EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.10663 – ORANGE / VOO / BRUTÉLÉ

(Only the English text is authentic)

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 8(2) Regulation (EC) 139/2004
Date: 20/03/2023

EUROPEAN
COMMISSION

Brussels, 20.3.2023
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COMMISSION DECISION

of 20.3.2023

declaring a concentration to be compatible with the internal market and the EEA agreement

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declaring a concentration to be compatible with the internal market and the EEA agreement

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

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

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings[2], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 28 July 2022 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations,[3]

Having regard to the final report of the Hearing Officer in this case,[4]

Whereas:

1. INTRODUCTION

(1) On 22 June 2022, the European Commission ("**Commission**") received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("**Merger Regulation**") by which Orange S.A. ("**Orange**" or the "**Notifying Party**", France), through its solely controlled Belgian subsidiary Orange Belgium S.A. ("**OBE**", Belgium), will acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control over the whole of VOO S.A. ("**VOO**", Belgium) and the telecommunications, media and technology activities[5] of Société Intercommunale pour la Diffusion de la Télevision ("**Brutélé**", Belgium, together

[1] OJ C 115, 9.8.2008, p.47.

[2] OJ L 24, 29.1.2004, p. 1 ("**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.

[3] Opinion of the Advisory Committee on Concentrations of 8 March 2023.

[4] Final report of the Hearing Officer.

[5] The telecommunications, media and technology activities of Société Intercommunale pour la Diffusion de la Télévision includes all the assets and liabilities of Société Intercommunale pour la Diffusion de la Télévision with the exception of: (i) minority shareholdings in Network Research Belgium S.A., EthiasCo S.C.R.L. and Enodia S.C.; (ii) ownership of lands and buildings located in Brussels and Couillet and the liabilities related to those assets; and, (iii) the statutory personnel and associated liabilities of Société Intercommunale pour la Diffusion de la Télévision ("**Excluded Assets of Brutélé**").

with VOO, the "**Targets**") (the "**Transaction**").[6] Orange together with the Targets will be referred to as the "**Parties**".

(2) This decision is structured as follows. Section 2 describes the Parties and explains why the Transaction would result in a concentration. Section 3 explains why the concentration brought about by the Transaction has a Union dimension. Section 4 describes the procedure followed in this case. Section 5 describes the investigation undertaken by the Commission into the Transaction. Section 6 defines the relevant product and geographic markets. Section 7 sets out the Commission's assessment of whether the Transaction is likely to significantly impede effective competition. Section 8 contains the Commission's assessment of the commitments proposed by Orange. Section 9 contains the conditions and obligations attached to this decision.

2. THE PARTIES AND THE OPERATION

(3) **Orange** is a French global telecommunications operator, active in Belgium primarily through OBE and through other subsidiaries (Orange Business Services SA, Business & Decision SAS, Orange Cyberdefense Belgium NV and Orange Bank SA via its subsidiary Anytime SA).[7] OBE primarily offers mobile telecommunications services based on its own mobile network in Belgium. OBE also provides fixed telecommunications services in Belgium based on third-party fixed networks. To provide its fixed services, OBE relies on Telenet Group Holding NV's ("**Telenet**", Belgium)[8] network in Flanders and two-thirds of Brussels and on the Targets' networks for the rest of Belgium.

(4) **VOO** is a cable operator mainly active in the Walloon region of Belgium. VOO primarily provides fixed telecommunications services through its own cable network, and, to a limited degree, mobile telecommunications services based on third-party mobile networks (currently including Telenet and Proximus NV/SA ("**Proximus**", Belgium).[9] VOO also has television ("**TV**") activities in Belgium through its solely controlled subsidiary BeTV S.A. ("**BeTV**"). VOO is currently solely controlled by Nethys S.A. ("**Nethys**", Belgium), in turn solely controlled by Enodia S.C. ("**Enodia**", Belgium). Enodia is ultimately owned by the province of Liège (owning 53.91% of Enodia's shareholding) and other municipalities.

(5) **Brutélé** is a cable operator mainly active in the Brussels-Capital Region and in certain municipalities in the Walloon region of Belgium (essentially around the city of Charleroi in the Province of Hainaut, in the Province of Namur and in the Walloon Brabant Province). Brutélé provides fixed telecommunications services through its cable network. Brutélé is currently owned by 30 Brussels and Walloon municipalities, including the municipality of Charleroi (27.5%), Ixelles (10.4%), Uccle (8.5%) and Saint-Gilles (6.4%). All other municipalities own less than 5% of Brutélé's share capital.

(6) VOO and Brutélé market, at the retail level, their telecommunications services under the common brand VOO. This brand is part of VOO and Brutélé gradual integration since 2006, initiated by the creation of the economic interest group ALE-Téledis-

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6 Publication in the Official Journal of the European Union No C 246, 29.6.2022, p. 5.

7 References to OBE shall be understood as covering all the activities of Orange in Belgium, even those that are not directly supplied by OBE.

8 Telenet is ultimately controlled by Liberty Global Plc (United Kingdom).

9 Proximus is the Belgian telecommunications incumbent and is currently controlled by the Belgian government.

Brutélé. The fixed cable networks of VOO and Brutélé's do not overlap in any municipality.[10]

(7) The Transaction will take place through two inter-related transactions.[11] First, Enodia will acquire the entire issued share capital of Brutélé (including the Excluded Assets of Brutélé). Following internal restructuring operations, Brutélé (with the exception of the Excluded Assets of Brutélé) will be contributed to VOO whose entire share capital will be held by Nethys.[12] Enodia and Brutélé's shareholders executed the share purchase agreement related to Enodia's acquisition of Brutélé on 23 December 2021 ("**Brutélé SPA**").

(8) Second, OBE will acquire from Nethys the entire share capital of VOO through a special purpose vehicle ("**NewCo**"). Nethys will concomitantly reinvest in NewCo and acquire 25% plus one non-controlling[13] share of the fully diluted share capital of NewCo. Orange and Nethys executed the share purchase agreement for this second step on 24 December 2021 ("**VOO SPA**").

(9) Once both the Brutéle SPA and the VOO SPA are implemented, OBE will (i) hold the majority of votes both at the shareholders' meeting and at the board of directors of NewCo; (ii) have the exclusive right to unilaterally determine the business plan, major investments and other strategic decisions, subject to very limited exceptions;[14] and, (iii) have the exclusive right to unilaterally appoint the senior management of NewCo.

(10) Therefore, the Transaction concerns the acquisition of sole control of VOO and Brutélé by Orange which is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(11) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Orange: EUR 42 728 million, VOO: EUR […] million, Brutélé: EUR […] million). Each of Orange and VOO have a Union-wide turnover of more than EUR 250 million (Orange: EUR […] million; VOO: EUR […] million). While VOO and Brutélé generate more than two-thirds of their Union-wide turnover in Belgium, Orange generates more than two-thirds of its Union-wide turnover in France. Therefore, the Parties do not generate more than two-thirds of their Union-wide turnover is one and the same Member State.

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10 The horizontal overlaps and vertical links between VOO and Brutélé were assessed and cleared in the Commission decision of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé. However, that transaction was ultimately not implemented.

11 The Transaction follows a previous attempt by the United States based private equity firm Providence to acquire the Targets in 2019. While that concentration was cleared by the Commission (Commission decision of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé), OBE successfully challenged it before the Belgian Courts, which annulled it essentially on the grounds of lack of transparency and fairness of the sales process. Subsequently, Enodia and Nethys launched a new sales process in 2021, which led to the present Transaction.

12 For completeness, Enodia will retain the Excluded Assets of Brutélé.

13 On the basis Articles 4.5, 7.3 and 11 of the form of shareholders' agreement ("SHA") annexed to the VOO SPA (as defined at the end of paragraph (8)) that Orange and Nethys will execute at closing of the Transaction, Nethys will retain a limited number of veto rights aimed at preserving its minority interest without granting it joint control over NewCo. The SHA is included as Exhibit E to Annex 2 to the Form CO.

14 See footnote 9.

(12) Therefore, the Transaction has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

4. THE PROCEDURE

(13) The Transaction was notified on 22 June 2022.

(14) After a preliminary examination of the notification and based on the first phase market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 28 July 2022 (the "**Article 6(1)(c) Decision**").[15]

(15) In accordance with paragraphs 45 and 46 of the Best Practices on the conduct of EU merger control proceedings, on 29 July 2022 the Commission provided a number of key documents to the Notifying Party.

(16) On 8 August 2022, the second phase investigation period was extended by 10 working days at the request of the Notifying Party pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(17) On 22 August 2022, the Notifying Party submitted its written comments to the Article 6(1)(c) Decision (the "**Article 6(1)(c) Response**").

(18) On 31 August 2022, a state of play meeting between the Notifying Party and the Commission took place.

(19) On 9 September 2022, the Commission provided, at the request of the Notifying Party, two additional key documents to the Notifying Party.

(20) On 22 September 2022, a meeting between the Commission and the Notifying Party's economists took place.

(21) On 12 October 2022, the second phase investigation period was extended by 2 working days at the request of the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(22) On 14 October 2022, the second phase investigation period was extended by 2 working days at the request of the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(23) On 18 October 2022, the second phase investigation period was extended by 2 working days at the request of the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(24) On 21 October 2022, the second phase investigation period was extended by 4 working days at the request of the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.

(25) On 26 October 2022, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation, addressed to the Notifying Party following the conclusion of two memorandums of understanding ("**MoUs**") between Orange and Telenet ("**Orange Article 11(3) Decision**"). The Notifying Party complied with the Orange Article 11(3) Decision on 30 January 2023. Therefore, pursuant to Article 10(4) of the Merger Regulation, the suspension of the time limits expired at the end of 30 January 2023.

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15 Publication in the Official Journal of the European Union No C 315, 19.8.2022, p. 1.

(26) On 30 January 2023, the Notifying Party submitted commitments pursuant to Article 8(2) of the Merger Regulation in order to address the competition concerns identified by the Commission. On 31 January 2023, the Commission launched a market test of the commitments submitted by the Notifying Party on 30 January 2023.

(27) The Commission gave the Parties detailed feedback on the outcome of the market test during a call on 10 February 2023.

(28) The Advisory Committee discussed a draft of this decision on 8 March 2023 and issued a favourable opinion.

5. THE INVESTIGATION

(29) This decision contains the Commission's findings on the basis of the market investigation it carried out prior to the notification of the Transaction, in the first phase and in the second phase of the investigation until the adoption of the decision.

(30) Prior to the notification of the Transaction, the Commission sent 10 requests for information to the Parties, responses to which were included in the notification. The Commission conducted several interviews with market participants.

(31) During the first phase investigation, the Commission sent 5 requests for information to the Parties pursuant to Article 11 of the Merger Regulation. The Commission also sent requests for information in the form of three different questionnaires to competitors, suppliers and customers of the Parties.

(32) On the basis of the results of its first phase investigation, the Commission raised serious doubts as to the probability that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the markets for the retail supply of (i) fixed internet access, (ii) audio-visual services, (iii) multiple-play bundles (including FMC[16] bundles) in the areas covered by VOO and Brutélé's own fixed networks. The Commission could also not exclude serious doubts about the Transaction's possible (i) increase of the likelihood of coordination on the affected retail markets between the remaining operators in areas covered by VOO and Brutélé's own fixed networks, (ii) increase of the bargaining power of the merged entity in the market for the wholesale acquisition of TV channels, and (iii) impact on the deployment of third-party mobile networks following the migration of VOO's mobile customers (currently hosted on third-party mobile networks) to Orange's mobile network.

(33) Over the course of its second phase investigation, the Commission sent 13 requests for information to the Parties pursuant to Article 11 of the Merger Regulation, including four detailed internal documents requests, resulting in the submission of over 1.1 million internal documents (approximately 860 000 internal documents from Orange and approximately 230 000 from the Target and the Seller). Further, the Commission held several calls with market participants and sent requests for information to competitors of the Parties.

[16] FMC stands for Fixed-Mobile Convergence and FMC bundles are bundled telecommunication products offered at retail level which include at least one mobile and one fixed component (i.e., fixed internet/broadband, TV and/or fixed telephony/landline services).

6. RELEVANT MARKETS

6.1. Introduction

(34) In Belgium, Orange provides retail mobile telecommunications services on the basis of its own network. It also offers retail fixed internet, audio-visual ("**AV**") and fixed telephony services through wholesale access to Telenet's and the Targets' fixed cable networks, which respectively cover Flanders, two thirds of Brussels and a limited number of municipalities in Wallonia (the "**Telenet footprint**") and Wallonia and the remaining one third of Brussels (the "**Targets' footprint**")[17]. The Targets are mainly active in the retail supply of fixed internet, AV and fixed telephony services on the basis of their own cable networks. The Targets also provide mobile telecommunications services by relying on the mobile networks of Telenet and Proximus.

(35) Through the Transaction, OBE intends to become a fixed network operator ("**FNO**") in the south of Belgium and parts of Brussels rather than a fixed virtual network operator ("**FVNO**") relying entirely on regulated wholesale access, in particular in view of the increasing uptake of FMC offers in Belgium

(36) Based on the markets as defined below in sections 6.1. and 6.2., the Commission has found that the Transaction gives rise to the following horizontally affected markets:

(a) Retail supply of fixed internet access services in the Targets' footprint;

(b) Retail supply of AV services in the Targets' footprint;

(c) Retail supply of multiple-play bundles in the Targets' footprint;

(d) Retail supply of FMC bundles in the Targets' footprint;

(e) Retail supply of fixed-only bundles in the Targets' footprint;

(f) Retail supply of mobile telecommunications services in Belgium;

(g) Retail supply of fixed telephony services in the Targets' footprint;[18]

(h) Wholesale supply of basic pay TV and Free-To-Air ("**FTA**") TV channels in the Targets' footprint (demand side); and,

(i) Wholesale supply of premium pay TV channels in the Targets' footprint (demand side).

(37) Similarly, based on the markets as defined below in sections 6.1. and 6.2., the Transaction gives rise to the following vertically affected links:

(a) Vertically affected markets arising from the relationships between the market for the wholesale supply of broadband access services (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) in the Targets' footprint;

(b) Vertically affected markets arising from the relationships between the market for the wholesale supply of access to TV services (upstream), and the markets

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[17] Telenet's footprint and the Targets' footprint are entirely non-overlapping, meaning that a given municipality is either covered by Telenet's fixed cable network or by the Targets' fixed cable network.

[18] Even though the Commission has left open whether the market for the retail supply of fixed telephony services would be national in scope, the only geographic scope under which the combined market shares of the Parties exceeds 20% is the Targets' footprint. As such, the Transaction will only be assessed on the basis of a geographic scope corresponding to the Targets' footprint.

for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) in the Targets' footprint;

(c) Vertically affected markets arising from the relationships between the market for the wholesale supply of premium pay TV channels (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(d) Vertically affected markets arising from the relationships between the market for the wholesale supply of access and call origination services on mobile networks (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) in the Targets' footprint;

(e) Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on fixed networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(f) Vertically affected markets arising from the relationships between the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(g) Vertically affected markets arising from the relationships between the market for the wholesale supply of domestic call transit services on fixed networks (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(h) Vertically affected markets arising from the relationships between the market for the wholesale supply of internet connectivity services (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(i) Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on mobile networks (upstream), and the markets for the retail supply of fixed internet access services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(j) Vertically affected markets arising from the relationships between the market for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) in the Targets' footprint.

(38) The Transaction does not give rise to affected markets related to a conglomerate relationship.

6.2. Retail markets

6.2.1. Retail supply of fixed internet access services

(39) Fixed 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, fibre, fixed wireless access ("**FWA**"), a cable modem or mobile broadband technology, or in the form of dedicated access involving leased lines connecting a specific location to the internet and guaranteeing higher levels of performance and security ("**dedicated access**").[19]

6.2.1.1. Parties' activities

(40) Both the Targets and OBE are active in the market for the retail supply of fixed internet access services.

(41) OBE provides fixed internet access services mostly through FMC offers and, since October 2020, through standalone offers and fixed bundles under the brand "Orange" throughout Belgium. OBE is an FVNO that does not have any fixed network of its own in Belgium. As a result, OBE provides retail fixed internet access services through regulated wholesale access.[20] For residential and small office/home office ("**SOHO**") customers in Belgium, OBE relies on the reference offers for cable access of Telenet and the Targets in their respective footprints.

(42) The Targets provide fixed internet access services both in standalone offers and in multiple-play bundles under their brands "VOO" and "Zuny" in their respective footprints only. To provide these services, the Targets rely on their own cable networks in the Targets' footprint. The Targets do not provide any fixed internet access services outside of their own footprint and have never attempted to do so.

6.2.1.2. Product market definition

6.2.1.2.1. Past Commission decisions

(43) In recent cases, including specifically for Belgium, the Commission has considered that the relevant product market is the overall retail market for the provision of fixed internet access services, including all product types (narrowband, broadband, dedicated access), distribution modes (DSL, cable, fibre, FWA) and speeds/bandwidths, to residential and SOHO customers.[21]

(44) Furthermore, in previous decisions, the Commission excluded from the scope of the market for the retail supply of fixed internet access services, those fixed internet access services provided through mobile network infrastructure (e.g., fixed Long-Term Evolution ("**fLTE**")) which form part of the market for retail mobile telecommunications services.[22] Similarly, the Commission excluded from the scope

[19] Commission decision of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 37 and of 29 January 2010 in case M.5730 – Telefónica/Hansenet Telekommunikation, paragraph 7.

[20] Regulated wholesale access conditions to the cable networks of Telenet, VOO and Brutélé are set in the decision of the Conférence des régulateurs du secteur des communications électroniques/Conferentie van Regulatoren voor de elektronische Communicatiesector ("**CRC**") of 26 May 2020 on the monthly prices for wholesale access to the cable operators' networks ("**Wholesale Access Regulation**"). In this decision, Wholesale Access Regulation should be understood as also including any decision adopted by the Conseil Supérieur de l'audiovisuel ("**CSA**"), the Vlaamse Regulator voor de Media ("**VRM**") and the Medienrat der Deutschsprachigen Gemeinschaft ("**Medienrat**") outside the CRC which extends the scope, implements or otherwise impacts the Wholesale Access Regulation.

[21] Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 46; 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraphs 74; and, of 24 March 2021 in case M.10087 – Proximus/Nexus/JV, paragraphs 74.

[22] Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 40; of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraphs 74; and, of 24 March 2021 in case M.10087 – Proximus/Nexus/JV, paragraphs 74.

of the market fixed internet access services provided to large business and government customers, which form part of a separate market for the retail supply of business connectivity.[23]

6.2.1.2.2. Notifying Party's views

(45) The Notifying Party submits that there is an overall market for the retail supply of fixed internet access services, without any potential segmentation and excluding both fLTE and business connectivity services.

(46) In the Article 6(1)(c) Response, the Notifying Party does not submit any new observations.

6.2.1.2.3. Commission's assessment

(47) The market investigation indicated that there are no reasons to depart from the definition of the market for the retail supply of fixed internet access services adopted by the Commission in the past as it still adequately reflects the market realities in Belgium. In particular, all market participants who expressed a view confirmed that the market for the retail supply of fixed internet access should not include fLTE.[24]

(48) The market investigation was not conclusive as to a possible segmentation of the market for the retail supply of fixed internet access services by distribution technology between legacy distribution technologies (i.e., DSL and cable) and fibre-based distribution technologies.[25] From the demand-side perspective, one market respondent explained that: "[c]*onsumers associate* [f]*ibre with speed and quality, but believe it to be more expensive as well*".[26] At the same time, another market participant explained that: "[c]*onsumers mainly focus on providers and services, assuming that most of the providers provide similar services*".[27] From the supply-side perspective, one market participant explained that: "[f]*rom our experience from other markets where we conduct business, switching from one* [distribution] *technology to a superior one proved to be an operation that required significant human resources, time and investments*".[28]

(49) The market investigation was furthermore not conclusive as to whether the market for the retail supply of fixed internet access services should be segmented by available download speed.[29] While some market participants agree that in practice, from a demand-side perspective, customers consider download speeds above a certain minimum threshold to be interchangeable, there is a disagreement between market participants on what such minimum threshold should be.[30] For instance,

23 Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraphs 74; and, of 24 March 2021 in case M.10087 – Proximus/Nexus/JV, paragraphs 74.

24 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 8.

25 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 9.

26 M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 9.1 (ID 731).

27 Proximus' response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 9.1 (ID 705).

28 Digi's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 9.2 (ID 854).

29 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 10.

30 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 10.

Telenet explained that: "[w]*hile speed is an important element of differentiation for competition, Telenet does not consider that there is a minimum threshold below which customers do not consider a product to be interchangeable*".[31]

(50) Furthermore, from a supply-side perspective, the Commission notes that the Belgian Institute for Postal Services and Telecommunications ("**BIPT**") published data showing a very high penetration rate of high speed internet: 99.1% of Belgian households have access to an available download speed of more than 30 Mbps, while 97.2% of Belgian households have access to an available download speed of more than 100 Mbps.[32] Accordingly, due to the overall high available download speed penetration rate in Belgium and in the absence of a clear benchmark to segment the market for the retail supply of fixed internet access services, the Commission considers that it does not have enough evidence to take into account this possible segmentation.

(51) In light of the above and for the purpose of this decision, the Commission concludes that there is an overall market for the retail supply of fixed internet access services without further segmentations, excluding fLTE and retail business connectivity services.[33] The question whether the market for the retail supply of fixed internet services should be segmented between legacy distribution technologies on the one hand, and fibre-based distribution technologies on the other can be left open for the purpose of this decision as it would not materially affect the assessment of the Transaction.

6.2.1.3. Geographic market definition

6.2.1.3.1. Past Commission decisions

(52) The Commission has generally defined the retail supply of fixed internet access services as being national in scope.[34] However, in its latest decisions concerning Belgium, the Commission has left open the exact geographic scope and assessed the effects of the transactions at (i) national level, (ii) regional level (i.e., Flanders, Wallonia and the Brussels-Capital Region), (iii) the level of each cable operator's coverage area[35], and (iv) the level of each operator's footprint.[36]

(53) In case M.9757 – *Providence/VOO/Brutélé*, while the Commission excluded a definition on a regional basis and left open the question of whether the market should be national or limited to the cable operators' coverage areas, the Commission did observe that the CRC recommends adopting a geographic definition of the market

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[31] Telenet's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 10.1 (ID 646).

[32] BIPT's *Communication of 3 June 2022 on the situation of the electronic communications and television markets (2021)*, paragraphs 53 and 54 (ID 2068).

[33] See section 6.2.6 below which describes the different scope and customer needs of this market.

[34] Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 50; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraph 40; of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland, paragraph 197; of 29 June 2010 in case M.5532 – Carphone Warehouse/Tiscali UK, paragraph 47; of 9 January 2010 in case M.5730 – Telefónica/Hansenet Telekommunikation, paragraph 28.

[35] An operator's coverage area is the territory where its services are marketed and available to customers while an operator's footprint is the territory where that operator has deployed its own network and is marketing its services on that basis. A virtual fixed operator may have a larger coverage area than an operator that only owns its own network in a more limited territory.

[36] Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV; of 24 March 2021 in case M.10087 – Proximus/Nexus/JV.

according to the footprint of the cable networks.[37] The Commission further explained that this choice would be mainly based on the absence of direct substitution on the demand side and on the supply side between cable network offers. From a demand-side perspective, the Commission stressed that the networks are located in different areas and in the event of a price increase, a customer cannot decide to migrate to the services of an operator in another area/footprint. The Commission also underlined that, from a supply-side perspective, a cable operator cannot easily enter another operator's footprint, due to the high cost of building networks. In addition, the Commission referred to an analysis by the CRC which noted the existence of heterogeneous conditions of competition in the different cable footprints.[38]

6.2.1.3.2. Notifying Party's views

(54) The Notifying Party submits that the geographic scope of the market for the retail supply of fixed internet access services should be national.

(55) First, the Notifying Party notes that many of the players in the retail supply of fixed internet access services are active nation-wide. Second, the Notifying Party stresses that cable operators could easily start providing retail fixed internet access services outside their footprint area by relying on the Wholesale Access Regulation as this has also been OBE' strategy. Third, the Notifying Party submits that national presence and offerings of larger existing players like Proximus and Orange create uniform conditions of competition and would support its view that retail market for fixed internet services should be of national geographic scope. Finally, the Notifying Party considers that the increasing trend towards FMC bundles implies that Belgian fixed telecommunications markets should be national due to the mobile component of these bundles, which, the Notifying Party submits, is national in scope.

(56) In the Article 6(1)(c) Response, the Notifying Party further points to previous Commission cases with alleged equivalent market conditions as the ones in the present case – where most but not all of the players were active nationally and in which the Commission found that the retail fixed and multiple-play markets were national in scope.[39]

6.2.1.3.3. Commission's assessment

(57) The Commission considers that, for the purpose of this decision, the geographic scope of the market for the retail supply of fixed internet access corresponds to the Targets' footprint for the following reasons.

(58) First, the results of the market investigation confirmed that, from a demand-side perspective, a customer in the Targets' footprint cannot turn to an operator that is not active inside the Targets' footprint. The large majority of the respondents who expressed a view further indicated that, from a supply-side perspective, it would not be possible (without incurring significant investments) for an operator offering retail internet access services in Belgium outside the Targets' footprint to start providing

[37] Commission decision of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 34.

[38] CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, Decision of 29 June 2018, paragraphs 600-626 (ID 2058).

[39] Commission decisions of 2 July 2014 in case M.7231 – Vodafone/ONO; of 10 October 2014 in case M.7000 – Liberty Global/Ziggo; of 19 May 2015 in case M.7421 – Orange/Jazztel.

retail fixed internet access services in the short term in the specific geographic area of the Targets' footprint.[40]

(59) In addition, the results of the market investigation also confirmed that virtually none of the respondents advertise their retail internet access services outside their own network footprint area.[41]

(60) Second, while ultimately leaving the geographic market definition open, the CRC's 2018 analysis of the broadband and broadcasting markets explained that (i) the presence of regional market participants, (ii) the difference in the suppliers' market shares, and (iii) the existence of bundles with TV services specifically targeting Dutch and French speakers suggests that the geographic scope of the retail market for fixed internet access services could be the footprint of each cable operator in Belgium.[42]

(61) In addition, in its most recent communication of 16 July 2022 regarding the evolution of the retail markets for the supply of internet access and the supply of AV services, the BIPT reports market shares on a footprint basis and carries out its assessment on that basis indicating that "*in the VOO footprint, the cumulated shares of VOO and Proximus on the retail market for the supply of internet access reach [80-90%]*" and further concluding that "*the acquisition of VOO by Orange is going to modify the situation in Wallonia as, without measures taken in the framework of the merger control procedure, it will result in the establishment of a Proximus-Orange duopoly holding close to 98% of the market*".[43]

(62) Third, the Parties' internal documents largely support the feedback of the market investigation with respect to the geographic scope of the retail services markets including the retail supply of fixed internet access services. Indeed, in various internal Orange documents, the Transaction is described as having a [Details of internal documents describing OBE's strategy]. The Notifying Party further recognizes the existence of a [Details of internal documents describing OBE's strategy].[44] The same applies to Flanders about which OBE indicates that [Details of internal documents describing OBE's strategy] and that [Details of internal documents describing OBE's strategy].[45]

(63) This approach is also confirmed by the Targets' internal documents where the Targets only consider those operators active in their own footprint as being their relevant competitors.[46] The Targets similarly consider [Details of internal documents describing VOO's strategy]. Indeed, when they analyse the competition in the retail market for fixed internet services, the Targets indicate that [Details of internal documents describing VOO's strategy][47] [Details of internal documents describing

40 Response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 11.

41 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 12.

42 CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, section 7.3.4 (ID 2058).

43 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraphs 31-32 (ID 2057).

44 Internal Document ID 97-25.

45 Internal Document ID 1070-30953.

46 Among others, Orange's Board of Directors Meeting of 23 June 2021 where it is mentioned that [Details of internal documents describing OBE's strategy]. In the report of the OBE's Board of Directors Meeting of 1 July 2021 (page 6), [Details of internal documents describing OBE's strategy].

47 Internal Document ID 251.

VOO's strategy].[48] Even more explicit is the way the Targets' management reports the status of competition to their employees in the context of their "conseil d'entreprise"[49] when they indicate that [Details of internal documents describing VOO's strategy].[50] This is further confirmed in other internal VOO documents where the VOO commercial team indicates [Details of internal documents describing VOO's strategy][51] [Details of internal documents describing VOO's strategy].[52]

(64) Various contributions from market participants further illustrate the feedback of the market investigation about the geographic scope of the retail markets for fixed services. In that respect, Proximus indicates, for instance, that "*Telenet is not active in the South of Belgium, VOO is not active in the North of Belgium, while OBE is active throughout Belgium (via regulated wholesale access to Telenet's and VOO/Brutélé's respective fixed networks), leading to different competitive dynamics in different regions. Proximus believes the respective operators mainly have an effect on competition in the region they are active*".[53] Consumer association Test-Achats also referred to the Target's footprint when expressing its concerns about the Transaction and stating that "*the telecommunications supply in Wallonia and Brussels (and more specifically in the VOO and Brutélé footprints) for all retail fixed and mobile services, including FMC, will move from three to two operators (and in some areas to only one). One retail operator will disappear, which Test-Achats considers as an obvious lessening of competition and a real issue for consumers in the future*".[54]

(65) As the Notifying Party's argument's according to which the pricing policy of the operators with a national presence would create uniform conditions of competition and would justify a national retail market for the supply of fixed internet services is not relevant for demand- and supply-side substitutability considerations and hence geographic market definition purposes in the present case, it is discussed under the Competitive Assessment section below (see Section 7.4.2.2).

(66) Finally, the Notifying Party refers to previous Commission decisions[55] to submit that they featured equivalent market conditions as the ones in the present case and that, consequently, the Commission should equally define the retail market for fixed internet access services as national in scope. The Commission considers that the conclusions reached in those decisions are not incompatible with the precedents that exist for Belgium.[56] In that respect, while the analyses carried out are similar in all cases, none of the decisions relied upon by the Notifying Party concern the specific competitive conditions of Belgium. Furthermore, as outlined in the preceding paragraphs, the results of the market investigation in the present case support the Commission's approach that the geographic scope of the market for the retail supply of internet access services corresponds to the Targets' footprint.

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48 Internal Document ID 251.

49 The "conseil d'entreprise" or "works council" is a joint body in which the employer informs and consults the workers' representatives. In Belgium, a works council must be set up in any undertaking which employs on average at least 100 workers.

50 Free translation from the following quote in French : [Details of internal documents describing VOO's strategy] (ID 1089-35214)

51 Internal Document ID 1089-62852.

52 [Details of internal documents describing VOO's strategy] (ID 1089-81441).

53 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022 (ID 376).

54 Non-confidential agreed minutes of Test-Achats' call with the Commission on 5 May 2022 (ID 690).

55 See footnote 39.

56 Commission decisions of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 64.

(67) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic scope for the market for the retail supply of fixed internet access services corresponds to the footprint of each cable operator (*i.e.*, for this decision: the Targets' footprint) and that it is therefore appropriate to assess the competitive effects of the Transaction on that basis.

6.2.2. Retail supply of AV services

(68) The retail supply of AV services consists of the distribution of TV channels to end-customers. The distributor is responsible for the promotion and sale of the packages (through advertising or direct marketing), as well as subscriber relations.

6.2.2.1. Parties' activities

(69) Both OBE and the Targets are suppliers of retail AV services in Belgium.

(70) OBE only provides retail AV services in FMC bundles or as an add-on to a fixed internet subscription under the brand "Orange". To provide these services, OBE relies on the Wholesale Access Regulation. OBE does not provide retail AV services on a standalone basis.

(71) The Targets provide retail AV services to end-customers in their fixed footprints, both as standalone services and in multiple-play bundles (whether FMC or fixed-only offers) under the brands "VOO" and "Zuny". To do so, the Targets rely on their own cable networks, located in Wallonia and a third of the Brussels-Capital region. The Targets do not provide any retail AV services outside of their own footprint and have never attempted to do so.

(72) Over the years, the Targets have built a TV offer including proprietary premium sport and cinema/series channels and platforms offered some of their multiple-play customers or available as extras options. These include the BeTV TV channels and a subscription video on demand ("**SVOD**") platform BeTV on demand, which includes Home Box Office ("**HBO**"). In addition to their main offers, the Targets also launched in 2020 a fully digital over-the-top ("**OTT**") offer targeting young people available through an app with online activation under their brand "Zuny".

6.2.2.2. Product market definition

6.2.2.2.1. Past Commission decisions

(73) In previous cases, the Commission split the retail supply of AV services into two separate markets: free-to-air ("**FTA**") and pay TV.[57] In other more recent cases, the Commission ultimately left open the product market definition.[58] The Commission has also considered whether the market for retail pay TV services should be segmented further according to: (i) premium pay AV vs basic pay AV services;[59]

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57 Commission decision of 18 July 2007 in case M.4504 – SFR/Télé 2 France, paragraph 45.

58 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 63; of 6 November 2018 in case M.8785 –The Walt Disney Company/Twenty-First Century Fox, paragraph 98; of 8 October 2018 in case M.8842 – Tele2/ComHem, paragraph 37; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraph 137; of 6 February 2018 in case M.8665 – Discovery/Scripps, paragraph 33; of 7 April 2017 in case M.8354 – Fox/Sky, paragraph 101; of 3 August 2016 in Case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraph 56; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, paragraph 152.

59 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 63; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 119.

and, (ii) linear vs non-linear AV services;[60] but ultimately left the market definition open.[61] In past decisions, the Commission has considered that all distribution technologies are part of the same product market (e.g. cable, satellite, or terrestrial).[62]

(74) ***Premium and basic pay TV services:*** The Commission has left open the question whether premium and basic pay TV services constitute separate product markets in recent cases.[63]

(75) ***Linear and non-linear services:*** In the past, the Commission noted that non-linear services have gradually been integrated to complement TV broadcasters' and retail AV service providers' offerings and enhance the consumer's experience of linear TV channels. Most recently, in *NENT/Telenor*, the Commission indicated that linear and non-linear AV services are increasingly regarded as substitutable but left the market definition open.[64]

(76) ***Distribution technologies:*** In *Liberty Global / Corelio / W&W / De Vijver Media*, the Commission recognised that at least retail AV services offered over cable and internet protocol television ("**IPTV**") form part of the same relevant product market.[65] In the recent *Telia Company/Bonnier Broadcasting Holding* case,[66] the Commission concluded that all the different distribution technologies are part of the same product market.

6.2.2.2.2. Notifying Party's views

(77) The Notifying Party considers that the relevant product market to be taken into account is the market for the retail supply of AV services without any further potential segmentation.

(78) In the Article 6(1)(c) Response, the Notifying Party does not submit any new observations.

6.2.2.2.3. Commission's assessment

(79) A majority of respondents to the market investigation who expressed a view consider that the segmentation of the market for the retail supply of AV services into FTA and pay TV services is not accurate for Belgium.[67] One market participant in particular explains that "*the distinction between FTA TV channels and pay TV channels is not*

60 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 63; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraphs 109-110; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 124; of 25 June 2008 in case M.5121 – News Corp/Premiere, paragraph 21.

61 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 63; of 26 August 2020 in case M.9299 – Discovery/Polsat/JV, paragraph 82; of 6 November 2018 in case M.8785 –The Walt Disney Company/Twenty-First Century Fox, paragraph 93.

62 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 63; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraph 137; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 127; of 21 December 2010 in case M.5932 - News Corp/BskyB, paragraph 105; of 25 June 2008 in case M.5121 – News Corp/Premiere, paragraph 22.

63 Commission decision of 26 August 2020 in case M.9299 – Discovery/Polsat/JV, paragraph 82.

64 Commission decision of 30 April 2020 in case M.9604 – NENT/Telenor/JV, paragraph 184.

65 Commission decision of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 126.

66 Commission decision of 12 November 2019 in case M.9064 – Telia Company/Bonnier Broadcasting Holding, recital 195.

67 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 13.

really relevant for Belgium as FTA TV and pay TV channels are packaged together by TV distributors - ... - and reach over 95% of the Belgian households".[68] Similarly, another market participant explained that "*not many FTA exist in Belgium*".[69] Similarly, a majority of market participants who expressed a view confirmed that, from a demand-side perspective, basic pay TV channels and premium pay TV channels are substitutable.[70]

(80) However, a majority of respondents who expressed a view consider that linear and non-linear AV services are not substitutable, both from a supply- and demand-side perspective.[71] In particular, one market participant explained that: "*in our opinion, the content provided, the way to access the content and the providers are different than those who provide linear audio-visual services, and therefore the above constitute a separate market*".[72]

(81) The market investigation has not provided any reason to segment the relevant product market by distribution technology.

(82) In light of the above and for the purpose of this decision, the Commission concludes that the relevant product market at retail level is the market for the retail supply of linear AV services (i.e., excluding non-linear AV offerings) encompassing all distribution technologies and both FTA and pay TV channels.[73]

6.2.2.3. Geographic market definition

6.2.2.3.1. Past Commission decisions

(83) The Commission has generally concluded that the market for the retail supply of AV services is national in scope or at most corresponds to linguistically homogenous areas.[74] However, with respect to Belgium, the Commission has left open the exact geographic scope for the retail supply of AV services, considering that it could either be (i) national, (ii) regional, or (iii) correspond to the footprint of each operator.[75]

(84) In case M.9757 – *Providence/VOO/Brutélé,* while the Commission excluded a definition on a regional basis and left open the question of whether the market should be national or limited to the cable operators' coverage areas, the Commission did observe that the CRC recommends adopting a geographic definition according to the

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68 M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 13.1 (ID 731).

69 Citymesh's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 13.1 (ID 866).

70 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 14.

71 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 15.

72 Digi's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 15.1 (ID 854).

73 For simplicity, in the rest of this decision, references to the market for the retail supply of AV services should be understood as referring to the market for the retail supply of linear AV services (i.e., excluding non-linear AV offerings) encompassing all distribution technologies and both FTA and pay TV channels.

74 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 58; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraph 89; of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, paragraph 139; of 21 December 2011 in case M.6369 – HBO/Ziggo/HBO Nederland, paragraph 42; of 21 December 2010 in case M.5932 – NewsCorp/BSkyB, paragraph 110.

75 Commission decisions of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 35; of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, paragraph 56.

footprint of the cable networks.[76] The Commission further explained that this choice is mainly based on the absence of direct substitution on the demand side and on the supply side between cable network offers as the networks are located in different areas and that, from a demand-side perspective, in the event of a price increase, a customer cannot decide to migrate to the services of an operator in another area/footprint. The Commission also underlined that, from a supply-side perspective, a cable operator cannot easily enter another footprint, due to the high cost of building networks. In addition, the Commission referred to an analysis by the CRC which noted the existence of heterogeneous conditions of competition in the different cable footprints.[77]

(85) The Belgian Competition Authority has defined the retail market for the supply of AV services as limited to the cable operator's coverage area.[78]

6.2.2.3.2. Notifying Party's views

(86) In line with its arguments developed with respect to the retail market for the fixed internet access services listed above, the Notifying Party considers the Belgian market for the retail supply of AV services to be national in scope.[79]

6.2.2.3.3. Commission's assessment

(87) The Commission considers that, for the purpose of this decision, the geographic scope of the market for the retail supply of AV services corresponds to the Targets' footprint for the following reasons.

(88) First, the results of the market investigation confirmed that, from a demand-side perspective, a customer in the Targets' footprint cannot turn to an operator that is not active inside the Targets' footprint. The majority of the respondents who expressed a view further indicated that, from a supply-side perspective, it would not be possible (without incurring significant investments) for an operator offering retail AV services in Belgium outside the Targets' footprint to start providing retail AV services in the short term in the specific geographic area of the Targets' footprint.[80]

(89) In addition, the results of the market investigation also confirmed that the majority of the respondents do not advertise their retail AV services outside their own network footprint area.[81]

(90) Second, while ultimately leaving the geographic market definition open, the CRC's 2018 analysis of the broadband and broadcasting markets explained that (i) the presence of regional market participants, (ii) the difference in the suppliers' market shares, and (iii) the existence of bundles with TV services specifically targeting

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[76] Commission decision of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 34.

[77] CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, paragraphs 600-626 (ID 2058).

[78] Belgian Competition Authority, decision dated 31 May 2021, MEDE-C/C-21/0006, Proximus/Mobile Vikings, para. 89 and decision dated 12 June 2017, MEDE-C/C-17/0011, Telenet Group BVBA/Coditel SARL, para. 48.

[79] See section 19 above.

[80] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 16.

[81] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 17.

Dutch and French speakers suggest that the geographic scope of the retail market for AV services could be the footprint of each cable operator in Belgium.[82]

(91) In addition, in its most recent communication of 16 July 2022 regarding the evolution of the retail markets for the supply of internet access and the supply of AV services, the BIPT reports market shares on a footprint basis and carries out its assessment on that basis indicating that "*in the VOO footprint, the cumulated shares of VOO and Proximus on the retail market for the supply of internet access reach [80-90%]*" and further concluding that "*the acquisition of VOO by Orange is going to modify the situation in Wallonia as, without measures taken in the framework of the merger control procedure, it will result in the establishment of a Proximus-Orange duopoly holding close to 98% of the market*".[83]

(92) Third, the Parties' internal documents largely support the feedback of the market investigation with respect to the geographic scope of the retail services markets including the retail supply of AV services. Indeed, in various internal Orange documents, the Transaction is described as having a [Details of internal documents describing OBE's strategy].[84] [Details of internal documents describing OBE's strategy]. The Notifying Party further recognizes the existence of a [Details of internal documents describing OBE's strategy].[85] The same applies to Flanders about which OBE indicates that [Details of internal documents describing OBE's strategy] and that [Details of internal documents describing OBE's strategy].[86]

(93) This approach is also confirmed by the Targets' internal documents where the Targets only consider those operators active in their own footprint as being their relevant competitors.[87] The Targets similarly consider [Details of internal documents describing VOO's strategy]. Indeed, when the Targets' management reports the status of competition to their employees in the context of their "conseil d'entreprise"[88], they indicate that [Details of internal documents describing VOO's strategy]..[89] This is further confirmed in other internal VOO documents where the VOO commercial team indicates the [Details of internal documents describing VOO's strategy].[90] Finally, various contributions from market participants further illustrate the feedback of the market investigation about the geographic scope of the retail markets for fixed services including retail AV services. In that respect, Proximus indicates, for instance, that "*Telenet is not active in the South of Belgium, VOO is not active in the North of Belgium, while OBE is active throughout Belgium*

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82 CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, section 7.3.4 (ID 2058).

83 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraphs 31-32 (ID 2057).

84 Among others, Orange's Board of Directors Meeting of 23 June 2021 where it is mentioned that [Details of internal documents describing OBE's strategy]. In the report of the OBE's Board of Directors Meeting of 1 July 2021 (page 6), [Details of internal documents describing OBE's strategy].

85 Internal Document ID 97-25.

86 Internal Document ID 1070-30953.

87 Among others, Orange's Board of Directors Meeting of 23 June 2021 where it is mentioned that [Details of internal documents describing OBE's strategy]. In the report of the OBE's Board of Directors Meeting of 1 July 2021 (page 6), [Details of internal documents describing OBE's strategy].

88 The "conseil d'entreprise" or "works council" is a joint body in which the employer informs and consults the workers' representatives. In Belgium, a works council must be set up in any undertaking which employs on average at least 100 workers.

89 Free translation from the following quote in French : [Details of internal documents describing VOO's strategy] (ID 1089-35214).

90 Internal Document ID 1089-62852.

(via regulated wholesale access to Telenet's and VOO/Brutélé's respective fixed networks), leading to different competitive dynamics in different regions. Proximus believes the respective operators mainly have an effect on competition in the region they are active".[91] Consumer association Test-Achats also referred to the Target's footprint when expressing its concerns about the Transaction and stating that "*the telecommunications supply in Wallonia and Brussels (and more specifically in the VOO and Brutélé footprints) for all retail fixed and mobile services, including FMC, will move from three to two operators (and in some areas to only one). One retail operator will disappear, which Test-Achats considers as an obvious lessening of competition and a real issue for consumers in the future*".[92]

(94) As the Notifying Party's arguments according to which the pricing policy of the operators with a national presence would create uniform conditions of competition and would justify a national retail market for the supply of AV services, is not relevant for demand- and supply-side substitutability considerations and hence geographic market definition purposes in the present case, it is discussed under the Competitive Assessment section here below (see Section 7.4.2.2).

(95) Finally, the Notifying Party refers to previous Commission decisions[93] to submit that they featured equivalent market conditions as the ones in the present case and that, consequently, the Commission should equally define the retail market for fixed internet access services as national in scope. The Commission considers that the conclusions reached in those decisions are not incompatible with the precedents that exist for Belgium.[94] In that respect, while the analyses carried out are similar in all cases, none of the decisions relied upon by the Notifying Party concern the specific competitive conditions of Belgium. Furthermore, as outlined in the preceding paragraphs, the results of the market investigation in the present case support the Commission's approach that the geographic scope of the market for the retail supply of AV services corresponds to the Targets' footprint.

(96) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic scope for the market for the retail supply of AV services corresponds to the footprint of each cable operator (*i.e.,* for this decision: the Targets' footprints) and that it is therefore appropriate to assess the competitive effects of the Transaction on that basis.

6.2.3. Retail supply of multiple-play bundles

(97) The term "multiple-play" relates to product offerings comprising two or more of the following services provided to retail consumers on the basis of one 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.[95]

(98) 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

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91 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022 (ID 376).

92 Non-confidential agreed minutes of Test-Achats' call with the Commission on 5 May 2022 (ID 690).

93 See footnote 39.

94 Commission decisions of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 64.

95 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 62; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 146.

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 **FMC** products. FMC products may involve a single mobile subscription or more than one mobile subscription combined with the fixed services.[96]

6.2.3.1. Parties' activities

(99) Both OBE and the Targets provide retail multiple-play and FMC bundles.

(100) OBE mostly provides FMC offers and, since October 2020, fixed-only bundles under the brand "Orange" throughout Belgium. OBE provides the mobile component of the FMC offers based on its own mobile network. Since OBE is an FVNO, OBE provides the fixed services of its FMC and fixed-only bundles on the basis of the Wholesale Access Regulation on Telenet's and the Targets' networks.

(101) The Targets provide both fixed-only and FMC multiple-play bundles in their footprint under their main brand "VOO" and "Zuny". The Targets provide the mobile component of FMC offers based on Proximus' and Telenet's mobile networks. The Targets provide the fixed component of the multiple-play offers on their own cable network in their footprint. The Targets do not provide any fixed services outside their footprint area.

6.2.3.2. Product market definition

6.2.3.2.1. Past Commission decisions

(102) In previous decisions, including specifically for Belgium,[97] the Commission considered but ultimately left open whether there exist one or more multiple-play markets which are distinct from each of the underlying individual telecommunications services.[98] It also noted that, due to different services, delivered over different infrastructures (fixed for 2P and 3P or fixed and mobile for 4P), that are included in the different multiple-play bundles, instead of one hypothetical market for multiple-play, there could be several candidate multiple-play markets: a market for fixed bundles (dual play and triple play) and another separate market for FMC bundles. The possibility for several mobile subscriptions to be included in a quadruple play bundle further complicates the picture.[99]

6.2.3.2.2. Notifying Party's views

(103) The Notifying Party considers that the exact scope of the relevant product market can be left open.

