to mobile traffic volume originating in Poland. Form CO, paragraph 464.

300 UPC Polska considers that the traffic originating from its fixed network and terminating on mobile networks in France, Italy, Ireland, Malta and Cyprus is extremely limited ([…] million of minutes in 2020). Based on the information submitted by the Notifying Party, it represented only approx. […] of the total volume of fixed to mobile traffic originating on UPC Polska's fixed network, and approx. […] of the total traffic volume originating on a fixed network in Poland and terminating on a non-Polish fixed or mobile network ([…] million of minutes in 2019). See Form CO, paragraphs 465 and 466.

301 Based on the information submitted in the Form CO, paragraph 466. According to the Notifying Party, the volume of fixed to mobile traffic originating on UPC Polska's fixed network is also limited. It amounted to […] million of minutes in 2020. This figure includes both the volume of fixed traffic originating on UPC's fixed network and terminating on mobile networks in Poland and includes fixed calls terminating on foreign mobile networks. In reference to case M.9963 – *Iliad / Play Communications*, the Notifying Party estimated the size of the Polish market for mobile termination services to be […] million of minutes.

302 The Notifying Party submitted that the vertical relationship concerns mainly international fixed calls to mobile voice calls originating in Poland. According to the Notifying Party, in 2019, the volume of international fixed to mobile traffic originating in Poland represented less than […] of the total fixed to mobile traffic volume originating in Poland. Form CO, paragraph 464 and footnote 228.

above, applicable to the upstream market for wholesale mobile termination services, foreclosure of UPC's and XNG's competitors in the upstream market, would not be effective. Additional obligations such as non-discrimination or price control are likely to reduce the merged entity's incentive to reduce purchases from XNG's rivals in the upstream Cypriot, French, Irish, Italian, Maltese or Polish market, since the merged entity will not have the possibility to benefit from higher prices in the upstream market.

(244) Third, as explained in paragraphs 141 and 143 above on the horizontal non-coordinated effects assessment of the Polish market for retail supply of fixed telephony services, downstream, a number of competitors are active on such market with market shares around or in excess of 20%, both in volume and in value: Orange ([20-30]% by volume, [20-30]% by value); Polkomtel ([20-30]% by volume, [20-30]% by value); and T-Mobile ([10-20]% by volume, [20-30]% by value). In view of this, the Proposed Transaction is not expected to have detrimental effects on the upstream market for the provision of wholesale mobile call termination services in Cyprus, France, Ireland, Italy, Malta and Poland.

(245) Therefore, the Commission concludes that the merged entity is unlikely to have the ability and the incentive to engage in a customer foreclosure strategy, and even if it did, there would be no significant detrimental effect on competition on the markets concerned.

6. CONCLUSION

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

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President