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96 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 63; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 147.

97 Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraph 100; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraph 99.

98 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 71; 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.

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

(104) In the Article 6(1)(c) Response, the Notifying Party does not submit any new observations.

6.2.3.2.3. Commission's assessment

(105) The vast majority of market participants who expressed a view consider that in Belgium, consumers favour multiple-play packages over unbundled (standalone) offers.[100]

(106) A recent report from the BIPT clarified that the Belgian market for telecommunication services is dominated by bundled offers. At the end of 2021, 80% of residential customers subscribed to a bundled offer.[101] In particular, the BIPT's report shows that offering multiple-play offers is an efficient commercial strategy to reduce churn.[102] The market investigation confirmed this latter aspect.[103]

(107) In particular, from a demand-side perspective, the market investigation also provided some insight into the reasons for such consumer preference.

(108) First, overall market participants consider that the convenience of having a single supplier for telecommunications services is a relevant factor.[104] In that context, more than 80% of market participants who expressed a view considered that there are barriers that prevent or discourage customers from switching from multiple-play packages to a standalone service (or a combination of standalone services).[105] For instance, one market participant identifies the following barriers: "*pack advantage, such as price discount, extra data, adding services/deals (newspapers), content, free wifi booster, etc; convenience: having all at 1 operator is convenient: 1 invoice; if problems and 1 single point of contact; services: shared mobile data for example; habits: a large group in the population doesn't switch (risk avoidance, no trouble, etc.).*"[106]

(109) Furthermore, the majority of market participants who expressed a view consider that price is a very important parameter. In this regard, the market investigation has also confirmed that, from a demand-side, bundled offers tend to be cheaper than corresponding standalone offers. In particular, Test-Achats considered that bundled products are, at least, 13% cheaper than standalone products.[107]

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100 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 24.

101 BIPT's *Communication of 3 June 2022 on the situation of the electronic communications and television markets (2021)*, paragraph 40 (ID 2068).

102 BIPT's *Communication of 3 June 2022 on the situation of the electronic communications and television markets (2021)*, paragraphs 103 and 104 (ID 2068).

103 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 33.

104 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 25.

105 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 31.

106 Proximus' response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 32 (ID 705).

107 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 26.

(110) As regards the supply-side, market participants have confirmed that offering multiple-play products can generate cost-savings, even though it is not easy for retailers to quantify them.[108]

(111) In addition to the above, the market investigation has not yielded any evidence, whether from a supply- or demand-side perspective, that would affect the Commission's past decisional practice regarding a possible segmentation of the hypothetical market for the retail supply of multiple-play bundles between (i) the market for the retail supply of fixed bundles; and, (ii) the market for the retail supply of FMC bundles.

(112) In light of the above and for the purpose of this decision, the Commission concludes that the question whether there is a separate product market for the retail supply of multiple-play bundles, possibly segmented between fixed-only bundles and FMC bundles, can be left open.

6.2.3.3. Geographic market definition

6.2.3.3.1. Past Commission decisions

(113) In previous decisions, the Commission considered that the geographic scope of any possible retail market for multiple-play bundles would be (either regional or) at most national in scope.[109]

(114) Specifically with regard to Belgium, the Commission considered that the geographic scope of a hypothetical market for the retail supply of multiple-play and a hypothetical market for the retail supply of fixed-only or FMC bundles could be either (i) national; (ii) limited to each cable operator's coverage area; or, (iii) each cable operator's footprint.[110]

6.2.3.3.2. Notifying Party's views

(115) The Notifying Party submits that, should such hypothetical markets exist, their geographic scope would correspond to the geographic scope of the underlying telecommunications services, which the Notifying Party submits is national.

6.2.3.3.3. Commission's assessment

(116) The Commission considers that, for the purpose of this decision, the geographic scope of the market for the retail supply of multiple-play, fixed-only and/or FMC bundles corresponds to the Targets' footprint for the following reasons.

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108 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 34.

109 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 hypothetical 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 hypothetical 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 hypothetical markets to be at most national in scope.

110 Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraph 104; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraph 103; of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 64.

(117) First, the results of the market investigation confirmed that, from a demand-side perspective, a customer in the Targets' footprint cannot turn to an operator that is not active inside the Targets' footprint. The majority of the respondents who expressed a view further indicated that, from a supply-side perspective, it would not be possible (without incurring significant investments) for an operator offering retail multiple-play, fixed-only and/or FMC bundles in Belgium outside the Targets' footprint to start providing retail multiple-play, fixed-only and/or FMC bundles in the short term in the specific geographic area of the Targets' footprint.[111]

(118) In that context, specifically with respect to the retail supply of multiple-play, fixed-only and/or FMC bundles, the majority of the respondents confirm that only Proximus and OBE are alternative suppliers of comparable services[112] that current VOO/Brutélé customers could turn to if they wished to switch.[113]

(119) In addition, the results of the market investigation also confirmed that the majority of the respondents do not advertise their retail multiple-play, fixed-only and/or FMC bundles outside their own network footprint area.[114]

(120) Second, while ultimately leaving the geographic market definition open, the CRC's 2018 analysis of the broadband and broadcasting markets explained that (i) the presence of regional market participants, (ii) the difference in the suppliers' market shares, and (iii) the existence of bundles with TV services specifically targeting Dutch and French speakers suggest that the geographic scope of the retail supply of multiple-play, fixed-only and/or FMC bundles could be the footprint of each cable operator in Belgium.[115]

(121) Third, the Parties' internal documents largely support the feedback of the market investigation with respect to the geographic scope of the retail services markets including the retail supply of multiple-play, fixed-only and/or FMC bundles. Indeed, in various internal Orange documents, the Transaction is described as having a [Details of internal documents describing OBE's strategy].[116] [Details of internal documents describing OBE's strategy].[117] The Notifying Party further recognizes the existence of a [Details of internal documents describing OBE's strategy].[118] The same applies to Flanders about which OBE indicates that [Details of internal documents describing OBE's strategy] and that [Details of internal documents describing OBE's strategy].[119]

111 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 37.

112 While it is true that two other (much) smaller competitors (namely EDPnet and United Telecom) were added to the list, they do not offer comparable multiple-play packages (e.g., they do not include AV services).

113 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 35.

114 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 38.

115 CRC's decision of 29 June 2018 – *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle,* section 7.3.4 (ID 2058).

116 Among others, Orange's Board of Directors Meeting of 23 June 2021 where it is mentioned that [Details of internal documents describing OBE's strategy].

117 In the report of the OBE's Board of Directors Meeting of 1 July 2021 (page 6), [Details of internal documents describing OBE's strategy].

118 Internal Document ID 97-25.

119 Internal Document ID 1070-30953.

(122) This approach is also confirmed by the Targets' internal documents where the Targets only consider those operators active in their own footprint as being their relevant competitors.[120] The Targets similarly consider [Details of internal documents describing VOO's strategy]. Indeed, when the Targets' management reports the status of competition to their employees in the context of their "conseil d'entreprise" [121] when they indicate that [Details of internal documents describing VOO's strategy].[122] This is further confirmed in other internal VOO documents where the VOO commercial team indicates the [Details of internal documents describing VOO's strategy][123]or [Details of internal documents describing VOO's strategy].[124] Finally, various contributions from market participants further illustrate the feedback of the market investigation about the geographic scope of the retail markets for multiple-play, fixed-only and/or FMC bundles and the fact that at least 2 types of fixed services (i.e., retail internet access and retail AV services) that are usually part of the bundles belong to markets which, when considered individually, are geographically defined as limited to the Targets' footprint. Consumer association Test-Achats explained in that respect that "*operators that don't offer multiple-play services on the same footprint hardly compete with each other or influence each other's pricing*"[125] and that "*the telecommunications supply in Wallonia and Brussels (and more specifically in the VOO and Brutélé footprints) for all retail fixed and mobile services, including FMC, will move from three to two operators (and in some areas to only one). One retail operator will disappear, which Test-Achats considers as an obvious lessening of competition and a real issue for consumers in the future*".[126]

(123) As the Notifying Party's argument's according to which the pricing policy of the operators with a national presence would create uniform conditions of competition and would justify a national dimension for any hypothetical market for the retail supply of multiple-play bundles and any hypothetical market for the retail supply of fixed-only or FMC bundles is not necessarily relevant for demand- and supply-side substitutability considerations and hence geographic market definition purposes in the present case, it is discussed under the Competitive Assessment section here below (see Sections 7.4.2.2 and 7.4.2.2 respectively).

(124) Finally, the Notifying Party refers to previous Commission decisions[127] to submit that they featured equivalent market conditions as the ones in the present case and that, consequently, the Commission should equally define the retail market for fixed internet access services as national in scope. The Commission considers that the conclusions reached in those decisions are not incompatible with the precedents that

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120 Among others, Orange's Board of Directors Meeting of 23 June 2021 where it is mentioned that [Details of internal documents describing OBE's strategy]. In the report of the OBE's Board of Directors Meeting of 1 July 2021 (page 6), [Details of internal documents describing OBE's strategy].

121 The "conseil d'entreprise" or "works council" is a joint body in which the employer informs and consults the workers' representatives. In Belgium, a works council must be set up in any undertaking which employs on average at least 100 workers.

122 Free translation from the following quote in French : [Details of internal documents describing VOO's strategy] (ID 1089-35214).

123 See, for instance, ID 1089-62852.

124 [Details of internal documents describing VOO's strategy] (ID 1089-81441).

125 Test-Achats' response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 36 (ID 602).

126 Non-confidential agreed minutes of Test-Achats' call with the Commission on 5 May 2022 (ID 690).

127 See footnote 39.

exist for Belgium.[128] In that respect, while the analyses carried out are similar in all cases, none of the decisions relied upon by the Notifying Party concern the specific competitive conditions of Belgium.. Furthermore, as outlined in the preceding paragraphs, the results of the market investigation in the present case support the Commission's approach that the geographic scope of any hypothetical market for the retail supply of multiple-play bundles and any hypothetical market for the retail supply of fixed-only or FMC bundles corresponds to Targets' footprint.

(125) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic scope of any hypothetical market for the retail supply of multiple-play bundles and hypothetical market for the retail supply of fixed-only or FMC bundles corresponds to the geographic scope of the underlying fixed telecommunications services which likely corresponds to the footprint of each cable operator. On that basis, the Commission concludes, for the purpose of this decision, that the relevant geographic scope of any hypothetical market for the retail supply of multiple-play bundles and hypothetical market for the retail supply of fixed-only or FMC bundles corresponds to the footprint of each cable operator and that it is therefore appropriate to assess the competitive effects of the Transaction on that basis.

6.2.4. Retail supply of mobile telecommunications services

(126) The market for the retail supply of mobile telecommunications services is the market on which mobile network operators ("**MNOs**") and mobile virtual network operators ("**MVNOs**") sell voice, messaging and data services to end-customers via a mobile network.

6.2.4.1. Parties' activities

(127) Both OBE and the Targets provide retail mobile telecommunications services to end-customers.

(128) OBE provides mobile telecommunications services to residential and business customers both on a standalone basis and in FMC bundles in Belgium under the "Orange" brand. OBE also provides standalone mobile services to residential customers under the brand "Hey!". OBE relies on its own mobile network which covers the whole of Belgium to provide these services.

(129) The Targets do not have any mobile network in Belgium and rely on Proximus' and Telenet's mobile networks to provide mobile telecommunications services in their fixed footprints. They primarily sell mobile telecommunications services to residential and SOHO/SMEs as part of FMC bundles under the "VOO" brand. Residential customers may also access FMC bundles from the "Zuny" brand. Brutélé does not sell standalone mobile services while VOO does not actively market standalone mobile services.

6.2.4.2. Product market definition

6.2.4.2.1. Past Commission decisions

(130) In previous decisions, including specifically for Belgium,[129] the Commission has identified an overall retail market for mobile telecommunications services constituting a separate market, distinct from retail fixed telecommunication services.

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[128] Commission decisions of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraph 64.

[129] Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraph 50; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraph 51.

The Commission considered that the retail mobile 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).[130] The Commission considered a number of possible segmentations of the overall retail market for mobile telecommunication services (pre-paid vs post-paid services;[131] private customers vs. business customers;[132] high-value vs low-value customers;[133] sim-card only ("**SIMO**") and handset subscriptions;[134] different distribution channels[135]) but considered that they do not constitute separate product markets but rather segments of the same market .

(131) The Commission considered that OTT services (e.g., instant messaging or voice over Internet Protocol ("**VoIP**") applications), whether provided over Wireless Fidelity ("**Wi-Fi**") or via mobile telecommunications data networks, were not part of the market for mobile telecommunications services, as OTT services rely on mobile telecommunications (data) services and/or fixed broadband services to function.[136] Finally, the Commission excluded Machine-to-Machine ("**M2M**") services from the

130 Commission decisions of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 66; of 30 May 2018 in case M.7000 – Liberty Global/Ziggo, paragraph 207; of 1 September 2016 in case M.7758, Hutchison 3G Italy/Wind/JV, recitals 135 to 140; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraph 74; of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefónica UK, recitals 259 to 265 and 287; of 02 July 2014 in case M.7018 – Telefónica Deutschland/E-Plus, recitals 31 to 55; of 28 May 2014 in case M.6992 – Hutchison 3G UK/Telefónica Ireland, recital 141; of 12 December 2012 in case M.6497 – Hutchison 3G Austria/Orange Austria, recitals 43 to 58.

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

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

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

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

135 In Commission decision of 11 May 2016 in case M.7612 – Hutchison 3G UK/Telefónica UK, recitals 280 to 286, the Commission 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.

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

overall retail mobile market, due to the particular characteristics of the demand for and supply of these services.[137]

6.2.4.2.2. Notifying Party's views

(132) The Notifying Party agrees with the Commission that there is a single overall market for the retail supply of mobile telecommunication services. The Notifying Party considers that the Commission should leave open whether OTT and M2M services should be included in such overall market for the retail supply of mobile telecommunication services.

6.2.4.2.3. Commission's assessment

(133) Overall, the market investigation has supported the Commission's previous decisional practice that there is a single retail market for the provision of mobile telecommunication services to end customers (both private and business).[138] For instance, Telenet explained that: "[i]*n line with Commission precedent in Belgium, Telenet considers that there is a single retail market for mobile telecommunications services, which includes mobile data and is not segmented by technology*".[139] The market investigation has not yielded any evidence to suggest that the Commission should change its approach with regards to OTT and M2M services.

(134) In light of the above and for the purpose of this decision, the Commission concludes that the relevant product market is the market for the retail supply of mobile telecommunication services, excluding OTT and M2M services.

6.2.4.3. Geographic market definition

6.2.4.3.1. Past Commission decisions

(135) In previous decisions, including specifically for Belgium,[140] the Commission found that the market for the retail supply of mobile telecommunications services is national in scope.[141]

6.2.4.3.2. Notifying Party's views

(136) The Notifying Party agrees with the Commission's previous decisions that the geographic scope of the market for the retail supply of mobile telecommunications services is national.

6.2.4.3.3. Commission's assessment

(137) The absolute majority of the respondents to the market investigation who expressed an opinion confirmed that the geographic scope of the retail market for the supply of mobile telecommunication services in Belgium is national and that there is no reason

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137 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 22; of 15 July 2019 in case M.9370 – Telenor/DNA, paragraphs 39 to 42; of 27 November 2018 in case M.8792 – T-Mobile NL/Tele2 NL, recitals 223 and 224.

138 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 18.

139 Telenet's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 19 (ID 646).

140 Commission decisions of 26 July 2021 in case M.10070 – Eurofiber/Proximus/JV, paragraphs 53-54; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraphs 54-55; of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, paragraph 41.

141 Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications, paragraph 26; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 70; of 2 October 2008 in case M.5148 – Deutsche Telekom/OTE, paragraphs 18 to 20.

to depart from the Commission's past practice.[142] Proximus further indicated that such a definition is a "[s]*table and practically uncontested decision-making practice of the Belgian Competition Authority, confirmed by the Belgian courts*".[143]

(138) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the retail supply of mobile telecommunication services is the territory of Belgium.

6.2.5. Retail supply of fixed telephony services

(139) Retail 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.

6.2.5.1. Parties' activities

(140) OBE provides fixed telephony services to both residential and non-residential customers. OBE does not provide any fixed telephony services on a standalone basis. OBE however provides fixed telephony as an option which may be subscribed within fixed-only bundles (2P and 3P) or FMC bundles (3P and 4P) under the "Orange" brand through Belgium. To provide these services to residential customers and SOHO/SMEs, OBE relies on a wholesale agreement with OVH Telecom and EDPnet. For corporate customers, OBE relies on commercial agreements concluded on a case-by-case basis with third party operators depending on the customers' end location or, marginally where third party infrastructures are not available, OBE installs the fixed line to connect the end-user's premises.

(141) The Targets provide fixed telephony services to both residential and SOHO/small and medium enterprises ("**SME**") customers (to the exclusion of corporate customers). As OBE, the Targets do not provide any fixed telephony services on a standalone basis. They, however, provide fixed telephony services in their fixed footprints in multiple-play bundles (fixed-only offers, 2P and 3P) and FMC bundles (3P and 4P) under the "VOO" brand. To do so, the Targets rely on their own cable networks, located in Wallonia and one-third of the Brussels-Capital region. The Targets do not provide any fixed telephony services outside of their own fixed footprints and have never attempted to do so.

6.2.5.2. Product market definition

6.2.5.2.1. Past Commission decisions

(142) In previous decisions, the Commission considered whether to distinguish between residential and non-residential customers in the market for the retail supply of fixed telephony services.[144] While the Commission in several previous decisions left the precise scope of the market for retail supply of fixed telephony services open,[145] it found in recent decisions, including with regards to Belgium, that such market

[142] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 20.

[143] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 20.1.

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

[145] Commission decision of 8 October 2018 in case M.8842 – *Tele2/Com Hem Holding*, paragraph 17; of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 17; of 26 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 35 to 39; of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 12.

should not contain further segmentations[146] and that the overall product market for fixed telephony services includes VoIP services.[147]

6.2.5.2.2. Notifying Party's views

(143) The Notifying Party agrees with the Commission's previous decisions that there is an overall market for the retail supply of fixed telephony services, including VoIP services.

6.2.5.2.3. Commission's assessment

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

(145) In light of the above and for the purpose of this decision, the Commission considers that the relevant product market is the market for the retail supply of fixed telephony services, including VoIP services, without any further segmentations.

6.2.5.3. Geographic market definition

6.2.5.3.1. Past Commission decisions

(146) In its decisional practice regarding Belgium, the Commission left the geographic definition of the market open, considering the possibility that the market may be national, regional or limited to the coverage area of each operator.[148] In *Providence/VOO/Brutélé*, the Commission excluded that the geographic scope of the market for the retail supply of fixed telephony services could be regional.[149]

6.2.5.3.2. Notifying Party's views

(147) The Notifying Party submits that the geographic scope of the market for the retail supply of fixed telephony services is national in scope.

6.2.5.3.3. Commission's assessment

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

(149) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic scope of the market the retail supply of fixed telephony services could be national or limited to the coverage area of each operator. In the present case, since the Targets only provide fixed telephony services on their own fixed networks, the coverage area of the Targets corresponds to the Targets' footprint.

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146 Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 32; of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 59; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 60; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 19 to 23; of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 68 and 69.

147 Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 32; of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 59; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 60; of 29 September 2019 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 131; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 35 to 40.

148 Commission decision of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraphs 63-64; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraphs 64-65; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 73.

149 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*; paragraph 44.

6.2.6. Retail supply of business connectivity services

(150) 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.

6.2.6.1. Parties' activities

(151) Both Orange and the Targets provide, to a very limited extent,[150] retail business connectivity services in Belgium.

6.2.6.2. Product market definition

6.2.6.2.1. Past Commission decisions

(152) In previous decisions, the Commission considered a product market for the retail supply of business connectivity services, including (i) broadband access for large business customers; (ii) leased lines; and (iii) Virtual Private Network ("**VPN**") services, but excluding connectivity services offered to residential, SME and SOHO customers, which are part of the retail fixed internet market. This is because of the particular requirements and purchase processes of larger business customers. The precise product market definition was ultimately left open.[151]

(153) In the Commission's most recent decision related to the Belgian market, the Commission found an overall retail business connectivity market and left the question whether this market could be further segmented according to (i) technology (*i.e.*, DSL/copper, cable and fiber) or (ii) download speed open.[152]

6.2.6.2.2. Notifying Party's views

(154) The Notifying Party submits, in line with the Commission's most recent precedents regarding Belgium, that the market for the retail supply of business connectivity services should not be segmented, or any segmentation should be left open.

6.2.6.2.3. Commission's assessment

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

(156) In light of the above and for the purpose of this decision, the Commission considers that there is an overall product market for the retail supply of business connectivity services. The question whether this product market can be further segmented according to (i) technology or (ii) download speed can be left open as it does not affect the competitive assessment irrespective of how the market is defined..

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150 In 2021, Orange generated approximately EUR […] from the supply of retail business connectivity services, which represents approximately [0-5]% of Orange's overall revenues in Belgium in 2021 (totalling approximately EUR […]). In 2021, the Targets generated approximately EUR […] from the supply of retail business connectivity services, which represents approximately [0-5]% of the Targets' overall revenue in Belgium in 2020 (for VOO) and 2021 (for Brutélé) (totalling approximately EUR […]).

151 Commission decisions of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 87; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraph 86; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 171; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV, paragraphs 126-127

152 Commission decisions of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 87; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 86.

6.2.6.3. Geographic market definition

6.2.6.3.1. Past Commission decisions

(157) In previous decisions, the Commission found that the retail market for business connectivity was national in scope.[153] In the Commission's most recent decision relating to the Belgian market, the possible delineation of the relevant geographic market between (i) national; (ii) level of each cable operator's coverage area/region or; (iii) at the level of each operators' footprint was left open.[154]

6.2.6.3.2. Notifying Party's views

(158) The Notifying Party submits that the geographic scope of the market for the retail supply of business connectivity services should be national in scope.

6.2.6.3.3. Commission's assessment

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

(160) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic scope of the market the retail supply of business connectivity services could be national, limited to the coverage area of each operator or limited to the footprint of each operator and that, as such, it can be left open as it does not affect the competitive assessment irrespective of the definition considered.

6.3. Wholesale markets

6.3.1. Wholesale supply of TV channels

(161) In the wholesale market for TV channels, TV broadcasters supply linear TV channels that retail AV providers either purchase or carry in order to provide AV 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 AV services incorporate those TV channels in their retail AV offerings for final viewers. TV broadcasters are therefore active on the supply side whilst providers of retail AV services are active on the demand side on the wholesale market for TV channels.

6.3.1.1. Parties' activities

(162) Both OBE and the Targets are active on the demand side of the market for the wholesale supply of TV channels. In addition, through BeTV, VOO is also active on the supply side of the market for the wholesale supply of TV channels.

6.3.1.2. Product market definition

6.3.1.2.1. Past Commission decisions

(163) In its previous decisions, the Commission has identified a wholesale market for the supply of TV channels. Within that market, in certain decisions, the Commission has further identified two separate product markets for: (i) FTA TV channels, and (ii)

153 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 176; of 14 April 2014 in case M.7109 – *Deutsche Telecom/GTS*, paragraph 30; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 10; of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraph 28.

154 Commission decision of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 92; of 24 March 2021 in case M.10087 – Proximus/Nexus Infrastructure/JV, paragraph 91

pay TV channels.[155] The Commission has further stated that, within the pay TV channels market, there could be different segments for: (i) basic pay TV channels, which are included in the basic subscription fee, and (ii) premium pay TV channels,[156] for which customers pay a premium in addition to their basic subscription fee.

(164) In *Liberty Global / Corelio / W&W / De Vijver Media*, the Commission concluded that, at the level of the wholesale supply of TV channels, there were two separate product markets, one consisting of the wholesale supply of premium pay TV channels and one consisting of the wholesale supply of basic pay TV/FTA channels. In that decision, the Commission also considered that there was no need to draw a distinction between linear TV channels and their non-linear ancillary services.[157]

(165) In its previous decisions, the Commission also examined a number of other potential segmentations of the market for the wholesale supply of TV channels but ultimately left the market definition open, as regards: (i) genre or thematic content (films, sports, news, children/youth, and others);[158] and (ii) different means of infrastructure used for the delivery to the consumer (cable, satellite, terrestrial TV and IPTV).[159] In the *Telia Company/Bonnier Broadcasting Holding* decision, the Commission considered that the market for the wholesale supply of TV channels should not be further segmented according to the type of infrastructure used for the delivery to the consumer (such as cable, direct to home ("**DTH**"), digital terrestrial television ("**DTT**") and IPTV) since the competitive conditions in the market for the wholesale supply of TV channels, and any possible segmentation, would be similar irrespective of the distribution technology and type of infrastructure used for the distribution of the TV channels.[160]

6.3.1.2.2. Notifying Party's views

(166) The Notifying Party does not consider it appropriate to segment the market for the wholesale supply of TV channels between FTA and pay TV, whether basic or premium, between genres, or between means of transmission.

155 Commission decision of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recitals 90-91.

156 Commission decisions of 6 November 2018 in case M.8785 – The Walt Disney Company/Twenty-First Century Fox, paragraph 77; of 15 June 2018 in Case M.8861 – Comcast/Sky, paragraph 50; of 6 February 2018 in case M.8665 – Discovery/Scripps, paragraphs 19- 20; of 7 April 2018 in case M.8354 – Fox/Sky, paragraphs 80- 81.

157 Commission decision of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recitals 93-94.

158 Commission decisions of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 43; of 7 April 2017 in case M.8354 – Fox/Sky, recitals 82-83; of 24 February 2015 in case M.7194 - Liberty Global/Corelio/W&W/De Vijver Media, recital 92; of 2 April 2003 in case M.2876 - Newscorp/Telepiù, recital 76; of 18 July 2007 in case M.4504 - SFR/Télé 2 France, recitals 41–42; of 26 August 2008 in case M.5121 - News Corp/Premiere, recital 35; of 21 December 2010 in case M.5932 – News Corp/BskyB, recital 81; of 10 October 2014 in case M.7000 - Liberty Global/Ziggo, recital 89.

159 Commission decisions of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/De Vijver Media, recital 98; of 18 July 2007 in case M.4504 – SFR/Télé 2 France, paragraph 44; of 26 August 2008 in case M.5121 – News Corp/Premiere, paragraph 22.

160 Commission decision of 12 November 2019 in case M.9064 – Telia Company/ Bonnier Broadcasting Holding, para. 162.

6.3.1.2.3. Commission's assessment

(167) Overall, the market investigation supported the Commission's past decisional practice in relation to Belgium. In particular, 60% of wholesale suppliers of TV channels in Belgium who expressed a view and all wholesale acquirers of TV channels in Belgium consider that there is a market for the wholesale supply of TV channels in Belgium, both from a supply- and demand-side perspective.[161] Furthermore, those same market participants consider that the wholesale supply of FTA TV channels and basic pay TV channels on the one hand, and the wholesale supply of premium pay TV channels on the other hand, constitute two separate product markets, both from a supply and demand-side perspective.[162] In particular, one wholesale acquirer of TV channel explains that: "[t]*he wholesale supply of FTA/basic pay TV channels on the one hand and of premium pay TV channels on the other hand should be considered as two separate product markets. Although in more decisions concerning other Member States, the Commission has left this distinction open, it remains relevant in the Belgian market today*".[163]

(168) Furthermore, the market investigation has concluded that the segmentation by (i) genre or thematic content; (ii) type of infrastructure used to deliver the service; and, (iii) ancillary services (e.g., TV Everywhere, etc.) is not appropriate with regard to Belgium.[164] In particular, one wholesale supplier of TV channels clarified that, from a supply-side perspective, "*in line with the decision practice of the* [Belgian Competition Authority]*... there is no need to further segment the market for the wholesale supply and acquisition of TV channels by genre or thematic content,*"[165] nor by "*type of infrastructure used to deliver the service to the end customer.*"[166] Similarly, from the demand-side of the market, Telenet clarified that: "[i]*n line with ... previous decisions of the European Commission, SBS Belgium considers that possible further segmentations of the market ... can be left open*".[167] Furthermore, the Commission notes that the results of its market investigation did not produce any evidence suggesting that drawing a distinction between linear TV channels and their non-linear ancillary services.

(169) In light of the above and for the purpose of this decision, the Commission concludes that the relevant product markets are the market for the wholesale supply of FTA and basic pay TV and the market for the wholesale supply of premium pay TV channels on the other. These markets include ancillary services and do not need to be further segmented by types of distribution infrastructure or by genre or thematic content.

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161 Responses to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 5; to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 5.

162 Responses to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 9; to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 9.

163 Response to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 10; to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 10.

164 Responses to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 7.1.

165 DPG Media's response to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 10.1 (ID 713).

166 DPG Media's response to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 11.1 (ID 713).

167 Telenet's response to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 10.1 (ID 656).

6.3.1.3. Geographic market definition

6.3.1.3.1. Past Commission decisions

(170) In its previous decisions, the Commission found the market for the wholesale supply of TV channels to be either national in scope,[168] regional,[169] or delineated by linguistically homogeneous areas encompassing more than one EU Member State.[170]

(171) In the Discovery/Warner Media decision, the Commission noted that "[i]n Belgium, market participants considered that TV channels are usually targeted at specific audiences on the basis of the language of the channel. As such, agreements tend to be negotiated on the basis [of] the footprint of network retailers." [171] In that case, with regards to Belgium, the Commission concluded that the market for the wholesale supply of TV channels was either national or regional in scope.[172]

(172) In a case involving the Targets, the Commission has also recently considered that the geographic scope of the market for the wholesale supply of TV channels corresponded to the footprint of each operator.[173]

6.3.1.3.2. Notifying Party's views

(173) The Notifying Party submits that the geographic scope of the market for the wholesale supply of TV channels is the whole of Belgium.

6.3.1.3.3. Commission's assessment

(174) While a majority of the respondents to the market investigation, whether purchasers or suppliers of TV channels in Belgium, considered that the geographic scope of agreements for the supply of TV channels in Belgium is sub-national, depending on the language of the TV channel or the distributor's footprint, the feedback of the market investigation remains inconclusive as to the exact scope i.e., linguistically homogenous areas (i.e., Dutch vs French-speaking areas in Belgium) or the Targets' footprint.

(175) In light of the above and for the purpose of this decision, the Commission concludes that the relevant geographic market for the wholesale supply of TV channels, and all its possible sub-segments, is narrower than national. The question whether the relevant scope should be either linguistically homogenous areas (i.e., Dutch vs French-speaking areas in Belgium) or the Targets' footprint may be left open. However, in this decision, given the higher combined market shares of the Parties when considering a geographic scope corresponding to the Targets' footprint, the Commission will assess the Transaction considering the Targets' footprint as the relevant geographic scope.

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168 Commission decisions of 26 August 2020 in case M.9299 – Discovery / Polsat / JV, paragraph 70; of 15 April 2013 in case M.6880 – Liberty Global/Virgin Media, paragraph 41; of 21 December 2011 in case M.6369 – HBO/Ziggo/HBO Nederland, paragraph 39; of 10 October 2014 in case M.7000 – Liberty Global/Ziggo, paragraph 98.

169 Commission decision of 24 February 2015 in case M.7197 – Liberty Global/Corelio/W&W/De Vijver Media, recitals 106 and following.

170 Commission decision of 7 April 2017 in case M.8354 – Fox/Sky, paragraphs 90 and following

171 Commission decision of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 46

172 Commission decision of 22 December 2021 in case M.10343 – Discovery/Warner Media, paragraph 49

173 Commission decision of 30 June 2020 in case M.9757 – Providence/VOO/Brutélé, paragraphs 95-98.

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

(176) Wholesale access and call origination services are provided by MNOs (on the supply side) to MVNOs (on the demand side) to enable MVNOs to provide retail mobile telecommunications services to end-customers. MVNOs can be distinguished depending on their features. "Full" MVNOs maintain their own core infrastructure and use MNOs only for access to a radio network, while "light" MVNOs do not have their own core infrastructure and rely entirely on the infrastructure of an MNO.

6.3.2.1. Parties' activities

(177) OBE currently hosts MVNOs on its own network, including Mobile Vikings,[174] EDPnet, L-Mobi, Transatel and Effortel.

(178) VOO is an MVNO hosted on Telenet's and Proximus' networks. Brutélé does not provide retail mobile telecommunications services. Since they do not operate their own mobile network, the Targets are not active in the market for the wholesale supply of access and call origination services on mobile networks.

6.3.2.2. Product market definition

6.3.2.2.1. Past Commission decisions

(179) In previous decisions, 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.[175]

6.3.2.2.2. Notifying Party's views

(180) The Notifying Party agrees with the Commission's approach that network access and call origination are part of the same product market.

6.3.2.2.3. Commission's assessment

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

(182) In light of the above and for the purpose of this decision, the Commission considers that the relevant product market is the market for the wholesale supply of access and call origination services on mobile networks.

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174 Mobile Viking is currently migrating its customer base to Proximus' network, following Proximus' acquisition of Mobile Viking in May 2021.

175 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 197; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 248; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 185 to 187; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 296 to 300; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 77 to 79; of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 156; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 61 to 63; of 1 March 2010 in case M.5650 – *T Mobile/Orange UK*, paragraphs 27 to 30; of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, paragraph 15.

6.3.2.3. Geographic market definition

6.3.2.3.1. Past Commission decisions

(183) In previous decisions, the Commission held the geographic scope of the market for the wholesale supply of access and call origination services on mobile networks to be national,[176] including for Belgium.[177]

6.3.2.3.2. Notifying Party's views

(184) The Notifying Party agrees with the Commission's previous decisional practice that the geographic scope of the market for wholesale supply of access and call origination services on mobile networks is national in scope.

6.3.2.3.3. Commission's assessment

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

(186) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic market for the market for the wholesale supply of access and call origination services on mobile networks is national, *i.e.*, the territory of Belgium.

6.3.3. Wholesale supply of broadband access services

(187) The market for wholesale supply of broadband access services includes different types of access to fixed connections that allow internet service providers to provide services to end consumers. It comprises: (i) physical access at a fixed location (such as local loop unbundling ("**LLU**")[178]), (ii) non-physical or virtual network access at a fixed location (such as bitstream access), and (iii) resale of a fixed provider's internet access services.

6.3.3.1. Parties' activities

(188) The Targets provide wholesale broadband access services on their own respective fixed network. OBE does not provide wholesale broadband access services as it does not own its fixed network infrastructure.

6.3.3.2. Product market definition

6.3.3.2.1. Past Commission decisions

(189) In previous decisions, including relating to the Belgian market,[179] the Commission defined the product market as a separate wholesale broadband access market, and left the question open as to whether it should be subdivided according to the type of

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[176] Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Telecommunications, paragraphs 198-201; 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.

[177] Commission decision of 4 February 2016 in case M.7637 – Liberty Global/BASE Belgium, paragraphs 103-105.

[178] LLU: unbundled (shared) access to metallic loops of the local access network in a number of local telecommunications exchanges (in particular in urban areas), as this is the most cost-efficient way for alternative operators to provide differentiated retail broadband services.

[179] Commission decision of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 22; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 24.

access, or based on the level where the point of interconnection is situated.[180] The point of interconnection connects the infrastructure of the wholesale provider and that of the customer and comprises (i) local broadband access and (ii) central broadband access.[181]

(190) The Commission also considered but left open whether the wholesale broadband access market should be segmented according to the type of technology used between (i) stand-alone DSL access, (ii) stand-alone cable access, and (iii) cable access for all TV and internet services.[182] In the Commission's most recent decision related to the Belgian market, the Commission considered but left open whether the wholesale broadband access market should be segmented according to the type of technology (i.e., DSL/copper, cable and fibre).[183]

6.3.3.2.2. Notifying Party's views

(191) The Notifying Party submits that there is an overall market for the wholesale supply of broadband access services.

6.3.3.2.3. Commission's assessment

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

(193) In light of the above, the Commission considers that, for the purpose of this decision, the question of the exact scope of the wholesale broadband access market with respect to its possible segmentations ((i) the level where the point of interconnection is situated (i.e., wholesale local or central broadband access), (ii) the type of access to fixed connections (i.e., wholesale LLU, bitstream or resale broadband access), or (iii) the type of technology (as defined in recital 190 above)) can be left open as the assessment of the Transaction remains the same irrespective of the exact product market definition considered.

6.3.3.3. Geographic market definition

6.3.3.3.1. Past Commission decisions

(194) In its decisional practice, the Commission considered whether the geographic market for wholesale broadband access was national (i.e., Belgium) or limited to the coverage area of each cable operator, but ultimately left the definition open.[184] In case *Providence/VOO/Brutélé*, the Commission concluded that, for the purpose of that decision, the geographic scope corresponded to the coverage area of each cable

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180 Commission decisions of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 76; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 164; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 161; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 28- 34.

181 Commission decisions of 24 October 2014 in case M.7307 – *Electricity Supply Board/Vodafone Ireland/JV*, paragraph 22; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraph 33.

182 Commission decisions of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraphs 71-74; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 165-168.

183 Commission decision of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 22; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 24.

184 Commission decisions of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 29; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 32; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 172; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 48-53.

operator (i.e., Telenet, Brutélé and VOO).[185] In the Commission's most recent decision related to the Belgian market, the Commission considered the effects of the Transaction on both a national level and at the level of the cable operator's coverage area.[186]

6.3.3.3.2. Notifying Party's views

(195) The Notifying Party agrees with the Commission's previous decisions concluding that the geographic scope of the market for the wholesale supply of broadband access corresponds to the coverage area of each cable operator (i.e., Telenet, Brutélé and VOO).

6.3.3.3.3. Commission's assessment

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

(197) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic market corresponds to each cable operator's coverage area.

6.3.4. Wholesale supply of access to TV services

(198) AV services can be delivered to end users through different infrastructures, including cable, terrestrial, satellite and IPTV. Operators that own the necessary infrastructure grant wholesale access to FVNOs, enabling them to offer their own retail AV services.

6.3.4.1. Parties' activities

(199) The Targets provide wholesale broadband access services on their own respective fixed network. OBE does not provide wholesale broadband access services as it does not own its fixed network infrastructure.

6.3.4.2. Product market definition

6.3.4.2.1. Past Commission decisions

(200) In its past practice regarding Belgium, the Commission has found that wholesale access to AV services constitutes a separate product market and considered a possible segmentation between copper/DSL and cable but ultimately left the question open.[187]

6.3.4.2.2. Notifying Party's views

(201) The Notifying Party submits that there is an overall market for the wholesale supply of access to TV services.

6.3.4.2.3. Commission's assessment

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

(203) In light of the above, the Commission considers that, for the purpose of this decision, the question of the exact scope of the wholesale TV access market with respect to its possible segmentation by type of technology (i.e., DSL/copper, cable or fibre) can be

185 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 79.

186 Commission decisions of 26 July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 29; of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 31.

187 Commission decisions of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 84.

left open as the Transaction would not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation under any of the plausible product market definitions considered.

6.3.4.3. Geographic market definition

6.3.4.3.1. Past Commission decisions

(204) In its past practice regarding Belgium, the Commission has found that wholesale access to TV services corresponds to the coverage area of each cable operator.[188]

6.3.4.3.2. Notifying Party's views

(205) The Notifying Party agrees that the geographic scope of the market for the wholesale supply of TV access corresponds to the coverage area of each cable operator.

6.3.4.3.3. Commission's assessment

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

(207) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic market is at the level of the cable operator's coverage area.

6.3.5. Wholesale supply of call termination services on fixed networks

(208) Call termination is the service provided by a fixed 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.

6.3.5.1. Parties' activities

(209) Each of OBE, VOO and Brutélé provide wholesale call termination services on their respective fixed networks.

6.3.5.2. Product market definition

6.3.5.2.1. Past Commission decisions

(210) In the past, the Commission has concluded that each individual network (both in mobile and in fixed networks separately) 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.[189] Each individual network constitutes a separate product market.

188 Commission decisions of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 89.

189 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 138; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 42 to 44; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 190 to 193; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 206 to 208; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraphs 47 to 48; of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraphs 36 and 37.

(211) Further, in previous decisions, the Commission considered wholesale call termination services on fixed networks to be a distinct market from the market for the wholesale supply of international voice carrier services.[190]

6.3.5.2.2. Notifying Party's views

(212) The Notifying Party considers that termination in each individual fixed network constitutes a separate product market.

6.3.5.2.3. Commission's assessment

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

(214) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the market for wholesale supply of call termination services on fixed networks that is a distinct market from the market for the wholesale supply of call termination services on mobile networks. On the market for wholesale supply of call termination services on fixed networks, each individual fixed network constitutes a separate product market.

6.3.5.3. Geographic market definition

6.3.5.3.1. Past Commission decisions

(215) In previous decisions, the Commission considered the geographic market for the wholesale supply call termination services in fixed networks to be national in scope.[191] The same approach has been taken by the Commission with respect to Belgium.[192]

6.3.5.3.2. Notifying Party's views

(216) The Notifying Party considers that the relevant geographic market for the wholesale supply of call termination services on fixed network corresponds to the territory of Belgium.

6.3.5.3.3. Commission's assessment

(217) The results of the market investigation did not provide reasons to depart from the Commission's previous approach.

(218) In light of the above, the Commission considers that, for the purpose of this decision, the relevant geographic market for the supply of wholesale call termination services on fixed networks is national, so the territory of Belgium.

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190 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 138; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 217 to 219; of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 131 to 133; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 26.

191 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 142; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 45 to 47; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 195; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 210; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 121; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 48; of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraph 38.

192 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 128.

6.3.6. *Wholesale supply of termination and hosting of calls to non-geographic numbers services*

(219) Voice calls are not only made to geographic numbers but also to non-geographic numbers. A non-geographic number is a number associated with a country, but not to any single geographic location within that country. Non-geographic number services are less frequently used than standard services and are typically used for free and paid information services, for example, for helpdesks, subscription services, TV voting lines etc.

(220) When a caller initiates a call to a non-geographic number, the call is automatically transferred from the originating operator to the terminating operator hosting the service provider that operates the service related to the non-geographic number, irrespective of the location.

(221) Unlike ordinary call termination services, call origination and call termination regulation does not apply to these numbers. Therefore, different revenue sharing agreements exist between the originating operator, the terminating operator, and the service provider.

6.3.6.1. Parties' activities

(222) OBE has very limited activities[193] on the market for the wholesale supply of termination and hosting of calls to non-geographic numbers. The Targets are not active on this market.

6.3.6.2. Product market definition

6.3.6.2.1. Past Commission decisions

(223) In previous decisions, the Commission considered that there is a product market for the wholesale supply of termination and hosting of calls to non-geographic numbers without it being necessary to consider further possible segmentations.[194] The same approach has been taken by the Commission with respect to Belgium.[195]

6.3.6.2.2. Notifying Party's views

(224) The Notifying Party considers that the relevant product market to be taken into account is the market for the wholesale supply of termination and hosting of calls to non-geographic numbers.

6.3.6.2.3. Commission's assessment

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

(226) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the market for the wholesale supply of termination and hosting of calls to non-geographic numbers that is distinct from other wholesale termination services.

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193 In 2021, Orange generated approximately EUR […] from the supply of retail business connectivity services, which represents approximately [0-5]% of Orange's overall revenues in Belgium in 2021 (totalling approximately EUR […]).

194 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 149; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 209 to 211; of 3 July 2021 in case M.6584 – *Vodafone/Cable & Wireless*, paragraphs 14 to 18.

195 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 137 to 139.

6.3.6.3. Geographic market definition

6.3.6.3.1. Past Commission decisions

(227) In previous decisions, the Commission considered that the geographic scope of the wholesale market for the supply of termination and hosting of calls to non-geographic numbers is national.[196] The same approach has been taken by the Commission with respect to Belgium.[197]

6.3.6.3.2. Notifying Party's views

(228) The Notifying Party considers that the relevant geographic market for the wholesale supply of termination and hosting of calls to non-geographic numbers corresponds to the territory of Belgium.

6.3.6.3.3. Commission's assessment

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

(230) In light of the above, the Commission considers that, for the purpose of this decision, the relevant geographic market for the wholesale supply of termination and hosting of calls to non-geographic numbers is national, *i.e.*, the territory of Belgium.

6.3.7. Wholesale supply of domestic call transit services on fixed networks

(231) The market for the wholesale supply of domestic call transit on a fixed network is a wholesale service provided by a third party where there is no direct connection between originating communication providers and terminating communication providers.

6.3.7.1. Parties' activities

(232) OBE has very limited activities[198] on the market for the wholesale supply of domestic call transit services on fixed networks. The Targets are not active on this market.

6.3.7.2. Product market definition

6.3.7.2.1. Past Commission decisions

(233) In previous decisions, the Commission found the market for the wholesale supply domestic transit services in fixed networks to be a separate product market, from the market for global telecommunications services.[199] The same approach has been taken by the Commission with respect to Belgium.[200]

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[196] Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 153; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 213; of 3 July 2012 in case M.6584- *Vodafone/Cable & Wireless*, paragraph 18.

[197] Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 142.

[198] In 2021, Orange generated approximately EUR **[…]** from the supply of retail business connectivity services, which represents approximately **[0-5]%** of Orange's overall revenues in Belgium in 2021 (totalling approximately EUR **[…]**).

[199] Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 158; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 221; of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, paragraph 77; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 27.

[200] Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 134-135.

6.3.7.2.2. Notifying Party's views

(234) The Notifying Party considers that the relevant product market to be taken into account is the market for the wholesale supply of domestic call transit services on fixed networks.

6.3.7.2.3. Commission's assessment

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

(236) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the market for the wholesale supply of domestic call transit services on fixed networks.

6.3.7.3. Geographic market definition

6.3.7.3.1. Past Commission decisions

(237) The Commission found that the market for the wholesale supply of domestic transit services in fixed networks is national in scope.[201] The same approach has been taken by the Commission with respect to Belgium.[202]

6.3.7.3.2. Notifying Party's views

(238) The Notifying Party considers that the relevant geographic market for the wholesale supply of domestic call transit services on fixed networks corresponds to the territory of Belgium.

6.3.7.3.3. Commission's assessment

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

(240) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographic market for the wholesale supply of domestic call transit services on fixed networks is national, so the territory of Belgium.

6.3.8. Wholesale supply of internet connectivity services

(241) Internet connectivity services allow corporate customers to be present on the internet by providing access to the entire routing table of the global internet or to a subset of the same, in which case the customer will need to cover the totality of its needs by means of a multi-homing strategy. Connectivity to the internet can be achieved (i) by the purchasing of transit services, (ii) by means of peering with selected networks, or (iii) by means of a combination of the two. Entities which do not connect directly to the internet may also call upon hosting providers, who aggregate hosting needs and procure in turn internet connectivity for their customers. Whilst global coverage is a primary requirement, there are also other performance criteria such as latency, reliability, speed and minimization of traffic-related costs.

(242) Transit is a service whereby a customer pays for access to all or a large part of the internet, with performance characteristics which may vary according to the

201 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 162; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 221; of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, paragraph 77; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 27.

202 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/Base Belgium*, recitals 134-135.

destination of the traffic. Peering, on the other hand, whether settlement-free or paid, provides access to individual networks but no further onward connectivity. Providers of transit services will use a combination of peering relationships and/or paid commercial relationships with other transit providers in order to provide global internet coverage. A transit provider which does not purchase transit services from other providers because it is able to reach the entire internet merely by means of peering relationships is referred to as a "Tier-1" transit provider. Tier-1 transit providers are capable of delivering complete internet connectivity entirely or in the great majority through their own network or under mutual traffic transit agreements with other Tier-1 providers. Tier-2 providers supplement the reach of their own network by purchasing transit rights from Tier-1 transit providers.

(243) Operators of retail internet access networks, sometimes referred to as "eyeball networks", procure internet connectivity in the same way as any other corporate customer, and may themselves also provide wholesale internet connectivity services. Certain internet access providers ("**IAPs**") offer transit services, whereas many offer direct connectivity to their own network and subscribers. To the extent that the IAPs purchase transit services, these may also be used to reach its users. The end users of a given IAP can also be reached by means of relationships with those networks which peer with the IAP in question.

6.3.8.1. Parties' activities

(244) OBE is active on the market for the wholesale supply of internet connectivity services. The Targets are not active on this market.

6.3.8.2. Product market definition

6.3.8.2.1. Past Commission decisions

(245) In previous decisions, the Commission considered the existence of an overall market for the wholesale supply of internet connectivity services, including both transit and peering services and potentially further segmented between transit and peering services but ultimately left the exact product market definition open.[203] Further, the Commission considered, but ultimately left open a possible segmentation of the product market for wholesale internet connectivity services between Tier-1 transit providers and Tier-2 transit providers.[204]

6.3.8.2.2. Notifying Party's views

(246) The Notifying Party considers that the relevant product market to be taken into account is the market for the wholesale supply of internet connectivity services.

6.3.8.2.3. Commission's assessment

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

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203 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 179; of 18 July 2019 in case M.8864 – *Vodafone/ Certain Liberty Global Assets*, recitals 237-238; of 14 April 2014 in case M.7109 – *Deutsche Telekom / GTS*, paragraphs 21-22; of 7 October 2005 in case M.3752 – *MCI/Verizon*, paragraphs 17-24.

204 Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 179; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 237 to 239; Commission decision of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraphs180 and 181; Commission decision of 7 October 2005 in case M.3752 – *Verizon/MCI*, paragraphs 14 to 24.

(248) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the market for the wholesale supply of internet connectivity services. The question whether such market (i) includes both transit and peering services; (ii) should be further segmented between transit services on the one hand and peering services on the other; and (iii) can be further segmented between Tier-1 transit providers and Tier-2 transit providers can be left open as the Transaction would not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation under any plausible product market definition.

6.3.8.3. Geographic market definition

6.3.8.3.1. Past Commission decisions

(249) The Commission previously found the market for the wholesale supply of internet connectivity services to be either global or regional in scope.[205]

6.3.8.3.2. Notifying Party's views

(250) The Notifying Party considers the relevant market to be at least EEA-wide if not global in scope.

6.3.8.3.3. Commission's assessment

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

(252) In light of the above, the Commission considers that, for the purpose of this decision, the exact geographic scope of the market for the wholesale supply of internet connectivity services can be left open between global or regional as the Transaction would not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation under any plausible geographic market definition.

6.3.9. Wholesale supply of call termination services on mobile networks

(253) 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 of 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 telecommunications services.

6.3.9.1. Parties' activities

(254) OBE is active on the market for the wholesale supply of call termination services on mobile networks. The Targets are not active on this market.

6.3.9.2. Product market definition

6.3.9.2.1. Past Commission decisions

(255) In previous decisions, the Commission has identified relevant markets for the wholesale supply of call termination services on mobile and fixed networks. Further, the Commission found that there is no substitute for call termination on each

[205] Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 183; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recitals 242-243; of 14 April 2014 in case M.7109 – *Deutsche Telekom/GTS*, paragraphs 24-25.

individual network, as the operator transmitting the call can reach the intended recipient only through the operator of the network to which the recipient is connected and thus concluded that each individual network, either fixed or mobile, constitutes a separate market.[206] The same approach has been taken by the Commission with respect to Belgium.[207]

6.3.9.2.2. Notifying Party's views

(256) The Notifying Party considers that the relevant product market to be taken into account is the market for wholesale supply of call termination services on mobile networks.

6.3.9.2.3. Commission's assessment

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

(258) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the market for the wholesale supply of call termination services on mobile networks. On the market for the wholesale supply of call termination services on mobile networks, each mobile network constitutes a separate product market.

6.3.9.3. Geographic market definition

6.3.9.3.1. Past Commission decisions

(259) In previous decisions, the Commission considered the geographic market for the wholesale supply of call termination services on mobile networks to be national in scope,[208] including for Belgium.[209]

6.3.9.3.2. Notifying Party's views

(260) The Notifying Party agrees with the Commission and considers that the relevant geographic market for the wholesale supply of call termination services on mobile networks corresponds to the territory of Belgium.

6.3.9.3.3. Commission's assessment

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

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206 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraphs 185-188; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 36-38; of 15 July 2019 in case M.9370 – *Telenor/DNA*, paragraphs 68-70; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recitals 255-259; of 27 July 2018 in case M.8883 – *PPF/Telenor Target Companies*, paragraphs 24-26; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 68-70.

207 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, paragraph 112.

208 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 192; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraph 39; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 259; of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 48; of 3 July 2012 in case M.5650 – *T-Mobile/Orange UK*, paragraph 38.

209 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, paragraph 114.

(262) In light of the above, the Commission considers that, for the purpose of this decision, the relevant geographic market for the wholesale supply of call termination services on mobile networks is national, *i.e.*, the territory of Belgium.

6.3.10. Wholesale supply of international roaming services

(263) International roaming is a service which allows mobile subscribers to use their mobile handsets and SIM cards to make and receive calls, to send and receive text messages and to use other data services when abroad. To be able to offer this service to their customers, MNOs conclude wholesale agreements with one another providing access and capacity on mobile networks in the foreign country.

(264) With regards to calls, roaming consists of both terminating and originating calls. For originating calls while roaming, the foreign or visited mobile network is used to make phone calls when abroad and a wholesale roaming charge is paid by the home network to the visited network. For terminating calls, the call is routed by the home network to the visited network, and the home network pays for the international carriage of the call and the normal termination charge to the visited network.

(265) Demand for wholesale international roaming services comes upstream from foreign mobile operators that wish to provide their own customers with mobile services outside their own network and, downstream, from subscribers wishing to use their mobile telephones outside their own countries.

6.3.10.1. Parties' activities

(266) OBE is active on the market for the wholesale supply of internet connectivity services. The Targets are not active on this market.

6.3.10.2. Product market definition

6.3.10.2.1. Past Commission decisions

(267) In previous decisions, the Commission found that international roaming services constitute a distinct product market.[210]

6.3.10.2.2. Notifying Party's views

(268) The Notifying Party considers that the relevant product market to be taken into account is the market for wholesale supply of international roaming services.

6.3.10.2.3. Commission's assessment

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

(270) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant product market is the market for the wholesale supply of international roaming services.

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[210] Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 203; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 29-31; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 264; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 97; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 64-67.

6.3.10.3. Geographic market definition

6.3.10.3.1. Past Commission decisions

(271) In previous decisions, the Commission held that the relevant geographic market for the wholesale supply of international roaming is national in scope due to regulatory barriers,[211] including in Belgium.[212]

6.3.10.3.2. Notifying Party's views

(272) The Notifying Party considers that the relevant geographic market for the wholesale supply of international roaming services corresponds to the territory of Belgium.

6.3.10.3.3. Commission's assessment

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

(274) In light of the above, the Commission considers that, for the purpose of this Decision, the relevant geographic market for the wholesale supply of international roaming services is national, *i.e.*, the territory of Belgium.

7. COMPETITIVE ASSESSMENT[213]

7.1. Identification of affected markets

7.1.1. Horizontally affected markets

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

(a) Retail supply of fixed internet access services in the Targets' footprint;[214]

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211 Commission decision of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 207; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 32-34; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 266; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 99-100; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraphs 251-252; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 78-79; of 1 March 2010 in case M.5650 – *T-Mobile/Orange UK*, paragraph 35.

212 Commission decision of 4 February 2016 in case M.7637 – Liberty Global/Base Belgium, recitals 120-122.

213 Since the horizontal overlaps and vertical links between VOO and Brutélé were assessed and cleared in the Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, the Commission will present, wherever relevant, market shares of the Targets on a combined basis.

214 Even though the Commission left open whether the market for the retail supply of fixed internet services should be segmented between legacy distribution technologies on the one hand, and fibre-based distribution technologies on the other, the Commission will only provide the market shares and assess the effects of the Transaction on the basis of an overall market for the retail supply of fixed internet access services. In particular, the Commission notes that, to date and in the Targets' footprint, the Parties are only active in the market for the retail supply of fixed internet access services on legacy distribution technologies. Furthermore, the Commission notes that the overall size of the market for retail supply of fixed internet access services on legacy distribution technologies in the Targets' footprint would not be significantly different from the overall market for the retail supply of fixed internet access services as, to date and in the whole of Belgium, retail fibre-based fixed internet access services amount to less than 3.25% of the overall retail fixed internet access connections. This figure is extrapolated from Table 1 of Annex 8 to the Article 6(1)(c) Response which suggests that approximately 17% of households had fibre coverage in June 2022 and that, out of those 17%, only 19% subscribed to a fibre-based product. Accordingly, the Commission considers that an assessment of the market for the retail supply of fixed internet access services on legacy distribution technologies in the Targets' footprint would not materially differ from an assessment of the market for the retail supply of fixed internet access services in the Targets' footprint.

(b) Retail supply of linear AV services in the Targets' footprint;

(c) Retail supply of multiple-play bundles in the Targets' footprint;

(d) Retail supply of FMC bundles in the Targets' footprint;

(e) Retail supply of fixed-only bundles in the Targets' footprint;

(f) Retail supply of mobile telecommunications services in Belgium;

(g) Retail supply of fixed telephony services in the Targets' footprint;[215]

(h) Wholesale supply of basic pay TV and FTA TV channels in the Targets' footprint (demand side); and,

(i) Wholesale supply of premium pay TV channels in the Targets' footprint (demand side).

7.1.1.1. Targets' footprint

(276) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following horizontally affected markets in the Targets' footprint:

215 Even though the Commission has left open whether the market for the retail supply of fixed telephony services would be national in scope, the only geographic scope under which the combined market shares of the Parties exceeds 20% is the Targets' footprint. As such, the Transaction will only be assessed on the basis of a geographic scope corresponding to the Targets' footprint.

Table 1: Horizontally affected markets in the Targets' footprint (2021)

	Value			Volume		
	OBE	Targets	Combined	OBE	Targets	Combined
Retail supply of fixed internet access	[5-10%]	[20-30%]	[30-40%]	[5-10%]	[20-30%]	[30-40%]
Retail supply of AV services	[5-10%]	[30-40%]	[40-50%]	[5-10%]	[40-50%]	[40-50%]
Retail supply of multiple-play bundles	[5-10%]	[30-40%]	[40-50%]	[5-10%]	[30-40%]	[40-50%]
Retail supply of FMC bundles	[10-20%]	[20-30%]	[30-40%]	[10-20%]	[20-30%]	[40-50%]
Retail supply of fixed-only bundles	[0-5%]	[40-50%]	[40-50%]	[0-5%]	[40-50%]	[40-50%]
Retail supply of fixed telephony services	[0-5%]	[20-30%]	[20-30%]	[0-5%]	[20-30%]	[20-30%]
Wholesale supply of premium pay TV channels[216]	[0-5%]	[40-50%]	[50-60%]	/	/	/
Wholesale supply of basic pay TV and FTA TV channels[217]	[10-20%]	[40-50%]	[50-60%]	/	/	/

Source: Form CO, Annex 17

7.1.1.2. Belgium

(277) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following horizontally affected markets in Belgium:

Table 2: Horizontally affected markets in Belgium (2021)

	Value			Volume		
	OBE	Targets	Combined	OBE	Targets	Combined
Retail supply of mobile telecommunications services	[20-30%]	[5-10%]	[20-30%]	[20-30%]	[0-5%]	[20-30%]

Source: Form CO, Annex 17

7.1.2. Non-horizontally affected markets

(278) The Transaction gives rise to the following vertically affected markets:

(a) Vertically affected markets arising from the relationships between the market for the wholesale supply of broadband access services (upstream),[218] and the

216 The Notifying Party specified that market shares for the wholesale supply of TV channels are only estimated in value, given the absence of any relevant volume metric. This is consistent with the Commission's past decisional practice, notably in the Commission's decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, where the market shares on the demand side of the market for the wholesale supply of TV channels are expressed in terms of expenditure (see paragraph 433).

217 The Notifying Party specified that market shares for the wholesale supply of TV channels are only estimated in value, given the absence of any relevant volume metric. This is consistent with the Commission's past decisional practice, notably in the Commission's decision of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, where the market shares on the demand side of the market for the wholesale supply of TV channels are expressed in terms of expenditure (see paragraph 433).

markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services[219] (downstream) in the Targets' footprint;

(b) Vertically affected markets arising from the relationships between the market for the wholesale supply of access to TV services (upstream),[220] and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) in the Targets' footprint;

(c) Vertically affected markets arising from the relationships between the market for the wholesale supply of premium pay TV channels (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(d) Vertically affected markets arising from the relationships between the market for the wholesale supply of access and call origination services on mobile networks (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) in the Targets' footprint;

(e) Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on fixed networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(f) Vertically affected markets arising from the relationships between the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(g) Vertically affected markets arising from the relationships between the market for the wholesale supply of domestic call transit services on fixed networks (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(h) Vertically affected markets arising from the relationships between the market for the wholesale supply of internet connectivity services (upstream),[221] and the

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218 The Commission notes that the Wholesale Access Regulation imposes access obligations on all FNOs active in the Targets' footprint irrespective of the specific product market segment considered. Accordingly, the Commission will assess the effects of the Transaction on the basis of an overall market for the wholesale supply of broadband access services as any vertical effect on narrower segments of such overall market would be the same in light of the application of the Wholesale Access Regulation.

219 As the Notifying Parties confirmed that the market shares of the Parties presented below would not materially differ depending on any product market segmentation, the Commission will undergo its assessment in relation to the market for the retail supply of business connectivity services on the basis of an overall market for the retail supply of business connectivity services (Form CO, paragraph 1122).

220 As the Targets already have [90-100]% market shares on this market, the Commission does not consider it necessary to assess any of those left open segments as the effects of the Transactions on any such segments would be the same irrespective of the exact product market segment considered.

221 In response to RFI 28, the Notifying Party explained that in the absence of any precise data on the size of the segments identified by the Commission, the Notifying Party is unable to provide precise estimates of its market share in these segments. However, the Notifying Party confirms that its market share is low and would likely be below 10% on all of those segments. Accordingly, and without

markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(i) Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on mobile networks (upstream), and the markets for the retail supply of fixed internet access services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) in the Targets' footprint;

(j) Vertically affected markets arising from the relationships between the market for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) in the Targets' footprint.

(279) The Transaction does not give rise to affected markets related to a conglomerate relationship.

7.1.2.1. Vertically affected markets arising from the relationships between the market for the wholesale supply of broadband access (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream)

(280) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

prejudice to the relevant product market definition, the Commission will undergo its assessment of the Transaction on the basis of the overall market for the wholesale supply of internet connectivity services, as the effects of the Transaction would be the same irrespective of the exact product market definition. For simplicity, the overall market for the wholesale supply of internet connectivity services will be referred to as the market for the wholesale supply of internet connectivity services.

Table 3: Vertically affected markets arising from the relationships between the markets for the wholesale supply of broadband access (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of broadband access in VOO's footprint[222] **Value:** VOO: [90-100%] (only); **Combined:** [90-100%] **Volume:** VOO: [90-100%] (only); **Combined:** [90-100%]	**Retail supply of fixed internet access services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [20-30%]; **Combined**: [30-40%] **Volume:** OBE: [5-10%]; Targets: [20-30%]; **Combined**: [30-40%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]. **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%].
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]. **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%].
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20]%; Targets: [20-30]%; **Combined:** [30-40]%. **Volume:** OBE: [10-20]%; Targets: [20-30]%; **Combined:** [40-50]%.
	Retail supply of business connectivity services in the Targets' footprint[223] **Value: Combined:** [0-5]%. **Volume: Combined:** [0-5]%.
Wholesale supply of broadband access in Brutélé's footprint **Value:** Brutélé: [90-100%] (only); **Combined:** [90-100%] **Volume:** Brutélé: [90-100%] (only); **Combined:** [90-100%]	**Retail supply of fixed internet access services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [20-30%]; **Combined**: [30-40%] **Volume:** OBE: [5-10%]; Targets: [20-30%]; **Combined:** [30-40%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]

222 Even though the Commission has left open the exact product scope of the market for the wholesale supply of access to broadband services, the Targets only provide their wholesale supply of access to broadband services on a cable network. As such, the Commission will make its assessment considering a wholesale supply of access to broadband services via a cable network, as the effects of the Transaction on a wider market would not be materially different.

223 Even though the Commission has left open the exact geographic scope of the market for the retail supply of business connectivity services, the Commission will make its assessment considering that the geographic scope of the market corresponds to the Targets' footprint as the assessment of the Transaction would not be materially different irrespective of the exact geographic scope of the market for the retail supply of business connectivity services.

Upstream market	Downstream market
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]
	Retail supply of business connectivity services in the Targets' footprint **Value: Combined:** [0-5%] **Volume: Combined:** [0-5%]

Source: Form CO, Annex 17 and Commission's own calculations

7.1.2.2. Vertically affected markets arising from the relationships between the market for the wholesale supply of access to TV services (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream)

(281) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 4: Vertically affected markets arising from the relationships between the markets for the wholesale supply of access to TV services (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of access to TV services in VOO's footprint[224] **Value:** VOO: [90-100%] (only); **Combined**: [90-100%] **Volume:** VOO: [90-100%] (only); **Combined:** [90-100%]	**Retail supply of AV services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]
	Retail supply of business connectivity services in the Targets' footprint **Value: Combined:** [0-5%] **Volume: Combined:** [0-5%]
Wholesale supply of access to TV services in Brutélé's footprint **Value:** Brutélé: [90-100%] (only); **Combined**: [90-100%] **Volume:** Brutélé: [90-100%] (only); **Combined**: [90-100%]	**Retail supply of AV services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:**

224 Even though the Commission has left open the exact product scope of the market for the wholesale supply of access to TV services, the Targets only provide their wholesale supply of access to TV services on a cable network. As such, the Commission will make its assessment considering a wholesale supply of access to TV services via a cable network, as the effects of the Transaction on a wider market would not be materially different.

Upstream market	Downstream market
	[40-50%]
	Retail supply of business connectivity services in the Targets' footprint **Value: Combined:** [0-5%] **Volume: Combined:** [0-5%]

Source: Form CO, Annex 17

7.1.2.3. Vertically affected markets arising from the relationships between the market for the wholesale supply of premium pay TV channels (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(282) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 5: Vertically affected markets arising from the relationships between the markets for the wholesale supply of TV channels (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of premium pay TV channels in the Targets' footprint[225] **Value:** VOO: [0-5%] (only); **Combined:** [0-5%]	**Retail supply of AV services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.4. Vertically affected markets arising from the relationships between the market for the wholesale supply of access and call origination services on mobile networks (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream)

(283) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

225 Since the Targets only supply, on a wholesale basis, premium pay TV channels, the Transaction does not give rise to any vertically affected markets with respect to the market for the wholesale supply of FTA and basic pay TV channels in the Targets' footprint.

Table 6: Vertically affected markets arising from the relationships between the markets for the wholesale supply of access and call origination services on mobile networks (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of access and call origination services on mobile networks in Belgium **Value:** OBE: [20-30%] (only); **Combined:** [20-30%] **Volume:** OBE: [20-30%] (only); **Combined:** [20-30%]	**Retail supply of mobile telecommunications services in Belgium**[226] **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.5. Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on fixed networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(284) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

226 While the merged entity's market shares do not *per se* exceed the threshold for vertically affected markets, they are close enough to warrant further investigation given the specific conditions of the concerned upstream and downstream markets as well as the situation of Telenet/BASE on those markets in the Targets' footprint. Indeed, during the market investigation, Telenet/BASE raised the concern that, post-Transaction, it would lose the revenues associated with the volume of VOO's mobile traffic hosted on the Telenet/BASE mobile network and that such a foreclosure situation could be (i) directly detrimental to competition on the market for the wholesale access and call origination for mobile telecommunication services and, (ii) indirectly detrimental to competition on the market for the supply of mobile telecommunications services in particular in the Targets footprint.

Table 7: Vertically affected markets arising from the relationships between the markets for the wholesale supply of call termination services on fixed networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of call termination services on fixed networks on OBE's network in Belgium **Value:** OBE: [90-100%] (only); **Combined:** [90-100%] **Volume:** OBE: [90-100%] (only); **Combined:** [90-100%]	**Retail supply of telephony services in the Targets' footprint** **Value:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%] **Volume:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%]
	Retail supply of mobile telecommunications in Belgium **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]
Wholesale supply of call termination services on fixed networks on VOO's network in Belgium **Value:** VOO: [90-100%]; **Combined:** [90-100%] **Volume:** VOO: [90-100%]; **Combined:** [90-100%]	**Retail supply of telephony services in the Targets' footprint** **Value:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%] **Volume:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%]
	Retail supply of mobile telecommunications in Belgium **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%]

Upstream market	Downstream market
	Volume: OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]
Wholesale supply of call termination services on fixed networks on Brutélé's network in Belgium **Value:** Brutélé: [90-100%]; **Combined:** [90-100%] **Volume:** Brutélé: [90-100%]; **Combined:** [90-100%]	**Retail supply of telephony services in the Targets' footprint** **Value:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%] **Volume:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%]
	Retail supply of mobile telecommunications in Belgium **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.6. Vertically affected markets arising from the relationships between the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(285) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 8: Vertically affected markets arising from the relationships between the markets for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of termination and hosting of calls services to non-geographic numbers in Belgium **Value:** OBE: [5-10%] (only); **Combined:** [5-10%] **Volume:** OBE: [5-10%] (only); **Combined:** [5-10%]	**Retail supply of multiple-play bundles in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.7. Vertically affected markets arising from the relationships between the market for the wholesale supply of domestic call transit services on fixed networks (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(286) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 9: Vertically affected markets arising from the relationships between the markets for the wholesale supply of domestic call transit services on fixed networks (upstream), and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of domestic call transit services on fixed networks in Belgium **Value:** OBE: [5-10%] (only); **Combined:** [5-10%] **Volume:** OBE: [5-10%] (only); **Combined:** [5-10%]	**Retail supply of multiple-play bundles in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.8. Vertically affected markets arising from the relationships between the market for the wholesale supply of internet connectivity services (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(287) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 10: Vertically affected markets arising from the relationships between the markets for the wholesale supply of internet connectivity services (upstream), and the markets for the retail supply of internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of internet connectivity services worldwide[227] **Value:** OBE: [0-5%] (only); **Combined:** [0-5%].[228]	**Retail supply of fixed internet access services in the Targets' footprint** **Value:** OBE: [5-10%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [5-10%]; Targets: [20-30%]; **Combined:** [30-40%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.9. Vertically affected markets arising from the relationships between the market for the wholesale supply of call termination services on mobile networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(288) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

227 Even though the Commission has left open the exact geographic scope of the market for the wholesale supply of internet connectivity services, the Notifying Party confirmed that the global market shares provided were not materially different from their EEA-wide market shares. As such, the Commission will make its assessment on the basis of the global market shares provided by the Notifying Party. Furthermore, the Notifying Party explains that it has not been able to estimate the total market volume and has therefore been unable to provide volume-based market shares.

228 The Notifying Party has been unable to estimate the total market volume and therefore, was unable to provide the market shares by volume.

Table 11: Vertically affected markets arising from the relationships between the markets for the wholesale supply of call termination services on mobile networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of call termination services on mobile networks on OBE's mobile network in Belgium **Value:** OBE: [90-100%] (only); **Combined:** [90-100%]	**Retail supply of fixed telephony services in the Targets' footprint** **Value:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%] **Volume:** OBE: [0-5%]; Targets: [20-30%]; **Combined:** [20-30%]
	Retail supply of mobile telecommunications in Belgium **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of fixed-only bundles in the Targets' footprint **Value:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%] **Volume:** OBE: [0-5%]; Targets: [40-50%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Form CO, Annex 17

7.1.2.10. Vertically affected markets arising from the relationships between the market for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream)

(289) Based on the market shares submitted by the Notifying Party, the Transaction gives rise to the following vertically affected markets:

Table 12: Vertically affected markets arising from the relationships between the markets for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream) (2021)

Upstream market	Downstream market
Wholesale supply of international roaming services in Belgium **Value:** OBE: [30-40%] (only); **Combined:** [30-40%].[229]	**Retail supply of mobile telecommunications in Belgium** **Value:** OBE: [20-30%]; Targets: [5-10%]; **Combined:** [20-30%] **Volume:** OBE: [20-30%]; Targets: [0-5%]; **Combined:** [20-30%]
	Retail supply of multiple-play bundles in the Targets' footprint **Value:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%] **Volume:** OBE: [5-10%]; Targets: [30-40%]; **Combined:** [40-50%]
	Retail supply of FMC bundles in the Targets' footprint **Value:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [30-40%] **Volume:** OBE: [10-20%]; Targets: [20-30%]; **Combined:** [40-50%]

Source: Notifying Party's response to RFI 25, question 5

7.1.3. *Conclusion*

(290) The effects arising from the affected horizontal and vertical markets described above will be discussed in turn in the following sections. After setting out the analytical framework (section 7.2) and the market shares in the relevant markets, including all plausible segments sub-segments (section 7.3), the Commission will first assess the potential horizontal non-coordinated effects stemming from the Transaction (section 7.4). Then, the Commission will assess the potential horizontal coordinated effects stemming from the Transaction (section 7.5). Finally, the Commission will assess the potential vertical effects of the Transaction (section 7.6).

7.2. Analytical framework

(291) 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.

(292) In this respect, a merger may entail horizontal and/or non-horizontal (namely, vertical or conglomerate) effects. Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors of each other in one or more of the relevant markets concerned. Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. Conglomerate effects are those deriving from a concentration where the undertakings concerned are in a relationship which is neither horizontal nor vertical. A concentration may involve all three types

[229] In its response to question 5 of RFI 25, the Notifying Party explains that it is unable to provide market share estimates in volume as there is no publicly available data regarding market size estimated in volume. Furthermore, the Notifying Party explains that as roaming communications are split across different services expressed in different metrics (minutes of calls, number of SMS, volume of data), it would be difficult if not impossible to estimate an aggregated market size in terms of roaming communications' volume.

of effects. In such a case, the Commission will appraise horizontal and non-horizontal effects in accordance with the guidance set out in the relevant notices, that is to say the Horizontal Merger Guidelines[230] and the Non-Horizontal Merger Guidelines.[231]

(293) In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases, the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.[232]

7.3. Market shares

(294) According to the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines,[233] in the assessment of the effects of a merger, market shares constitute a useful first indication of the structure of the markets at stake and of the competitive importance of the relevant market players.

(295) In the following recitals, the Commission presents the market shares of the Parties to the Transaction and their competitors, in all horizontally affected markets where the Parties have combined market shares above 20%, and all non-horizontally affected markets where the Parties have an individual or combined market share above 30%.

7.3.1. Retail markets

7.3.1.1. Retail supply of fixed internet access services in the Targets' footprint

(296) The following table presents the market shares (by volume and value) on the market for the retail supply of fixed internet access services in the Targets' footprint.

Table 13: Market shares on the market for the retail supply of fixed internet access services in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Targets	[30-40]	[20-30]	[20-30]	[30-40]	[30-40]	[20-30]
Combined	***[30-40]***	***[30-40]***	***[30-40]***	***[30-40]***	***[30-40]***	***[30-40]***
Proximus	[60-70]	[60-70]	[60-70]	[60-70]	[60-70]	[60-70]
Telenet	/	/	/	/	/	/
Others	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

230 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Horizontal Merger Guidelines**"), OJ C31, 5.2.2004, p. 5.

231 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Non-Horizontal Merger Guidelines**"), OJ C 265, 190.2008.

232 Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

233 Horizontal Merger Guidelines, paragraph 14; Non-Horizontal Merger Guidelines, paragraph 24.

(297) In the Targets' footprint, Proximus is the market leader in the market for the retail supply of fixed internet access services. The merged entity will become the second market participant in this market. Some smaller market participants will remain but only with a negligible market share.

7.3.1.2. Retail supply of AV services in the Targets' footprint

(298) The following table presents the market shares (by volume and value) on the market for the retail supply of AV services in the Targets' footprint.

Table 14: Market shares on the market for the retail supply of AV services in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Targets	[30-40]	[30-40]	[30-40]	[40-50]	[40-50]	[40-50]
Combined	***[40-50]***	***[40-50]***	***[40-50]***	***[50-60]***	***[50-60]***	***[40-50]***
Proximus	[50-60]	[50-60]	[50-60]	[40-50]	[40-50]	[50-60]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(299) In the Targets' footprint, Proximus is the market leader in the market for the retail supply of AV services. The merged entity will become the second and only other market participant in this market.

7.3.1.3. Retail supply of multiple-play bundles in the Targets' footprint

(300) The following table presents the market shares (by volume and value) on the market for the retail supply of multiple-play bundles in the Targets' footprint.

Table 15: Market shares on the market for the retail supply of multiple-play bundles in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Targets	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]
Combined	***[30-40]***	***[30-40]***	***[40-50]***	***[40-50]***	***[40-50]***	***[40-50]***
Proximus	[60-70]	[60-70]	[50-60]	[50-60]	[50-60]	[50-60]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(301) In the Targets' footprint, Proximus is the market leader in the market for the retail supply of multiple-play bundles. The merged entity will become the second and only other market participant in this market.

7.3.1.4. Retail supply of FMC bundles in the Targets' footprint

(302) The following table presents the market shares (by volume and value) on the market for the retail supply of FMC bundles in the Targets' footprint.

Table 16: Market shares on the market for the retail supply of FMC bundles in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[5-10]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]
Targets	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
Combined	***[30-40]***	***[30-40]***	***[30-40]***	***[30-40]***	***[30-40]***	***[40-50]***
Proximus	[60-70]	[60-70]	[60-70]	[60-70]	[60-70]	[60-70]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(303) In the Targets' footprint, Proximus is the market leader in the market for the retail supply of FMC bundles. The merged entity will become the second and only other market participant in this market.

7.3.1.5. Retail supply of fixed-only bundles in the Targets' footprint

(304) The following table presents the market shares (by volume and value) on the market for the retail supply of fixed-only bundles in the Targets' footprint.

Table 17: Market shares on the market for the retail supply of fixed-only bundles in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]
Combined	***[40-50]***	***[40-50]***	***[40-50]***	***[50-60]***	***[40-50]***	***[40-50]***
Proximus	[50-60]	[50-60]	[50-60]	[40-50]	[50-60]	[50-60]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(305) In the Targets' footprint, Proximus is the current market leader in the market for the retail supply of fixed-only bundles. The merged entity will become the second and only other market participant in this market.

7.3.1.6. Retail supply of mobile telecommunications services in Belgium

(306) The following table presents the market shares (by volume and value) on the market for the retail supply of mobile telecommunications services in Belgium.

Table 18: Market shares on the market for the retail supply of mobile telecommunications services in Belgium (2019-2021)

	2019	**2020**	**2021**	**2019**	**2020**	**2021**
	Market shares by value (%, share of revenue)			**Market shares by volume (%, share of SIM cards)**		
OBE	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
Targets	[0-5]	[0-5]	[5-10]	[0-5]	[0-5]	[0-5]
Combined	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***
Proximus	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]
Telenet	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
Others	[0-5]	[0-5]	[0-5]	[5-10]	[5-10]	[5-10]
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(307) In Belgium, the market for the retail supply of mobile telecommunications services is dominated by the three MNOs, namely Proximus, Telenet and OBE (by value-based market shares) and Proximus, OBE and Telenet (by volume-based market share). The merged entity will combine OBE's market share the market share of the Targets, currently offering their services as an MVNO. On the basis of the market share data provided by the Notifying Party, the Targets are the largest MVNO on the market. However, the merged entity will remain the third largest market participant by value, and the second largest market participant by volume.

(308) There are small MVNO operators in Belgium which account for a small share of the active SIM cards in Belgium, and a very small share of the overall revenues of the retail market for the supply of mobile telecommunications services.

(309) Following the auction for 5G spectrum, Digi has been awarded a specific spectrum allocation and is expected to enter the market for the retail supply of mobile telecommunications services in the future.[234]

7.3.1.7. Retail supply of fixed telephony services in the Targets' footprint

(310) The following table presents the market shares (by volume and value) on the market for the retail supply of fixed telephony services in the Targets' footprint.

[234] BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).

Table 19: Market shares on the market for the retail supply of fixed telephony services in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
Combined	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***
Proximus	[70-80]	[70-80]	[70-80]	[70-80]	[70-80]	[70-80]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(311) In the Targets' footprint, Proximus is the market leader in the market for the retail supply of fixed telephony services. The merged entity will become the second and only other market participant in this market.

7.3.1.8. Retail supply of business connectivity services in the Targets' footprint

(312) The following table presents the market shares (by volume and value) on the market for the retail supply of business connectivity services in the Targets' footprint.

Table 20: Market shares on the market for the retail supply of business connectivity services in the Targets' footprint (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of subscribers)		
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	***[0-5]***	***[0-5]***	***[0-5]***	***[0-5]***	***[0-5]***	***[0-5]***
Others	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(313) In the Targets' footprint, the merged entity will remain a small market participant in the market for the retail supply of business connectivity services.

7.3.2. Wholesale markets

7.3.2.1. Wholesale supply of TV channels in the Targets' footprint

(314) The following table presents the market shares (by value) on the market for the (i) wholesale supply of premium pay TV channels (supply and demand side); and, (ii) wholesale supply of FTA and basic pay TV channels in the Targets' footprint (demand side).

Table 21: Market shares on the market for the wholesale supply of premium pay TV channels (supply and demand side) and on the market for the wholesale supply of FTA and basic pay TV channels in the Targets' footprint (demand side) (2019-2021)

	2019	2020	2021	2019	2020	2021
	Wholesale supply of premium pay TV channels Market shares by value (%, share of spending/revenue)			Wholesale supply of FTA and basic pay TV channels Market shares by value (%, share of spending/revenue)		
Demand side (i.e., share of acquisition for wholesale TV channel services)						
OBE	[10-20]	[10-20]	[10-20]	[10-20]	[5-10]	[0-5]
Targets	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]
Combined	***[50-60]***	***[50-60]***	***[50-60]***	***[50-60]***	***[50-60]***	***[50-60]***
Proximus	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]
Telenet	/	/	/	/	/	/
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100
Supply side (i.e., share of supply for wholesale TV channel services)						
OBE	[0-5]	[0-5]	[0-5]	/	/	/
Targets	[20-30]	[5-10]	[0-5]	/	/	/
Combined	***[20-30]***	***[5-10]***	***[0-5]***	/	/	/
Others[235]	[70-80]	[90-100]	[90-100]	/	/	/
Total	100	100	100	/	/	/

Source: Form CO, Annex 17

(315) In the Targets' footprint, on the demand side of the markets for both the wholesale supply of FTA and basic pay TV channels as well as the premium pay TV channels, the merged entity will become the market leader. Proximus will be second and only other market participant in these markets. On the supply side of the market for the wholesale supply of premium pay TV channels, the merged entity will have a small and possibly declining market share if the current trend continues. Here, in fact only the Targets are active with their BeTV offers with a negligible market share.

(316) Since the market shares in the market for the two segments of the market for the wholesale supply of TV channels (demand side) are not materially different between, on the one hand, the market for the wholesale supply of premium pay TV channels in the Targets' footprint and, the market for the wholesale supply of FTA and basic pay TV channels on the other hand, the Commission will conduct its assessment below on the basis of an overall market for the wholesale supply of TV channels (demand side) since the effects of the Transaction would be the same irrespective of the specific segment assessed.[236]

235 These include large local and international wholesale suppliers of TV channels, such as BBC, Canal +, Warner Bros. Discovery, DPG Media, France Télévisions, Groupe TF1, RTL, RTBF, VRT….

236 Furthermore, in its decision of 22 December 2021 in case M.10343 – Discovery/WarnerMedia, the Commission explained that "[w]*ith regards to the market for the wholesale supply of TV channels, the Commission notes that any significant degree of bargaining power* [on the demand side] *would only be*

7.3.2.2. Wholesale supply of call access and call origination services on mobile networks in Belgium

(317) The following table presents the market shares (by volume and value) on the market for the wholesale supply of call access and call origination services on mobile networks in Belgium.

Table 22: Market shares on the market for the wholesale supply of call access and call origination services on mobile networks in Belgium (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of SIM cards)		
OBE	[10-20]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]
Targets	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	***[10-20]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***	***[20-30]***
Proximus	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Telenet	[80-90]	[70-80]	[70-80]	[70-80]	[70-80]	[60-70]
Others	/	/	/	/	/	/
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(318) In Belgium, Telenet is the largest wholesale supplier of wholesale for the call access and call origination services on mobile networks, OBE is the second largest and Proximus the smallest operator. However, since the Targets do not operate their own mobile network, the Transaction does not affect the structure of this market.

(319) Following the auction for 5G spectrum, Digi has been awarded a specific spectrum allocation and is expected to enter the wholesale market for the call access and call origination services on mobile networks in the future.[237]

7.3.2.3. Wholesale supply of broadband access services in each of the Targets' footprint

(320) The following table presents the market shares (by volume and value) on the market for the wholesale supply of broadband access services in each of the Targets' footprint.

possible if the Parties had a significant combined market share in the overall market for the wholesale supply of TV channels" (paragraph 206). Accordingly and in line with its previous practice, the competitive assessment of the demand side of the market for the wholesale supply of TV channels will be made on the basis of an overall market for the wholesale supply of TV channels.

237 BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).

Table 23: Market shares on the market for the wholesale supply of broadband access services in each of the Targets' footprint (2019-2021)[238]

	2019	2020 H1	2020 H2	2021	2019	2020 H1	2020 H2	2021
	Market shares by value (%, share of revenue)				Market shares by volume (%, share of lines)			
VOO's footprint								
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[70-80]	[70-80]	[70-80]	[70-80]	[60-70]	[70-80]	[70-80]	[70-80]
Combined	***[70-80]***	***[70-80]***	***[70-80]***	***[70-80]***	***[60-70]***	***[70-80]***	***[70-80]***	***[70-80]***
Proximus	[20-30]	[20-30]	[20-30]	[20-30]	[30-40]	[20-30]	[20-30]	[20-30]
Telenet	/	/	/	/	/	/	/	/
Others	/	/	/	/	/	/	/	/
Total	100	100	100	100	100	100	100	100
Brutélé's footprint								
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[70-80]	[70-80]	[70-80]	[70-80]	[60-70]	[70-80]	[70-80]	[80-90]
Combined	***[70-80]***	***[70-80]***	***[70-80]***	***[70-80]***	***[70-80]***	***[70-80]***	***[70-80]***	***[80-90]***
Proximus	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[10-20]
Telenet	/	/	/	/	/	/	/	/
Others	/	/	/	/	/	/	/	/
Total	100	100	100	100	100	100	100	100

Source: Form CO, Annex 17

(321) In each of the Targets' footprint, the merged entity will remain the market leader in the market for the wholesale supply of broadband access services. Proximus will remain the second and only other market participant in this market. Since OBE is not active in the market for the wholesale supply of broadband access services, the Transaction does not bring about any change in the structure of the market.

7.3.2.4. Wholesale supply of access to TV services in each of the Targets' footprint

(322) The following table presents the market shares (by volume and value) on the market for the wholesale supply of access to TV services in each of the Targets' footprint.

238 The Notifying Party explains that, on the basis of the regulatory framework applicable to the markets for the wholesale supply of broadband access services and the wholesale supply of access to TV services, it is not possible to provide a breakdown of the market shares between these two markets over the period 2019-first half ("**H1**") of 2020. As such, only the market shares of from the second half ("**H2**") of 2020 relate specifically to the market for the wholesale supply of brandband access services. Accordingly, the Commission considers that the market shares for the period 2019-2020 H1 are representative of the market shares in each market individually over that period.

Table 24: Market shares on the market for the wholesale supply of access to TV services in each of the Targets' footprint (2019-2021)[239]

	2019	2020 H1	2020 H2	2021	2019	2020 H1	2020 H2	2021
	Market shares by value (%, share of revenue)				Market shares by volume (%, share of lines)			
VOO's footprint								
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[70-80]	[70-80]	[90-100]	[90-100]	[60-70]	[70-80]	[90-100]	[90-100]
Combined	***[70-80]***	***[70-80]***	***[90-100]***	***[90-100]***	***[60-70]***	***[70-80]***	***[90-100]***	***[90-100]***
Proximus	[20-30]	[20-30]	/	/	[30-40]	[20-30]	/	/
Telenet	/	/	/	/	/	/	/	/
Others	/	/	/	/	/	/	/	/
Total	100	100	100	100	100	100	100	100
Brutélé's footprint								
OBE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Targets	[70-80]	[70-80]	[90-100]	[90-100]	[70-80]	[70-80]	[90-100]	[90-100]
Combined	***[70-80]***	***[70-80]***	***[90-100]***	***[90-100]***	***[70-80]***	***[70-80]***	***[90-100]***	***[90-100]***
Proximus	[20-30]	[20-30]	/	/	[20-30]	[20-30]	/	/
Telenet	/	/	/	/	/	/	/	/
Others	/	/	/	/	/	/	/	/
Total	100	100	100	100	100	100	100	100

Source: Form CO, Annex 17

(323) In each of the Targets' footprint, merged entity will remain the sole market participant in the market for the wholesale supply of access to TV services. Since OBE is not active in the market for the wholesale supply of broadband access services, the Transaction does not bring about any change in the structure of the market.

7.3.2.5. Wholesale supply of call termination services on fixed networks in Belgium

(324) The following table presents the market shares (by volume and value) on the market for the wholesale supply of call termination services on fixed networks in Belgium.

239 The Notifying Party explains that, on the basis of the regulatory framework applicable to the markets for the wholesale supply of broadband access services and the wholesale supply of access to TV services, it is not possible to provide a breakdown of the market shares between these two markets over the period 2019-2020 H1. As such, only the market shares of from the H2 of 2020 relate specifically to the market for the wholesale supply of access to TV services. Accordingly, the Commission considers that the market shares for the period 2019-2020 H1 are representative of the market shares in each market individually over that period.

Table 25: Market shares on the market for the wholesale supply of call termination services on fixed networks in Belgium (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of lines)		
OBE's network						
OBE	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Combined	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***
Total	100	100	100	100	100	100
VOO's network						
VOO	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Combined	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***
Total	100	100	100	100	100	100
Brutélé's network						
Brutélé	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Combined	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(325) In Belgium, on the market for wholesale supply of call termination services on fixed networks, each individual fixed network constitutes a separate product market. Accordingly, each operator has a 100% market share on its own individual fixed network. The Transaction will therefore not affect the structure of this market.

7.3.2.6. Wholesale supply of call termination and hosting of calls to non-geographic numbers in Belgium

(326) The following table presents the market shares (by volume and value) on the market for the wholesale supply of call termination and hosting of calls to non-geographic numbers in Belgium.

Table 26: Market shares on the market for the wholesale supply of call termination and hosting of calls to non-geographic numbers in Belgium (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of lines)		
OBE	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Targets	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***
Others[240]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(327) In Belgium, on the market for wholesale supply of call termination and hosting of calls to non-geographic numbers, the Parties have a very limited combined market share.

7.3.2.7. Wholesale supply of domestic call transit services on fixed networks in Belgium

(328) The following table presents the market shares (by volume and value) on the market for the wholesale supply of domestic call transit services on fixed networks in Belgium.

Table 27: Market shares on the market for the wholesale supply of domestic call transit services on fixed networks in Belgium (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of lines)		
OBE	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]
Targets	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***	***[5-10]***
Others	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(329) In Belgium, on the market for the wholesale supply of domestic call transit services on fixed networks, OBE has a very limited combined market share. Since the Targets are not active on this market, the Transaction does not affect the structure of this market.

7.3.2.8. Wholesale supply of internet connectivity services worldwide

(330) The following table presents the market shares (by value)[241] on the market for the wholesale supply of internet connectivity services worldwide.

[240] In its decision of 31 May 2021 in case MEDE-C/C-21/0006 – *Proximus/Mobile Viking*, the Belgian Competition Authority found that in 2020, Proximus had a market share of [80-90]% on the market for the wholesale supply of termination and hosting of calls to non-geographic numbers in Belgium.

[241] The Notifying Parties have been unable to estimate the overall market volume and, subsequently, provide market shares in volume.

Table 28: Market shares on the market for the wholesale supply of internet connectivity services worldwide (2019-2021)[242]

	2019	2020	2021
	Market shares by value (%, share of revenue)		
OBE	[0-5]	[0-5]	[0-5]
Targets	[0-5]	[0-5]	[0-5]
Combined	***[0-5]***	***[0-5]***	***[0-5]***
Others	[90-100]	[90-100]	[90-100]
Total	100	100	100

Source: Form CO, Annex 17

(331) On a global market for wholesale supply of internet connectivity services, OBE has a very limited combined market share. Since the Targets are not active on this market, the Transaction does not affect the structure of this market.

7.3.2.9. Wholesale supply of call termination services on fixed networks in Belgium

(332) The following table presents the market shares (by volume and value) on the market for the wholesale supply of call termination services on fixed networks in Belgium.

Table 29: Market shares on the market for the wholesale supply of call termination services on fixed networks in Belgium (2019-2021)

	2019	2020	2021	2019	2020	2021
	Market shares by value (%, share of revenue)			Market shares by volume (%, share of lines)		
OBE's network						
OBE	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]	[90-100]
Targets	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***	***[90-100]***
Total	100	100	100	100	100	100

Source: Form CO, Annex 17

(333) In Belgium, on the market for wholesale supply of call termination services on fixed networks, each individual fixed network constitutes a separate product market. Accordingly, each operator has a 100% market share on its own individual fixed network. The Transaction will therefore not affect the structure of this market.

7.3.2.10. Wholesale supply of international roaming services in Belgium

(334) The following table presents the market shares (by volume and value) on the market for the wholesale supply of call termination services on fixed networks in Belgium.

242 The Notifying Parties have been unable to estimate its market shares at the EEA level. However, the Notifying Party confirmed that the Parties' market shares would not materially differ from those included in this table. As such, the Commission considers that it is sufficient to rely on these market shares for the purpose of its assessment of the Transaction.

Table 30: Market shares on the market for the wholesale supply of international roaming services in Belgium (2019-2021)

	2019	2020	2021
	Market shares by value (%, share of revenue)		
OBE	[30-40]	[30-40]	[30-40]
Targets	[0-5]	[0-5]	[0-5]
Combined	***[30-40]***	***[30-40]***	***[30-40]***
Proximus	[30-40]	[30-40]	[30-40]
Telenet	[20-40]	[20-30]	[20-30]
Total	100	100	100

Source: Notifying Party's response to RFI 27, question 5

(335) In Belgium, on the market for the wholesale supply of international roaming services, OBE is the second market participants after Proximus. The third market participant will be Telenet. As the Targets are not active in the market for the wholesale supply of international roaming services in Belgium, the Transaction will not affect the structure of this market.

7.4. Horizontal non-coordinated effects

7.4.1. Legal framework

(336) 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.[243]

(337) 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 guidance set out in the relevant notice, that is to say the Horizontal Merger Guidelines.[244]

(338) 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 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".[245]

243 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.

244 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.

245 Horizontal Merger Guidelines, paragraph 24.

(339) Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening of the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger.

(340) 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.[246] 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.*"[247]

(341) 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. The following sentence of paragraph 24 of the Horizontal Merger Guidelines clarifies that the removal of the rivalry between the parties may have consequences also 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.

(342) 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.

(343) 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.[248]

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246 Merger Regulation, recital 25.

247 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.

248 Horizontal Merger Guidelines, paragraph 26.

(344) The factors listed in the Horizontal Merger Guidelines include: 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.[249]

(345) 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.[250] 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. There may, however, also be other situations where a merger may lead to significant non-coordinated effects by removing an important competitive force.

(346) In situations where a merger may result in harmful non-coordinated effects on competition, the Horizontal Merger Guidelines describe a number of factors, which could counteract such harmful effects, that is, the likelihood of buyer power, entry, efficiencies and the fact that one of the merging parties is a failing firm.

(347) As regards entry, paragraph 68 of the Horizontal Merger Guidelines provides that when entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. However, for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

7.4.2. Retail supply of fixed internet access services

7.4.2.1. The Notifying Party's view

(348) The Notifying Party considers that the Transaction does not raise any competition concerns on the retail market for the supply of fixed internet access services as a result of horizontal non-coordinated effects irrespective of the geographic market retained, for the following reasons.

(349) First, in the Form CO, the Notifying Party submits that the new entity will continue to compete against several strong players at national level post-Transaction for both standalone and multiple-play offers, Proximus and Telenet in particular.

(350) Even considering the competitive landscape at the level of the Target's footprint, the Notifying Party submits that Telenet is likely to begin offering fixed and convergent services in the south of the country as a result of the present Transaction. The Notifying Party further submits that Citymesh Mobile, a joint-venture between Citymesh (part of the IT-group Cegeka) and RCS& RDS (part of the Digi group) (together "**Citymesh/Digi**"), which acquired mobile spectrum in the 5G spectrum auction held by the Belgian telecoms regulator on 20 June 2022, is likely to enter fixed and convergent markets in Belgium as well.

(351) Second, the Notifying Party indicates that the increment brought about by OBE is marginal in standalone offers.

(352) Third, the Notifying Party submits that the Transaction will not reduce infrastructure competition and, on the contrary, will actually increase the number of fully

[249] Horizontal Merger Guidelines, paragraphs 27 et seq.
[250] Horizontal Merger Guidelines, paragraph 37.

convergent network operators on the territory of Belgium. In that respect, the Notifying Party considers that the Transaction is expected to strengthen OBE's competitiveness vis-à-vis Proximus and Telenet in Belgium.

(353) Fourth, the Notifying Party considers that OBE and the Targets are not close competitors and that, in any event, customers are able to easily switch to alternative players.

(354) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies. In particular, the Notifying Party submits that the Transaction will lead to increased investments in fixed infrastructure in the Targets' footprint and to the elimination of double marginalisation for both fixed and mobile networks of the Parties. The Notifying Party further submits that the Transaction will increase the quality of the Parties' FMC bundles.[251]

(355) In the Article 6(1)(c) Response, the Notifying Party restates many of the arguments from the Form CO, including that:

– The Parties are not each other's closest competitors, on the basis that Proximus is the closest competitor of each of them,

– The Transaction will not eliminate an important competitive force because Orange is not the cheapest operator and does not stand out in terms of innovation,

– There will be entry in the Targets' footprint by Telenet and Digi, which will compensate for any loss of competition; and

– The Transaction will generate substantial efficiencies in the form of increased network investment compared to what the Targets' would have invested alone, and on the basis that there will be an elimination of double marginalisation for the provision of both fixed and mobile services.

7.4.2.2. The Commission's assessment

(356) The Commission considers that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for fixed internet access services within the Targets' footprint. This is in particular because, as set out in further detail below, (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant, (ii) customers have limited possibilities of switching supplier post-Transaction, (iii) the Parties are close competitors, (iv) the merger would eliminate an important competitive force and (v) any entry would not be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the Transaction.

7.4.2.2.1. The Parties' combined market share are high and underestimate the Parties' market power

(357) As set out in the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors, and they are normally important factors in the assessment. For example, changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, by indicating whether firms have been

[251] Article 6(1)(c) Response, paragraph 331-396.

gaining or losing market shares.[252] In addition, a merger involving a firm whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.[253]

(358) For the following reasons the Commission considers that the Parties' combined market shares are high, and these high combined market shares underestimate the Parties' actual market power on the market.

(359) First, the combined market shares of the Parties are high with a significant increment. Based on share data provided by the Parties, as set out in section 7.1 above, in the market for the retail provision of fixed internet access services within the Targets' footprint, the merged entity would have a share of c. [30-40]%, by value and by volume, with an increment of c. [5-10]% by value and c. [5-10]% by volume. The Commission considers that the merged entity's combined share would be substantial; it is the second highest in the market, after that of Proximus, in a market with virtually no other competitor.

(360) Second, the combined market shares of the Parties underestimate the market power that the merged entity will be able to exercise on the market. In line with its past decisions, the Commission considers that market shares based on gross additions ("**gross adds**"), as opposed to volume-based market shares, provide a reasonable measure that captures the current competitive strength of market participants.[254] Gross adds reflect the respective number of new subscribers acquired in a year by each operator (irrespective of where these customers came from) without deduction of the subscribers who leave. Market shares based on gross adds are generally used in the telecommunications industry and allow for a dynamic measure of market power as they focus on those customers that market participants actively seek to attract. On the basis of the data provided by the Notifying Party, the Commission has been able to calculate market shares of the Parties on the basis of gross adds.

(361) In the following table, the Commission presents the gross-adds market shares of the Parties in the market for the retail supply of fixed internet access in the Targets' footprint, calculated on the basis of the data provided by the Parties.

252 Horizontal Merger Guidelines, paragraphs 14, 15 and 27.

253 Horizontal Merger Guidelines, paragraph 17.

254 Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*, paragraph 397.

Table 31: Gross adds shares in the markets for the retail supply of fixed internet access in the Targets' footprints[255]

	Gross adds share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[30-40]	[20-30]	[20-30]	+[20-30]	+[10-20]	+[10-20]
Targets	[30-40]	[30-40]	[30-40]	+[0-5]	+[5-10]	+[5-10]
Combined	[60-70]	[60-70]	[60-70]	+[30-40]	+[20-30]	+[20-30]

Source: Commission calculations based on Parties' data submitted in response to RFI 20, questions 10 and 11.

(362) On the basis of Table 31 above, the Commission notes that pre-Transaction, OBE, the Targets and Proximus (since it is the only other significant player in the market) each account for about [30-40%] of the share of gross adds. Post-Transaction the merged entity would become the market leader (ahead of Proximus) with a gross add share of approximately [60-70]%.

(363) Further, the Commission notes that the Parties' gross add shares, even if they have been slightly decreasing over the past three years, far exceed the Parties' market share of revenue/subscribers, which implies that the Parties' ability to attract customers, and thus their role on the market, far exceeds its value and volume market shares.

(364) More concretely, looking at the gross adds market shares, it appears that if all customers decided to switch, customers would approximately evenly split between each of the Parties and Proximus, and each market participant would approximately have a [30-40]% market share. The comparison between the gross adds market shares and the market shares of the Parties shows that the merged entity is thus able to attract a disproportionate amount of customers in comparison to its market share. Further, because Proximus accounts for the remainder of the gross adds market shares, these results imply the converse for Proximus, i.e. Proximus' market power is significantly lower than their current market shares would suggest.

(365) As such, the Transaction would lead to the consolidation of two players whose market power far exceeds their current market shares.

(366) Third, the Commission finds that the pre-merger margins of the Parties are high, which is consistent with high market power.[256]

[255] The residual gross adds shares essentially correspond to Proximus' gross adds, since Proximus is the only other significant player in the market.

[256] Horizontal Merger Guidelines, paragraph 27-28.

Table 32: Margins of the Parties in the market for retail supply of fixed internet access services in the Targets' footprints[257]

	Contribution margin (%)			EBITDA margin (%)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE[258]	[…]	[…]	[…]	[…]	[…]	[…]
Targets	[…]	[…]	[…]	[…]	[…]	[…]

Source: Response to RFI 22, Annex 1

(367) On the basis of Table 32 above, the Commission notes that both Parties' pre-merger margins are high in comparison to the average EBIDTA margin in the telecommunications sector in Europe in 2021, 26%.[259]

(368) On the basis of the above, the Commission concludes, for the purpose of this decision, that the combined market shares of the Parties are significant and that the Transaction gives rise to a significant market share increment. In addition to the high market shares, the Commission further finds, on the basis of the gross adds shares, net adds and margin data presented above, that the market power that the merged entity will be able to exercise on the market post-transaction far exceeds its current market share.

7.4.2.2.2. The Parties' customers have limited possibilities of switching suppliers

(369) The Horizontal Merger Guidelines provide, in paragraph 31, that where customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers, such customers are particularly vulnerable to price increases.

(370) In the following paragraphs, the Commission will first show that there are limited alternative operators in the Targets' footprint for the retail supply of fixed internet access services and, second, that the remaining alternative would be more expensive and of lower download speed.

(371) First, contrary to the Notifying Party's argument as set out in section 7.4.2.1 above that several strong competitors will remain, the Commission notes that the Transaction will reduce the number of retail providers of fixed internet access services in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active on the market, they consistently account for only a very small proportion of the market (collectively, [0-2]% in terms of subscribers and [0-2]% in terms of revenue). Also, whereas the Notifying Party also mentions Telenet as a strong competitor, it also acknowledges that there is "*no direct demand substitutability between … the Targets and Telenet [because they] currently do not provide retail fixed and multiple-play services in the same footprint (aside from Telenet's fLTE offers)*."[260] Overall, the Parties also confirm the fact that [Details of internal documents describing the Parties'

257 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

258 […]. However, the Commission considers that the OBE's nationwide margin data is representative of OBE's margin data in the Targets' footprint.

259 See data from New York University's Stern School of Business (ID 2066). Global figures are similar; see data from CSIMarket.com (ID 2059).

260 Response to RFI 22, question 6.

strategy].[261] Indeed, the large majority of the market (collectively, [98-100]% in terms of subscribers and [98-100]% in terms of revenue) will be in the hands of two FNOs, i.e., the merged entity and Proximus, with Telenet not having a market position.

(372) Notably, the market investigation confirmed that post-Transaction, customers will be able to choose from less retail providers of fixed internet services, with one respondent noting that the Transaction "*will lead to less choose* [sic – choice] *for consumers living in that footprint*"[262] and another observing that "*The Transaction will combine the two players who are particularly close competitors […] leaving the incumbent Proximus as the only alternative to the merged entity*."[263] The BIPT concluded similarly that "*the takeover of VOO by Orange ... will result in the establishment of a Proximus-Orange duopoly holding almost 98% of the market*."[264]

(373) Second, while Proximus is the market leader with a share of [60-70]% by value and [60-70]% by volume, as the former incumbent operator in Belgium, Proximus is positioned "*at the high end of the market*"[265] in terms of prices. Proximus also largely offers lower maximum internet download speeds (based on its predominantly xDSL network) compared to the Parties, which offer higher internet download speeds (based on VOO's and Brutélé's coax/cable network).[266] As illustrated by the graph provided by Telenet in the slide deck of a meeting that took place between Telenet and the case team on 5 April 2022, Proximus' offers are consistently of lower speed and higher price than those of OBE and the Targets, with the exception of Scarlet which provides significantly lower speeds (50 Mbps) at moderately lower prices.[267] As such, the choice of end-customers is not only limited, it is also likely to be more expensive and slower than the one offered by the Targets.

(374) Finally, the buyer-side of the retail market for fixed internet access services consists of individual customers who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[268]

(375) On the basis of the above, the Commission concludes, for the purpose of this decision, that the Transaction will materially limit the switching ability of customers.

7.4.2.2.3. The Parties are close competitors

(376) As set out in paragraph 28 of the Horizontal Merger Guidelines, a transaction is more likely to result in competition concerns if the merging firms are "*close competitors*" since, for instance, their respective incentive to raise prices pre-transaction is more

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[261] Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

[262] Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 76 (ID 602).

[263] Telenet's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 62.1 (ID 646).

[264] BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraph 32 (ID 2057).

[265] Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165).

[266] Proximus also higher speed (e.g. 1 Gbps) fixed internet packages based on fibre technology, but these offers, which are also c. 40% more expensive than its 100 MBPS offer, are not available nationally in Belgium as Proximus' fibre network roll-out is ongoing (and will remain ongoing for several years).

[267] See slide 11 of Telenet's presentation to the Commission on 5 April 2022 (ID 906). Furthermore, as all other FVNOs active in the Targets' footprint operate on the basis of wholesale access to Proximus' network, they are unable to provide higher speeds than those of Proximus.

[268] See Horizontal Merger Guidelines, paragraph 64.

likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes.

(377) The Commission considers, contrary to the Notifying Party's argument as set out in Section 7.4.2.1 above, that the Parties' are close competitors, based on a number of elements.[269]

(378) First, in light of the market shares presented above in Section 7.4.2.2.1, the Commission considers that, in such highly concentrated market, the Parties compete closely with each other. This is corroborated by the Parties' own internal documents, in particular those of the Targets and Sellers, which refer to Orange as a direct and important competitor:

– For instance, Nethys' legal counsel explains that [Details of internal documents describing the Targets' strategy][270] when trying to fend off Orange's legal challenge of the sale of VOO to Providence, and that [Details of internal documents describing the Targets' strategy].[271]

– The importance of their market position was further confirmed by the VOO management in 2021 when reporting to the VOO works council about the competition on the market and when OBE was described as [Details of internal documents describing the Targets' strategy].[272]

(379) Second, the Parties' respective fixed internet offerings are closely substitutable. As Orange is an access seeker on the Target's fixed network, its fixed internet offering is most closely comparable to that of the Targets' in terms of speed and quality. Indeed, Orange's and the Targets' respective fixed internet offerings provide comparable maximum download speeds (150 MBPS and 125 MBPS respectively) and are similarly priced. By contrast, the closest equivalent offering of Proximus is more expensive and offers a lower maximum download speed (100 MBPS), in view of the fact that it is based on an xDLS network which, as a rule, allows for lower maximum internet speeds than the coax/cable network used by Orange and the Targets.[273] In the Article 6(1)(c) Response, the Notifying Party submits that the Commission ignores the fact that Proximus is also rolling out a fibre network, and already covers "*approximately 20% of households in its entire footprint*", while allows for speeds of either 350 Mbps or 1 Gbps.[274] However, this means that the vast majority of customers in the Targets' footprint do not currently have the option of switching to a fibre connection from Proximus. As the BIPT pointed out Proximus' fibre roll-out is "*currently limited to a fraction of the population (17% of homes passed by June*

[269] The Notifying Party also submits that Proximus is both the Targets' and Orange's closest competitor respectively (See e.g. Form CO, paragraph 42, and the Article 6(1)(c) Response, paragraph 121). The Commission notes that the Horizontal Merger Guidelines do not require that the merging parties be ranked by reference to how closely they compete with one another compared to how closely they compete with third parties. Rather, it is sufficient to assess whether the merging parties compete closely with each other.

[270] Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-62545).

[271] Free translation of [Details of internal documents describing the Targets' strategy](Internal Document ID 1090-22575).

[272] Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-35214).

[273] Form CO, Annex 13 – Benchmark of offers, Table 5.

[274] Article 6(1)(c) Response, paragraphs 126 and following.

2022, Proximus targeting to reach 70% of the population only by 2028)" and moreover, *when available, is, not being adopted in a fast way.*"[275]

(380) In addition, the majority of respondents that expressed a view listed Orange as the closest or second closest competitor of the Targets (and similarly listed the Targets as the closest or second closest competitor of Orange) based a number of key parameters of competition, namely price, download speed, upload speed and quality (latency, etc.), notably due to the fact that the Parties distribute their services on the basis of the same cable network.[276]

(381) Third, the Horizontal Merger Guidelines state that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties.[277] The Commission has applied that type of analysis in previous merger cases in the telecommunications sector.[278] Table 5 presents the diversion ratios from each of the Parties to one another both in terms of customers lost and customers won within the Target's footprint for each year between 2019 and 2021 and the first half of 2022.

Table 33: Diversion ratios of the Parties in the markets for the retail supply of fixed internet access in the Targets' footprints[279]

Operator	Customers won/lost	Diversion ratio (%)			
		2019	2020	2022	2022 H1
OBE	Customers won from the Targets	[60-70]	[60-70]	[60-70]	[60-70]
	Customers lost to the Targets	[50-60]	[40-50]	[40-50]	[30-40]
Targets	Customers won from OBE	[10-20]	[10-20]	[10-20]	[20-30]
	Customers lost to OBE	[40-50]	[30-40]	[30-40]	[30-40]

Source: Response to RFI 20, questions 10 and 11.

(382) A review of switching data provided by the Parties supports the conclusion that the Parties are close competitors. Both OBE and the Targets win and lose a significant proportion of their customers from and to one another, in certain cases even more than [50-60]%. The analysis also indicates that there is a general slight downward trend over time in the diversion ratios based on customers lost between the Parties. Whilst this would be consistent with the Parties becoming slightly less close competitors over time, the level of switching between the Parties indicates that the Parties will remain close competitors for the foreseeable future, even if this historical trend continues.

(383) Fourth, in line with its precedents, the Commission also expresses the diversion ratios in Table 5 as so-called "implied market shares".[280] Implied market shares

275 BIPT's submission of 30 August 2022 entitled "Answer CE about VOO-Orange", page 13 (ID 1122).

276 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 40 and 47.

277 Horizontal Merger Guidelines, paragraph 29.

278 For example, Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*; Commission decision of 1 September 2016 in Case M.7758 – *Hutchison 3G Italy / WIND / JV*; Commission decision of 11 May 2016 in Case *M.7612 – Hutchinson 3G UK/Telefónica UK*.

279 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

indicate how large the Parties' market shares would have to be for them to give rise to the observed diversion ratios.[281] When the Parties' implied market shares exceed their actual market shares, then the Parties compete more closely with each other than their market shares suggest. Table 6 below shows the results of the Commission's diversion analysis expressed in terms of implied market shares.

Table 34: Parties' implied market shares in the retail fixed internet market in the Targets' footprints[282]

	Implied market share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[20-30]	[20-30]	+[10-20]	+[10-20]	+[10-20]
Targets	[40-50]	[30-40]	[30-40]	+[10-20]	+[5-10]	+[5-10]
Combined	[60-70]	[60-70]	[50-60]	+[20-30]	+[20-30]	+[10-20]

Source: Commission calculations based on the Parties' data submitted in response to RFI 20, questions 10 and 11.

(384) Table 6 demonstrates that the Parties compete significantly more closely with each other than their market shares suggest (i.e. because their implied market shares exceed their actual market shares). Therefore, market shares underestimate the competitive constraint that the Parties place on each other. Further, because Proximus is the only other significant player in the market (and therefore would account for the remainder of the (implied) market share outside of the Parties combined (implied) market share), the results above also demonstrate that Proximus competes significantly less closely with each of the Parties than its market shares would suggest. In other words, market shares overestimate the competitive constraint that Proximus places on each of the Parties.

7.4.2.2.4. The merger would eliminate an important competitive force

(385) The Horizontal Merger Guidelines provide that a merger can lead to significant non-coordinated effects if it eliminates an important competitive force, which can be the case where an undertaking may have more of an influence on the competitive process than its market shares would suggest, such as a recent entrant that exerts—or is expected to exert—significant competitive pressure on other firms in the market. A merger involving such a firm may have a significant negative impact on competition when the market is already concentrated.[283]

(386) As set out above, the Transaction is a three-to-two merger within the Targets' footprint. The market is therefore already concentrated, with a pre-merger Herfindahl-Hirschman Index ("**HHI**") of over 4,500.[284] In addition, there are a

280 See Valletti and Zenger (2020). See also Commission decision of 21 December 2020 in case M.9730 – *FCA / PSA*.

281 Specifically, if diversion occurred in proportion to market shares, the diversion ratio from firm 1 to firm 2 would equal $d_{12} = s_2/(1 - s_1)$, where s_1 and s_2 denote the market shares of firms 1 and 2, respectively. Similarly, $d_{21} = s_1/(1 - s_2)$. Solving this pair of equations for s_1 and s_2 then gives the Parties' implied market shares as a function of both diversion ratios, $s_1 = [d_{21}(1 - d_{12})]/(1 - d_{12}d_{21})$ and $s_2 = [d_{12}(1 - d_{21})]/(1 - d_{12}d_{21})$.

282 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

283 Horizontal Merger Guidelines, paragraph 38.

284 The post-Transaction HHI would be over 5 000 with a delta of over 500.

number of different elements, which all point to Orange being an important competitive force on market.

(387) First, Orange is the most recent entrant in the Belgian fixed internet, TV and multiple-play markets. Since entering six years ago, in 2016, Orange has positioned itself as a "*challenger*"[285], a point confirmed by the majority of market participants,[286] and, as observed by the BIPT,[287] has generally offered, and continues to offer, lower prices than other players on the market, notably the Targets and Proximus.[288] Indeed, VOO in its internal documents acknowledged [Details of internal documents describing VOO's strategy].[289]

(388) Second, market participants also view Orange as one of the fastest growing players on the market. One competitor indicated that the challenger strategy has made Orange "*by far fastest growing (if not the only growing) fixed operator in Belgium… bringing it to a [approx. 10]% market share in 2020 (from 0% in 2016) […] in 2020, OBE, despite being the smallest operator, gained [60-70]% of all net add fixed customers in the Belgian market*"[290] while another competitor similarly observed that "*the past years [Orange] gained significant market share*"[291]. The fact that Orange is the fastest-growing player on the market is corroborated by the market share data provided by the Parties, which show year-on-year market share increases for Orange[292], as well as by the win/loss data provided by the Parties.[293]

(389) Third, Orange is seen as an innovative player in the market in Belgium, with one competitor observing that "OBE has played an innovative and disruptive role since entering the market in 2016 … for example, OBE was the first operator to launch a new bundle offering with the introduction of a bundle that includes only fixed and mobile in 2019."[294] This offer, which was called "Love Duo" and aimed at offering more tailored options to customers' needs (e.g. younger demographics with a preference for consuming audiovisual content via VOD and SVOD platforms over more traditional linear TV) was subsequently mirrored by the introduction of similar offers by each of the other main operators, notably by VOO in 2021 and by Proximus in March 2022. The BIPT similarly considered that Orange's entry into fixed and

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285 See Orange's press release of 20 July 2018 *Orange Belgium's confirms its commercial success as a Bold Challenger* (ID 2063).

286 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41 and 41.1.

287 BIPT's press release of 18 July 2022 *The BIPT notices the positive impact of market regulation,* published on 18 July 2022, page 2: "*Since its entry into the market, Orange has positioned itself as a "challenger" operator offering the cheapest offer on the market for most consumption profiles*" (ID 2056)

288 The only exception to this is Proximus' low-cost sub-brand Scarlet, whose offering is not comparable to that of Orange, the Targets' or Proximus in terms of quality. See e.g. Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 602). ("*While they [Orange] offer lower prices, they also never could be labelled as a low-cost operator like for instance Scarlet*"). See also Form CO, Annex 13 – Benchmark of offers.

289 VOO Art. 4.5 document, 7._Presentation_on_the_overview_of_the_Commercial_Performance.pdf, page 10.

290 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 646).

291 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 705).

292 Form CO, Annex 17.

293 Response to RFI 10.

294 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 44.1.1 (ID 646).

multiple-play markets resulted in "revived market dynamics" and "has led to new offers (e.g. the 2P BB Mobile or 3P BB TV Mobile packages) and more competitive prices."[295] In the Article 6(1)(c) Response, the Notifying Party submitted the introduction of new bundle types is "not a technical innovation, only a marketing choice that can be easily and quickly replicated by competitors."[296] The Commission nonetheless considers that this was an innovative and disruptive move by Orange aimed at addressing a customer segment that established players were not minded to address spontaneously, and only introduced similar offers in reaction to that of Orange. Indeed, an analyst report at the time of Orange's introduction of Love Duo referred to it as having "high disruptive potential".[297]

(390) The Parties acknowledge the competitive force of Orange when they mention that "[Details of internal documents describing the Parties' strategy][298] or when they indicate that [Details of internal documents describing the Parties' strategy].[299]

(391) The Commission considers that through its acquisition of an established player, the incentives of Orange to act as a disruptive force on the market may change. Indeed, a majority of respondents to the market investigation considered that following the Transaction, the merged entity would not innovate to the same extent as Orange pre-Transaction, including through the introduction of disruptive new offer or bundle types to better address a diverse range of end customers.[300]

(392) In view of the above elements, taken as a whole, the Commission concludes for the purpose of this decision that the Transaction may result in the elimination of an important competitive force.

7.4.2.2.5. Conclusion on the likely effects of the Transaction

(393) On the basis of the analysis above, the Commission has shown that (i) the Transaction will combine two entities whose combined market shares are high and which underestimate their actual combined market power (see paragraphs (359)-(365) above); (ii) the margins of the Parties are high (see paragraphs (366)-(367) above); (iii) customers have limited possibilities of switching supplier (see paragraphs (370)-(374) above); (iv) the Parties are close competitors (see paragraphs (378)-(384) above); and, (v) the Transaction will eliminate an important competitive force (see paragraphs (386)-(391) above).

(394) In particular, in line with paragraph 28 of the Horizontal Merger Guidelines, the merging entity's incentive to raise prices post-Transaction is higher the more substitutable the Parties' products are or the closer the Parties compete with each other. High pre-merger margins may also make significant price increases more likely. As such, the Parties' relatively high diversion ratios (presented in Table 33)

295 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraph 38 (ID 2057).

296 Article 6(1)(c) Response, paragraph 195.

297 ING Belgian Telecom Sector Update dated 22 November 2019 ("*Internet-mobile offer: Love Duo [had] high disruptive Potential ... Orange Belgium ... 'Love Duo' packs, targeting 'cord cutters', ie, clients with no interest in traditional TV or fixed phone lines. We think this is a coherent, appealing and disruptive portfolio of offers*" (emphasis added) (Internal Document ID 1065-66666).

298 Free translation [Details of internal documents describing the Parties' strategy](Internal Document ID 1090-27793).

299 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

300 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 44.1.

and relatively high pre-merger margins (presented in Table 34) are consistent with a conclusion that there would be significant upward pricing pressure post-Transaction. Further, as noted in paragraph (373) above, Proximus is positioned "*at the high end of the market*"[301] in terms of prices. This increases the ability of the merged entity to raise prices post-Transaction.

(395) Accordingly, and in view of the loss of competition between the Parties that would result from the Transaction,[302] the Commission concludes that, the Transaction will lead to significant price increases, reduced innovation, and/or reduced quality (e.g. less choice, lower data usage limits) in the market for the retail supply of fixed internet access in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction may negatively impact other non-price parameters of competition such as, for instance, customer service/care.

(396) While, as outlined in paragraph (65) above, the Commission acknowledges that OBE's national pricing strategy would imply that any price increase in the Targets' footprint by the merged entity would need to take into account the price constraints exercised by operators active outside the Targets' footprint, the Commission considers that these constraints would not be significant with regard to the present Transaction for the following reasons.

(397) First, while Orange may find it appropriate to price nationally today, as it is active across Belgium, it is uncertain if Orange would, post-Transaction, continue pricing nationally. In particular, following the Transaction, Orange will be an FNO (i.e. a network operator) in the Targets' footprint but remain an FVNO (i.e., and access seeker) outside the Targets' footprint – in Telenet's footprint –, thereby creating an asymmetry in its cost base in each footprint, in addition to the fact that it will continue to face two rival operators in Telenet's footprint, versus only one remaining competitor in the Target's footprint. As such, Orange may have the incentive, from an objective profit maximisation standpoint, to adopt a differentiated pricing strategy in the Targets' and Telenet's respective footprints following the Transaction, whether directly (e.g., offering identical bundles at different prices), indirectly (e.g., reducing advertising expenses in some geographic areas, providing higher discounts in some geographic areas,[303] boosting a cheaper sub-brand in some geographic areas) or a combination of both.

(398) Second, and in any event, any constraint exercised by operators not active in the Targets' footprint on Orange's pricing in the Targets' footprint would only extend to pricing. Any quality-related parameters of competition (e.g. quality or speed of customer support) would not, or only minimally, be affected by operators not active in the Targets' footprint. For example, Orange will not be able to directly intervene on Telenet's network to resolve issues with customers complaining with network-related problems while it will be able to do so on its own network in the Targets' footprint.

(399) On the basis of the above, the Commission concludes that the Transaction will give rise to significant anticompetitive price effects in the Targets' footprint. Furthermore,

301 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165).

302 Horizontal Merger Guidelines, paragraph 24.

303 For instance, Telenet is currently (from 27/02/2023 to 16/04/2023) offering a special discount called "Top promo on unlimited and super fast internet" which only applies to the municipalities in the Brussels Capital Region. In particular, the promotion is only available in "*only for customers with a new internet line in the sub municipalities of Brussels where Telenet is available,*" which only includes the municipalities where Telenet has its own fixed cable network in Brussels (ID 2071).

the Commission cannot exclude that the Transaction will give rise to significant anticompetitive non-price effects in the Targets' footprint. On this basis, in the following sections, the Commission assesses whether, and to what extent, the anticompetitive effects resulting from the Transaction may be (partially) offset by any (i) countervailing buyer power; (ii) entry; and/or, (iii) efficiency.

7.4.2.2.6. There is no countervailing buyer power

(400) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability.[304]

(401) The Notifying Party does not provide any views on whether the customers of the merged entity in the market for the retail supply of fixed internet access services will have sufficient countervailing buyer power.

(402) In this regard, the buyer-side of the retail market for fixed internet access services consists of individual end customers who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[305]

7.4.2.2.7. Any entry would not be likely, timely

(403) As outlined in Section 7.4.2.1 above, the Notifying Party submits that Telenet is likely to enter the fixed internet, TV and convergent services markets in the Targets' footprint[306] following the Transaction and that similarly, Citymesh/Digi, which acquired mobile spectrum in the recent Belgian 5G spectrum auction, is likely to enter fixed and convergent markets in Belgium as well.

(404) The Horizontal Merger Guidelines provide that for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[307]

(405) The Commission has assessed each of these three elements separately in respect of the potential entry of Telenet and Citymesh/Digi below.

<u>*With respect to Telenet*</u>:

(406) An entry of Telenet in the market for the retail supply of fixed internet access services in the Targets' footprint is not likely. The Horizontal Merger Guidelines provide that for entry to be likely, it must be sufficiently profitable taking into

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304 Horizontal Merger Guidelines, paragraph 64.

305 See Horizontal Merger Guidelines, paragraph 65. The comparison in the sentence "*It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry*" applies to an even greater extent to end customers.

306 Telenet is already active in the Targets' footprint (and Belgium overall) on the mobile market via its brand, BASE, and has a limited internet offering based on mobile fLTE technology under the brand TADAM, which is also available in the Targets' footprint. In this regard, as set out in Section 3.2.2.3 above, internet offerings based on fLTE (i.e. mobile) technology do not form part of the same relevant product market as internet offerings based on fixed infrastructure (i.e. xDSL, coax/cable, fibre).

307 Horizontal Merger Guidelines, paragraph 68.

account the price effects of injecting additional output into the market and the potential responses of the incumbents. Historical examples of entry and exit may be illustrative of the existence and size of any entry barriers.[308]

(407) During the investigation, Telenet submitted detailed financial modelling of entry in the Targets' footprint under different scenarios, including pre-transaction, post-transaction without any remedy and post-transaction with a divestiture remedy. Telenet submits that this modelling shows that "*entry in the South without a remedy that includes a divestment of customers, and a lowering of the wholesale rates does not meet* [its] *investment thresholds* [which it submits]*... is consistent with previous modelling which underpinned Telenet's historic decision to refrain from South entry through wholesale access*."[309] According to Telenet's modelling, only a "*combination of the divestment of customers and the lowering of the wholesale rates will provide sufficient revenues from Day 1 and sufficient margins to lower the payback to a more acceptable level ...* [and] *increases the IRR* [internal rate of return] *above the ... threshold*."[310] This modelling would in fact be based on a longer payback period compared to Orange's own entry into fixed and FMC bundles in Belgium (which Orange indicated […]) and result in a similar IRR to that of Orange (which […]), although only following a longer payback period[311]

(408) The Notifying Party argues that "*the vast majority of the costs related to Telenet's expansion in the Targets' footprint would be variable costs*"[312] whereas Telenet has provided the Commission with submissions, together with financial modelling, pointing out that "e*ntry based on wholesale access requires significant upfront investments which do not vary materially depending on the number of subscribers or the exact territory covered by the entry (meaning that a more limited entry, for example the expansion of Telenet's presence in Brussels, would entail very similar upfront costs but more limited returns). These costs include IT costs (such as IT set-up costs, IT baseline, network setup and video setup) ... and additional high upfront marketing costs*."[313]

(409) Furthermore, none of the respondents to the market investigation mentioned a possible entry by Telenet when asked about potential entrants in the Targets' footprint with fixed and convergent services following the Transaction.[314]

(410) Moreover, it is a fact that Telenet has not entered the Targets' footprint in the past with fixed or convergent services, despite Wholesale Access Regulation being in place for many years (e.g. Orange entered on this basis in 2016) and Telenet submits that "*consistent with the findings of previous modelling exercises, Telenet entry without remedy therefore remains commercially unattractive*."[315]

308 Horizontal Merger Guidelines, paragraphs 69-70.
309 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 6 (ID 1166).
310 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 20 (ID 1166).
311 Response to RFI 20, paragraph 97.
312 Article 6(1)(c) Response, paragraph 259.
313 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 8 (ID 1166).
314 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.
315 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 17 (ID 1166).

(411) In the context of the 2019 sale process that led to the – ultimately abandoned – sale of VOO to Providence Equity Partners, a management consultant report commissioned by Nethys to facilitate and promote the sale of VOO pointed out that [Details of internal documents describing the Targets' strategy].[316] The Notifying Party submits that two of the three arguments in that document *"are no longer valid or at least less valid than in 2019"* namely that *"there will be no risk of "retaliation" in Flanders as OBE is already active in fixed services in Flanders*" and that "*Telenet already has upside exposure to VOO mobile growth thanks to MVNO contract*"[317] However, the point for which the Notifying Party does not submit that it is no longer valid is the primary finding of that report, [Details of internal documents describing the Targets' strategy].[318]

(412) As such, the Commission considers that any entry by Telenet cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(413) An entry of Telenet in the market for the retail supply of fixed internet access services in the Targets' footprint would not be timely. According to the Horizontal Merger Guidelines, what constitutes an appropriate time period depends on the characteristics and dynamics of the market but entry is normally only considered timely if it occurs within two years.[319]

(414) In the Article 6(1)(c) Response, the Notifying Party points out that in a similar manner to Orange, Telenet "could subscribe to the [regulated] reference offers of VOO/Brutélé or Proximus without having to conclude a commercial agreement" and quickly enter the Targets' footprint on that basis.[320] While this is technically correct, Telenet has not opted to enter on the basis of regulated wholesale access in the past primarily for profitability reasons. [Details of internal documents describing the Targets' strategy][321], and in any event there is currently uncertainty around the future of regulated wholesale access, as a review of the current regulatory framework is scheduled for 2023.

(415) Respondents to the market investigation, when asked to list any players that they expect to enter the hypothetical market for the retail supply of fixed-mobile multiple-play packages in the next 2-3 years — which would likely require an existing mobile player to start offering fixed services — none of the respondents to the market investigation mentioned a possible entry in the next 2-3 years by Telenet.[322] This is also consistent with what Telenet itself indicated to the Commission where it stated that "*any entry into the fixed markets in Wallonia (which is unlikely to happen) would not be timely, and … there are no plans in place to do so at present*."[323]

(416) As such, the Commission considers that any entry by Telenet cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

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316 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).

317 Response to RFI 20, question 18(a).

318 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 [Details of internal documents describing the Targets' strategy] (Doc ID:1090-5517).

319 Horizontal Merger Guidelines, paragraph 74.

320 Article 6(1)(c) Response, paragraph 276.

321 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).

322 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

323 Non-confidential agreed minutes of Telenet with the Commission on 5 April 2022, paragraph 20 (ID 1165).

(417) An entry of Telenet in the market for the retail supply of fixed internet access services in the Targets' footprint may however be sufficient. To be sufficient within the meaning of the Horizontal Merger Guidelines, any entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger and, for instance, small-scale entry may not be considered sufficient.[324]

(418) In this regard, it took Orange six years since it entered the market in 2016 to reach its current market position of c. […] fixed internet customers[325] and a market share of c. [5-10]% within the Targets' footprint. Telenet submitted that any entry without a divestiture that included an initial customer base would "*not be sufficient, as it will not be possible to replicate a player with [5-10]% market share from one day to the next*."[326] This view was echoed by consumer association Test-Achats, which indicated that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer. The "success" of Orange on the bundled market is due to the fact that <u>they</u> had their mobile only clients to start from*."[327] Within the Targets' footprint, Orange has a mobile base of over […] customers, whereas the mobile customer base of Telenet in the Targets' footprint is significantly smaller and declining (c. […] in 2021, which is c. [20-30]% less than in 2020).[328]

(419) Nonetheless, in the Article 6(1)(c) Response, the Notifying Party submits that it is not necessary for entry to be considered sufficient to "*require the new entrant to replicate the market share lost as a result of the Transaction. What matters is to recreate an array of constraints similar to those that would have existed absent the Transaction, which is therefore able to deter and defeat any attempt to exercise market power*."[329]

(420) In that respect, the Commission considers that any entry by Telenet, if it were to take place, may be sufficient within the meaning of the Horizontal Merger Guidelines. However, since the Commission found that any entry by Telenet would not be timely and likely, the Commission cannot take into consideration entry by Telenet as a countervailing factor in assessing the non-coordinated effects that would arise as a result of the Transaction on the market for the retail supply of fixed internet access services.

<u>*With respect to Citymesh/Digi*</u>:

(421) An entry of Digi in the market for the retail supply of fixed internet access services in the Targets' footprint is not likely. As set out in paragraph (404) above, the HMG provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.

(422) In the Article 6(1)(c) Response, the Notifying Party submits that Digi's entry on the fixed services market is expected to take place "*in the near future*".[330]

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324 Horizontal Merger Guidelines. Paragraph 75.

325 Of which the majority are also multiple-play (c. […]), FMC bundle (c. […]) and/or AV service (c. […]) customers.

326 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).

327 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).

328 Form CO, Annex 17.

329 Article 6(1)(c) Response, paragraphs 11 and 226.

330 Article 6(1)(c) Response, paragraphs 14, 15 and 17.

(423) The Commission considers that an entry of Citymesh/Digi is not likely. Citymesh/Digi acquired mobile spectrum in a 5G spectrum auction held by the BIPT on 20 June 2022.[331] The press release of Citymesh/Digi refers to a planned roll-out of a 4G/5G network in Belgium,[332] the deployment of which is, according to the Notifying Party, "*expected to take approximately five years but* [the Notifying Party also pointed out that] *Digi and Citymesh have announced that their goal is to launch their own commercial offers already in 2023 by accessing to a third party mobile network*."[333] All indications at present are that Digi, which will focus on B2C, i.e. consumers (while Citymesh will focus on B2B, i.e. business customers) will focus its efforts on entering the mobile market in Belgium, as indeed it is required to in order to meet the national coverage requirements imposed on it as part of the spectrum award.

(424) The Commission considers that any potential entrant that plans to enter a new market would usually have a business plan supporting and planning for such entry. While it is not excluded that Citymesh/Digi may enter fixed and convergent markets in the Targets' footprint, the Commission considers that any such entry by Citymesh/Digi cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(425) An entry of Digi in the market for the retail supply of fixed internet access services in the Targets' footprint would not be timely. As stated above, it appears that Citymesh/Digi plans to initially focus on entering the retail mobile market in Belgium. Any entry into fixed (i.e., internet and/or TV) or convergent markets would require either wholesale access to a fixed network or the deployment of its own fixed network. Any fixed network deployment in Belgium would likely take a number of years (e.g., by analogy, as the Notifying Party observes, the deployment of a mobile network is expected to take five years) and therefore not allow for timely entry within the meaning of the Horizontal Merger Guidelines.

(426) There are also no indications at present that Citymesh/Digi would seek to enter fixed or convergent retail markets on the basis of wholesale access to a third party's fixed network. This may be because, as one market participant indicated in response to the Commission's market investigation "*wholesale prices are most probably to[o] high for a new player to enter the market successfully*."[334] Indeed, the […][335] The Notifying Party has however not substantiated its assumption.

(427) In Spain, where Digi entered the mobile market in 2008, it took over 10 years for Digi to enter fixed and convergent markets (based partially on wholesale access). In Belgium, similar to the situation faced by Digi in Spain in 2008, Proximus' fixed network is predominantly (i.e., 80-90%) a DSL network at present. While Proximus is rolling out a (faster) fibre network, this is expected to take several years: "*Proximus is currently at 10-20 % national fibre coverage and aims at 70% national fibre coverage by the end of 2028*."[336] Finally, Orange itself does not appear to expect Digi to quickly enter the Belgian market, with Xavier Pichon, the OBE's

331 BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).

332 Citimesh's and Digi's press release of 21 June 2022 *Citimesh and Digi win spectrum in the auction and will start building a nationwide network* (ID 2060).

333 Form CO, paragraph 26.

334 M7's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 731).

335 Response to RFI 10, paragraph 23.

336 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022, paragraph 28 (ID 376).

Chief Executive Office ("**CEO**") noting that "*between today's announcement [i.e. on 21 June 2022 that Citymesh/Digi acquired mobile spectrum] and the timetable (necessary for technical deployment ....), there will be* <u>*plenty of time*</u> *to analyse all this*" (emphasis added).[337]

(428) Digi confirmed that its plan is to develop fixed infrastructure in Belgium. In that context, Digi explained that it considers that access to infrastructure is an integral part of an operator's ability to develop a solid business plan and of its capacity to effectively compete on the long term with other operators on the market. Digi further indicates that access to ducts and micro-ducts at competitive tariffs and non-discriminatory conditions is very important for the provision of services at competitive and affordable prices.[338]

(429) Consumer association Test-Achats considers that "the potential entry by Digi with fixed or multiple-play markets would likely be too far in the future to address any potential concerns raised by the Transaction".[339]

(430) Further to the above, the Commission considers that any entry by Digi cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(431) An entry of Digi in the market for the retail supply of fixed internet access services in the Targets' footprint would not be sufficient. As mentioned above, it took Orange six years since it entered the market in 2016 to reach its current market position in fixed and convergent markets and it already had a sizeable mobile customer base in 2016, which it could cross-sell to. Digi, on the other hand, is not active in any retail market in Belgium at present. While it will likely (and indeed is required to) enter the mobile market in the short term, Digi's mobile customer base will likely be small in the short to medium term. While some market participants that responded to the market investigation noted that Digi may seek to enter fixed and/or bundled markets,[340] a majority that expressed a view also considered that the upfront investment required for such entry (in particular the wholesale fixed network access costs) may be too high to allow for successful or sustainable entry. Consumer association Test-Achats noted that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer [and] for an operator starting from scratch the investments might be too high*."[341]

(432) As such, the Commission considers that any entry by Digi cannot be said to be timely, likely and sufficient within the meaning of the Horizontal Merger Guidelines.

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337 See, for example, press article of 21 June 2022 on Le Vif *L'opérateur mobile DIGI débarque en Belgique et défie ses concurrents avec des « prix très abordable »*":« *Ce nouvel entrant aura-t-il un effet baissier sur les prix? Difficile de se prononcer pour le CEO. "Mais, entre l'annonce d'aujourd'hui et le calendrier (nécessaire au déploiement technique, NDLR), on aura largement le temps d'analyser tout cela", conclut Xavier Pichon* ») (ID 2062).

338 Non-confidential version of Digi's response to RFI 1 on 21 September 2022, questions 2, 5, 6 and 7 (ID 1355).

339 Non-confidential agreed minutes of Test-Achat's call with the Commission on 13 september 2022, paragraph 5 (ID 1357).

340 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

341 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).

7.4.2.2.8. The Notifying Party has not provided sufficient evidence to support the alleged efficiencies brought along by the Transaction

(433) The Horizontal Merger Guidelines provide that it is possible that efficiencies brought about by a merger counteract the effects on competition, and in particular the potential harm to consumers that it might otherwise have.[342] In this regard, any claimed efficiencies have to (i) benefit consumers; (ii) be merger-specific; and, (iii) be verifiable.[343]

(434) The Notifying Party submits that the merger will generate efficiencies. As set out in Section 7.4.2.1 above, the Notifying Party makes three efficiency claims. First, the Notifying Party explains that the Transaction will bring about an increase in investments into the fixed networks of the Targets in the Targets' footprint. Second, the Notifying Party considers that the Transaction will lead to the elimination of double marginalisation for both fixed and mobile networks of the Parties. Finally, the Notifying Party considers that the Transaction will increase the quality of the Parties' fixed-mobile bundles.

(435) For the following reasons, the Commission considers that the Notifying Party has not demonstrated to the required standard that the claimed efficiencies meet three cumulative criteria of (i) benefit to consumers; (ii) merger-specificity; and, (iii) verifiability, for the reasons explained below.

7.4.2.2.8.1. Increased investments in the fixed networks in the Targets' footprint

(436) In the Form CO, the Notifying Party claims that "the Transaction will generate significant efficiencies in the fixed markets because of the substantial investments in cable and fiber infrastructures that OBE is planning to conduct and that would not have taken place absent the Transaction"[344] and that "as a result of those investments, customers of fixed and FMC offers will have more choices, both in terms of speeds and number of operators available".[345]

(437) In the Article 6(1)(c) Response, the Notifying Party provides further details as to the reasons why it expects that the Transaction will lead to significantly more extensive investments in network upgrades (Data Over Cable Service Interface Specification ("**DOCSIS**") 3.1 and Fibre-To-The-Home ("**FTTH**") ("**Fixed Network Efficiency**") than VOO had planned ([…] greater CAPEX for network upgrades through 2030).

(438) First, with regard to verifiability, the Notifying Party submits that Orange's investment plan is significantly higher than the investment plan of VOO absent the Transaction. In that respect, Orange claims that its investment plan is approximately […] higher than VOO's investment plan when looking at all fixed network CAPEX (EUR […] vs. EUR […]), and […] higher when only looking at fixed network CAPEX for cable upgrade and fibre roll-out (EUR […] vs EUR […]).

(439) Second, with regard to merger-specificity, the Notifying Party considers that absent the Transaction, Orange would not have deployed its own fixed network and VOO would not have been able to commit the same amount of CAPEX as Orange will do post-Transaction.

[342] Horizontal Merger Guidelines. Paragraph 76.
[343] Horizontal Merger Guidelines, paragraph 78.
[344] Form CO, paragraph 1906.
[345] Form CO, paragraph 1906.

(440) Finally, the Notifying Party considers that these additional investments will benefit consumers in the form of higher internet speed availability and greater choice (as it will have a network in areas currently only served by one player, and will operate an open fibre network accessible by third party access-seekers).

(441) Since the Notifying Party has proposed remedies to resolve the Commission's competition concerns in the market for the retail supply of fixed internet access services, the Commission considers that it is not necessary to assess the Fixed Network Efficiency put forward by the Notifying Party against the requirements of the Horizontal Merger Guidelines as the proposed remedy resolves, in any event, the Commission's competition concerns in the market for the retail supply of fixed internet access services in the Targets' footprint.

7.4.2.2.8.2. Elimination of double marginalisation

(442) In the Article 6(1)(c) Response, the Notifying Party brings forward two possible efficiencies relating to the elimination of double marginalisation ("**EDM**") on (i) the provision of fixed and multiple-play bundles by OBE ("**Fixed EDM Efficiency**"); and, (ii) the provision of mobile and multiple-play bundles by VOO ("**Mobile EDM Efficiency**") as a result of the integration of a MNO and a FNO.

(443) Accordingly, the Commission will assess both EDM Efficiencies in turn in the following sections.

7.4.2.2.8.2.1. Fixed EDM Efficiency

(444) The Notifying Party explains that the Transaction will result in the partial integration of the upstream network service of the Targets and the downstream retail service of OBE. In particular, the Notifying Party submits that the marginal cost to OBE of wholesale fixed access will be eliminated post-Transaction as OBE will recoup 75% of the margins made by the Targets on providing wholesale access as OBE will own 75% minus one share in the Targets. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[346]

(445) In the following paragraphs, the Commission will show that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(446) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[347] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(447) The Commission considers that the wholesale access fee that OBE pays and will continue to pay to the Targets post-Transaction is entirely a variable cost. These costs are charged by the Targets per active customer. As clarified by OBE, the Commission considers that post-Transaction, OBE will be able to recoup approximately 75% of its wholesale access costs to the Targets' fixed network.

346 Horizontal Merger Guidelines, paragraph 78.

347 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

(448) Hence, the Commission considers that the partial elimination of OBE's variable costs related to the wholesale access fee that OBE pays, and will continue to pay, to the Targets, to obtain wholesale access to the Targets' fixed network will likely partly be passed on to consumers in terms of lower prices or higher quality of service.

(449) However, the Commission considers that the benefit to consumers from the Fixed EDM Efficiency would be limited even if the reduction in OBE's variable cost were entirely passed on to consumers. This is because (i) the Fixed EDM Efficiency, which will be limited to consumers in the Targets' footprint, would be diluted across all consumers in Belgium, and (ii) the wholesale access fee that OBE pays is limited relative to average prices.

(450) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by the Targets for the wholesale supply of broadband access to Orange was EUR […] per month in 2021.[348] Post-Transaction, OBE would recoup around [70-80]% of this EBITDA margin, so EUR […]. However, this EBIDTA margin would be recouped only on the […] OBE consumers in the Targets' footprint, but then diluted across the […] OBE consumers in Belgium. Therefore, on average the EBITDA margin recouped would represent EUR […] per OBE consumer.[349] The average revenue per subscriber made by OBE for the retail supply of fixed internet was EUR […] per month in 2021. As such, the maximum EBIDTA margin that OBE could pass on to consumers would represent approximately [0-5]% of the average price for the retail supply of fixed internet (i.e. assuming OBE would pass the entirety of the Fixed EDM Efficiency on to consumers).

(451) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[350] OBE has a lesser incentive to pass on the Fixed EDM efficiency to consumers, because it will also take into account the effect on the Targets of lowering OBE's prices (or raising quality) downstream in the retail supply of fixed internet. By lowering OBE's prices (or raising quality) downstream as a result of the Fixed EDM efficiency, OBE will entice customers of the Targets (in addition to of third parties) to switch to OBE. However, the merged entity gains significantly less from a customer switching from the Targets to OBE, compared to a customer switching from a third party rival to OBE, because the merged entity would lose the margin made by the Targets. Therefore, because OBE and the Targets are competitors downstream in the retail supply of fixed internet (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Fixed EDM Efficiency to consumers.

(452) On the basis of the analysis above, the Commission considers that while it is possible that the Fixed EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Fixed EDM Efficiency will benefit consumers.

[348] Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph.

[349] […].

[350] In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, the Targets provide an input to OBE but also compete with OBE downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

(453) **Merger-specificity.** The Commission considers that the savings related to OBE's recoupment of part of the wholesale access fee it pays and will continue to pay to the Targets post-Transaction are unlikely to be achieved by other means than the Transaction.

(454) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for OBE but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[351] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[352]

(455) In the Article 6(1)(c) Response, the Notifying Party generically asserts that: "OBE will … have the possibility to return these margins to customers through additional investment, new services or price reductions to compete more aggressively for FMC customers."[353] The fact that the Notifying Party expressly refers to various "possibilities" suggests that the Fixed EDM Efficiency would only be hypothetically verifiable. Accordingly, the Commission considers that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable.

(456) **Conclusion on the Fixed EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Fixed EDM Efficiency in its assessment of the Transaction.

7.4.2.2.8.2.2. Mobile EDM Efficiency

(457) The Notifying Party explains that as a result of the Transaction, VOO's mobile traffic will be shifted to be hosted on OBE's network. The Notifying Party considers that this shift of mobile data traffic will result in a reduction in double marginalisation on mobile services proposed by VOO as OBE will earn the margin on wholesale sales to VOO. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[354]

(458) In the following paragraphs, the Commission will show that the Mobile EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

351 Horizontal Merger Guidelines, paragraph 87.
352 Horizontal Merger Guidelines, paragraph 86.
353 Article 6(1)(c) Response, paragraph 377.
354 Horizontal Merger Guidelines, paragraph 78.

(459) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[355] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(460) The Commission considers that the wholesale access fee that VOO will pay to OBE post-Transaction is entirely a variable cost. These costs are charged by OBE per active SIM card. The Commission considers that the partial internalisation of VOO's variable costs related to the wholesale access fee that VOO will pay to OBE to obtain wholesale access to OBE's mobile network may partly be passed on to consumers in terms of lower prices or higher quality of service.

(461) However, the Commission considers that the benefit to consumers from the Mobile EDM Efficiency would be limited even if the reduction in VOO's variable cost were entirely passed on to consumers. This is because the wholesale access fee that VOO pays is limited relative to average prices.

(462) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by OBE for the wholesale supply of mobile access to third party MNVOs was EUR […] per month in 2021.[356] The average revenue per subscriber made by VOO for the retail supply of fixed internet was EUR […] per month in 2021. As such, the maximum EBIDTA margin that VOO could pass on to consumers would represent approximately [5-10]% of the average price for the retail supply of fixed internet (i.e. assuming VOO would pass the entirety of the Fixed EDM Efficiency on to consumers).

(463) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[357] the merged entity has a lesser incentive to pass on the Mobile EDM efficiency to consumers, because it will also take into account the effect on OBE of lowering VOO's prices (or raising quality) downstream in the retail supply of fixed internet. By lowering VOO's prices (or raising quality) downstream as a result of the Mobile EDM efficiency, VOO will entice customers of OBE (in addition to of third parties) to switch to VOO. However, the merged entity gains significantly less from a customer switching from OBE to VOO, compared to a customer switching from a third party rival to VOO, because the merged entity would lose the margin made by OBE. Therefore, because OBE and VOO are competitors downstream in the retail supply of fixed internet (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Mobile EDM Efficiency to consumers.

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355 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

356 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph. The Commission assumes that the EBITDA margin made by OBE from MNVOs would be similar to the EBIDTA margin made from VOO.

357 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, OBE provides an input to the Targets but also competes with the Targets downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

(464) On the basis of the analysis above, the Commission considers that while it is possible that the Mobile EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Mobile EDM Efficiency will benefit consumers.

(465) **Merger-specificity.** The Commission considers that the internalisation of VOO's wholesale access fee paid to OBE to access OBE's mobile network post-Transaction are unlikely to be achieved by other means than the Transaction.

(466) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for VOO but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[358] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[359]

(467) In the Article 6(1)(c) Response, the Notifying Parties generically assert that: "To the extent the combined firm/VOO internalises this margin in setting its retail prices, then there will be a reduction in double marginalisation, creating a possibility to have an aggressive FMC commercial policy."[360] The wording of the quoted sentence suggests that the Mobile EDM Efficiency is purely hypothetical and dependent on the extent to which the combined firm/VOO internalises the margin. Accordingly, the Commission considers that the Notifying Party has failed to show that the Mobile EDM Efficiency would be verifiable.

(468) **Conclusion on the Mobile EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Mobile EDM Efficiency put forward by the Notifying Party is likely merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Mobile EDM Efficiency in its assessment of the Transaction.

7.4.2.2.8.3. Increase in quality of the Parties' FMC bundles

(469) The Notifying Party considers that, in addition to the efficiencies discussed above, the Transaction will allow the combined entity to offer higher quality of fixed and mobile bundles in the Targets' footprint than either Party could offer absent the Transaction. The Notifying Party explains that this type of efficiency was accepted in

[358] Horizontal Merger Guidelines, paragraph 87.
[359] Horizontal Merger Guidelines, paragraph 86.
[360] Article 6(1)(c) Response, paragraph 386.

previous cases by the Commission in case M.8864 – *Vodafone/Certain Liberty Global Assets*.[361]

(470) First, the Article 6(1)(c) Response fails to provide an assessment of the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines. Rather, the Article 6(1)(c) Response focuses on the comparison between the present Transaction to the transaction underlying case M.8864 – *Vodafone/Certain Liberty Global Assets*.

(471) Second, the only listed efficiencies include (i) better and more efficient technical incident resolution; (ii) improvement in the provisioning process of FMC offers; and (iii) creating the possibility of do-it-yourself installation of FMC products. While the Commission may deduce from the limited amount of information provided in this regard that customers may benefit from some non-price related efficiencies, the Notifying Party fails to (i) provide any evidence to quantify or qualify the extent of such efficiencies; and, (ii) explain why the Transaction is the only way to achieve these efficiencies.

(472) On the basis of the above assessment, the Commission considers that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles put forward by the Notifying Party may satisfy one of the three cumulative criteria required under the Horizontal Merger Guidelines of benefit to consumers. The Commission considers that the Notifying Party has failed to show that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles is merger-specific or that it would be verifiable.

7.4.2.2.8.4. Conclusion on the efficiencies

(473) On the basis of the above, the Commission considers that none of the alleged efficiencies put forward by the Parties meets the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines.

7.4.2.2.9. Conclusion

(474) In light of the above, the Commission has come to the conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for fixed internet access services within the Targets' footprint, including increased prices and/or reduced quality for end customers.

7.4.3. Retail supply of AV services

7.4.3.1. The Notifying Party's view

(475) The Notifying Party considers that the Transaction does not raise any concerns on the retail market for the supply of AV services even if the market would be defined based on the Target's footprint for the following reasons.

(476) First, in the Form CO, the Notifying Party submits that the new entity will continue to compete against several strong players at national level post-Transaction, in particular Proximus and Telenet, which both invest heavily into content. The Notifying Party further submits that merged entity will also be faced with major OTT players, such as Netflix, Amazon Prime Video and Disney+ as there are increasingly

[361] Commission decision of 18 July 2019 in case case M.8864 – *Vodafone/Certain Liberty Global Assets*.

being used by Belgian consumers and the "cord-cutting" trend is progressing in Belgium.

(477) When considering the competitive landscape at the level of the Target's footprint, the Notifying Party submits that the market will also remain competitive post-Transaction essentially based on market leader Proximus' "*increasing trend*" and the expectation that the Targets' market shares "*will continue to decrease over the years to the benefit of Proximus if they do not invest in fixed networks*", which, the Notifying Party submits, "*they are not in a position to make without the Transaction*".[362]

(478) Second, the Notifying Party considers that there is no increment brought about by OBE in standalone AV services.

(479) Third, the Notifying Party submits that the Transaction will not reduce infrastructure competition and, on the contrary, will actually increase the number of fully convergent network operators on the territory of Belgium. In that respect, the Notifying Party considers that the Transaction is expected to enhance infrastructure competition by bolstering investments in network upgrading.[363] In that respect, the Notifying Party submits that the Transaction will increase OBE's competitiveness vis-à-vis Proximus and Telenet.

(480) Fourth, the Notifying Party indicates that Targets' share decreased from [40-50]% to [40-50]% in volume in their footprints over the last 3 years and that they actually lost more than […] customers. In that respect, the Notifying Party submits that, since Proximus' entry on the retail market for AV services in 2005, the Targets lost a significant portion of their TV customer base to Proximus.

(481) Fifth, the Notifying Party submits that OBE is not an important competitive force in terms of TV content, technical operations, equipment and innovations as it positions itself rather as a low-cost player, offering basic TV services as an option, which may be added on top of internet or convergent subscriptions. In that respect, the Notifying Party submits that "*OBE decided not to invest too much on TV content but to put emphasis on its fixed internet offering, notably launching unlimited offers to support the market trend towards OTT services*".[364]

(482) Sixth, the Notifying Party considers that OBE and the Targets are not close competitors as they have very different profiles and core activities: OBE's core activity is mobile telecommunications services whereas the Targets' core activities are fixed services. In addition, the Notifying Party submits that, in any event, customers are able to easily switch to alternative AV services providers.

(483) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies. In particular, the Notifying Party submits that the Transaction will lead to increased investments in fixed infrastructure in the Targets' footprint and to the elimination of double marginalisation for both fixed and mobile networks of the Parties. The Notifying Party further submits that the Transaction will increase the quality of the Parties' FMC bundles.[365]

(484) In the Article 6(1)(c) Response, the Notifying Party restates many of the arguments from the Form CO, including that:

362 Form CO, paragraph 848.
363 Form CO, paragraph 858.
364 Form CO, paragraph 864.
365 Article 6(1)(c) Response, paragraph 331-396.

– The Parties are not each other's closest competitors, on the basis that Proximus is the closest competitor of each of them,

– The Transaction will not eliminate an important competitive force because Orange is not the cheapest operator and does not stand out in terms of innovation,

– There will be entry in the Targets' footprint by Telenet and Digi, which will compensate for any loss of competition; and

– The Transaction will generate substantial efficiencies in the form of increased network investment compared to what the Targets' would have invested alone, and on the basis that there will be an elimination of double marginalisation for the provision of both fixed and mobile services.

7.4.3.2. The Commission's assessment

(485) The Commission considers that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for AV services within the Targets' footprint. This is in particular because, as set out in further detail below, (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant, (ii) customers have limited possibilities of switching supplier post-Transaction; (iii) the Parties are close competitors, (iv) the merger would eliminate an important competitive force and (v) any entry is would not be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

7.4.3.2.1. The Parties' combined market share is high and the increment is significant

(486) As set out in the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors, and they are normally important factors in the assessment. For example, changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, by indicating whether firms have been gaining or losing market shares.[366] In addition, a merger involving a firm whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.[367]

(487) For the following reasons the Commission considers that the Parties' combined market shares are high, and these high combined market shares underestimate the Parties' actual market power on the market.

(488) First, the combined market shares of the Parties are high with a significant increment. Based on share data provided by the Parties, as set out in section 7.1 above, in the market for the retail provision of AV services within the Targets' footprint, the merged entity would have a share of c. [40-50]%, by value and over [40-50]% by volume, with an increment of c. [5-10]% by value and by volume. The Commission considers that the merged entity's combined share would be substantial, the second highest in the market, after that of Proximus.

366 Horizontal Merger Guidelines, paragraphs 14, 15 and 27.

367 Horizontal Merger Guidelines, paragraph 17.

(489) Second, the combined market shares of the Parties underestimate the market power that the merged entity will be able to exercise on the market. In line with its past decisions, the Commission considers that market shares based on gross adds, as opposed to volume-based market shares, provide a reasonable measure that captures the current competitive strength of market participants.[368] Gross adds reflect the respective number of new subscribers acquired in a year by each operator (irrespective of where these customers came from) without deduction of the subscribers who leave. Market shares based on gross adds are generally used in the telecommunications industry and allow for a dynamic measure of market power as they focus on those customers that market participants actively seek to attract. On the basis of the data provided by the Notifying Party, the Commission has been able to calculate market shares of the Parties on the basis of gross adds.

(490) In the following table, the Commission presents the gross-adds market shares of the Parties in the market for the retail supply of AV services in the Targets' footprint, calculated on the basis of the data provided by the Parties.

Table 35: Gross adds shares in the markets for the retail supply of AV services in the Targets' footprints[369]

	Gross adds share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[20-30]	[20-30]	+[20-30]	+[10-20]	+[10-20]
Targets	[30-40]	[30-40]	[30-40]	-[10-20]	-[5-10]	-[5-10]
Combined	[60-70]	[50-60]	[50-60]	+[10-20]	+[5-10]	+[5-10]

Source: Commission calculations based on Parties' data submitted in response to RFI 20, questions 10 and 11.

(491) On the basis of Table 7 above, the Commission notes that pre-Transaction, OBE, the Targets and Proximus (since it is the only other significant player in the market) each account for about [30-40]% of the share of gross adds. Post-Transaction the merged entity would become the market leader (ahead of Proximus) with a gross add share of approximately [50-60]%.

(492) Further, the Commission notes that the Parties' gross add shares, even if they have been slightly decreasing over the past three years, far exceed Orange's market share of revenue/subscribers, which implies that Orange's ability to attract customers, and thus their role on the market, far exceeds its value and volume market shares. The same is not true for the Targets because of their relatively higher market shares in AV services, and therefore the competitive constraint it places on Orange is in line with its already high market shares.

(493) More concretely, looking at the gross adds market shares, it appears that if all customers decided to switch, customers would approximately evenly split between each of the Parties and Proximus, and each market participant would approximately have a [30-40]% market share. The comparison between the gross adds market shares and the market shares of the Parties shows that the merged entity is thus able to attract a disproportionate amount of customers in comparison to its market share.

368 Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*, paragraph 397.

369 The residual gross adds shares essentially correspond to Proximus' gross adds, since Proximus is the only other significant player in the market.

Further, because Proximus accounts for the remainder of the gross adds market shares, these results imply the converse for Proximus, i.e. Proximus' market power is significantly lower than their current market shares would suggest.

(494) As such, the Transaction would lead to the consolidation of two players whose market power far exceeds their current market shares.

(495) Third, the Commission finds that the pre-merger margins of the Parties are high, which is consistent with high market power.[370]

Table 36: Margins of the Parties in the market for retail supply of AV services in the Targets' footprints[371]

	Contribution margin (%)			EBITDA margin (%)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE[372]	[…]	[…]	[…]	[…]	[…]	[…]
Targets	[…]	[…]	[…]	[…]	[…]	[…]

Source: Response to RFI 22, Annex 1

(496) On the basis of Table 8 above, the Commission notes that both Parties' pre-merger margins are high in comparison to the average EBIDTA margin in the telecommunications sector in Europe in 2021, 26%.[373]

(497) On the basis of the above, the Commission concludes, for the purpose of this decision, that the combined market shares of the Parties are significant and that the Transaction gives rise to a significant market share increment. In addition to the high market shares, the Commission further finds, on the basis of the gross adds shares, net adds and margin data presented above, that the market power that the merged entity will be able to exercise on the market post-transaction far exceeds its current market share.

7.4.3.2.2. Customers have limited possibilities of switching supplier post-Transaction

(498) The Horizontal Merger Guidelines provide, in paragraph 31, that where customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers, such customers are particularly vulnerable to price increases.

(499) In the following paragraphs, the Commission will first show that there are limited alternative operators in the Targets' footprint for the retail supply of AV services.

(500) First, contrary to the Notifying Party's argument as set out in section 7.4.3.1 above that several strong competitors will remain, the Commission notes that the Transaction will reduce the number of retail providers of AV services in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active in the Targets' footprint, none of

370 Horizontal Merger Guidelines, paragraph 27-28.

371 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

372 The Notifying Party submits that […]. Accordingly, the Commission considers that the margins of OBE in the market for the retail supply of fixed internet access are representative of the margin in the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles.

373 See data from New York University's Stern School of Business (ID 2066). Global figures are similar; see data from CSIMarket.com (ID 2059).

them provide retail AV services. The entirety of the market will be in the hands of two FNOs. This was confirmed by the market investigation, which — contrary to what the Notifying Party submits in Section 7.4.3.1 above — indicated that non-linear AV services, such as those offered by OTT streaming platforms do not for part of the relevant market, as set out in section 6.2.2.2.3 above.

(501) Second, while Proximus is the market leader with a share of [50-60]% by value and [50-60]% by volume, as the former incumbent operator in Belgium, Proximus is positioned "*at the high end of the market*"[374] in terms of prices.[375]

(502) Finally, the buyer-side of the retail market for AV services consists of individual customers who purchase AV services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[376]

(503) On the basis of the above, the Commission concludes, for the purpose of this decision, that the Transaction will materially limit the switching ability of customers.

7.4.3.2.3. The Parties are close competitors

(504) As set out in paragraph 28 of the Horizontal Merger Guidelines, a transaction is more likely to result in competition concerns if the merging firms are "*close competitors*" since, for instance, their respective incentive to raise prices pre-transaction is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. The Commission considers, contrary to the Notifying Party's argument as set out in Section 7.4.3.1 above, that the Parties' are close competitors, based on a number of elements.[377]

(505) First, in light of the market shares presented above in Section 7.3.3.2.1, the Commission considers that, in such highly concentrated market, the Parties compete closely with each other, as well as with Proximus. This is corroborated by the Parties' own internal documents, in particular those of the Targets and Sellers, which refer to Orange as a direct and important competitor:

– For instance, Nethys' legal counsel explains that [Details of internal documents describing the Targets' strategy][378] when trying to fend off Orange's legal challenge of the sale of VOO to Providence, and that [Details of internal documents describing the Targets' strategy].[379]

[374] Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165). Proximus also operates a low-cost Brand, Scarlet, whose offerings are less expensive, but at the same time more basic in terms of quality and therefore not comparable to the offers of Orange or VOO. Indeed, according to Form CO, Annex 13 – Benchmark of offers, bundles offered by Scarlet that include a TV offering have c. 30 channels, compared to c. 80 for VOO and c. 70 for Orange.

[375] For example, Proximus' fixed internet and TV bundles are higher in price and come with more channels and add-ons than the corresponding bundles of VOO and Orange (see Form CO, Annex 13 – Benchmark of offers).

[376] See Horizontal Merger Guidelines, paragraph 64.

[377] The Notifying Party also submits that Proximus is both the Targets' and Orange's closest competitor respectively (See e.g. Form CO, paragraph 42). The Commission does not necessarily agree with the Notifying Party's view in this regard, but notes that in any event the Horizontal Merger Guidelines do not require that the merging parties be ranked by reference to how closely they compete with one another compared to how closely they compete with third parties. Rather it is sufficient to assess whether the merging parties compete closely with each other.

[378] Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-62545).

[379] Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1090-22575).

– The importance of their market position was further confirmed by the VOO management in 2021 when reporting to the VOO works council about the competition on the market [Details of internal documents describing the Targets' strategy].[380]

(506) Second, the Parties' respective AV offerings are closely substitutable. The majority of respondents that expressed a view listed Orange as the closest or second closest competitor of the Targets (and similarly listed the Targets as the closest or second closest competitor of Orange) based a number of key parameters of competition, namely price and quality (e.g. channel line-up, premium content, catch-up rights, VOD platforms).[381]

(507) Third, the Horizontal Merger Guidelines state that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties.[382] The Commission has applied that type of analysis in previous merger cases in the telecommunications sector.[383] Table 9 presents the diversion ratios from each of the Parties to one another both in terms of customers lost and customers won within the Target's footprint for each year between 2019 and 2021 and the first half of 2022.

Table 37: Diversion ratios of the Parties in the markets for the retail supply of AV services in the Targets' footprints[384]

Operator	Customers won/lost	Diversion ratio (%)			
		2019	2020	2022	2022 H1
OBE	Customers won from the Targets	[60-70]	[60-70]	[60-70]	[60-70]
	Customers lost to the Targets	[50-60]	[40-50]	[40-50]	[30-40]
Targets	Customers won from OBE	[10-20]	[10-20]	[10-20]	[10-20]
	Customers lost to OBE	[30-40]	[30-40]	[30-40]	[30-40]

Source: Response to RFI 20, questions 10 and 11.

(508) A review of switching data provided by the Parties supports the conclusion that the Parties are close competitors. Both OBE and the Targets win and lose a significant proportion of their customers from and to one another, in certain cases even more than [50-60]%. The analysis also indicates that there is a general slight downward trend over time in the diversion ratios based on customers lost between the Parties. Whilst this would be consistent with the Parties becoming slightly less close competitors over time, the level of switching between the Parties indicates that the Parties will remain close competitors for the foreseeable future, even if this historical trend continues.

380 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-35214).

381 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 47.

382 Horizontal Merger Guidelines, paragraph 29.

383 For example, Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*; Commission decision of 1 September 2016 in Case M.7758 – *Hutchison 3G Italy / WIND / JV*; Commission decision of 11 May 2016 in Case *M.7612 – Hutchinson 3G UK/Telefónica UK*.

384 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

(509) Fourth, in line with its precedents, the Commission also expresses the diversion ratios in Table 9 as so-called "implied market shares".[385] Implied market shares indicate how large the Parties' market shares would have to be for them to give rise to the observed diversion ratios.[386] When the Parties' implied market shares exceed their actual market shares, then the Parties compete more closely with each other than their market shares suggest. Table 10 below shows the results of the Commission's diversion analysis expressed in terms of implied market shares.

Table 38: Parties' implied market shares in the AV services market in the Targets' footprints[387]

	Implied market share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[10-20]	[20-30]	+[10-20]	+[10-20]	+[10-20]
Targets	[40-50]	[30-40]	[30-40]	-[0-5]	-[5-10]	-[5-10]
Combined	[60-70]	[50-60]	[50-60]	+[10-20]	+[5-10]	+[5-10]

Source: Commission calculations based on the Parties' data submitted in response to RFI 20, questions 10 and 11.

(510) Table 10 demonstrates that Orange competes significantly more closely with the Targets than its market shares suggest (i.e. because its implied market shares exceed their actual market shares). Therefore, market shares underestimate the competitive constraint that Orange places on the Targets. The same is not true for the Targets because of their relatively higher market shares in AV services, and therefore the competitive constraint it places on Orange is in line with its already high market shares. Further, because Proximus is the only other significant player in the market (and therefore would account for the remainder of the (implied) market share outside of the Parties combined (implied) market share), the results above also demonstrate that Proximus competes significantly less closely with each of the Parties than its market shares would suggest. In other words, market shares overestimate the competitive constraint that Proximus places on each of the Parties.

7.4.3.2.4. The merger would eliminate an important competitive force

(511) The Horizontal Merger Guidelines provide that a merger can lead to significant non-coordinated effects if it eliminates an important competitive force, which can be the case where an undertaking may have more of an influence on the competitive process than its market shares would suggest, such as a recent entrant that exerts — or is expected to exert — significant competitive pressure on other firms in the market. A

385 See Valletti and Zenger (2020). See also Commission decision of 21 December 2020 in case M.9730 – *FCA / PSA*.

386 Specifically, if diversion occurred in proportion to market shares, the diversion ratio from firm 1 to firm 2 would equal $d_{12} = s_2/(1 - s_1)$, where s_1 and s_2 denote the market shares of firms 1 and 2, respectively. Similarly, $d_{21} = s_1/(1 - s_2)$. Solving this pair of equations for s_1 and s_2 then gives the Parties' implied market shares as a function of both diversion ratios, $s_1 = [d_{21}(1 - d_{12})]/(1 - d_{12}d_{21})$ and $s_2 = [d_{12}(1 - d_{21})]/(1 - d_{12}d_{21})$.

387 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

merger involving such a firm may have a significant negative impact on competition when the market is already concentrated.[388]

(512) As set out above, the Transaction is a three-to-two merger within the Targets' footprint. The market is therefore already concentrated, with a pre-merger HHI of over 4,500.[389] In addition, and contrary the Notifying Party's argument as set out in Section 7.4.3.1 above, there are a number of different elements which all point to Orange being an important competitive force on market.

(513) First, as outlined in Section 7.4.2.2.4 above, Orange is the most recent entrant in the Belgian fixed internet, TV and multiple-play markets. Since entering six years ago, in 2016, Orange has positioned itself as a "*challenger*"[390], a point confirmed by the majority of market participants,[391] and, as observed by the BIPT,[392] has generally offered, and continues to offer, lower prices than other players on the market, notably the Targets and Proximus.[393] Indeed, VOO in its internal documents acknowledged [Details of internal documents describing VOO's strategy].[394] The Notifying Party's argument, as set out in Section 7.4.3.1 above, that Orange is not an important competitive force because it only offers a low-cost, and presumably not comparable, TV solution is directly contradicted by the responses to the market investigation, with consumer association Test-Achats noting that "*They [Orange] offer lower prices, but they also never could be labelled as a low-cost operator like for instance Scarlet*."[395] The Notifying Party's further argument, as set out in Section 7.4.3.1 above, that there is no increment in standalone AV services fails to address the points that, first, retail customers have the ability to switch one service in a bundle while keeping the remaining services, and second, as one competitor observed in response to the market investigation, "*AV only offers are very limited on the market, their price is also high, which makes multiple-play offers choice most relevant, [going on to note that, like Orange] Proximus does not promote TV-only*"[396] offers but rather focuses on AV services as part of bundles. In this regard, see also the Commission's assessment in sections 7.4.4.2.4 and 7.4.5.2.4 below.

(514) Second, market participants also view Orange as one of the fastest growing players on the market. One competitor indicated that "*Since the launch of the Orange Belgium LOVE offer including AV services, the growth of its park has been*

388 Horizontal Merger Guidelines, paragraph 38.

389 The post-Transaction HHI would be over 5 000 with a delta of over 500.

390 See Orange's press release of 20 July 2018 *Orange Belgium's confirms its commercial success as a Bold Challenger* (ID 2063).

391 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 48 and 48.1.

392 BIPT's press release of 18 July 2022 *The BIPT notices the positive impact of market regulation*, published on 18 July 2022, page 2: "*Since its entry into the market, Orange has positioned itself as a "challenger" operator offering the cheapest offer on the market for most consumption profiles*" (ID 2056).

393 The only exception to this is Proximus' low-cost sub-brand Scarlet, whose offering is not comparable to that of Orange, the Targets' or Proximus in terms of quality. Indeed, according to Form CO, Annex 13 – Benchmark of offers, bundles offered by Scarlet that include a TV offering have c. 30 channels, compared to c. 80 for VOO and c. 70 for Orange.

394 VOO Art. 4.5 document, 7._Presentation_on_the_overview_of_the_Commercial_Performance.pdf, page 10.

395 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 48.1 (ID 602).

396 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 47.1 (ID 705).

continuous and important, gaining market share from other market players."[397] The fact that Orange is the fastest-growing player on the market is corroborated by the market share data provided by the Parties, which show year-on-year market share increases for Orange[398], as well as by the win/loss data provided by the Parties.[399]

(515) Third, a number of respondents to the market investigation considered Orange to be an innovative player in the market in Belgium,[400] with one respondent observing that "*Orange innovated in the VOO/Brutélé footprint market by launching a TV app as an alternative to a classic decoder.*"[401] While the market investigation was mixed, a number of respondents to the market investigation also considered that following the Transaction, Orange may limit innovation compared to what it did pre-Transaction,[402] while the majority considered that following the Transaction, Orange may increase the price that end-consumers pay for their retail AV services.[403]

(516) The Parties acknowledge the competitive force of Orange when they mention that [Details of internal documents describing the Parties' strategy][404] or when they indicate that [Details of internal documents describing the Parties' strategy].[405]

(517) In view of the above elements, taken as a whole, the Commission concludes for the purpose of this decision that the Transaction may result in the elimination of an important competitive force.

7.4.3.2.5. Conclusion on the likely effects of the Transaction

(518) On the basis of the analysis above, the Commission has shown that (i) the Transaction will combine two entities whose combined market shares are high and which underestimate their actual combined market power (see paragraphs (488)-(494) above); (ii) the margins of the Parties are high (see paragraphs (495)-(496) above); (iii) customers have limited possibilities of switching supplier (see paragraphs (500)-(502) above); (iv) the Parties are close competitors (see paragraphs (505)-(510) above); and, (v) the Transaction will eliminate an important competitive force (see paragraphs (513)-(515) above).

(519) In particular, in line with paragraph 28 of the Horizontal Merger Guidelines, the merging entity's incentive to raise prices post-Transaction is higher the more substitutable the Parties' products are or the closer the Parties compete with each other. High pre-merger margins may also make significant price increases more likely. As such, the Parties' relatively high diversion ratios (presented in Table 9) and relatively high pre-merger margins (presented in Table 36) are consistent with a conclusion that there would be significant upward pricing pressure post-Transaction.

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397 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 48.1 (ID 705).

398 Form CO, Annex 17.

399 Response to RFI 10.

400 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 48.

401 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 48.1 (ID 602).

402 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 53.1.

403 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 53.2.

404 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

405 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

Further, as noted in paragraph (501) above, Proximus is positioned "*at the high end of the market*"[406] in terms of prices. This increases the ability of the merged entity to raise prices post-Transaction.

(520) Accordingly, and in view of the loss of competition between the Parties that would result from the Transaction,[407] the Commission concludes that, the Transaction will lead to significant price increases, reduced innovation, and/or reduced quality (e.g. less choice) in the market for the retail supply of AV services in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction may negatively impact other non-price parameters of competition such as, for instance, customer service/care.

(521) While, as outlined in paragraph (65) above, the Commission acknowledges that OBE's national pricing strategy would imply that any price increase in the Targets' footprint by the merged entity would need to take into account the price constraints exercised by operators active outside the Targets' footprint, the Commission considers that these constraints would not be significant with regard to the present Transaction for the following reasons.

(522) First, while Orange may find it appropriate to price nationally today, as it is active across Belgium, it is uncertain if Orange would, post-Transaction, continue pricing nationally. In particular, following the Transaction, Orange will be an FNO (i.e. a network operator) in the Targets' footprint but remain an FVNO (i.e., and access seeker) in Telenet's footprint, thereby creating an asymmetry in its cost base in each footprint, in addition to the fact that it will continue to face two rival operators in Telenet's footprint, versus only one remaining competitor in the Target's footprint. As such, Orange may have the incentive, from an objective profit maximisation standpoint, to adopt a differentiated pricing strategy in the Targets' and Telenet's respective footprints following the Transaction, whether directly (e.g., offering identical bundles at different prices), indirectly (e.g., reducing advertising expenses in some geographic areas, providing higher discounts in some geographic areas,[408] boosting a cheaper sub-brand in some geographic areas) or a combination of both.

(523) Second, and in any event, any constraint exercised by operators not active in the Targets' footprint on Orange's pricing in the Targets' footprint would only extend to pricing. Any quality-related parameters of competition (e.g. quality or speed of customer support) would not, or only minimally, be affected by operators not active in the Targets' footprint. For example, Orange will not be able to directly intervene on Telenet's network to resolve issues with customers complaining with network-related problems while it will be able to do so on its own network in the Targets' footprint.

(524) On the basis of the above, the Commission concludes that the Transaction will give rise to significant anticompetitive price effects in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction will give rise to significant anticompetitive non-price effects in the Targets' footprint. On this basis, in the following sections, the Commission assesses whether, and to what extent, the

406 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165).

407 Horizontal Merger Guidelines, paragraph 24.

408 For instance, Telenet is currently (from 27/02/2023 to 16/04/2023) offering a special discount called "Top promo on unlimited and super fast internet" which only applies to the municipalities in the Brussels Capital Region. In particular, the promotion is only available in "*only for customers with a new internet line in the sub municipalities of Brussels where Telenet is available,*" which only includes the municipalities where Telenet has its own fixed cable network in Brussels (ID 2071).

anticompetitive effects resulting from the Transaction may be (partially) offset by any (i) countervailing buyer power; (ii) entry; and/or, (iii) efficiency.

7.4.3.2.6. There is no countervailing buyer power

(525) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability.[409]

(526) The Notifying Party does not provide any views on whether the customers of the merged entity in the market for the retail supply of AV services will have sufficient countervailing buyer power.

(527) In this regard, the buyer-side of the retail market for AV services consists of individual end customers who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[410]

7.4.3.2.7. Any entry would not be likely, timely

(528) As outlined in Section 7.4.3.1 above, the Notifying Party submits that Telenet is likely to enter the fixed internet, TV and convergent services markets in the Targets' footprint[411] as a result of the Transaction and that similarly, Citymesh/Digi, which acquired mobile spectrum in the recent Belgian 5G spectrum auction, is likely to enter fixed and convergent markets in Belgium as well. The Horizontal Merger Guidelines provide that for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[412] The Commission has assessed each of these three elements separately in respect of Telenet and Citymesh/Digi in Section 7.4.2.2.5 above and concluded that any entry by Telenet or by Citymesh/Digi in the market for fixed internet access services cannot be said to be likely, timely and sufficient within the meaning of the Horizontal Merger Guidelines. The same reasoning applies mutatis mutandis to the Notifying Party's arguments in respect of entry into the retail market for AV services as set out in Section 7.4.3.1 above. If anything, entry into the market for AV services would involve additional hurdles compared to entry into the fixed internet market, as any prospective entrant would need to conclude distribution agreements with TV channel providers, in addition to acquiring a means of distribution (e.g. wholesale access to a fixed network).

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[409] Horizontal Merger Guidelines, paragraph 64.

[410] See Horizontal Merger Guidelines, paragraph 65. The comparison in the sentence "*It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry*" applies to an even greater extent to end customers.

[411] Telenet is already active in the Targets' footprint (and Belgium overall) on the mobile market via its brand, BASE, and has a limited internet offering based on mobile fLTE technology under the brand TADAM, which is also available in the Targets' footprint. In this regard, as set out in Section 3.2.2.3 above, internet offerings based on fLTE (i.e. mobile) technology do not form part of the same relevant product market as internet offerings based on fixed infrastructure (i.e. xDSL, coax/cable, fibre).

[412] Horizontal Merger Guidelines, paragraph 68.

(529) The Commission has assessed each of these three elements separately in respect of the potential entry of Telenet and Citymesh/Digi below.

<u>*With respect to Telenet*</u>:

(530) An entry of Telenet in the market for the retail supply of AV services in the Targets' footprint is not likely. The Horizontal Merger Guidelines provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents. Historical examples of entry and exit may be illustrative of the existence and size of any entry barriers.[413]

(531) During the investigation, Telenet submitted detailed financial modelling of entry in the Targets' footprint under different scenarios, including pre-transaction, post-transaction without any remedy and post-transaction with a divestiture remedy. Telenet submits that this modelling shows that "*entry in the South without a remedy that includes a divestment of customers, and a lowering of the wholesale rates does not meet* [its] *investment thresholds* [which it submits]... *is consistent with previous modelling which underpinned Telenet's historic decision to refrain from South entry through wholesale access*."[414] According to Telenet's modelling, only a "*combination of the divestment of customers and the lowering of the wholesale rates will provide sufficient revenues from Day 1 and sufficient margins to lower the payback to a more acceptable level* [and] *increases the IRR* [internal rate of return] *above the ... threshold*."[415] This modelling would in fact be based on a longer payback period compared to Orange's own entry into fixed and FMC bundles in Belgium (which Orange indicated […]) and result in a similar IRR to that of Orange (which […]), although only following a longer payback period.[416]

(532) The Notifying Party argues that "*the vast majority of the costs related to Telenet's expansion in the Targets' footprint would be variable costs*"[417] whereas Telenet has provided the Commission with submissions, together with financial modelling, pointing out that "e*ntry based on wholesale access requires significant upfront investments which do not vary materially depending on the number of subscribers or the exact territory covered by the entry (meaning that a more limited entry, for example the expansion of Telenet's presence in Brussels, would entail very similar upfront costs but more limited returns). These costs include IT costs (such as IT set-up costs, IT baseline, network setup and video setup) ... and additional high upfront marketing costs*."[418]

(533) Furthermore, none of the respondents to the market investigation mentioned a possible entry by Telenet when asked about potential entrants in the Targets' footprint with fixed and convergent services following the Transaction.[419]

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413 Horizontal Merger Guidelines, paragraphs 69-70.

414 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 6 (ID 1166).

415 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 20 (ID 1166).

416 Response to RFI 20, paragraph 97.

417 Article 6(1)(c) Response, paragraph 259.

418 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 8 (ID 1166).

419 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

(534) Moreover, it is a fact that Telenet has not entered the Targets' footprint in the past with fixed or convergent services, despite Wholesale Access Regulation being in place for many years (e.g. Orange entered on this basis in 2016) and Telenet submits that "*consistent with the findings of previous modelling exercises, Telenet entry without remedy therefore remains commercially unattractive*."[420]

(535) In the context of the 2019 sale process that led to the – ultimately abandoned – sale of VOO to Providence Equity Partners, a management consultant report commissioned by Nethys to facilitate and promote the sale of VOO pointed out that [Details of internal documents describing the Targets' strategy].[421] The Notifying Party submits that two of the three arguments in that document *"are no longer valid or at least less valid than in 2019"* namely that *"there will be no risk of "retaliation" in Flanders as OBE is already active in fixed services in Flanders*" and that "*Telenet already has upside exposure to VOO mobile growth thanks to MVNO contract*"[422] However, the point for which the Notifying Party does not submit that it is no longer valid is the primary finding of that report, [Details of internal documents describing the Targets' strategy].[423]

(536) As such, the Commission considers that any entry by Telenet cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(537) An entry of Telenet in the market for the retail supply of AV services in the Targets' footprint would not be timely. According to the Horizontal Merger Guidelines, what constitutes an appropriate time period depends on the characteristics and dynamics of the market but entry is normally only considered timely if it occurs within two years.[424]

(538) In the Article 6(1)(c) Response, the Notifying Party points out that in a similar manner to Orange, Telenet "could subscribe to the [regulated] reference offers of VOO/Brutélé or Proximus without having to conclude a commercial agreement" and quickly enter the Targets' footprint on that basis.[425] While this is technically correct, Telenet has not opted to enter on the basis of regulated wholesale access in the past primarily for profitability reasons. [Details of internal documents describing the Targets' strategy][426], and in any event there is currently uncertainty around the future of regulated wholesale access, as a review of the current regulatory framework is scheduled for 2023.

(539) Respondents to the market investigation, when asked to list any players that they expect to enter the hypothetical market for the retail supply of fixed-mobile multiple-play packages in the next 2-3 years—which would likely require an existing mobile player to start offering fixed services—none of the respondents to the market investigation mentioned a possible entry in the next 2-3 years by Telenet.[427] This is

420 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 17 (ID 1166).
421 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).
422 Response to RFI 20, question 18(a).
423 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 ([Details of internal documents describing the Targets' strategy]) (Doc ID:1090-5517).
424 Horizontal Merger Guidelines, paragraph 74.
425 Article 6(1)(c) Response, paragraph 276.
426 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).
427 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

also consistent with what Telenet itself indicated to the Commission where it stated that "*any entry into the fixed markets in Wallonia (which is unlikely to happen) would not be timely, and … there are no plans in place to do so at present*."[428]

(540) As such, the Commission considers that any entry by Telenet cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(541) An entry of Telenet in the market for the retail supply of AV services in the Targets' footprint may however be sufficient. To be sufficient within the meaning of the Horizontal Merger Guidelines, any entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger and, for instance, small-scale entry may not be considered sufficient.[429]

(542) In this regard, it took Orange six years since it entered the market in 2016 to reach its current market position of c. […] customers[430] and a market share of c. [5-10]% within the Targets' footprint. Telenet submitted, referring to fixed internet, although the same logic applies here, that any entry without a divestiture that included an initial customer base would "*not be sufficient, as it will not be possible to replicate a player with [5-10]% market share from one day to the next*."[431] This view was echoed by consumer association Test-Achats, which indicated that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer. The "success" of Orange on the bundled market is due to the fact that <u>they</u> had their mobile only clients to start from*."[432] Within the Targets' footprint, Orange has a mobile base of over […] customers, whereas the mobile customer base of Telenet in the Targets' footprint is significantly smaller and declining (c. […] in 2021, which is c. [20-30]% less than in 2020).[433]

(543) Nonetheless, in the Article 6(1)(c) Response, the Notifying Party submits that it is not necessary for entry to be considered sufficient to "*require the new entrant to replicate the market share lost as a result of the Transaction. What matters is to recreate an array of constraints similar to those that would have existed absent the Transaction, which is therefore able to deter and defeat any attempt to exercise market power*."[434]

(544) In that respect, the Commission considers that any entry by Telenet, if it were to take place, may be sufficient within the meaning of the Horizontal Merger Guidelines. However, since the Commission found that any entry by Telenet would not be timely and likely, the Commission cannot take into consideration entry by Telenet as a countervailing factor in assessing the non-coordinated effects that would arise as a result of the Transaction on the market for the retail supply of AV services.

<u>With respect to Citymesh/Digi</u>:

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428 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).

429 Horizontal Merger Guidelines. Paragraph 75.

430 Of which the majority are also multiple-play (c. […]), FMC bundle (c. […]) and/or AV service (c. […]) customers.

431 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).

432 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).

433 Form CO, Annex 17.

434 Article 6(1)(c) Response, paragraphs 11 and 226.

(545) An entry of Digi in the market for the retail supply of AV services in the Targets' footprint is not likely. As set out in paragraph (404) above, the HMG provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.

(546) In the Article 6(1)(c) Response, the Notifying Party submits that Digi's entry on the fixed services market is expected to take place "*in the near future*".[435]

(547) The Commission considers that an entry of Citymesh/Digi is not likely. Citymesh/Digi acquired mobile spectrum in a 5G spectrum auction held by the BIPT on 20 June 2022. [436] The press release of Citymesh/Digi refers to a planned roll-out of a 4G/5G network in Belgium,[437] the deployment of which is, according to the Notifying Party, "*expected to take approximately five years but* [the Notifying Party also pointed out that] *Digi and Citymesh have announced that their goal is to launch their own commercial offers already in 2023 by accessing to a third party mobile network*."[438] All indications at present are that Digi, which will focus on B2C, i.e. consumers (while Citymesh will focus on B2B, i.e. business customers) will focus its efforts on entering the mobile market in Belgium, as indeed it is required to in order to meet the national coverage requirements imposed on it as part of the spectrum award.

(548) The Commission considers that any potential entrant that plans to enter a new market would usually have a business plan supporting and planning for such entry. While it is not excluded that Citymesh/Digi may enter fixed and convergent markets in the Targets' footprint, the Commission considers that any such entry by Citymesh/Digi cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(549) An entry of Digi in the market for the retail supply of AV services in the Targets' footprint would not be timely. As stated above, it appears that Citymesh/Digi plans to initially focus on entering the retail mobile market in Belgium. Any entry into fixed (i.e., internet and/or TV) or convergent markets would require either wholesale access to a fixed network or the deployment of its own fixed network. Any fixed network deployment in Belgium would likely take a number of years (e.g., by analogy, as the Notifying Party observes, the deployment of a mobile network is expected to take five years) and therefore not allow for timely entry within the meaning of the Horizontal Merger Guidelines.

(550) There are also no indications at present that Citymesh/Digi would seek to enter fixed or convergent retail markets on the basis of wholesale access to a third party's fixed network. This may be because, as one market participant indicated in response to the Commission's market investigation "*wholesale prices are most probably to[o] high for a new player to enter the market successfully*."[439] Indeed, the […].[440] The Notifying Party has however not substantiated its assumption.

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435 Article 6(1)(c) Response, paragraphs 14, 15 and 17.

436 BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).

437 Citimesh's and Digi's press release of 21 June 2022 *Citimesh and Digi win spectrum in the auction and will start building a nationwide network* (ID 2060).

438 Form CO, paragraph 26.

439 M7's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 731).

440 Response to RFI 10, paragraph 23.

(551) In Spain, where Digi entered the mobile market in 2008, it took over 10 years for Digi to enter fixed and convergent markets (based partially on wholesale access). In Belgium, similar to the situation faced by Digi in Spain in 2008, Proximus' fixed network is predominantly (i.e., 80-90%) a DSL network at present. While Proximus is rolling out a (faster) fibre network, this is expected to take several years: "*Proximus is currently at 10-20 % national fibre coverage and aims at 70% national fibre coverage by the end of 2028*."[441] Finally, Orange itself does not appear to expect Digi to quickly enter the Belgian market, with Xavier Pichon, the OBE's Chief Executive Office ("**CEO**") noting that "*between today's announcement [i.e. on 21 June 2022 that Citymesh/Digi acquired mobile spectrum] and the timetable (necessary for technical deployment ….), there will be plenty of time to analyse all this*" (emphasis added).[442]

(552) Digi confirmed that its plan is to develop fixed infrastructure in Belgium. In that context, Digi explained that it considers that access to infrastructure is an integral part of an operator's ability to develop a solid business plan and of its capacity to effectively compete on the long term with other operators on the market. Digi further indicates that access to ducts and micro-ducts at competitive tariffs and non-discriminatory conditions is very important for the provision of services at competitive and affordable prices.[443]

(553) Consumer association Test-Achats considers that "the potential entry by Digi with fixed or multiple-play markets would likely be too far in the future to address any potential concerns raised by the Transaction".[444]

(554) Further to the above, the Commission considers that any entry by Digi cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(555) An entry of Digi in the market for the retail supply of AV services in the Targets' footprint would not be sufficient. As mentioned above, it took Orange six years since it entered the market in 2016 to reach its current market position in fixed and convergent markets and it already had a sizeable mobile customer base in 2016, which it could cross-sell to. Digi, on the other hand, is not active in any retail market in Belgium at present. While it will likely (and indeed is required to) enter the mobile market in the short term, Digi's mobile customer base will likely be small in the short to medium term. While some market participants that responded to the market investigation noted that Digi may seek to enter fixed and/or bundled markets,[445] a majority that expressed a view also considered that the upfront investment required for such entry (in particular the wholesale fixed network access costs) may be too high to allow for successful or sustainable entry. Consumer association Test-Achats noted that "*if you don't have an existing customer base to start from it's very difficult*

441 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022, paragraph 28 (ID 376).

442 See, for example, press article of 21 June 2022 on Le Vif *L'opérateur mobile DIGI débarque en Belgique et défie ses concurrents avec des « prix très abordable »*":« *Ce nouvel entrant aura-t-il un effet baissier sur les prix? Difficile de se prononcer pour le CEO. "Mais, entre l'annonce d'aujourd'hui et le calendrier (nécessaire au déploiement technique, NDLR), on aura largement le temps d'analyser tout cela", conclut Xavier Pichon* ») (ID 2062).

443 Non-confidential version of Digi's response to RFI 1 on 21 September 2022, questions 2, 5, 6 and 7 (ID 1355).

444 Non-confidential agreed minutes of Test-Achats' call with the Commission on 13 september 2022, paragraph 5 (ID 1357).

445 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

to have a sustainable offer [and] for an operator starting from scratch the investments might be too high."[446]

(556) As such, the Commission considers that any entry by Digi cannot be said to be timely, likely and sufficient within the meaning of the Horizontal Merger Guidelines.

7.4.3.2.8. The Notifying Party has not provided sufficient evidence to support the alleged efficiencies brought along by the Transaction

(557) The Horizontal Merger Guidelines provide that it is possible that efficiencies brought about by a merger counteract the effects on competition, and in particular the potential harm to consumers that it might otherwise have.[447] In this regard, any claimed efficiencies have to (i) benefit consumers; (ii) be merger-specific; and, (iii) be verifiable.[448]

(558) The Notifying Party submits that the merger will generate efficiencies. As set out in Section 7.4.2.1 above, the Notifying Party makes three efficiency claims. First, the Notifying Party explains that the Transaction will bring about an increase in investments into the fixed networks of the Targets in the Targets' footprint. Second, the Notifying Party considers that the Transaction will lead to the elimination of double marginalisation for both fixed and mobile networks of the Parties. Finally, the Notifying Party considers that the Transaction will increase the quality of the Parties' fixed-mobile bundles.

(559) For the following reasons, the Commission considers that the Notifying Party has not demonstrated to the required standard that the claimed efficiencies meet three cumulative criteria of (i) benefit to consumers; (ii) merger-specificity; and, (iii) verifiability, for the reasons explained below.

7.4.3.2.8.1. Increased investments in the fixed networks in the Targets' footprint

(560) In the Form CO, the Notifying Party claims that "the Transaction will generate significant efficiencies in the fixed markets because of the substantial investments in cable and fiber infrastructures that OBE is planning to conduct and that would not have taken place absent the Transaction"[449] and that "as a result of those investments, customers of fixed and FMC offers will have more choices, both in terms of speeds and number of operators available".[450]

(561) In the Article 6(1)(c) Response, the Notifying Party provides further details as to the reasons why it expects that the Transaction will lead to significantly more extensive investments in network upgrades (Data Over Cable Service Interface Specification ("**DOCSIS**") 3.1 and Fibre-To-The-Home ("**FTTH**") ("**Fixed Network Efficiency**") than VOO had planned ([…] greater CAPEX for network upgrades through 2030).

(562) First, with regard to verifiability, the Notifying Party submits that Orange's investment plan is significantly higher than the investment plan of VOO absent the Transaction. In that respect, Orange claims that its investment plan is approximately […] higher than VOO's investment plan when looking at all fixed network CAPEX (EUR […] vs. EUR […]), and […] higher when only looking at fixed network CAPEX for cable upgrade and fibre roll-out (EUR […] vs EUR […]).

[446] Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).
[447] Horizontal Merger Guidelines. Paragraph 76.
[448] Horizontal Merger Guidelines, paragraph 78.
[449] Form CO, paragraph 1906.
[450] Form CO, paragraph 1906.

(563) Second, with regard to merger-specificity, the Notifying Party considers that absent the Transaction, Orange would not have deployed its own fixed network and VOO would not have been able to commit the same amount of CAPEX as Orange will do post-Transaction.

(564) Finally, the Notifying Party considers that these additional investments will benefit consumers in the form of higher internet speed availability and greater choice (as it will have a network in areas currently only served by one player, and will operate an open fibre network accessible by third party access-seekers).

(565) Since the Notifying Party has proposed remedies to resolve the Commission's competition concerns in the market for the retail supply of AV services, the Commission considers that it is not necessary to assess the Fixed Network Efficiency put forward by the Notifying Party against the requirements of the Horizontal Merger Guidelines as the proposed remedy resolves, in any event, the Commission's competition concerns in the market for the retail supply of AV services in the Targets' footprint.

7.4.3.2.8.2. Elimination of double marginalisation

(566) In the Article 6(1)(c) Response, the Notifying Party brings forward two possible efficiencies relating to the elimination of double marginalisation ("**EDM**") on (i) the provision of fixed and multiple-play bundles by OBE ("**Fixed EDM Efficiency**"); and, (ii) the provision of mobile and multiple-play bundles by VOO ("**Mobile EDM Efficiency**") as a result of the integration of a MNO and a FNO.

(567) Accordingly, the Commission will assess both EDM Efficiencies in turn in the following sections.

7.4.3.2.8.2.1. Fixed EDM Efficiency

(568) The Notifying Party explains that the Transaction will result in the partial integration of the upstream network service of the Targets and the downstream retail service of OBE. In particular, the Notifying Party submits that the marginal cost to OBE of wholesale fixed access will be eliminated post-Transaction as OBE will recoup 75% of the margins made by the Targets on providing wholesale access as OBE will own 75% minus one share in the Targets. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[451]

(569) In the following paragraphs, the Commission will show that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(570) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[452] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

[451] Horizontal Merger Guidelines, paragraph 78.

[452] Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

(571) The Commission considers that the wholesale access fee that OBE pays and will continue to pay to the Targets post-Transaction is entirely a variable cost. These costs are charged by the Targets per active customer. As clarified by OBE, the Commission considers that post-Transaction, OBE will be able to recoup approximately 75% of its wholesale access costs to the Targets' fixed network.

(572) Hence, the Commission considers that the partial elimination of OBE's variable costs related to the wholesale access fee that OBE pays, and will continue to pay, to the Targets, to obtain wholesale access to the Targets' fixed network will likely partly be passed on to consumers in terms of lower prices or higher quality of service.

(573) However, the Commission considers that the benefit to consumers from the Fixed EDM Efficiency would be limited even if the reduction in OBE's variable cost were entirely passed on to consumers. This is because (i) the Fixed EDM Efficiency, which will be limited to consumers in the Targets' footprint, would be diluted across all consumers in Belgium, and (ii) the wholesale access fee that OBE pays is limited relative to average prices.

(574) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by the Targets for the wholesale supply of broadband access to Orange was EUR […] per month in 2021.[453] Post-Transaction, OBE would recoup around [70-80]% of this EBITDA margin, so EUR […]. However, this EBIDTA margin would be recouped only on the […] OBE consumers in the Targets' footprint, but then diluted across the […] OBE consumers in Belgium. Therefore, on average the EBITDA margin recouped would represent EUR […] per OBE consumer.[454] The average revenue per subscriber made by OBE for the retail supply of AV services was EUR […] per month in 2021. As such, the maximum EBIDTA margin that OBE could pass on to consumers would represent approximately [0-5]% of the average price for the retail supply of AV services (i.e. assuming OBE would pass the entirety of the Fixed EDM Efficiency on to consumers).

(575) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[455] OBE has a lesser incentive to pass on the Fixed EDM efficiency to consumers, because it will also take into account the effect on the Targets of lowering OBE's prices (or raising quality) downstream in the retail supply of AV services. By lowering OBE's prices (or raising quality) downstream as a result of the Fixed EDM efficiency, OBE will entice customers of the Targets (in addition to of third parties) to switch to OBE. However, the merged entity gains significantly less from a customer switching from the Targets to OBE, compared to a customer switching from a third party rival to OBE, because the merged entity would lose the margin made by the Targets. Therefore, because OBE and the Targets are competitors downstream in the retail supply of AV services (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Fixed EDM Efficiency to consumers.

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453 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph.

454 […].

455 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, the Targets provide an input to OBE but also compete with OBE downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

(576) On the basis of the analysis above, the Commission considers that while it is possible that the Fixed EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Fixed EDM Efficiency will benefit consumers.

(577) **Merger-specificity.** The Commission considers that the savings related to OBE's recoupment of part of the wholesale access fee it pays and will continue to pay to the Targets post-Transaction are unlikely to be achieved by other means than the Transaction.

(578) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for OBE but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[456] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[457]

(579) In the Article 6(1)(c) Response, the Notifying Party generically asserts that: "OBE will … have the possibility to return these margins to customers through additional investment, new services or price reductions to compete more aggressively for FMC customers."[458] The fact that the Notifying Party expressly refers to various "possibilities" suggests that the Fixed EDM Efficiency would only be hypothetically verifiable. Accordingly, the Commission considers that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable.

(580) **Conclusion on the Fixed EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Fixed EDM Efficiency in its assessment of the Transaction.

7.4.3.2.8.2.2. Mobile EDM Efficiency

(581) The Notifying Party explains that as a result of the Transaction, VOO's mobile traffic will be shifted to be hosted on OBE's network. The Notifying Party considers that this shift of mobile data traffic will result in a reduction in double marginalisation on mobile services proposed by VOO as OBE will earn the margin

456 Horizontal Merger Guidelines, paragraph 87.
457 Horizontal Merger Guidelines, paragraph 86.
458 Article 6(1)(c) Response, paragraph 377.

on wholesale sales to VOO. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[459]

(582) In the following paragraphs, the Commission will show that the Mobile EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(583) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[460] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(584) The Commission considers that the wholesale access fee that VOO will pay to OBE post-Transaction is entirely a variable cost. These costs are charged by OBE per active SIM card. The Commission considers that the partial internalisation of VOO's variable costs related to the wholesale access fee that VOO will pay to OBE to obtain wholesale access to OBE's mobile network may partly be passed on to consumers in terms of lower prices or higher quality of service.

(585) However, the Commission considers that the benefit to consumers from the Mobile EDM Efficiency would be limited even if the reduction in VOO's variable cost were entirely passed on to consumers. This is because the wholesale access fee that VOO pays is limited relative to average prices.

(586) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by OBE for the wholesale supply of mobile access to third party MNVOs was EUR […] per month in 2021.[461] The average revenue per subscriber made by VOO for the retail supply of AV services was EUR […] per month in 2021. As such, the maximum EBIDTA margin that VOO could pass on to consumers would represent approximately [5-10]% of the average price for the retail supply of AV services (i.e. assuming VOO would pass the entirety of the Fixed EDM Efficiency on to consumers).

(587) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[462] the merged entity has a lesser incentive to pass on the Mobile EDM efficiency to consumers, because it will also take into account the effect on OBE of lowering VOO's prices (or raising quality) downstream in the retail supply of AV services. By lowering VOO's prices (or raising quality) downstream as a result of the Mobile EDM efficiency, VOO will entice customers of OBE (in addition to of third parties) to switch to VOO. However, the merged entity gains significantly less from a customer switching from OBE to VOO, compared to a

459 Horizontal Merger Guidelines, paragraph 78.

460 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

461 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph. The Commission assumes that the EBITDA margin made by OBE from MNVOs would be similar to the EBIDTA margin made from VOO.

462 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, OBE provides an input to the Targets but also competes with the Targets downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

customer switching from a third party rival to VOO, because the merged entity would lose the margin made by OBE. Therefore, because OBE and VOO are competitors downstream in the retail supply of AV services (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Mobile EDM Efficiency to consumers.

(588) On the basis of the analysis above, the Commission considers that while it is possible that the Mobile EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Mobile EDM Efficiency will benefit consumers.

(589) **Merger-specificity.** The Commission considers that the internalisation of VOO's wholesale access fee paid to OBE to access OBE's mobile network post-Transaction are unlikely to be achieved by other means than the Transaction.

(590) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for VOO but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[463] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[464]

(591) In the Article 6(1)(c) Response, the Notifying Parties generically assert that: "To the extent the combined firm/VOO internalises this margin in setting its retail prices, then there will be a reduction in double marginalisation, creating a possibility to have an aggressive FMC commercial policy."[465] The wording of the quoted sentence suggests that the Mobile EDM Efficiency is purely hypothetical and dependent on the extent to which the combined firm/VOO internalises the margin. Accordingly, the Commission considers that the Notifying Party has failed to show that the Mobile EDM Efficiency would be verifiable.

(592) **Conclusion on the Mobile EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Mobile EDM Efficiency put forward by the Notifying Party is likely merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Mobile EDM Efficiency in its assessment of the Transaction.

463 Horizontal Merger Guidelines, paragraph 87.
464 Horizontal Merger Guidelines, paragraph 86.
465 Article 6(1)(c) Response, paragraph 386.

7.4.3.2.8.3. Increase in quality of the Parties' FMC bundles

(593) The Notifying Party considers that, in addition to the efficiencies discussed above, the Transaction will allow the combined entity to offer higher quality of fixed and mobile bundles in the Targets' footprint than either Party could offer absent the Transaction. The Notifying Party explains that this type of efficiency was accepted in previous cases by the Commission in case M.8864 – *Vodafone/Certain Liberty Global Assets*.[466]

(594) First, the Article 6(1)(c) Response fails to provide an assessment of the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines. Rather, the Article 6(1)(c) Response focuses on the comparison between the present Transaction to the transaction underlying case M.8864 – *Vodafone/Certain Liberty Global Assets*.

(595) Second, the only listed efficiencies include (i) better and more efficient technical incident resolution; (ii) improvement in the provisioning process of FMC offers; and, (iii) creating the possibility of do-it-yourself installation of FMC products. While the Commission may deduce from the limited amount of information provided in this regard that customers may benefit from some non-price related efficiencies, the Notifying Party fails to (i) provide any evidence to quantify or qualify the extent of such efficiencies; and, (ii) explain why the Transaction is the only way to achieve these efficiencies.

(596) On the basis of the above assessment, the Commission considers that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles put forward by the Notifying Party may satisfy one of the three cumulative criteria required under the Horizontal Merger Guidelines of benefit to consumers. The Commission considers that the Notifying Party has failed to show that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles is merger-specific or that it would be verifiable.

7.4.3.2.8.4. Conclusion on the efficiencies

(597) On the basis of the above, the Commission considers that none of the alleged efficiencies put forward by the Parties meets the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines.

7.4.3.2.9. Conclusion

(598) In light of the above, the Commission has come to the conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for AV services within the Targets' footprint, including increased prices and/or reduced quality for end customers.

7.4.4. Retail supply of all multiple-play bundles

7.4.4.1. The Notifying Party's view

(599) The Notifying Party considers that the Transaction does not raise any concerns on the hypothetical retail market for the supply of multiple-play bundles (including FMC

[466] Commission decision of 18 July 2019 in case case M.8864 – *Vodafone/Certain Liberty Global Assets*.

bundles) even if the market is defined based on the Target's footprint for the following reasons.

(600) First, in the Form CO, the Notifying Party submits that the new entity will continue to compete against several strong players at national level post-Transaction, in particular Proximus and Telenet. In that respect, the Notifying Party submits that the gap between Proximus and the new entity will remain significant at [20-30] points in value and [20-30] points in volume at national level.

(601) When considering the competitive landscape at the level of the Target's footprint, the Notifying Party submits that the market will also remain competitive post-Transaction essentially based on Proximus' "*uncontested*" market leadership and the expectation that the Targets "*will lose market shares and value to the benefit of Proximus if they do not invest in fixed networks, which they are not in a position to make without the Transaction*".[467]

(602) In addition, the Notifying Party adds that Telenet already provides multiple-play bundles (including FMC bundles) based on its own fixed network in the botte du Hainaut as well as fLTE internet + TV offers (which can be combined with a mobile service) with Tadaam/BASE across Belgium. The Notifying Party furthermore considers that (i) "*Telenet will very likely further expand*" in the South of Belgium as a result of the present Transaction and, (ii) that new MNOs will also emerge as a result of the 5G auction that took place on 20 June 2022 such as Citymesh and Digi which is expected to provide its services to the B-to-C market and, given the trend towards convergence and the existence of regulated wholesale access, is considered by the Notifying Party to "*likely position themselves in the multiple-play sector*"[468] in the future. On that basis, the Notifying Party submits that the "*new entity will thus face fierce competition from both established incumbent players and aggressive new entrants, which precludes any risk that the Transaction would significantly impede effective competition*".[469]

(603) Second, the Notifying Party considers that the increment brought about by OBE for fixed bundles is marginal.

(604) Third, the Notifying Party submits that the Transaction will not reduce infrastructure competition and, on the contrary, will actually increase the number of convergent network operators from two to three at national level and from one to two within the Targets' footprints. In that respect, the Notifying Party submits that the merged entity will have "*stronger ability and incentives than OBE individually to implement an aggressive commercial policy enabling to transform existing mobile customers into FMC customers and/or poach customers from other operators*".[470]

(605) Fourth, the Notifying Party considers that OBE and the Targets are not close competitors as they have very different profiles and core activities: OBE's core activity is mobile telecommunications services whereas the Targets' core activities are fixed services. In addition, the Notifying Party submits that, in any event, customers are able to easily switch to alternative fixed and mobile services providers thanks to the "Easy Switch"[471] procedure and the mobile number portability.[472]

[467] Form CO, paragraph 1031.
[468] Form CO, paragraph 1035.
[469] Form CO, paragraph 1036.
[470] Form CO, paragraph 1042.
[471] Form CO, paragraph 1061.

(606) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies. In particular, the Notifying Party submits that the Transaction will lead to increased investments in fixed infrastructure in the Targets' footprint and to the elimination of double marginalisation for both fixed and mobile networks of the Parties. The Notifying Party further submits that the Transaction will increase the quality of the Parties' FMC bundles.[473]

(607) In the Article 6(1)(c) Response, the Notifying Party restates many of the arguments from the Form CO, including that:

– The Parties are not each other's closest competitors, on the basis that Proximus is the closest competitor of each of them,

– The Transaction will not eliminate an important competitive force because Orange is not the cheapest operator and does not stand out in terms of innovation,

– There will be entry in the Targets' footprint by Telenet and Digi, which will compensate for any loss of competition; and

(608) The Transaction will generate substantial efficiencies in the form of increased network investment compared to what the Targets' would have invested alone, and on the basis that there will be an elimination of double marginalisation for the provision of both fixed and mobile services.

7.4.4.2. The Commission's assessment

(609) The Commission has come to the conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the hypothetical retail market for multiple-play bundles within the Targets' footprint. This is in particular because, as set out in further detail below, (i) the Parties' combined market share is high and the increment as a result of the Transaction is significant, (ii) customers have limited possibilities of switching supplier post-Transaction; (iii) the Parties are close competitors, (iv) the merger would eliminate an important competitive force and (v) any entry is would not be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

7.4.4.2.1. The Parties' combined market share is high and the increment is significant

(610) As set out in the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors, and they are normally important factors in the assessment. For example, changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, by indicating whether firms have been gaining or losing market shares.[474] In addition, a merger involving a firm whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the

472 Form CO, paragraph 1062.

473 Article 6(1)(c) Response, paragraph 331-396.

474 Horizontal Merger Guidelines, paragraphs 14, 15 and 27.

presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.[475]

(611) For the following reasons the Commission considers that the Parties' combined market shares are high, and these high combined market shares underestimate the Parties' actual market power on the market.

(612) First, the combined market shares of the Parties are high with a significant increment. Based on share data provided by the Parties, as set out in section 7.1 above, in the hypothetical market for the retail provision of multiple-play bundles within the Targets' footprint, the merged entity would have a share of c. [40-50]%, by value and c. [40-50]% by volume, with an increment of c. [5-10]% by value and c. [10-20]% by volume. The Commission considers that the merged entity's combined share would be substantial, the second highest in the market, after that of Proximus.

(613) Second, the combined market shares of the Parties underestimate the market power that the merged entity will be able to exercise on the market. In line with its past decisions, the Commission considers that market shares based on gross adds, as opposed to volume-based market shares, provide a reasonable measure that captures the current competitive strength of market participants.[476] Gross adds reflect the respective number of new subscribers acquired in a year by each operator (irrespective of where these customers came from) without deduction of the subscribers who leave. Market shares based on gross adds are generally used in the telecommunications industry and allow for a dynamic measure of market power as they focus on those customers that market participants actively seek to attract. On the basis of the data provided by the Notifying Party, the Commission has been able to calculate market shares of the Parties on the basis of gross adds.

(614) In the following table, the Commission presents the gross-adds market shares of the Parties in the market for the retail supply of multiple-play bundles in the Targets' footprint, calculated on the basis of the data provided by the Parties.

Table 39: Gross adds shares in the markets for the retail supply of multiple-play bundles in the Targets' footprints[477]

	Gross adds share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[20-30]	[20-30]	+ [5-10]	+ [5-10]	+ [5-10]
Targets	[30-40]	[30-40]	[30-40]	+ [10-20]	+ [10-20]	+ [10-20]
Combined	[60-70]	[60-70]	[50-60]	+ [20-30]	+ [20-30]	+ [10-20]

Source: Commission calculations based on Parties' data submitted in response to RFI 20, questions 10 and 11.

(615) On the basis of Table 11Table 39 above, the Commission notes that pre-Transaction, OBE, the Targets and Proximus (since it is the only other significant player in the market) each account for about [30-40%] the share of gross adds. Post-Transaction the merged entity would become the market leader (ahead of Proximus) with a gross add share of approximately [50-60]%.

475 Horizontal Merger Guidelines, paragraph 17.

476 Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*, paragraph 397.

477 The residual gross adds shares essentially correspond to Proximus' gross adds, since Proximus is the only other significant player in the market.

(616) Further, the Commission notes that the Parties' gross add shares, even if they have been slightly decreasing over the past three years, far exceed the Parties' market share of revenue/subscribers, which implies that the Parties' ability to attract customers, and thus their role on the market, far exceeds its value and volume market shares.

(617) More concretely, looking at the gross adds market shares, it appears that if all customers decided to switch, customers would approximately evenly split between each of the Parties and Proximus, and each market participant would approximately have a [30-40]% market share. The comparison between the gross adds market shares and the market shares of the Parties shows that the merged entity is thus able to attract a disproportionate amount of customers in comparison to its market share. Further, because Proximus accounts for the remainder of the gross adds market shares, these results imply the converse for Proximus, i.e. Proximus' market power is significantly lower than their current market shares would suggest.

(618) As such, the Transaction would lead to the consolidation of two players whose market power far exceeds their current market shares.

(619) Third, the Commission finds that the pre-merger margins of the Parties are high, which is consistent with high market power.[478]

Table 40: Margins of the Parties in the market for retail supply of multiple-play bundles in the Targets' footprints[479]

	Contribution margin (%)			EBITDA margin (%)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE[480]	[…]	[…]	[…]	[…]	[…]	[…]
Targets	[…]	[…]	[…]	[…]	[…]	[…]

Source: Response to RFI 22, Annex 1

(620) On the basis of Table 12 above, the Commission notes that both Parties' pre-merger margins are high in comparison to the average EBIDTA margin in the telecommunications sector in Europe in 2021, 26%.[481]

(621) On the basis of the above, the Commission concludes, for the purpose of this decision, that the combined market shares of the Parties are significant and that the Transaction gives rise to a significant market share increment. In addition to the high market shares, the Commission further finds, on the basis of the gross adds shares, net adds and margin data presented above, that the market power that the merged entity will be able to exercise on the market post-transaction far exceeds its current market share.

478 Horizontal Merger Guidelines, paragraph 27-28.

479 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

480 The Notifying Party submits that […]. Accordingly, the Commission considers that the margins of OBE in the market for the retail supply of fixed internet access are representative of the margin in the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles.

481 See data from New York University's Stern School of Business (ID 2066). Global figures are similar; see data from CSIMarket.com (ID 2059).

7.4.4.2.2. Customers have limited possibilities of switching supplier post-Transaction

(622) The Horizontal Merger Guidelines provide, in paragraph 31, that where customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers, such customers are particularly vulnerable to price increases.

(623) In the following paragraphs, the Commission will first show that there are limited alternative operators in the Targets' footprint for the retail supply of multiple-play bundles and, second, that the remaining alternative would be more expensive and of lower download speed.

(624) First, contrary to the Notifying Party's argument as set out in section 7.4.4.1 above that several strong competitors will remain, the Commission notes that the Transaction will reduce the number of retail providers of multiple-play bundles in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active in the Targets' footprint, none of them provide retail multiple-play bundles. The entirety of the market will be in the hands of two FNOs. This was confirmed by the market investigation, with one respondent noting that the transaction "*will lead to less choose [sic – choice] for consumers living in that footprint*"[482] and another observing that "*The Transaction will combine the two players who are particularly close competitors … leaving the incumbent Proximus as the only alternative to the merged entity*."[483] Moreover, and contrary to the Notifying Party's argument as set out in Section 7.4.4.1 above, Telenet does not offer multiple-play bundles (or FMC bundles) in the Targets' footprint to any meaningful extent, and indeed the Parties' own market share data indicates that Telenet has a share of [0-5]% in the hypothetical market for multiple-play bundles.[484]

(625) Second, while Proximus is the market leader with a share of [50-60]% by value and [50-60]% by volume, as the former incumbent operator in Belgium, Proximus is positioned "*at the high end of the market*"[485] in terms of prices.[486] Proximus also largely offers lower maximum internet download speeds (based on its predominantly xDSL network) compared to the Parties, which offer higher internet download speeds (based on VOO's and Brutélé's coax/cable network).[487] As illustrated by the graph provided by Telenet in the slide deck of a meeting that took place between Telenet and the case team on 5 April 2022, Proximus' offers are consistently of lower speed and higher price than those of OBE and the Targets, with the exception

482 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 76 [Test Achats].

483 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 62.1 (ID 646).

484 Form CO, Annex 17.

485 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165). Proximus also operates a low-cost Brand, Scarlet, whose offerings are less expensive, but at the same time more basic in terms of quality and therefore not comparable to the offers of Orange or VOO. Indeed, according to Form CO, Annex 13 – Benchmark of offers, bundles offered by Scarlet that include a TV offering have c. 30 channels, compared to c. 80 for VOO and c. 70 for Orange.

486 For example, Proximus' fixed internet and TV bundles are higher in price and come with more channels and add-ons than the corresponding bundles of VOO and Orange (see Form CO, Annex 13 – Benchmark of offers).

487 Proximus also higher speed (e.g. 1 Gbps) fixed internet packages based on fibre technology, but these offers, which are also c. 40% more expensive than its 100 MBPS offer, are not available nationally in Belgium as Proximus' fibre network roll-out is ongoing (and will remain ongoing for several years).

of Scarlet which provides significantly lower speeds (50 Mbps) at moderately lower prices.[488] As such, the choice of end-customers is not only limited, it is also likely to be more expensive and slower than the one offered by the Targets.

(626) Finally, the buyer-side of the retail market for multiple-play bundles consists of individual customers who purchase multiple-play bundles through a multitude of small transactions. Accordingly, such customers have very little buyer power.[489]

(627) On the basis of the above, the Commission concludes, for the purpose of this decision, that the Transaction will materially limit the switching ability of customers.

7.4.4.2.3. The Parties are close competitors

(628) As set out in paragraph 28 of the Horizontal Merger Guidelines, a transaction is more likely to result in competition concerns if the merging firms are "*close competitors*" since, for instance, their incentive to raise prices pre-transaction is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. The Commission considers, contrary to the Notifying Party's argument as set out in Section 7.4.4.1 above, that the Parties' are close competitors, based on a number of elements.[490]

(629) First, in light of the market shares presented above in Section 7.3.4.2.1, the Commission considers that, in such highly concentrated market, the Parties compete closely with each other, as well as with Proximus. This is corroborated by the Parties' own internal documents, in particular those of the Targets and Sellers, which refer to Orange as a direct and important competitor:

– For instance, Nethys' legal counsel explains that [Details of internal documents describing the Targets' strategy][491] when trying to fend off Orange's legal challenge of the sale of VOO to Providence, and that [Details of internal documents describing the Targets' strategy].[492]

– The importance of their market position was further confirmed by the VOO management in 2021 when reporting to the VOO works council about the competition on the market [Details of internal documents describing the Targets' strategy].[493]

(630) Second, the Parties' respective multiple-play offerings are closely substitutable. As Orange is an access seeker on the Target's fixed network, the fixed internet component of Orange's multiple-play offerings is most closely comparable to that of

488 See slide 11 of Telenet's presentation to the Commission on 5 April 2022 (ID 906). Furthermore, as all other FVNOs active in the Targets' footprint operate on the basis of wholesale access to Proximus' network, they are unable to provide higher speeds than those of Proximus.

489 See Horizontal Merger Guidelines, paragraph 64.

490 The Notifying Party also submits that Proximus is both the Targets' and Orange's closest competitor respectively (See e.g. Form CO, paragraph 42). The Commission does not necessarily agree with the Notifying Party's view in this regard, but notes that in any event the Horizontal Merger Guidelines do not require that the merging parties be ranked by reference to how closely they compete with one another compared to how closely they compete with third parties. Rather it is sufficient to assess whether the merging parties compete closely with each other.

491 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-62545).

492 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1090-22575).

493 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-35214).

the Targets' in terms of speed and quality.[494] Indeed, Orange's and the Targets' respective fixed internet offerings provide comparable maximum download speeds (150 MBPS and 125 MBPS respectively) and are similarly priced. By contrast, the closest equivalent offering of Proximus is more expensive and offers a lower maximum download speed (100 MBPS), in view of the fact that it is based on an xDLS network which, as a rule, allows for lower maximum internet speeds than the coax/cable network used by Orange and the Targets.[495] In the Article 6(1)(c) Response, the Notifying Party submits that the Commission ignores the fact that Proximus is also rolling out a fibre network, and already covers "approximately 20% of households in its entire footprint", while allows for speeds of either 350 Mbps or 1 Gbps. However, this means that the vast majority of customers in the Targets' footprint do not currently have the option of switching to a fibre connection from Proximus. As the BIPT pointed out Proximus' fibre roll-out is "currently limited to a fraction of the population (17% of homes passed by June 2022, Proximus targeting to reach 70% of the population only by 2028)" and moreover, when available, is, not being adopted in a fast way."[496]

(631) In addition, the majority of respondents that expressed a view listed Orange as the closest or second closest competitor of the Targets (and likewise listed the Targets as the closest or second closest competitor of Orange) across the full range of multiple-play bundles, namely fixed dual play, fixed-mobile dual play, fixed triple play, fixed-mobile triple play and quadruple play bundles.[497]

(632) Third, the Horizontal Merger Guidelines state that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties.[498] The Commission has applied that type of analysis in previous merger cases in the telecommunications sector.[499] Table 13 presents the diversion ratios from each of the Parties to one another both in terms of customers lost and customers won within the Target's footprint for each year between 2019 and 2021 and the first half of 2022.

494 Fixed internet is a component in materially all multiple-play bundles offer in Belgium.

495 Form CO, Annex 13 – Benchmark of offers, Table 5.

496 BIPT's submission of 30 August 2022 entitled "Answer CE about VOO-Orange", page 13 (ID 1122).

497 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 57.1, 57.2 and 57.3.

498 Horizontal Merger Guidelines, paragraph 29.

499 For example, Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*; Commission decision of 1 September 2016 in Case M.7758 – *Hutchison 3G Italy / WIND / JV*; Commission decision of 11 May 2016 in Case *M.7612 – Hutchinson 3G UK/Telefónica UK*.

Table 41: Diversion ratios of the Parties in the markets for the retail supply of all multiple-play bundles in the Targets' footprints[500]

Operator	Customers won/lost	Diversion ratio (%)			
		2019	2020	2022	2022 H1
OBE	Customers won from the Targets	[50-60]	[60-70]	[50-60]	[50-60]
	Customers lost to the Targets	[40-50]	[40-50]	[30-40]	[30-40]
Targets	Customers won from OBE	[10-20]	[10-20]	[20-30]	[20-30]
	Customers lost to OBE	[40-50]	[30-40]	[30-40]	[30-40]

Source: Response to RFI 20, questions 10 and 11.

(633) A review of switching data provided by the Parties supports the conclusion that the Parties are close competitors. Both OBE and the Targets win and lose a significant proportion of their customers from and to one another, in certain cases even more than [50-60]%. The analysis also indicates that there is a general slight downward trend over time in the diversion ratios based on customers lost between the Parties. Whilst this would be consistent with the Parties becoming slightly less close competitors over time, the level of switching between the Parties indicates that the Parties will remain close competitors for the foreseeable future, even if this historical trend continues.

(634) Fourth, in line with its precedents, the Commission also expresses the diversion ratios in Table 13 as so-called "implied market shares".[501] Implied market shares indicate how large the Parties' market shares would have to be for them to give rise to the observed diversion ratios.[502] When the Parties' implied market shares exceed their actual market shares, then the Parties compete more closely with each other than their market shares suggest. Table 14 below shows the results of the Commission's diversion analysis expressed in terms of implied market shares.

500 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

501 See Valletti and Zenger (2020). See also Commission decision of 21 December 2020 in case M.9730 – *FCA / PSA*.

502 Specifically, if diversion occurred in proportion to market shares, the diversion ratio from firm 1 to firm 2 would equal $d_{12} = s_2/(1 - s_1)$, where s_1 and s_2 denote the market shares of firms 1 and 2, respectively. Similarly, $d_{21} = s_1/(1 - s_2)$. Solving this pair of equations for s_1 and s_2 then gives the Parties' implied market shares as a function of both diversion ratios, $s_1 = [d_{21}(1 - d_{12})]/(1 - d_{12}d_{21})$ and $s_2 = [d_{12}(1 - d_{21})]/(1 - d_{12}d_{21})$.

Table 42: Parties' implied market shares in the all multiple-play bundles market in the Targets' footprints[503]

	Implied market share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[20-30]	[20-30]	+[10-20]	+[5-10]	+[5-10]
Targets	[30-40]	[30-40]	[20-30]	+[10-20]	+[5-10]	+[5-10]
Combined	[60-70]	[50-60]	[50-60]	+[20-30]	+[10-20]	+[10-20]

Source: Commission calculations based on the Parties' data submitted in response to RFI 20, questions 10 and 11.

(635) Table 14 demonstrates that the Parties compete significantly more closely with each other than their market shares suggest (i.e. because their implied market shares exceed their actual market shares). Therefore, market shares underestimate the competitive constraint that the Parties place on each other. Further, because Proximus is the only other significant player in the market (and therefore would account for the remainder of the (implied) market share outside of the Parties combined (implied) market share), the results above also demonstrate that Proximus competes significantly less closely with each of the Parties than its market shares would suggest. In other words, market shares overestimate the competitive constraint that Proximus places on each of the Parties.

7.4.4.2.4. The merger would eliminate an important competitive force

(636) The Horizontal Merger Guidelines provide that a merger can lead to significant non-coordinated effects if it eliminates an important competitive force, which can be the case where an undertaking may have more of an influence on the competitive process than its market shares would suggest, such as a recent entrant that exerts—or is expected to exert—significant competitive pressure on other firms in the market. A merger involving such a firm may have a significant negative impact on competition when the market is already concentrated.[504]

(637) As set out above, the Transaction is a three-to-two merger within the Targets' footprint. The market is therefore already concentrated, with a pre-merger HHI of over 4,500.[505] In addition, there are a number of different elements which all point to Orange being an important competitive force on market.

(638) First, as outlined in Section 7.4.2.2.4 above, Orange is the most recent entrant in the Belgian fixed internet, TV and multiple-play markets. Since entering six years ago, in 2016, Orange has positioned itself as a "*challenger*"[506], a point confirmed by market participants,[507] and, as observed by the BIPT,[508] has generally offered, and

503 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

504 Horizontal Merger Guidelines, paragraph 38.

505 The post-Transaction HHI would be over 5 000 with a delta of over 500.

506 See Orange's press release of 20 July 2018 *Orange Belgium's confirms its commercial success as a Bold Challenger* (ID 2063).

507 See, e.g. Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 58.1 to 58.6 [TELESAT].

continues to offer, lower prices than other players on the market, notably the Targets and Proximus.[509] Indeed, VOO acknowledged [Details of internal documents describing the Targets' strategy].[510]

(639) Second, market participants also view Orange as one of the fastest growing players on the market. One competitor indicated that in "*the past years [Orange] gained significant market share*"[511]. The market share data provided by the Parties, which show year-on-year market share increases for Orange[512], as well as by the win/loss data provided by the Parties corroborate the fact that Orange is the fastest-growing player on the market.[513]

(640) Third, Orange is seen as an innovative player in the market in Belgium, with one competitor observing that "OBE has played an innovative and disruptive role since entering the market in 2016 … for example, OBE was the first operator to launch a new bundle offering with the introduction of a bundle that includes only fixed and mobile in 2019."[514] This offer, which was called "Love Duo" and aimed at offering more tailored options to customers' needs (e.g. younger demographics with a preference for consuming audiovisual content via VOD and SVOD platforms over more traditional linear TV) was subsequently mirrored by the introduction of similar offers by each of the other main operators, notably by VOO in 2021 and by Proximus in March 2022. It was also observed that "OBE was able to meet specific customer needs by introducing a wider variety of more flexible tariffs and bundles than other operators."[515] The BIPT similarly considered that Orange's entry into fixed and multiple-play markets resulted in "revived market dynamics" and "has led to new offers (e.g. the 2P BB Mobile or 3P BB TV Mobile packages) and more competitive prices."[516] In the Article 6(1)(c) Response, the Notifying Party submitted the introduction of new bundle types is "not a technical innovation, only a marketing

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508 BIPT's press release of 18 July 2022 *The BIPT notices the positive impact of market regulation*, published on 18 July 2022, page 2: "*Since its entry into the market, Orange has positioned itself as a "challenger" operator offering the cheapest offer on the market for most consumption profiles*" (ID 2056).

509 The only exception to this is Proximus' low-cost sub-brand Scarlet, whose offering is not comparable to that of Orange, the Targets' or Proximus in terms of quality/speed or variety of bundles. See Form CO, Annex 13 – Benchmark of offers.

510 VOO Art. 4.5 document, 7._Presentation_on_the_overview_of_the_Commercial_Performance.pdf, page 10.

511 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 705). The Commission notes that this and certain other responses to the market investigation questionnaire in respect of the market for fixed internet access services are also relevant to an assessment of the Transaction and Orange's position in the hypothetical market for multiple-play bundles. This is the case for several reasons. First, multiple-play bundles almost invariably include a fixed internet component. Second, according to market share data provided by the Parties (Form CO, Annex 17) the vast majority of Orange's sales of fixed internet access services (c. [90-100]% in 2021) were through multiple-play (including fixed-only and FMC) bundles. Third, the market share data provided by the parties for fixed internet access services does not differentiate between fixed internet access services provided on a standalone basis and as part of bundles.

512 Form CO, Annex 17.

513 Response to RFI 10.

514 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 646).

515 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 41.1 and 58.1 (ID 646).

516 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraph 38 (ID 2057).

choice that can be easily and quickly replicated by competitors".[517] The Commission nonetheless considers that this was an innovative and disruptive move by Orange aimed at addressing a customer segment that established players were not minded to address spontaneously, and only introduced similar offers in reaction to that of Orange. Indeed, an analyst report at the time of Orange's introduction of Love Duo referred to it as having "high disruptive potential".[518]

(641) The Parties acknowledge the competitive force of Orange when they mention that [Details of internal documents describing the Parties' strategy][519] or when they indicate that [Details of internal documents describing the Parties' strategy].[520]

(642) The Commission considers that through its acquisition of an established player, the incentives of Orange to act as a disruptive force on the market may change. Indeed, a majority of respondents to the market investigation considered that following the Transaction, Orange would stop innovating to the same extent, including through the introduction of disruptive new offer or bundle types to better address a diverse range of end customers, or limit innovation compared to what it did pre-Transaction.[521]

(643) In view of the above elements, taken as a whole, the Commission concludes for the purpose of this decision that the Transaction may result in the elimination of an important competitive force.

7.4.4.2.5. Conclusion on the likely effects of the Transaction

(644) On the basis of the analysis above, the Commission has shown that (i) the Transaction will combine two entities whose combined market shares are high and which underestimate their actual combined market power (see paragraphs (612)-(618) above); (ii) the margins of the Parties are high (see paragraphs (619)-(620) above); (iii) customers have limited possibilities of switching supplier (see paragraphs (624)-(626) above); (iv) the Parties are close competitors (see paragraphs (629)-(635) above); and, (v) the Transaction will eliminate an important competitive force (see paragraphs (638)-(641) above).

(645) In particular, in line with paragraph 28 of the Horizontal Merger Guidelines, the merging entity's incentive to raise prices post-Transaction is higher the more substitutable the Parties' products are or the closer the Parties compete with each other. High pre-merger margins may also make significant price increases more likely. As such, the Parties' relatively high diversion ratios (presented in Table 13) and relatively high pre-merger margins (presented in Table 12) are consistent with a conclusion that there would be significant upward pricing pressure post-Transaction. Further, as noted in paragraph (625) above, Proximus is positioned "*at the high end*

517 Article 6(1)(c) Response, paragraph 195.

518 ING Belgian Telecom Sector Update dated 22 November 2019 ("Internet-mobile offer: Love Duo [had] high disruptive Potential … Orange Belgium … 'Love Duo' packs, targeting 'cord cutters', ie, clients with no interest in traditional TV or fixed phone lines. We think this is a coherent, appealing and disruptive portfolio of offers" (emphasis added) (Internal Document ID 1065-66666).

519 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

520 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).

521 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 44.1.

of the market"[522] in terms of prices. This increases the ability of the merged entity to raise prices post-Transaction.

(646) Accordingly, and in view of the loss of competition between the Parties that would result from the Transaction,[523] the Commission concludes that, the Transaction will lead to significant price increases, reduced innovation, and/or reduced quality (e.g. less choice) in the market for the retail supply of multiple-play bundles in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction may negatively impact other non-price parameters of competition such as, for instance, customer service/care.

(647) While, as outlined in paragraph (65) above, the Commission acknowledges that OBE's national pricing strategy would imply that any price increase in the Targets' footprint by the merged entity would need to take into account the price constraints exercised by operators active outside the Targets' footprint, the Commission considers that these constraints would not be significant with regard to the present Transaction for the following reasons.

(648) First, while Orange may find it appropriate to price nationally today, as it is active across Belgium, it is uncertain if Orange would, post-Transaction, continue pricing nationally. In particular, following the Transaction, Orange will be an FNO (i.e. a network operator) in the Targets' footprint but remain an FVNO (i.e., and access seeker) in Telenet's footprint, thereby creating an asymmetry in its cost base in each footprint, in addition to the fact that it will continue to face two rival operators in Telenet's footprint, versus only one remaining competitor in the Target's footprint. As such, Orange may have the incentive, from an objective profit maximisation standpoint, to adopt a differentiated pricing strategy in the Targets' and Telenet's respective footprints following the Transaction, whether directly (e.g., offering identical bundles at different prices), indirectly (e.g., reducing advertising expenses in some geographic areas, providing higher discounts in some geographic areas,[524] boosting a cheaper sub-brand in some geographic areas) or a combination of both.

(649) Second, and in any event, any constraint exercised by operators not active in the Targets' footprint on Orange's pricing in the Targets' footprint would only extend to pricing. Any quality-related parameters of competition (e.g. quality or speed of customer support) would not, or only minimally, be affected by operators not active in the Targets' footprint. For example, Orange will not be able to directly intervene on Telenet's network to resolve issues with customers complaining with network-related problems while it will be able to do so on its own network in the Targets' footprint.

(650) Third, as VOO will no longer be OBE's pricing in the Targets' footprint as a result of the Transaction, Orange may very quickly and easily decide to progressively adjust VOO's pricing and let it go back up to where it was before Orange actually entered the market, which, in turn, progressively constrained VOO to revise its prices down as demonstrated by the BIPT's communication of 16 July 2022 on the evolution of

522 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165).

523 Horizontal Merger Guidelines, paragraph 24.

524 For instance, Telenet is currently (from 27/02/2023 to 16/04/2023) offering a special discount called "Top promo on unlimited and super fast internet" which only applies to the municipalities in the Brussels Capital Region. In particular, the promotion is only available in "*only for customers with a new internet line in the sub municipalities of Brussels where Telenet is available,*" which only includes the municipalities where Telenet has its own fixed cable network in Brussels (ID 2071).

the broadband and television markets since Q1 2018, published on 18 July 2022.[525] Indeed, as illustrated on Figures 22, 30 and 34 of the BIPT's communication, the BIPT indicates (in paragraph 132 of the Communication) that "*the consumer has a larger choice than in 2018 and has, in most cases, "more for his/her money" than four years ago*" and that "*this evolution is mostly linked, on the one hand, to the development of Orange and, on the other hand, the increase in the mobile content of the FMC packs/bundles.*"[526]

(651) On the basis of the above, the Commission concludes that the Transaction will give rise to significant anticompetitive price effects in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction will give rise to significant anticompetitive non-price effects in the Targets' footprint. On this basis, in the following sections, the Commission assesses whether, and to what extent, the anticompetitive effects resulting from the Transaction may be (partially) offset by any (i) countervailing buyer power; (ii) entry; and/or, (iii) efficiency.

7.4.4.2.6. There is no countervailing buyer power

(652) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability.[527]

(653) The Notifying Party does not provide any views on whether the customers of the merged entity in the market for the retail supply of multiple-play bundles will have sufficient countervailing buyer power.

(654) In this regard, the buyer-side of the retail market for multiple-play bundles consists of individual end customers who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[528]

7.4.4.2.7. Any entry would not be likely, timely

(655) As outlined in Section 7.4.4.1 above, the Notifying Party submits that Telenet is likely to enter the fixed internet, TV and convergent services markets in the Targets' footprint[529] as a result of the Transaction and that similarly, Citymesh/Digi, which acquired mobile spectrum in the recent Belgian 5G spectrum auction, is likely to

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525 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018* (ID 2057)..

526 Free translation of "*Le consommateur dispose en effet d'un choix plus large qu'en 2018 et en a, le plus souvent, « davantage pour son argent qu'il y a quatre ans ». Cette évolution est liée principalement, d'une part, au développement d'Orange et, d'autre part, à la hausse du contenu mobile des packs.*"

527 Horizontal Merger Guidelines, paragraph 64.

528 See Horizontal Merger Guidelines, paragraph 65. The comparison in the sentence "*It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry*" applies to an even greater extent to end customers.

529 Telenet is already active in the Targets' footprint (and Belgium overall) on the mobile market via its brand, BASE, and has a limited internet offering based on mobile fLTE technology under the brand TADAM, which is also available in the Targets' footprint. In this regard, as set out in Section 3.2.2.3 above, internet offerings based on fLTE (i.e. mobile) technology do not form part of the same relevant product market as internet offerings based on fixed infrastructure (i.e. xDSL, coax/cable, fibre).

enter fixed and convergent markets in Belgium as well. The Horizontal Merger Guidelines provide that for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[530] The Commission has assessed each of these three elements separately in respect of Telenet and Citymesh/Digi in Section 7.4.2.2.5 above and concluded that any entry by Telenet or by Citymesh/Digi in the market for fixed internet access services cannot be said to be likely, timely and sufficient within the meaning of the Horizontal Merger Guidelines. The same reasoning applies *mutatis mutandis* to the Notifying Party's arguments in respect of entry into the hypothetical retail market for multiple-play bundles as set out in Section 7.4.4.1 above.

(656) The Commission has assessed each of these three elements separately in respect of the potential entry of Telenet and Citymesh/Digi below.

<u>*With respect to Telenet*</u>:

(657) An entry of Telenet in the hypotheticalmarket for the retail supply of multiple-play bundles in the Targets' footprint is not likely. The Horizontal Merger Guidelines provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the responses of the incumbents. Historical examples of entry and exit may be illustrative of the existence and size of any entry barriers.[531]

(658) During the investigation, Telenet submitted detailed financial modelling of entry in the Targets' footprint under different scenarios, including pre-transaction, post-transaction without any remedy and post-transaction with a divestiture remedy. Telenet submits that this modelling shows that "*entry in the South without a remedy that includes a divestment of customers and a lowering of the wholesale rates does not meet* [its] *investment thresholds* [which it submits]... *is consistent with previous modelling which underpinned Telenet's historic decision to refrain from South entry through wholesale access*."[532] According to Telenet's modelling, only a "*combination of the divestment of customers and the lowering of the wholesale rates will provide sufficient revenues from Day 1 and sufficient margins to lower the payback to a more acceptable level* [and] *increases the IRR* [internal rate of return] *above the ... threshold*."[533] This modelling would in fact be based on a longer payback period compared to Orange's own entry into fixed and FMC bundles in Belgium (which Orange indicated […]) and result in a similar IRR to that of Orange (which […]), although only following a longer payback period.[534]

(659) The Notifying Party argues that "*the vast majority of the costs related to Telenet's expansion in the Targets' footprint would be variable costs*"[535] whereas Telenet has provided the Commission with submissions, together with financial modelling, pointing out that "e*ntry based on wholesale access requires significant upfront investments which do not vary materially depending on the number of subscribers or the exact territory covered by the entry (meaning that a more limited entry, for*

530 Horizontal Merger Guidelines, paragraph 68.
531 Horizontal Merger Guidelines, paragraphs 69-70.
532 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 6 (ID 1166).
533 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 20 (ID 1166).
534 Response to RFI 20, paragraph 97.
535 Article 6(1)(c) Response, paragraph 259.

example the expansion of Telenet's presence in Brussels, would entail very similar upfront costs but more limited returns). These costs include IT costs (such as IT set-up costs, IT baseline, network setup and video setup) … and additional high upfront marketing costs."[536]

(660) Furthermore, none of the respondents to the market investigation mentioned a possible entry by Telenet when asked about potential entrants in the Targets' footprint with fixed and convergent services following the Transaction.[537]

(661) Moreover, it is a fact that Telenet has not entered the Targets' footprint in the past with fixed or convergent services, despite Wholesale Access Regulation being in place for many years (e.g. Orange entered on this basis in 2016) and Telenet submits that "*consistent with the findings of previous modelling exercises, Telenet entry without remedy therefore remains commercially unattractive*."[538]

(662) In the context of the 2019 sale process that led to the – ultimately abandoned – sale of VOO to Providence Equity Partners, a management consultant report commissioned by Nethys to facilitate and promote the sale of VOO pointed out that [Details of internal documents describing the Targets' strategy].[539] The Notifying Party submits that two of the three arguments in that document *"are no longer valid or at least less valid than in 2019"* namely that *"there will be no risk of "retaliation" in Flanders as OBE is already active in fixed services in Flanders*" and that "*Telenet already has upside exposure to VOO mobile growth thanks to MVNO contract*"[540] However, the point for which the Notifying Party does not submit that it is no longer valid is the primary finding of that report, [Details of internal documents describing the Targets' strategy].[541]

(663) As such, the Commission considers that any entry by Telenet cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(664) An entry of Telenet in the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint would not be timely. According to the Horizontal Merger Guidelines, what constitutes an appropriate time period depends on the characteristics and dynamics of the market but entry is normally only considered timely if it occurs within two years.[542]

(665) In the Article 6(1)(c) Response, the Notifying Party points out that in a similar manner to Orange, Telenet "*could subscribe to the [regulated] reference offers of VOO/Brutélé or Proximus without having to conclude a commercial agreement*" and quickly enter the Targets' footprint on that basis.[543] While this is technically correct, Telenet has not opted to enter on the basis of regulated wholesale access in the past primarily for profitability reasons. [Details of internal documents describing the

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536 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 8 (ID 1166).

537 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

538 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 20 (ID 1166).

539 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).

540 Response to RFI 20, question 18(a).

541 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 ([Details of internal documents describing the Targets' strategy]) (Doc ID:1090-5517).

542 Horizontal Merger Guidelines, paragraph 74.

543 Article 6(1)(c) Response, paragraph 276.

Targets' strategy][544], and in any event there is currently uncertainty around the future of regulated wholesale access, as a review of the current regulatory framework is scheduled for 2023.

(666) Respondents to the market investigation, when asked to list any players that they expect to enter the hypothetical market for the retail supply of fixed-mobile multiple-play packages in the next 2-3 years—which would likely require an existing mobile player to start offering fixed services—none of the respondents to the market investigation mentioned a possible entry in the next 2-3 years by Telenet.[545] This is also consistent with what Telenet itself indicated to the Commission where it stated that "*any entry into the fixed markets in Wallonia (which is unlikely to happen) would not be timely, and … there are no plans in place to do so at present*."[546]

(667) As such, the Commission considers that any entry by Telenet cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(668) An entry of Telenet in the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint may however be sufficient. To be sufficient within the meaning of the Horizontal Merger Guidelines, any entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger and, for instance, small-scale entry may not be considered sufficient.[547]

(669) In this regard, it took Orange six years since it entered the market in 2016 to reach its current market position of c. […] multiple-play customers[548] and a market share of c. [10-20]% within the Targets' footprint. Telenet submitted, referring to fixed internet, although the same logic applies here, that any entry without a divestiture that included an initial customer base would "*not be sufficient, as it will not be possible to replicate a player with [5-10]% market share from one day to the next*."[549] This view was echoed by consumer association Test-Achats, which indicated that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer. The "success" of Orange on the bundled market is due to the fact that they had their mobile only clients to start from*."[550] Within the Targets' footprint, Orange has a mobile base of over […] customers, whereas the mobile customer base of Telenet in the Targets' footprint is significantly smaller and declining (c. […] in 2021, which is c. [20-30]% less than in 2020).[551]

(670) Nonetheless, in the Article 6(1)(c) Response, the Notifying Party submits that it is not necessary for entry to be considered sufficient to "*require the new entrant to replicate the market share lost as a result of the Transaction. What matters is to recreate an array of constraints similar to those that would have existed absent the*

544 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).
545 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.
546 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).
547 Horizontal Merger Guidelines. Paragraph 75.
548 Of which the majority are also multiple-play (c. […]), FMC bundle (c. […]) and/or AV service (c. […]) customers.
549 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).
550 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).
551 Form CO, Annex 17.

Transaction, which is therefore able to deter and defeat any attempt to exercise market power."[552]

(671) In that respect, the Commission considers that any entry by Telenet, if it were to take place, may be sufficient within the meaning of the Horizontal Merger Guidelines. However, since the Commission found that any entry by Telenet would not be timely and likely, the Commission cannot take into consideration entry by Telenet as a countervailing factor in assessing the non-coordinated effects that would arise as a result of the Transaction on the market for the retail supply of multiple-play bundles.

<u>With respect to Citymesh/Digi</u>:

(672) An entry of Digi in the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint is not likely. As set out in paragraph (404) above, the HMG provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.

(673) In the Article 6(1)(c) Response, the Notifying Party submits that Digi's entry on the fixed services market is expected to take place "*in the near future*".[553]

(674) The Commission considers that an entry of Citymesh/Digi is not likely. Citymesh/Digi acquired mobile spectrum in a 5G spectrum auction held by the BIPT on 20 June 2022.[554] The press release of Citymesh/Digi refers to a planned roll-out of a 4G/5G network in Belgium,[555] the deployment of which is, according to the Notifying Party, "*expected to take approximately five years but* [the Notifying Party also pointed out that] *Digi and Citymesh have announced that their goal is to launch their own commercial offers already in 2023 by accessing to a third party mobile network*."[556] All indications at present are that Digi, which will focus on B2C, i.e. consumers (while Citymesh will focus on B2B, i.e. business customers) will focus its efforts on entering the mobile market in Belgium, as indeed it is required to in order to meet the national coverage requirements imposed on it as part of the spectrum award.

(675) The Commission considers that any potential entrant that plans to enter a new market would usually have a business plan supporting and planning for such entry. While it is not excluded that Citymesh/Digi may enter fixed and convergent markets in the Targets' footprint, the Commission considers that any such entry by Citymesh/Digi cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(676) An entry of Digi in the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint would not be timely. As stated above, it appears that Citymesh/Digi plans to initially focus on entering the retail mobile market in Belgium. Any entry into fixed (i.e., internet and/or TV) or convergent markets would require either wholesale access to a fixed network or the deployment of its own fixed network. Any fixed network deployment in Belgium would likely take a number of years (e.g., by analogy, as the Notifying Party observes, the deployment of a mobile

552 Article 6(1)(c) Response, paragraphs 11 and 226.
553 Article 6(1)(c) Response, paragraphs 14, 15 and 17.
554 BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).
555 Citimesh's and Digi's press release of 21 June 2022 *Citimesh and Digi win spectrum in the auction and will start building a nationwide network* (ID 2060).
556 Form CO, paragraph 26.

network is expected to take five years) and therefore not allow for timely entry within the meaning of the Horizontal Merger Guidelines.

(677) There are also no indications at present that Citymesh/Digi would seek to enter fixed or convergent retail markets on the basis of wholesale access to a third party's fixed network. This may be because, as one market participant indicated in response to the Commission's market investigation "*wholesale prices are most probably to[o] high for a new player to enter the market successfully*."[557] Indeed, the […][558] The Notifying Party has however not substantiated its assumption.

(678) In Spain, where Digi entered the mobile market in 2008, it took over 10 years for Digi to enter fixed and convergent markets (based partially on wholesale access). In Belgium, similar to the situation faced by Digi in Spain in 2008, Proximus' fixed network is predominantly (i.e., 80-90%) a DSL network at present. While Proximus is rolling out a (faster) fibre network, this is expected to take several years: "*Proximus is currently at 10-20 % national fibre coverage and aims at 70% national fibre coverage by the end of 2028*."[559] Finally, Orange itself does not appear to expect Digi to quickly enter the Belgian market, with Xavier Pichon, the OBE's Chief Executive Office ("**CEO**") noting that "*between today's announcement [i.e. on 21 June 2022 that Citymesh/Digi acquired mobile spectrum] and the timetable (necessary for technical deployment ....), there will be <u>plenty of time</u> to analyse all this*" (emphasis added).[560]

(679) Digi confirmed that its plan is to develop fixed infrastructure in Belgium. In that context, Digi explained that it considers that access to infrastructure is an integral part of an operator's ability to develop a solid business plan and of its capacity to effectively compete on the long term with other operators on the market. Digi further indicates that access to ducts and micro-ducts at competitive tariffs and non-discriminatory conditions is very important for the provision of services at competitive and affordable prices.[561]

(680) Consumer association Test-Achats considers that "the potential entry by Digi with fixed or multiple-play markets would likely be too far in the future to address any potential concerns raised by the Transaction".[562]

(681) Further to the above, the Commission considers that any entry by Digi cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(682) An entry of Digi in the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint would not be sufficient. As mentioned above, it took Orange six years since it entered the market in 2016 to reach its current market

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557 M7's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 731).

558 Response to RFI 10, paragraph 23.

559 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022, paragraph 28 (ID 376).

560 See, for example, press article of 21 June 2022 on Le Vif *L'opérateur mobile DIGI débarque en Belgique et défie ses concurrents avec des « prix très abordable »*":« *Ce nouvel entrant aura-t-il un effet baissier sur les prix? Difficile de se prononcer pour le CEO. "Mais, entre l'annonce d'aujourd'hui et le calendrier (nécessaire au déploiement technique, NDLR), on aura largement le temps d'analyser tout cela", conclut Xavier Pichon* ») (ID 2062).

561 Non-confidential version of Digi's response to RF1 on 21 September 2022, questions 2, 5, 6 and 7 (ID 1355).

562 Non-confidential agreed minutes of Test-Achats' call with the Commission on 13 september 2022, paragraph 5 (ID 1357).

position in fixed and convergent markets and it already had a sizeable mobile customer base in 2016, which it could cross-sell to. Digi, on the other hand, is not active in any retail market in Belgium at present. While it will likely (and indeed is required to) enter the mobile market in the short term, Digi's mobile customer base will likely be small in the short to medium term. While some market participants that responded to the market investigation noted that Digi may seek to enter fixed and/or bundled markets,[563] a majority that expressed a view also considered that the upfront investment required for such entry (in particular the wholesale fixed network access costs) may be too high to allow for successful or sustainable entry. Consumer association Test-Achats noted that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer [and] for an operator starting from scratch the investments might be too high*."[564]

(683) As such, the Commission considers that any entry by Digi cannot be said to be timely, likely and sufficient within the meaning of the Horizontal Merger Guidelines.

7.4.4.2.8. The Notifying Party has not provided sufficient evidence to support the alleged efficiencies brought along by the Transaction

(684) The Horizontal Merger Guidelines provide that it is possible that efficiencies brought about by a merger counteract the effects on competition, and in particular the potential harm to consumers that it might otherwise have.[565] In this regard, any claimed efficiencies have to (i) benefit consumers; (ii) be merger-specific; and, (iii) be verifiable.[566]

(685) The Notifying Party submits that the merger will generate efficiencies. As set out in Section 7.4.2.1 above, the Notifying Party makes three efficiency claims. First, the Notifying Party explains that the Transaction will bring about an increase in investments into the fixed networks of the Targets in the Targets' footprint. Second, the Notifying Party considers that the Transaction will lead to the elimination of double marginalisation for both fixed and mobile networks of the Parties. Finally, the Notifying Party considers that the Transaction will increase the quality of the Parties' fixed-mobile bundles.

(686) For the following reasons, the Commission considers that the Notifying Party has not demonstrated to the required standard that the claimed efficiencies meet three cumulative criteria of (i) benefit to consumers; (ii) merger-specificity; and, (iii) verifiability, for the reasons explained below.

7.4.4.2.8.1. Increased investments in the fixed networks in the Targets' footprint

(687) In the Form CO, the Notifying Party claims that "the Transaction will generate significant efficiencies in the fixed markets because of the substantial investments in cable and fiber infrastructures that OBE is planning to conduct and that would not have taken place absent the Transaction"[567] and that "as a result of those investments,

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563 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

564 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).

565 Horizontal Merger Guidelines. Paragraph 76.

566 Horizontal Merger Guidelines, paragraph 78.

567 Form CO, paragraph 1906.

customers of fixed and FMC offers will have more choices, both in terms of speeds and number of operators available".[568]

(688) In the Article 6(1)(c) Response, the Notifying Party provides further details as to the reasons why it expects that the Transaction will lead to significantly more extensive investments in network upgrades (Data Over Cable Service Interface Specification ("**DOCSIS**") 3.1 and Fibre-To-The-Home ("**FTTH**") ("**Fixed Network Efficiency**") than VOO had planned ([…] greater CAPEX for network upgrades through 2030).

(689) First, with regard to verifiability, the Notifying Party submits that Orange's investment plan is significantly higher than the investment plan of VOO absent the Transaction. In that respect, Orange claims that its investment plan is approximately […] higher than VOO's investment plan when looking at all fixed network CAPEX (EUR […] vs. EUR […]), and […] higher when only looking at fixed network CAPEX for cable upgrade and fibre roll-out (EUR […] vs EUR […]).

(690) Second, with regard to merger-specificity, the Notifying Party considers that absent the Transaction, Orange would not have deployed its own fixed network and VOO would not have been able to commit the same amount of CAPEX as Orange will do post-Transaction.

(691) Finally, the Notifying Party considers that these additional investments will benefit consumers in the form of higher internet speed availability and greater choice (as it will have a network in areas currently only served by one player, and will operate an open fibre network accessible by third party access-seekers).

(692) Since the Notifying Party has proposed remedies to resolve the Commission's competition concerns in the market for the retail supply of multiple-play bundles, the Commission considers that it is not necessary to assess the Fixed Network Efficiency put forward by the Notifying Party against the requirements of the Horizontal Merger Guidelines as the proposed remedy resolves, in any event, the Commission's competition concerns in the market for the retail supply of multiple-play bundles in the Targets' footprint.

7.4.4.2.8.2. Elimination of double marginalisation

(693) In the Article 6(1)(c) Response, the Notifying Party brings forward two possible efficiencies relating to the elimination of double marginalisation ("**EDM**") on (i) the provision of fixed and multiple-play bundles by OBE ("**Fixed EDM Efficiency**"); and, (ii) the provision of mobile and multiple-play bundles by VOO ("**Mobile EDM Efficiency**") as a result of the integration of a MNO and a FNO.

(694) Accordingly, the Commission will assess both EDM Efficiencies in turn in the following sections.

7.4.4.2.8.2.1. Fixed EDM Efficiency

(695) The Notifying Party explains that the Transaction will result in the partial integration of the upstream network service of the Targets and the downstream retail service of OBE. In particular, the Notifying Party submits that the marginal cost to OBE of wholesale fixed access will be eliminated post-Transaction as OBE will recoup 75% of the margins made by the Targets on providing wholesale access as OBE will own 75% minus one share in the Targets. In this regard, the Notifying Party considers that

[568] Form CO, paragraph 1906.

this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[569]

(696) In the following paragraphs, the Commission will show that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(697) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[570] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(698) The Commission considers that the wholesale access fee that OBE pays and will continue to pay to the Targets post-Transaction is entirely a variable cost. These costs are charged by the Targets per active customer. As clarified by OBE, the Commission considers that post-Transaction, OBE will be able to recoup approximately 75% of its wholesale access costs to the Targets' fixed network.

(699) Hence, the Commission considers that the partial elimination of OBE's variable costs related to the wholesale access fee that OBE pays, and will continue to pay, to the Targets, to obtain wholesale access to the Targets' fixed network will likely partly be passed on to consumers in terms of lower prices or higher quality of service.

(700) However, the Commission considers that the benefit to consumers from the Fixed EDM Efficiency would be limited even if the reduction in OBE's variable cost were entirely passed on to consumers. This is because (i) the Fixed EDM Efficiency, which will be limited to consumers in the Targets' footprint, would be diluted across all consumers in Belgium, and (ii) the wholesale access fee that OBE pays is limited relative to average prices.

(701) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by the Targets for the wholesale supply of broadband access to Orange was EUR […] per month in 2021.[571] Post-Transaction, OBE would recoup around [70-80]% of this EBITDA margin, so EUR […]. However, this EBIDTA margin would be recouped only on the […] OBE consumers in the Targets' footprint, but then diluted across the […] OBE consumers in Belgium. Therefore, on average the EBITDA margin recouped would represent EUR […] per OBE consumer.[572] The average revenue per subscriber made by OBE for the retail supply of multiple-play bundles was EUR […] per month in 2021. As such, the maximum EBIDTA margin that OBE could pass on to consumers would represent approximately [0-5]% of the average price for the retail supply of multiple-play bundles (i.e. assuming OBE would pass the entirety of the Fixed EDM Efficiency on to consumers).

569 Horizontal Merger Guidelines, paragraph 78.

570 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

571 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph.

572 […].

(702) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[573] OBE has a lesser incentive to pass on the Fixed EDM efficiency to consumers, because it will also take into account the effect on the Targets of lowering OBE's prices (or raising quality) downstream in the retail supply of multiple-play bundles. By lowering OBE's prices (or raising quality) downstream as a result of the Fixed EDM efficiency, OBE will entice customers of the Targets (in addition to of third parties) to switch to OBE. However, the merged entity gains significantly less from a customer switching from the Targets to OBE, compared to a customer switching from a third party rival to OBE, because the merged entity would lose the margin made by the Targets. Therefore, because OBE and the Targets are competitors downstream in the retail supply of multiple-play bundles (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Fixed EDM Efficiency to consumers.

(703) On the basis of the analysis above, the Commission considers that while it is possible that the Fixed EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Fixed EDM Efficiency will benefit consumers.

(704) **Merger-specificity.** The Commission considers that the savings related to OBE's recoupment of part of the wholesale access fee it pays and will continue to pay to the Targets post-Transaction are unlikely to be achieved by other means than the Transaction.

(705) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for OBE but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[574] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[575]

(706) In the Article 6(1)(c) Response, the Notifying Party generically asserts that: "OBE will … have the possibility to return these margins to customers through additional investment, new services or price reductions to compete more aggressively for FMC

573 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, the Targets provide an input to OBE but also compete with OBE downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

574 Horizontal Merger Guidelines, paragraph 87.

575 Horizontal Merger Guidelines, paragraph 86.

customers."[576] The fact that the Notifying Party expressly refers to various "possibilities" suggests that the Fixed EDM Efficiency would only be hypothetically verifiable. Accordingly, the Commission considers that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable.

(707) **Conclusion on the Fixed EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Fixed EDM Efficiency in its assessment of the Transaction.

7.4.4.2.8.2.2. Mobile EDM Efficiency

(708) The Notifying Party explains that as a result of the Transaction, VOO's mobile traffic will be shifted to be hosted on OBE's network. The Notifying Party considers that this shift of mobile data traffic will result in a reduction in double marginalisation on mobile services proposed by VOO as OBE will earn the margin on wholesale sales to VOO. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[577]

(709) In the following paragraphs, the Commission will show that the Mobile EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(710) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[578] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(711) The Commission considers that the wholesale access fee that VOO will pay to OBE post-Transaction is entirely a variable cost. These costs are charged by OBE per active SIM card. The Commission considers that the partial internalisation of VOO's variable costs related to the wholesale access fee that VOO will pay to OBE to obtain wholesale access to OBE's mobile network may partly be passed on to consumers in terms of lower prices or higher quality of service.

(712) However, the Commission considers that the benefit to consumers from the Mobile EDM Efficiency would be limited even if the reduction in VOO's variable cost were entirely passed on to consumers. This is because the wholesale access fee that VOO pays is limited relative to average prices.

(713) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by OBE for the wholesale supply of mobile access to

576 Article 6(1)(c) Response, paragraph 377.
577 Horizontal Merger Guidelines, paragraph 78.
578 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

third party MNVOs was EUR […] per month in 2021.[579] The average revenue per subscriber made by VOO for the retail supply of multiple-play bundles was EUR […] per month in 2021. As such, the maximum EBIDTA margin that VOO could pass on to consumers would represent approximately [5-10]% of the average price for the retail supply of multiple-play bundles (i.e. assuming VOO would pass the entirety of the Fixed EDM Efficiency on to consumers).

(714) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[580] the merged entity has a lesser incentive to pass on the Mobile EDM efficiency to consumers, because it will also take into account the effect on OBE of lowering VOO's prices (or raising quality) downstream in the retail supply of multiple-play bundles. By lowering VOO's prices (or raising quality) downstream as a result of the Mobile EDM efficiency, VOO will entice customers of OBE (in addition to of third parties) to switch to VOO. However, the merged entity gains significantly less from a customer switching from OBE to VOO, compared to a customer switching from a third party rival to VOO, because the merged entity would lose the margin made by OBE. Therefore, because OBE and VOO are competitors downstream in the retail supply of multiple-play bundles (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Mobile EDM Efficiency to consumers.

(715) On the basis of the analysis above, the Commission considers that while it is possible that the Mobile EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Mobile EDM Efficiency will benefit consumers.

(716) **Merger-specificity.** The Commission considers that the internalisation of VOO's wholesale access fee paid to OBE to access OBE's mobile network post-Transaction are unlikely to be achieved by other means than the Transaction.

(717) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for VOO but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.*"[581] The Horizontal Merger Guidelines further state that: "*When the*

579 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph. The Commission assumes that the EBITDA margin made by OBE from MNVOs would be similar to the EBIDTA margin made from VOO.

580 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, OBE provides an input to the Targets but also competes with the Targets downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

581 Horizontal Merger Guidelines, paragraph 87.

necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one."[582]

(718) In the Article 6(1)(c) Response, the Notifying Parties generically assert that: "To the extent the combined firm/VOO internalises this margin in setting its retail prices, then there will be a reduction in double marginalisation, creating a possibility to have an aggressive FMC commercial policy."[583] The wording of the quoted sentence suggests that the Mobile EDM Efficiency is purely hypothetical and dependent on the extent to which the combined firm/VOO internalises the margin. Accordingly, the Commission considers that the Notifying Party has failed to show that the Mobile EDM Efficiency would be verifiable.

(719) **Conclusion on the Mobile EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Mobile EDM Efficiency put forward by the Notifying Party is likely merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Mobile EDM Efficiency in its assessment of the Transaction.

7.4.4.2.8.3. Increase in quality of the Parties' FMC bundles

(720) The Notifying Party considers that, in addition to the efficiencies discussed above, the Transaction will allow the combined entity to offer higher quality of fixed and mobile bundles in the Targets' footprint than either Party could offer absent the Transaction. The Notifying Party explains that this type of efficiency was accepted in previous cases by the Commission in case M.8864 – *Vodafone/Certain Liberty Global Assets*.[584]

(721) First, the Article 6(1)(c) Response fails to provide an assessment of the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines. Rather, the Article 6(1)(c) Response focuses on the comparison between the present Transaction to the transaction underlying case M.8864 – *Vodafone/Certain Liberty Global Assets*.

(722) Second, the only listed efficiencies include (i) better and more efficient technical incident resolution; (ii) improvement in the provisioning process of FMC offers; and, (iii) creating the possibility of do-it-yourself installation of FMC products. While the Commission may deduce from the limited amount of information provided in this regard that customers may benefit from some non-price related efficiencies, the Notifying Party fails to (i) provide any evidence to quantify or qualify the extent of such efficiencies; and, (ii) explain why the Transaction is the only way to achieve these efficiencies.

(723) On the basis of the above assessment, the Commission considers that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles put forward by the Notifying Party may satisfy one of the three cumulative criteria required under the Horizontal Merger Guidelines of benefit to consumers. The Commission considers that the Notifying Party has failed to show that the

582 Horizontal Merger Guidelines, paragraph 86.
583 Article 6(1)(c) Response, paragraph 386.
584 Commission decision of 18 July 2019 in case case M.8864 – *Vodafone/Certain Liberty Global Assets*.

efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles is merger-specific or that it would be verifiable.

7.4.4.2.8.4. Conclusion on the efficiencies

(724) On the basis of the above, the Commission considers that none of the alleged efficiencies put forward by the Parties meets the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines.

7.4.4.2.9. Conclusion

(725) In light of the above, the Commission has come to the conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for multiple-play bundles within the Targets' footprint, including increased prices and/or reduced quality for end customers.

7.4.5. Retail supply of FMC bundles

7.4.5.1. The Notifying Party's view

(726) The Notifying Party considers that the Transaction does not raise any concern on the hypothetical retail market for the supply of multiple-play bundles (including FMC bundles) even if the market would be defined based on the Target's footprint for the following reasons.

(727) First, the Notifying Party submits that the new entity will continue to compete against several strong players at national level post-Transaction, in particular Proximus and Telenet. In that respect, the Notifying Party submits that the gap between Proximus and the new entity will remain significant at [20-30] points in value and [20-30] points in volume at national level.

(728) When considering the competitive landscape at the level of the Target's footprint, the Notifying Party submits that the market will also remain competitive post-Transaction essentially based on Proximus' "*uncontested*" market leadership and the expectation that the Targets "*will lose market shares and value to the benefit of Proximus if they do not invest in fixed networks, which they are not in a position to make without the Transaction*".[585]

(729) Second, the Notifying Party adds that Telenet already provides multiple-play bundles (including FMC bundles) based on its own fixed network in the botte du Hainaut as well as fLTE internet + TV offers (which can be combined with a mobile service) with Tadaam/BASE across Belgium. The Notifying Party furthermore considers that (i) "*Telenet will very likely further expand*" in the South of Belgium as a result of the present Transaction and, (ii) that new MNOs will also emerge as a result of the 5G auction that took place on 20 June 2022 such as Citymesh and Digi which is expected to provide its services to the B-to-C market and, given the trend towards convergence and the existence of regulated wholesale access, is considered by the Notifying Party to "*likely position themselves in the multiple-play sector*"[586] in the future. On that basis, the Notifying Party submits that the "*new entity will thus face fierce competition from both established incumbent players and aggressive new*

[585] Form CO, paragraph 1031.
[586] Form CO, paragraph 1035.

entrants, which precludes any risk that the Transaction would significantly impede effective competition".[587]

(730) Third, the Notifying Party submits that the Transaction will not reduce infrastructure competition and, on the contrary, will actually increase the number of convergent network operators from two to three at national level and from one to two within the Targets' footprints. In that respect, the Notifying Party submits that the merged entity will have "*stronger ability and incentives than OBE individually to implement an aggressive commercial policy enabling to transform existing mobile customers into FMC customers and/or poach customers from other operators*".[588]

(731) Fourth, the Notifying Party considers that OBE and the Targets are not close competitors as they have very different profiles and core activities: OBE's core activity is mobile telecommunications services whereas the Targets' core activities are fixed services. In addition, the Notifying Party submits that, in any event, customers are able to easily switch to alternative fixed and mobile services providers thanks to the "Easy Switch"[589] procedure and the mobile number portability.[590]

(732) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies. In particular, the Notifying Party submits that the Transaction will lead to increased investments in fixed infrastructure in the Targets' footprint and to the elimination of double marginalisation for both fixed and mobile networks of the Parties. The Notifying Party further submits that the Transaction will increase the quality of the Parties' FMC bundles.[591]

(733) In the Article 6(1)(c) Response, the Notifying Party restates many of the arguments from the Form CO, including that:

– The Parties are not each other's closest competitors, on the basis that Proximus is the closest competitor of each of them,

– The Transaction will not eliminate an important competitive force because Orange is not the cheapest operator and does not stand out in terms of innovation,

– There will be entry in the Targets' footprint by Telenet and Digi, which will compensate for any loss of competition; and

(734) The Transaction will generate substantial efficiencies in the form of increased network investment compared to what the Targets' would have invested alone, and on the basis that there will be an elimination of double marginalisation for the provision of both fixed and mobile services.

7.4.5.2. The Commission's assessment

(735) The Commission has come to the conclusion the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the hypothetical retail market segment for FMC bundles within the Targets' footprint. This is in particular because, as set out in further detail below, (i) the Parties' combined market share is high and the increment as a result of

587 Form CO, paragraph 1036.
588 Form CO, paragraph 1042.
589 Form CO, paragraph 1061.
590 Form CO, paragraph 1062.
591 Article 6(1)(c) Response, paragraph 331-396.

the Transaction is significant, (ii) customers have limited possibilities of switching supplier post-Transaction; (iii) the Parties are close competitors, (iv) the merger would eliminate an important competitive force and (v) any entry is would not be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

7.4.5.2.1. The Parties' combined market share is high and the increment is significant

(736) As set out in the Horizontal Merger Guidelines, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors, and they are normally important factors in the assessment. For example, changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, by indicating whether firms have been gaining or losing market shares.[592] In addition, a merger involving a firm whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.[593]

(737) For the following reasons the Commission considers that the Parties' combined market shares are high, and these high combined market shares underestimate the Parties' actual market power on the market.

(738) First, the combined market shares of the Parties are high with a significant increment. Based on share data provided by the Parties, as set out in section 4.2 above, in the hypothetical market segment for the retail provision of FMC bundles within the Targets' footprint, the merged entity would have a share of c. [30-40]%, by value and [40-50]% by volume, with an increment of c. [10-20]% by value and c. [10-20]% by volume. The Commission considers that the merged entity's combined share would be substantial, the second highest in the market, after that of Proximus.

(739) Second, the combined market shares of the Parties underestimate the market power that the merged entity will be able to exercise on the market. In line with its past decisions, the Commission considers that market shares based on gross adds, as opposed to volume-based market shares, provide a reasonable measure that captures the current competitive strength of market participants.[594] Gross adds reflect the respective number of new subscribers acquired in a year by each operator (irrespective of where these customers came from) without deduction of the subscribers who leave. Market shares based on gross adds are generally used in the telecommunications industry and allow for a dynamic measure of market power as they focus on those customers that market participants actively seek to attract. On the basis of the data provided by the Notifying Party, the Commission has been able to calculate market shares of the Parties on the basis of gross adds.

(740) In the following table, the Commission presents the gross-adds market shares of the Parties in the market for the retail supply of FMC bundles in the Targets' footprint, calculated on the basis of the data provided by the Parties.

592 Horizontal Merger Guidelines, paragraphs 14, 15 and 27.
593 Horizontal Merger Guidelines, paragraph 17.
594 Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*, paragraph 397.

Table 43: Gross adds shares in the markets for the retail supply of FMC bundles in the Targets' footprints[595]

	Gross adds share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[20-30]	[20-30]	+ [10-20]	+ [10-20]	+ [10-20]
Targets	[40-50]	[40-50]	[40-50]	+ [10-20]	+ [10-20]	+ [5-10]
Combined	[70-80]	[60-70]	[60-70]	+ [30-40]	+ [20-30]	+ [20-30]

Source: Commission calculations based on Parties' data submitted in response to RFI 20, questions 10 and 11.

(741) On the basis of Table 15 above, the Commission notes that pre-Transaction, OBE, the Targets and Proximus (since it is the only other significant player in the market) each account for about [30-40%] of the share of gross adds. Post-Transaction the merged entity would become the market leader (ahead of Proximus) with a gross add share of approximately [60-70]%.

(742) Further, the Commission notes that the Parties' gross add shares, even if they have been slightly decreasing over the past three years, far exceed the Parties' market share of revenue/subscribers, which implies that the Parties' ability to attract customers, and thus their role on the market, far exceeds its value and volume market shares.

(743) More concretely, looking at the gross adds market shares, it appears that if all customers decided to switch, customers would approximately evenly split between each of the Parties and Proximus, and each market participant would approximately have a [30-40]% market share. The comparison between the gross adds market shares and the market shares of the Parties shows that the merged entity is thus able to attract a disproportionate amount of customers in comparison to its market share. Further, because Proximus accounts for the remainder of the gross adds market shares, these results imply the converse for Proximus, i.e. Proximus' market power is significantly lower than their current market shares would suggest.

(744) As such, the Transaction would lead to the consolidation of two players whose market power far exceeds their current market shares.

(745) Third, the Commission finds that the pre-merger margins of the Parties are high, which is consistent with high market power.[596]

595 The residual gross adds shares essentially correspond to Proximus' gross adds, since Proximus is the only other significant player in the market.

596 Horizontal Merger Guidelines, paragraph 27-28.

Table 44: Margins of the Parties in the market for retail supply of FMC bundles in the Targets' footprints[597]

	Contribution margin (%)			EBITDA margin (%)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE[598]	[…]	[…]	[…]	[…]	[…]	[…]
Targets	[…]	[…]	[…]	[…]	[…]	[…]

Source: Response to RFI 22, Annex 1

(746) On the basis of Table 16 above, the Commission notes that both Parties' pre-merger margins are high in comparison to the average EBIDTA margin in the telecommunications sector in Europe in 2021, 26%.[599]

(747) On the basis of the above, the Commission concludes, for the purpose of this decision, that the combined market shares of the Parties are significant and that the Transaction gives rise to a significant market share increment. In addition to the high market shares, the Commission further finds, on the basis of the gross adds shares, net adds and margin data presented above, that the market power that the merged entity will be able to exercise on the market post-transaction far exceeds its current market share.

7.4.5.2.2. Customers have limited possibilities of switching supplier post-Transaction

(748) The Horizontal Merger Guidelines provide, in paragraph 31, that where customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers, such customers are particularly vulnerable to price increases.

(749) In the following paragraphs, the Commission will first show that there are limited alternative operators in the Targets' footprint for the retail supply of FMC bundles and, second, that the remaining alternative would be more expensive and of lower download speed.

(750) First, contrary to the Notifying Party's argument as set out in section 7.4.5.1 above that several strong competitors will remain, the Commission notes that the Transaction will reduce the number of retail providers of FMC bundles in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active in the Targets' footprint, none of them provide retail FMC bundles. The entirety of the market will be in the hands of two FNOs. This was confirmed by the market investigation, with one respondent noting that the transaction "*will lead to less choose [sic – choice] for consumers living in that footprint*"[600] and another observing that "*The Transaction will combine the two players who are particularly close competitors … leaving the incumbent*

597 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

598 The Notifying Party submits that […]. Accordingly, the Commission considers that the margins of OBE in the market for the retail supply of fixed internet access are representative of the margin in the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles.

599 See data from New York University's Stern School of Business (ID 2066). Global figures are similar; see data from CSIMarket.com (ID 2059).

600 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 76 [Test Achats].

Proximus as the only alternative to the merged entity."[601] Moreover, and contrary to the Notifying Party's argument as set out in section 7.4.5.1 above, Telenet does not offer FMC bundles in the Targets' footprint to any meaningful extent, and indeed the Parties' own market share data indicates that Telenet has a share of [0-5]% in the market for FMC bundles.[602]

(751) Second, While Proximus is the market leader with a share of [60-70]% by value and [60-70]% by volume, as the former incumbent operator in Belgium, Proximus is positioned "*at the high end of the market*"[603] in terms of prices. Proximus also largely offers lower maximum internet download speeds (based on its predominantly xDSL network) compared to the Parties, which offer higher internet download speeds (based on VOO's and Brutélé's coax/cable network).[604] As illustrated by the graph provided by Telenet in the slide deck of a meeting that took place between Telenet and the case team on 5 April 2022, Proximus' offers are consistently of lower speed and higher price than those of OBE and the Targets, with the exception of Scarlet which provides significantly lower speeds (50 Mbps) at moderately lower prices.[605] As such, the choice of end-customers is not only limited, it is also likely to be more expensive and slower than the one offered by the Targets.

(752) Finally, the buyer-side of the retail market for FMC bundles consists of individual customers who purchase FMC bundles through a multitude of small transactions. Accordingly, such customers have very little buyer power.[606]

(753) On the basis of the above, the Commission concludes, for the purpose of this decision, that the Transaction will materially limit the switching ability of customers.

7.4.5.2.3. The Parties are close competitors

(754) As set out in paragraph 28 of the Horizontal Merger Guidelines, a transaction is more likely to result in competition concerns if the merging firms are "*close competitors*" since, for instance, their incentive to raise prices pre-transaction is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. The Commission considers, contrary to the Notifying Party's argument as set out in Section 7.4.5.1 above, that the Parties' are close competitors, based on a number of elements.[607]

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601 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 62.1 (ID 646).

602 Form CO, Annex 17.

603 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165). Proximus also operates a low-cost Brand, Scarlet, whose offerings are less expensive, but at the same time more basic in terms of quality (e.g. in terms of internet speeds and download limits) and therefore not comparable to the offers of Orange or VOO. Indeed, one market participant observed that "*Scarlet offers products which are not comparable to those of OBE and VOO in terms of speed*", Telenet initial briefing paper to EC – 28 February 2022, page 10].

604 Proximus also higher speed (e.g. 1 Gbps) fixed internet packages based on fibre technology, but these offers, which are also c. 40% more expensive than its 100 MBPS offer, are not available nationally in Belgium as Proximus' fibre network roll-out is ongoing (and will remain ongoing for several years).

605 See slide 11 of Telenet's presentation to the Commission on 5 April 2022 (ID 906). Furthermore, as all other FVNOs active in the Targets' footprint operate on the basis of wholesale access to Proximus' network, they are unable to provide higher speeds than those of Proximus.

606 See Horizontal Merger Guidelines, paragraph 64.

607 The Notifying Party also submits that Proximus is both the Targets' and Orange's closest competitor respectively (See e.g. Form CO, paragraph 42). The Commission does not necessarily agree with the Notifying Party's view in this regard, but notes that in any event the Horizontal Merger Guidelines do not require that the merging parties be ranked by reference to how closely they compete with one

(755) First, in light of the market shares presented above in Section 7.3.5.2.1, the Commission considers that, in such highly concentrated market, the Parties compete closely with each other, as well as with Proximus. This is corroborated by the Parties' own internal documents, in particular those of the Targets and Sellers, which refer to Orange as a direct and important competitor:

– For instance, Nethys' legal counsel explains that [Details of internal documents describing the Targets' strategy][608] when trying to fend off Orange's legal challenge of the sale of VOO to Providence, and that [Details of internal documents describing the Targets' strategy].[609]

– The importance of their market position was further confirmed by the VOO management in 2021 when reporting to the VOO works council about the competition on the market [Details of internal documents describing the Targets' strategy].[610]

(756) Second, the Parties' respective FMC bundle offerings are closely substitutable. As Orange is an access seeker on the Target's fixed network, the fixed internet component of Orange's FMC bundles is most closely comparable to that of the Targets' in terms of speed and quality.[611] Indeed, Orange's and the Targets' respective fixed internet offerings provide comparable maximum download speeds (150 MBPS and 125 MBPS respectively) and are similarly priced. By contrast, the closest equivalent offering of Proximus is more expensive and offers a lower maximum download speed (100 MBPS), in view of the fact that it is based on an xDLS network which, as a rule, allows for lower maximum internet speeds than the coax/cable network used by Orange and the Targets.[612] In the Article 6(1)(c) Response, the Notifying Party submits that the Commission ignores the fact that Proximus is also rolling out a fibre network, and already covers "approximately 20% of households in its entire footprint", while allows for speeds of either 350 Mbps or 1 Gbps. However, this means that the vast majority of customers in the Targets' footprint do not currently have the option of switching to a fibre connection from Proximus. As the BIPT pointed out Proximus' fibre roll-out is "currently limited to a fraction of the population (17% of homes passed by June 2022, Proximus targeting to reach 70% of the population only by 2028)" and moreover, when available, is, not being adopted in a fast way."[613]

(757) In addition, the majority of respondents that expressed a view listed Orange as the closest or second closest competitor of the Targets (and likewise listed the Targets as the closest or second closest competitor of Orange) across the full range of FMC

another compared to how closely they compete with third parties. Rather it is sufficient to assess whether the merging parties compete closely with each other.

608 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-62545).

609 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1090-22575).

610 Free translation of [Details of internal documents describing the Targets' strategy] (Internal Document ID 1089-35214).

611 Fixed internet is a component in materially all multiple-play (including fixed-only and FMC) bundles offered in Belgium.

612 Form CO, Annex 13 – Benchmark of offers, Table 5.

613 BIPT's submission of 30 August 2022 entitled "Answer CE about VOO-Orange", page 13 (ID 1122).

bundles, namely fixed-mobile dual play, fixed-mobile triple play and quadruple play bundles.[614]

(758) Third, the Horizontal Merger Guidelines state that diversion ratios are one of the methods that can be used to assess the closeness of competition between the merging parties.[615] The Commission has applied that type of analysis in previous merger cases in the telecommunications sector.[616] Table 17 presents the diversion ratios from each of the Parties to one another both in terms of customers lost and customers won within the Target's footprint for each year between 2019 and 2021 and the first half of 2022.

Table 45: Diversion ratios of the Parties in the markets for the retail supply of FMC bundles in the Targets' footprints[617]

Operator	Customers won/lost	Diversion ratio (%)			
		2019	2020	2022	2022 H1
OBE	Customers won from the Targets	[50-60]	[60-70]	[50-60]	[50-60]
	Customers lost to the Targets	[40-50]	[40-50]	[40-50]	[30-40]
Targets	Customers won from OBE	[10-20]	[20-30]	[20-30]	[20-30]
	Customers lost to OBE	[30-40]	[20-30]	[20-30]	[20-30]

Source: Response to RFI 20, questions 10 and 11.

(759) A review of switching data provided by the Parties supports the conclusion that the Parties are close competitors. Both OBE and the Targets win and lose a significant proportion of their customers from and to one another, in certain cases even more than [50-60]%. The analysis also indicates that there is a general slight downward trend over time in the diversion ratios based on customers lost between the Parties. Whilst this would be consistent with the Parties becoming slightly less close competitors over time, the level of switching between the Parties indicates that the Parties will remain close competitors for the foreseeable future, even if this historical trend continues.

(760) Fourth, in line with its precedents, the Commission also expresses the diversion ratios in Table 17 as so-called "implied market shares".[618] Implied market shares indicate how large the Parties' market shares would have to be for them to give rise to the observed diversion ratios.[619] When the Parties' implied market shares exceed

614 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 57.1, 57.2 and 57.3.

615 Horizontal Merger Guidelines, paragraph 29.

616 For example, Commission decision of 18 July 2019 in case M.8864 – *Vodafone / Certain Liberty Global Assets*; Commission decision of 1 September 2016 in Case M.7758 – *Hutchison 3G Italy / WIND / JV*; Commission decision of 11 May 2016 in Case *M.7612 – Hutchinson 3G UK/Telefónica UK*.

617 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

618 See Valletti and Zenger (2020). See also Commission decision of 21 December 2020 in case M.9730 – *FCA / PSA*.

619 Specifically, if diversion occurred in proportion to market shares, the diversion ratio from firm 1 to firm 2 would equal $d_{12} = s_2/(1 - s_1)$, where s_1 and s_2 denote the market shares of firms 1 and 2, respectively. Similarly, $d_{21} = s_1/(1 - s_2)$. Solving this pair of equations for s_1 and s_2 then gives the Parties' implied

their actual market shares, then the Parties compete more closely with each other than their market shares suggest. Table 18 below shows the results of the Commission's diversion analysis expressed in terms of implied market shares.

Table 46: Parties' implied market shares in the FMC bundles market in the Targets' footprints[620]

	Implied market share (%)			Difference to market share data presented in section 7.1 (percentage points)		
Operator	**2019**	**2020**	**2021**	**2019**	**2020**	**2021**
OBE	[20-30]	[10-20]	[10-20]	+ [10-20]	+ [5-10]	+ [5-10]
Targets	[30-40]	[30-40]	[30-40]	+ [0-5]	+ [0-5]	+ [0-5]
Combined	[60-70]	[50-60]	[50-60]	+ [10-20]	+ [10-20]	+ [5-10]

Source: Commission calculations based on the Parties' data submitted in response to RFI 20, questions 10 and 11.

(761) Table 18 demonstrates that the Parties compete significantly more closely with each other than their market shares suggest (i.e. because their implied market shares exceed their actual market shares). Therefore, market shares underestimate the competitive constraint that the Parties place on each other. Further, because Proximus is the only other significant player in the market (and therefore would account for the remainder of the (implied) market share outside of the Parties combined (implied) market share), the results above also demonstrate that Proximus competes significantly less closely with each of the Parties than its market shares would suggest. In other words, market shares overestimate the competitive constraint that Proximus places on each of the Parties.

7.4.5.2.4. The merger would eliminate an important competitive force

(762) The Horizontal Merger Guidelines provide that a merger can lead to significant non-coordinated effects if it eliminates an important competitive force, which can be the case where an undertaking may have more of an influence on the competitive process than its market shares would suggest, such as a recent entrant that exerts—or is expected to exert—significant competitive pressure on other firms in the market. A merger involving such a firm may have a significant negative impact on competition when the market is already concentrated.[621]

(763) As set out above, the Transaction is a three-to-two merger within the Targets' footprint. The market is therefore already concentrated, with a pre-merger HHI of over 4,500.[622] In addition, there are a number of different elements which all point to Orange being an important competitive force on market.

(764) First, as outlined in Section 7.4.2.2.4 above, Orange is the most recent entrant in the Belgian fixed internet, TV and multiple-play markets. Since entering six years ago, in 2016, Orange has positioned itself as a "*challenger*"[623], a point confirmed by

market shares as a function of both diversion ratios, $s_1 = [d_{21}(1 - d_{12})]/(1 - d_{12}d_{21})$ and $s_2 = [d_{12}(1 - d_{21})]/(1 - d_{12}d_{21})$.

620 In this regard, the Notifying Party's data is based on Belgium-wide margins. However, the Notifying Party has confirmed that this is an accurate representation of the margins of the Notifying Party in each cable footprint where it operates. As such, the Commission relies on these national margin data to assess the margins of the Notifying Party in the Targets' footprint.

621 Horizontal Merger Guidelines, paragraph 38.

622 The post-Transaction HHI would be over 5 000 with a delta of over 600.

623 See Orange's press release of 20 July 2018 *Orange Belgium's confirms its commercial success as a Bold Challenger* (ID 2063).

market participants,[624] the BIPT,[625] and, as observed by consumer association Test-Achats[626] "*Orange positions itself cheaper than Proximus, Telenet and VOO. The exact price difference mainly depends on the mobile data that's included in the Multiple-play packages.*"[627] Indeed, VOO in its internal documents acknowledged [Details of internal documents describing the Targets' strategy].[628] In the Article 6(1)(c) Response, the Notifying Party submits that Orange is "*the most expensive operator for approximately a third of FMC profiles with basic internet and half of FMC profiles with boosted internet speeds*",[629] for example by taking into account FMC packs with more than one sim card. However, the Notifying Party concedes that the offers taken as part of its price comparison analysis were "*not weighted according to potential representativeness of certain offers.*"[630] In any case, the BIPT observed that "*although it brings some nuances, the comparison performed for the packs including 2 SIM cards does not fundamentally change the conclusions observed with the 1-SIM analysis*", notably because even taking into account such a broader set of offers, "*overall, Orange is the cheapest or the second cheapest choice for most of the cases [and]…in all cases where Orange does not provide the cheapest offer, it is VOO that takes (or sometimes share) the first place*."[631]

(765) Second, market participants also view Orange as one of the fastest growing players on the market. One competitor indicated that in "*the past years [Orange] gained significant market share*"[632]. The fact that Orange is the fastest-growing player on the market is corroborated by the market share data provided by the Parties, which show year-on-year market share increases for Orange[633], as well as by the win/loss data provided by the Parties.[634]

(766) Third, Orange is seen as an innovative player in the market in Belgium, with one competitor observing that "OBE has played an innovative and disruptive role since entering the market in 2016 … for example, OBE was the first operator to launch a new bundle offering with the introduction of a bundle that includes only fixed and

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624 See, e.g. Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 58.1 to 58.6 [TELESAT].

625 BIPT's press release of 18 July 2022 *The BIPT notices the positive impact of market regulation*, published on 18 July 2022, page 2: "*Since its entry into the market, Orange has positioned itself as a "challenger" operator offering the cheapest offer on the market for most consumption profiles*" (ID 2056).

626 See, e.g. Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 58.1 to 58.6 (ID 602).

627 See Form CO, Annex 13 – Benchmark of offers.

628 VOO Art. 4.5 document, 7._Presentation_on_the_overview_of_the_Commercial_Performance.pdf, page 10.

629 Article 6(1)(c) Response, paragraph 186.

630 Response to RFI 20, question 14(b).

631 BIPT's submission of 30 August 2022, "Answer CE about VOO-Orange", page 9 (ID 1122).

632 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 705). The Commission notes that this and certain other responses to the market investigation questionnaire in respect of the market for fixed internet access services are also relevant to an assessment of the Transaction and Orange's position in the hypothetical market for multiple-play services. This is the case for several reasons. First, multiple-play services almost invariably include a fixed internet component. Second, according to market share data provided by the Parties (Form CO, Annex 17) the vast majority of Orange's sales of fixed internet access services (c. [90-100]% in 2021) were through multiple-play (including fixed-only and FMC) bundles. Third, the market share data provided by the parties for fixed internet access services does not differentiate between fixed internet access services provided on a standalone basis and as part of bundles.

633 Form CO, Annex 17.

634 Response to RFI 10.

mobile in 2019."[635] This offer, which was called "Love Duo" and aimed at offering more tailored options to customers' needs (e.g. younger demographics with a preference for consuming audiovisual content via VOD and SVOD platforms over more traditional linear TV) was subsequently mirrored by the introduction of similar offers by each of the other main operators, notably by VOO in 2021 and by Proximus in March 2022. It was also observed that "OBE was able to meet specific customer needs by introducing a wider variety of more flexible tariffs and bundles than other operators."[636] The BIPT similarly considered that Orange's entry into fixed and multiple-play markets resulted in "revived market dynamics" and "has led to new offers (e.g. the 2P BB Mobile or 3P BB TV Mobile packages) and more competitive prices."[637] In the Article 6(1)(c) Response, the Notifying Party submitted the introduction of new bundle types is "not a technical innovation, only a marketing choice that can be easily and quickly replicated by competitors".[638] The Commission nonetheless considers that this was an innovative and disruptive move by Orange aimed at addressing a customer segment that established players were not minded to address spontaneously, and only introduced similar offers in reaction to that of Orange. Indeed, an analyst report at the time of Orange's introduction of Love Duo referred to it as having "high disruptive potential".[639]

(767) The Parties acknowledge the competitive force of Orange when they mention that [Details of internal documents describing the Parties' strategy][640] or when they indicate that [Details of internal documents describing the Parties' strategy].[641]

(768) The Commission considers that through its acquisition of an established player, the incentives of Orange to act as a disruptive force on the market may change. Indeed, a majority of respondents to the market investigation considered that following the Transaction, Orange would stop innovating to the same extent, including through the introduction of disruptive new offer or bundle types to better address a diverse range of end customers, or limit innovation compared to what it did pre-Transaction.[642]

(769) In view of the above elements, taken as a whole, the Commission concludes for the purpose of this decision that the Transaction may result in the elimination of an important competitive force.

7.4.5.2.5. Conclusion on the likely effects of the Transaction

(770) On the basis of the analysis above, the Commission has shown that (i) the Transaction will combine two entities whose combined market shares are high and

635 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 41.1 (ID 646).
636 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, questions 41.1 and 58.1 (ID 646).
637 BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018*, paragraph 38 (ID 2057).
638 Article 6(1)(c) Response, paragraph 195.
639 ING Belgian Telecom Sector Update dated 22 November 2019 ("Internet-mobile offer: Love Duo [had] high disruptive Potential … Orange Belgium … 'Love Duo' packs, targeting 'cord cutters', ie, clients with no interest in traditional TV or fixed phone lines. We think this is a coherent, appealing and disruptive portfolio of offers" (emphasis added) (Internal Document ID 1065-66666).
640 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).
641 Free translation of [Details of internal documents describing the Parties' strategy] (Internal Document ID 1090-27793).
642 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 44.1.

which underestimate their actual combined market power (see paragraphs (738)-(744) above); (ii) the margins of the Parties are high (see paragraphs (745)-(746) above); (iii) customers have limited possibilities of switching supplier (see paragraphs (750)-(752) above); (iv) the Parties are close competitors (see paragraphs (755)-(761) above); and, (v) the Transaction will eliminate an important competitive force (see paragraphs (764)-(768) above).

(771) In particular, in line with paragraph 28 of the Horizontal Merger Guidelines, the merging entity's incentive to raise prices post-Transaction is higher the more substitutable the Parties' products are or the closer the Parties compete with each other. High pre-merger margins may also make significant price increases more likely. As such, the Parties' relatively high diversion ratios (presented in Table 17) and relatively high pre-merger margins (presented in Table 16) are consistent with a conclusion that there would be significant upward pricing pressure post-Transaction. Further, as noted in paragraph (751) above, Proximus is positioned "*at the high end of the market*"[643] in terms of prices. This increases the ability of the merged entity to raise prices post-Transaction.

(772) Accordingly, and in view of the loss of competition between the Parties that would result from the Transaction,[644] the Commission concludes that, the Transaction will lead to significant price increases, reduced innovation, and/or reduced quality (e.g. less choice) in the market for the retail supply of FMC bundles in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction may negatively impact other non-price parameters of competition such as, for instance, customer service/care.

(773) While, as outlined in paragraph (65) above, the Commission acknowledges that OBE's national pricing strategy would imply that any price increase in the Targets' footprint by the merged entity would need to take into account the price constraints exercised by operators active outside the Targets' footprint, the Commission considers that these constraints would not be significant with regard to the present Transaction for the following reasons.

(774) First, while Orange may find it appropriate to price nationally today, as it is active across Belgium, it is uncertain if Orange would, post-Transaction, continue pricing nationally. In particular, following the Transaction, Orange will be an FNO (i.e. a network operator) in the Targets' footprint but remain an FVNO (i.e., and access seeker) in Telenet's footprint, thereby creating an asymmetry in its cost base in each footprint, in addition to the fact that it will continue to face two rival operators in Telenet's footprint, versus only one remaining competitor in the Target's footprint. As such, Orange may have the incentive, from an objective profit maximisation standpoint, to adopt a differentiated pricing strategy in the Targets' and Telenet's respective footprints following the Transaction, whether directly (e.g., offering identical bundles at different prices), indirectly (e.g., reducing advertising expenses in some geographic areas, providing higher discounts in some geographic areas,[645] boosting a cheaper sub-brand in some geographic areas) or a combination of both.

643 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022 (ID 1165).
644 Horizontal Merger Guidelines, paragraph 24.
645 For instance, Telenet is currently (from 27/02/2023 to 16/04/2023) offering a special discount called "Top promo on unlimited and super fast internet" which only applies to the municipalities in the Brussels Capital Region. In particular, the promotion is only available in "*only for customers with a new internet line in the sub municipalities of Brussels where Telenet is available,*" which only includes the municipalities where Telenet has its own fixed cable network in Brussels (ID 2071).

(775) Second, and in any event, any constraint exercised by operators not active in the Targets' footprint on Orange's pricing in the Targets' footprint would only extend to pricing. Any quality-related parameters of competition (e.g. quality or speed of customer support) would not, or only minimally, be affected by operators not active in the Targets' footprint. For example, Orange will not be able to directly intervene on Telenet's network to resolve issues with customers complaining with network-related problems while it will be able to do so on its own network in the Targets' footprint.

(776) Third, as VOO will no longer be OBE's pricing in the Targets' footprint as a result of the Transaction, Orange may very quickly and easily decide to progressively adjust VOO's pricing and let it go back up to where it was before Orange actually entered the market, which, in turn, progressively constrained VOO to revise its prices down as demonstrated by the BIPT's communication of 16 July 2022 on the evolution of the broadband and television markets since Q1 2018, published on 18 July 2022.[646] Indeed, as illustrated on Figures 22, 30 and 34 of the BIPT's communication, the BIPT indicates (in paragraph 132 of the Communication) that "*the consumer has a larger choice than in 2018 and has, in most cases, "more for his/her money" than four years ago*" and that "*this evolution is mostly linked, on the one hand, to the development of Orange and, on the other hand, the increase in the mobile content of the FMC packs/bundles.*"[647]

(777) On the basis of the above, the Commission concludes that the Transaction will give rise to significant anticompetitive price effects in the Targets' footprint. Furthermore, the Commission cannot exclude that the Transaction will give rise to significant anticompetitive non-price effects in the Targets' footprint. On this basis, in the following sections, the Commission assesses whether, and to what extent, the anticompetitive effects resulting from the Transaction may be (partially) offset by any (i) countervailing buyer power; (ii) entry; and/or, (iii) efficiency.

7.4.5.2.6. There is no countervailing buyer power

(778) According to the Horizontal Merger Guidelines, the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability.[648]

(779) The Notifying Party does not provide any views on whether the customers of the merged entity in the market for the retail supply of FMC bundles will have sufficient countervailing buyer power.

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[646] BIPT's *Communication du Conseil de l'IBPT du 16 juillet 2022 concernant l'évolution des marchés du haut débit et de la télévision en Belgique depuis Q1 2018* (ID 2057).

[647] Free translation of "*Le consommateur dispose en effet d'un choix plus large qu'en 2018 et en a, le plus souvent, « davantage pour son argent qu'il y a quatre ans ». Cette évolution est liée principalement, d'une part, au développement d'Orange et, d'autre part, à la hausse du contenu mobile des packs.*"

[648] Horizontal Merger Guidelines, paragraph 64.

(780) In this regard, the buyer-side of the retail market for FMC bundles consists of individual end customers who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.[649]

7.4.5.2.7. Any entry would not be likely, timely

(781) As outlined in Section 7.4.5.1 above, the Notifying Party submits that Telenet is likely to enter the fixed internet, TV and convergent services markets (including the FMC segment) in the Targets' footprint[650] as a result of the Transaction and that similarly, Citymesh/Digi, which acquired mobile spectrum in the recent Belgian 5G spectrum auction, is likely to enter fixed and convergent markets (including with an FMC offer) in Belgium as well. The Horizontal Merger Guidelines provide that for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.[651] The Commission has assessed each of these three elements separately in respect of Telenet and Citymesh/Digi in Section 7.4.2.2.5 above and concluded that any entry by Telenet or by Citymesh/Digi in the market for fixed internet access services cannot be said to be likely, timely and sufficient within the meaning of the Horizontal Merger Guidelines. The same reasoning applies *mutatis mutandis* to the Notifying Party's arguments in respect of entry into the hypothetical retail market segment for FMC bundles as set out in Section 7.4.5.1 above.

(782) The Commission has assessed each of these three elements separately in respect of the potential entry of Telenet and Citymesh/Digi below.

With respect to Telenet:

(783) An entry of Telenet in the hypothetical market segment for the retail supply of FMC bundles in the Targets' footprint is not likely. The Horizontal Merger Guidelines provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents. Historical examples of entry and exit may be illustrative of the existence and size of any entry barriers.[652]

(784) During the investigation, Telenet submitted detailed financial modelling of entry in the Targets' footprint under different scenarios, including pre-transaction, post-transaction without any remedy and post-transaction with a divestiture remedy. Telenet submits that this modelling shows that "*entry in the South without a remedy that includes a divestment of customers and a lowering of the wholesale rates does not meet* [its] *investment thresholds* [which it submits]*... is consistent with previous modelling which underpinned Telenet's historic decision to refrain from South entry through wholesale access*."[653] According to Telenet's modelling, only a

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649 See Horizontal Merger Guidelines, paragraph 65. The comparison in the sentence "*It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry*" applies to an even greater extent to end customers.

650 Telenet is already active in the Targets' footprint (and Belgium overall) on the mobile market via its brand, BASE, and has a limited internet offering based on mobile fLTE technology under the brand TADAM, which is also available in the Targets' footprint. In this regard, as set out in Section 3.2.2.3 above, internet offerings based on fLTE (i.e. mobile) technology do not form part of the same relevant product market as internet offerings based on fixed infrastructure (i.e. xDSL, coax/cable, fibre).

651 Horizontal Merger Guidelines, paragraph 68.

652 Horizontal Merger Guidelines, paragraphs 69-70.

653 Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 6 (ID 1166).

"*combination of the divestment of customers and the lowering of the wholesale rates will provide sufficient revenues from Day 1 and sufficient margins to lower the payback to a more acceptable level* [and] *increases the IRR* [internal rate of return] *above the ... threshold*."[654] This modelling would in fact be based on a longer payback period compared to Orange's own entry into fixed and FMC bundles in Belgium (which Orange indicated […]) and result in a similar IRR to that of Orange (which […]), although only following a longer payback period.[655]

(785) The Notifying Party argues that "*the vast majority of the costs related to Telenet's expansion in the Targets' footprint would be variable costs*"[656] whereas Telenet has provided the Commission with submissions, together with financial modelling, pointing out that "e*ntry based on wholesale access requires significant upfront investments which do not vary materially depending on the number of subscribers or the exact territory covered by the entry (meaning that a more limited entry, for example the expansion of Telenet's presence in Brussels, would entail very similar upfront costs but more limited returns). These costs include IT costs (such as IT set-up costs, IT baseline, network setup and video setup) ... and additional high upfront marketing costs*."[657]

(786) Furthermore, none of the respondents to the market investigation mentioned a possible entry by Telenet when asked about potential entrants in the Targets' footprint with fixed and convergent services following the Transaction.[658]

(787) Moreover, it is a fact that Telenet has not entered the Targets' footprint in the past with fixed or convergent services, despite Wholesale Access Regulation being in place for many years (e.g. Orange entered on this basis in 2016) and Telenet submits that "*consistent with the findings of previous modelling exercises, Telenet entry without remedy therefore remains commercially unattractive*."[659]

(788) In the context of the 2019 sale process that led to the – ultimately abandoned – sale of VOO to Providence Equity Partners, a management consultant report commissioned by Nethys to facilitate and promote the sale of VOO pointed out that [Details of internal documents describing the Targets' strategy].[660] The Notifying Party submits that two of the three arguments in that document *"are no longer valid or at least less valid than in 2019"* namely that *"there will be no risk of "retaliation" in Flanders as OBE is already active in fixed services in Flanders*" and that "*Telenet already has upside exposure to VOO mobile growth thanks to MVNO contract*"[661] However, the point for which the Notifying Party does not submit that it

[654] Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 20 (ID 1166).
[655] Response to RFI 20, paragraph 97.
[656] Article 6(1)(c) Response, paragraph 259.
[657] Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 8 (ID 1166).
[658] Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.
[659] Telenet response to European Commission's pre-notification questions, 1 June 2022, paragraph 17 (ID 1166).
[660] VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).
[661] Response to RFI 20, question 18(a).

is no longer valid is the primary finding of that report, [Details of internal documents describing the Targets' strategy].[662]

(789) As such, the Commission considers that any entry by Telenet cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(790) An entry of Telenet in the hypothetical market segment for the retail supply of FMC bundles in the Targets' footprint would not be timely. According to the Horizontal Merger Guidelines, what constitutes an appropriate time period depends on the characteristics and dynamics of the market but entry is normally only considered timely if it occurs within two years.[663]

(791) In the Article 6(1)(c) Response, the Notifying Party points out that in a similar manner to Orange, Telenet "could subscribe to the [regulated] reference offers of VOO/Brutélé or Proximus without having to conclude a commercial agreement" and quickly enter the Targets' footprint on that basis.[664] While this is technically correct, Telenet has not opted to enter on the basis of regulated wholesale access in the past primarily for profitability reasons. [Details of internal documents describing the Targets' strategy][665], and in any event there is currently uncertainty around the future of regulated wholesale access, as a review of the current regulatory framework is scheduled for 2023.

(792) Respondents to the market investigation, when asked to list any players that they expect to enter the hypothetical market for the retail supply of fixed-mobile multiple-play packages in the next 2-3 years—which would likely require an existing mobile player to start offering fixed services—none of the respondents to the market investigation mentioned a possible entry in the next 2-3 years by Telenet.[666] This is also consistent with what Telenet itself indicated to the Commission where it stated that "*any entry into the fixed markets in Wallonia (which is unlikely to happen) would not be timely, and … there are no plans in place to do so at present*."[667]

(793) As such, the Commission considers that any entry by Telenet cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(794) An entry of Telenet in the hypothetical market segment for the retail supply of FMC bundles in the Targets' footprint may however be sufficient. To be sufficient within the meaning of the Horizontal Merger Guidelines, any entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger and, for instance, small-scale entry may not be considered sufficient.[668]

(795) In this regard, it took Orange six years since it entered the market in 2016 to reach its current market position of c. […] FMC customers[669] and a market share of c. [10-20]% within the Targets' footprint. Telenet submitted, referring to fixed internet,

662 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 ("[Details of internal documents describing the Targets' strategy]") (Doc ID:1090-5517).

663 Horizontal Merger Guidelines, paragraph 74.

664 Article 6(1)(c) Response, paragraph 276.

665 VOO Internal Document entitled "TMT Assets Review" dated April 2019, slide 202 (Doc ID: 1090-5517).

666 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

667 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).

668 Horizontal Merger Guidelines. Paragraph 75.

669 Of which the majority are also multiple-play (c. […]), FMC bundle (c. […]) and/or AV service (c. […]) customers.

although the same logic applies here, that any entry without a divestiture that included an initial customer base would "*not be sufficient, as it will not be possible to replicate a player with [5-10]% market share from one day to the next*."[670] This view was echoed by consumer association Test-Achats, which indicated that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer. The "success" of Orange on the bundled market is due to the fact that they had their mobile only clients to start from*."[671] Within the Targets' footprint, Orange has a mobile base of over […] customers, whereas the mobile customer base of Telenet in the Targets' footprint is significantly smaller and declining (c. […] in 2021, which is c. [20-30]% less than in 2020).[672]

(796) Nonetheless, in the Article 6(1)(c) Response, the Notifying Party submits that it is not necessary for entry to be considered sufficient to "*require the new entrant to replicate the market share lost as a result of the Transaction. What matters is to recreate an array of constraints similar to those that would have existed absent the Transaction, which is therefore able to deter and defeat any attempt to exercise market power*."[673]

(797) In that respect, the Commission considers that any entry by Telenet, if it were to take place, may be sufficient within the meaning of the Horizontal Merger Guidelines. However, since the Commission found that any entry by Telenet would not be timely and likely, the Commission cannot take into consideration entry by Telenet as a countervailing factor in assessing the non-coordinated effects that would arise as a result of the Transaction on the market for the retail supply of FMC bundles.

With respect to Citymesh/Digi:

(798) An entry of Digi in the hypothetical market for the supply of FMC bundles in the Targets' footprint is not likely. As set out in paragraph (404) above, the HMG provide that for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.

(799) In the Article 6(1)(c) Response, the Notifying Party submits that Digi's entry on the fixed services market is expected to take place "*in the near future*".[674]

(800) The Commission considers that an entry of Citymesh/Digi is not likely. Citymesh/Digi acquired mobile spectrum in a 5G spectrum auction held by the BIPT on 20 June 2022.[675] The press release of Citymesh/Digi refers to a planned roll-out of a 4G/5G network in Belgium,[676] the deployment of which is, according to the Notifying Party, "*expected to take approximately five years but* [the Notifying Party also pointed out that] *Digi and Citymesh have announced that their goal is to launch their own commercial offers already in 2023 by accessing to a third party mobile network*."[677] All indications at present are that Digi, which will focus on B2C, i.e.

670 Non-confidential agreed minutes of Telenet's call with the Commission on 5 April 2022, paragraph 20 (ID 1165).
671 Test-Achat's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).
672 Form CO, Annex 17.
673 Article 6(1)(c) Response, paragraphs 11 and 226.
674 Article 6(1)(c) Response, paragraphs 14, 15 and 17.
675 BIPT's press release on the radio spectrum auction of 21 June 2022 (ID 2064).
676 Citimesh's and Digi's press release of 21 June 2022 *Citimesh and Digi win spectrum in the auction and will start building a nationwide network* (ID 2060).
677 Form CO, paragraph 26.

consumers (while Citymesh will focus on B2B, i.e. business customers) will focus its efforts on entering the mobile market in Belgium, as indeed it is required to in order to meet the national coverage requirements imposed on it as part of the spectrum award.

(801) The Commission considers that any potential entrant that plans to enter a new market would usually have a business plan supporting and planning for such entry. While it is not excluded that Citymesh/Digi may enter fixed and convergent markets in the Targets' footprint, the Commission considers that any such entry by Citymesh/Digi cannot be said to be likely within the meaning of the Horizontal Merger Guidelines.

(802) An entry of Digi in the hypothetical market for the retail supply of FMC bundles in the Targets' footprint would not be timely. As stated above, it appears that Citymesh/Digi plans to initially focus on entering the retail mobile market in Belgium. Any entry into fixed (i.e., internet and/or TV) or convergent markets would require either wholesale access to a fixed network or the deployment of its own fixed network. Any fixed network deployment in Belgium would likely take a number of years (e.g., by analogy, as the Notifying Party observes, the deployment of a mobile network is expected to take five years) and therefore not allow for timely entry within the meaning of the Horizontal Merger Guidelines.

(803) There are also no indications at present that Citymesh/Digi would seek to enter fixed or convergent retail markets on the basis of wholesale access to a third party's fixed network. This may be because, as one market participant indicated in response to the Commission's market investigation "*wholesale prices are most probably to[o] high for a new player to enter the market successfully*."[678] Indeed, the […].[679] The Notifying Party has however not substantiated its assumption.

(804) In Spain, where Digi entered the mobile market in 2008, it took over 10 years for Digi to enter fixed and convergent markets (based partially on wholesale access). In Belgium, similar to the situation faced by Digi in Spain in 2008, Proximus' fixed network is predominantly (i.e., 80-90%) a DSL network at present. While Proximus is rolling out a (faster) fibre network, this is expected to take several years: "*Proximus is currently at 10-20 % national fibre coverage and aims at 70% national fibre coverage by the end of 2028*."[680] Finally, Orange itself does not appear to expect Digi to quickly enter the Belgian market, with Xavier Pichon, the OBE's Chief Executive Office ("**CEO**") noting that "*between today's announcement [i.e. on 21 June 2022 that Citymesh/Digi acquired mobile spectrum] and the timetable (necessary for technical deployment ....), there will be* <u>*plenty of time*</u> *to analyse all this*" (emphasis added).[681]

(805) Digi confirmed that its plan is to develop fixed infrastructure in Belgium. In that context, Digi explained that it considers that access to infrastructure is an integral part of an operator's ability to develop a solid business plan and of its capacity to

678 M7's response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 731).

679 Response to RFI 10, paragraph 23.

680 Non-confidential agreed minutes of Proximus' call with the Commission on 19 April 2022, paragraph 28 (ID 376).

681 See, for example, press article of 21 June 2022 on Le Vif *L'opérateur mobile DIGI débarque en Belgique et défie ses concurrents avec des « prix très abordable »*":« *Ce nouvel entrant aura-t-il un effet baissier sur les prix? Difficile de se prononcer pour le CEO. "Mais, entre l'annonce d'aujourd'hui et le calendrier (nécessaire au déploiement technique, NDLR), on aura largement le temps d'analyser tout cela", conclut Xavier Pichon* ») (ID 2062).

effectively compete on the long term with other operators on the market. Digi further indicates that access to ducts and micro-ducts at competitive tariffs and non-discriminatory conditions is very important for the provision of services at competitive and affordable prices.[682]

(806) Consumer association Test-Achats considers that "the potential entry by Digi with fixed or multiple-play markets would likely be too far in the future to address any potential concerns raised by the Transaction".[683]

(807) Further to the above, the Commission considers that any entry by Digi cannot be said to be timely within the meaning of the Horizontal Merger Guidelines.

(808) An entry of Digi in the hypothetical market for the retail supply of FMC bundles in the Targets' footprint would not be sufficient. As mentioned above, it took Orange six years since it entered the market in 2016 to reach its current market position in fixed and convergent markets and it already had a sizeable mobile customer base in 2016, which it could cross-sell to. Digi, on the other hand, is not active in any retail market in Belgium at present. While it will likely (and indeed is required to) enter the mobile market in the short term, Digi's mobile customer base will likely be small in the short to medium term. While some market participants that responded to the market investigation noted that Digi may seek to enter fixed and/or bundled markets,[684] a majority that expressed a view also considered that the upfront investment required for such entry (in particular the wholesale fixed network access costs) may be too high to allow for successful or sustainable entry. Consumer association Test-Achats noted that "*if you don't have an existing customer base to start from it's very difficult to have a sustainable offer [and] for an operator starting from scratch the investments might be too high*."[685]

(809) As such, the Commission considers that any entry by Digi cannot be said to be timely, liklely and sufficient within the meaning of the Horizontal Merger Guidelines.

7.4.5.2.8. The Notifying Party has not provided sufficient evidence to support the alleged efficiencies brought along by the Transaction

(810) The Horizontal Merger Guidelines provide that it is possible that efficiencies brought about by a merger counteract the effects on competition, and in particular the potential harm to consumers that it might otherwise have.[686] In this regard, any claimed efficiencies have to (i) benefit consumers; (ii) be merger-specific; and, (iii) be verifiable.[687]

(811) The Notifying Party submits that the merger will generate efficiencies. As set out in Section 7.4.2.1 above, the Notifying Party makes three efficiency claims. First, the Notifying Party explains that the Transaction will bring about an increase in investments into the fixed networks of the Targets in the Targets' footprint. Second,

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682 Non-confidential version of Digi's response to RFI 1 on 21 September 2022, questions 2, 5, 6 and 7 (ID 1355).

683 Non-confidential agreed minutes of Test-Achats' call with the Commission on 13 september 2022, paragraph 5 (ID 1357).

684 Response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 65.

685 Test-Achats' response to Q1 Questionnaire to providers and customers of telecommunication services in Belgium, question 64.1 (ID 602).

686 Horizontal Merger Guidelines. Paragraph 76.

687 Horizontal Merger Guidelines, paragraph 78.

the Notifying Party considers that the Transaction will lead to the elimination of double marginalisation for both fixed and mobile networks of the Parties. Finally, the Notifying Party considers that the Transaction will increase the quality of the Parties' fixed-mobile bundles.

(812) For the following reasons, the Commission considers that the Notifying Party has not demonstrated to the required standard that the claimed efficiencies meet three cumulative criteria of (i) benefit to consumers; (ii) merger-specificity; and, (iii) verifiability, for the reasons explained below.

7.4.5.2.8.1. Increased investments in the fixed networks in the Targets' footprint

(813) In the Form CO, the Notifying Party claims that "the Transaction will generate significant efficiencies in the fixed markets because of the substantial investments in cable and fiber infrastructures that OBE is planning to conduct and that would not have taken place absent the Transaction"[688] and that "as a result of those investments, customers of fixed and FMC offers will have more choices, both in terms of speeds and number of operators available".[689]

(814) In the Article 6(1)(c) Response, the Notifying Party provides further details as to the reasons why it expects that the Transaction will lead to significantly more extensive investments in network upgrades (Data Over Cable Service Interface Specification ("**DOCSIS**") 3.1 and Fibre-To-The-Home ("**FTTH**") ("**Fixed Network Efficiency**") than VOO had planned ([…] greater CAPEX for network upgrades through 2030).

(815) First, with regard to verifiability, the Notifying Party submits that Orange's investment plan is significantly higher than the investment plan of VOO absent the Transaction. In that respect, Orange claims that its investment plan is approximately […] higher than VOO's investment plan when looking at all fixed network CAPEX (EUR […] vs. EUR […]), and […] higher when only looking at fixed network CAPEX for cable upgrade and fibre roll-out (EUR […] vs EUR […]).

(816) Second, with regard to merger-specificity, the Notifying Party considers that absent the Transaction, Orange would not have deployed its own fixed network and VOO would not have been able to commit the same amount of CAPEX as Orange will do post-Transaction.

(817) Finally, the Notifying Party considers that these additional investments will benefit consumers in the form of higher internet speed availability and greater choice (as it will have a network in areas currently only served by one player, and will operate an open fibre network accessible by third party access-seekers).

(818) Since the Notifying Party has proposed remedies to resolve the Commission's competition concerns in the market for the retail supply of FMC bundles, the Commission considers that it is not necessary to assess the Fixed Network Efficiency put forward by the Notifying Party against the requirements of the Horizontal Merger Guidelines as the proposed remedy resolves, in any event, the Commission's competition concerns in the market for the retail supply of FMC bundles in the Targets' footprint.

7.4.5.2.8.2. Elimination of double marginalisation

(819) In the Article 6(1)(c) Response, the Notifying Party brings forward two possible efficiencies relating to the elimination of double marginalisation ("**EDM**") on (i) the

688 Form CO, paragraph 1906.
689 Form CO, paragraph 1906.

provision of fixed and multiple-play bundles by OBE ("**Fixed EDM Efficiency**"); and, (ii) the provision of mobile and multiple-play bundles by VOO ("**Mobile EDM Efficiency**") as a result of the integration of a MNO and a FNO.

(820) Accordingly, the Commission will assess both EDM Efficiencies in turn in the following sections.

7.4.5.2.8.2.1. Fixed EDM Efficiency

(821) The Notifying Party explains that the Transaction will result in the partial integration of the upstream network service of the Targets and the downstream retail service of OBE. In particular, the Notifying Party submits that the marginal cost to OBE of wholesale fixed access will be eliminated post-Transaction as OBE will recoup 75% of the margins made by the Targets on providing wholesale access as OBE will own 75% minus one share in the Targets. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[690]

(822) In the following paragraphs, the Commission will show that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(823) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[691] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(824) The Commission considers that the wholesale access fee that OBE pays and will continue to pay to the Targets post-Transaction is entirely a variable cost. These costs are charged by the Targets per active customer. As clarified by OBE, the Commission considers that post-Transaction, OBE will be able to recoup approximately 75% of its wholesale access costs to the Targets' fixed network.

(825) Hence, the Commission considers that the partial elimination of OBE's variable costs related to the wholesale access fee that OBE pays, and will continue to pay, to the Targets, to obtain wholesale access to the Targets' fixed network will likely partly be passed on to consumers in terms of lower prices or higher quality of service.

(826) However, the Commission considers that the benefit to consumers from the Fixed EDM Efficiency would be limited even if the reduction in OBE's variable cost were entirely passed on to consumers. This is because (i) the Fixed EDM Efficiency, which will be limited to consumers in the Targets' footprint, would be diluted across all consumers in Belgium, and (ii) the wholesale access fee that OBE pays is limited relative to average prices.

(827) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by the Targets for the wholesale supply of broadband access to Orange was EUR […] per month in 2021.[692] Post-Transaction, OBE would

690 Horizontal Merger Guidelines, paragraph 78.

691 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

692 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph.

recoup around [70-80]% of this EBITDA margin, so EUR […]. However, this EBIDTA margin would be recouped only on the […] OBE consumers in the Targets' footprint, but then diluted across the […] OBE consumers in Belgium. Therefore, on average the EBITDA margin recouped would represent EUR […] per OBE consumer.[693] The average revenue per subscriber made by OBE for the retail supply of FMC bundles was EUR […] per month in 2021. As such, the maximum EBIDTA margin that OBE could pass on to consumers would represent approximately [0-5]% of the average price for the retail supply of FMC bundles (i.e. assuming OBE would pass the entirety of the Fixed EDM Efficiency on to consumers).

(828) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[694] OBE has a lesser incentive to pass on the Fixed EDM efficiency to consumers, because it will also take into account the effect on the Targets of lowering OBE's prices (or raising quality) downstream in the retail supply of FMC bundles. By lowering OBE's prices (or raising quality) downstream as a result of the Fixed EDM efficiency, OBE will entice customers of the Targets (in addition to of third parties) to switch to OBE. However, the merged entity gains significantly less from a customer switching from the Targets to OBE, compared to a customer switching from a third party rival to OBE, because the merged entity would lose the margin made by the Targets. Therefore, because OBE and the Targets are competitors downstream in the retail supply of FMC bundles (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Fixed EDM Efficiency to consumers.

(829) On the basis of the analysis above, the Commission considers that while it is possible that the Fixed EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Fixed EDM Efficiency will benefit consumers.

(830) **Merger-specificity.** The Commission considers that the savings related to OBE's recoupment of part of the wholesale access fee it pays and will continue to pay to the Targets post-Transaction are unlikely to be achieved by other means than the Transaction.

(831) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for OBE but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit*

693 […].

694 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, the Targets provide an input to OBE but also compete with OBE downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

consumers."[695] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[696]

(832) In the Article 6(1)(c) Response, the Notifying Party generically asserts that: "OBE will … have the possibility to return these margins to customers through additional investment, new services or price reductions to compete more aggressively for FMC customers."[697] The fact that the Notifying Party expressly refers to various "possibilities" suggests that the Fixed EDM Efficiency would only be hypothetically verifiable. Accordingly, the Commission considers that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable.

(833) **Conclusion on the Fixed EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Fixed EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Fixed EDM Efficiency in its assessment of the Transaction.

7.4.5.2.8.2.2. Mobile EDM Efficiency

(834) The Notifying Party explains that as a result of the Transaction, VOO's mobile traffic will be shifted to be hosted on OBE's network. The Notifying Party considers that this shift of mobile data traffic will result in a reduction in double marginalisation on mobile services proposed by VOO as OBE will earn the margin on wholesale sales to VOO. In this regard, the Notifying Party considers that this efficiency will (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[698]

(835) In the following paragraphs, the Commission will show that the Mobile EDM Efficiency put forward by the Notifying Party is likely to be merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard.

(836) **Benefit to consumers.** According to the Commission's practice, variable or marginal cost reductions are more likely to be passed on to consumers than fixed cost savings, as they directly affect firms' pricing incentives.[699] The reason is that a cost reduction in the marginal costs of serving additional customers increases the margin earned on such customers and hence the incentive to attract additional customers through lower prices.

(837) The Commission considers that the wholesale access fee that VOO will pay to OBE post-Transaction is entirely a variable cost. These costs are charged by OBE per active SIM card. The Commission considers that the partial internalisation of VOO's variable costs related to the wholesale access fee that VOO will pay to OBE to obtain wholesale access to OBE's mobile network may partly be passed on to consumers in terms of lower prices or higher quality of service.

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695 Horizontal Merger Guidelines, paragraph 87.

696 Horizontal Merger Guidelines, paragraph 86.

697 Article 6(1)(c) Response, paragraph 377.

698 Horizontal Merger Guidelines, paragraph 78.

699 Horizontal Merger Guidelines, paragraph 80. See also Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, paragraphs 894 and 895.

(838) However, the Commission considers that the benefit to consumers from the Mobile EDM Efficiency would be limited even if the reduction in VOO's variable cost were entirely passed on to consumers. This is because the wholesale access fee that VOO pays is limited relative to average prices.

(839) For illustrative purposes, according to data provided by the Parties, the EBITDA margin per subscriber made by OBE for the wholesale supply of mobile access to third party MNVOs was EUR […] per month in 2021.[700] The average revenue per subscriber made by VOO for the retail supply of FMC bundles was EUR […] per month in 2021. As such, the maximum EBIDTA margin that VOO could pass on to consumers would represent approximately [5-10]% of the average price for the retail supply of FMC bundles (i.e. assuming VOO would pass the entirety of the Fixed EDM Efficiency on to consumers).

(840) In addition, in comparison to a purely vertical setting where elimination of double marginalisation is usually assessed,[701] the merged entity has a lesser incentive to pass on the Mobile EDM efficiency to consumers, because it will also take into account the effect on OBE of lowering VOO's prices (or raising quality) downstream in the retail supply of FMC bundles. By lowering VOO's prices (or raising quality) downstream as a result of the Mobile EDM efficiency, VOO will entice customers of OBE (in addition to of third parties) to switch to VOO. However, the merged entity gains significantly less from a customer switching from OBE to VOO, compared to a customer switching from a third party rival to VOO, because the merged entity would lose the margin made by OBE. Therefore, because OBE and VOO are competitors downstream in the retail supply of FMC bundles (and because therefore the elimination of double marginalisation does not occur in a purely vertical setting), the merged entity will have a lesser incentive to pass on the Mobile EDM Efficiency to consumers.

(841) On the basis of the analysis above, the Commission considers that while it is possible that the Mobile EDM Efficiency will benefit consumers, the (limited) extent to which such benefit will accrue is uncertain. Accordingly, on the basis of the evidence provided by the Notifying Party, the Commission is unable to definitively conclude on whether the Mobile EDM Efficiency will benefit consumers.

(842) **Merger-specificity.** The Commission considers that the internalisation of VOO's wholesale access fee paid to OBE to access OBE's mobile network post-Transaction are unlikely to be achieved by other means than the Transaction.

(843) **Verifiability.** The Article 6(1)(c) Response only assesses the potential cost reduction for VOO but does not provide any quantitative assessment of the positive impact on consumers that the Transaction may bring about. In this regard, the Horizontal Merger Guidelines provide that "*Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is therefore, incumbent upon the notifying parties to provide in due time all the relevant*

700 Response to RFI 22, Annex 1. The source is identical for all figures in this paragraph. The Commission assumes that the EBITDA margin made by OBE from MNVOs would be similar to the EBIDTA margin made from VOO.

701 In a purely vertical setting, an upstream firm merges/integrates with a downstream firm to which it provides an input, and with which it does not compete downstream. In this instance, OBE provides an input to the Targets but also competes with the Targets downstream. Therefore, in this instance, the elimination of double marginalisation is assessed not in a purely vertical setting, and therefore the conclusions differ to an extent.

information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers."[702] The Horizontal Merger Guidelines further state that: "*When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one.*"[703]

(844) In the Article 6(1)(c) Response, the Notifying Parties generically assert that: "To the extent the combined firm/VOO internalises this margin in setting its retail prices, then there will be a reduction in double marginalisation, creating a possibility to have an aggressive FMC commercial policy."[704] The wording of the quoted sentence suggests that the Mobile EDM Efficiency is purely hypothetical and dependent on the extent to which the combined firm/VOO internalises the margin. Accordingly, the Commission considers that the Notifying Party has failed to show that the Mobile EDM Efficiency would be verifiable.

(845) **Conclusion on the Mobile EDM Efficiency.** On the basis of the above assessment, the Commission considers that the Mobile EDM Efficiency put forward by the Notifying Party is likely merger specific and may to some extent benefit consumers, but that the Notifying Party has failed to show that the Fixed EDM Efficiency would be verifiable to the required standard. As such, the Commission is unable, on the basis of the evidence provided by the Notifying Party to take into account the Mobile EDM Efficiency in its assessment of the Transaction.

7.4.5.2.8.3. Increase in quality of the Parties' FMC bundles

(846) The Notifying Party considers that, in addition to the efficiencies discussed above, the Transaction will allow the combined entity to offer higher quality of fixed and mobile bundles in the Targets' footprint than either Party could offer absent the Transaction. The Notifying Party explains that this type of efficiency was accepted in previous cases by the Commission in case M.8864 – *Vodafone/Certain Liberty Global Assets*.[705]

(847) First, the Article 6(1)(c) Response fails to provide an assessment of the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines. Rather, the Article 6(1)(c) Response focuses on the comparison between the present Transaction to the transaction underlying case M.8864 – *Vodafone/Certain Liberty Global Assets*.

(848) Second, the only listed efficiencies include (i) better and more efficient technical incident resolution; (ii) improvement in the provisioning process of FMC offers; and, (iii) creating the possibility of do-it-yourself installation of FMC products. While the Commission may deduce from the limited amount of information provided in this regard that customers may benefit from some non-price related efficiencies, the Notifying Party fails to (i) provide any evidence to quantify or qualify the extent of such efficiencies; and, (ii) explain why the Transaction is the only way to achieve these efficiencies.

[702] Horizontal Merger Guidelines, paragraph 87.
[703] Horizontal Merger Guidelines, paragraph 86.
[704] Article 6(1)(c) Response, paragraph 386.
[705] Commission decision of 18 July 2019 in case case M.8864 – *Vodafone/Certain Liberty Global Assets*.

(849) On the basis of the above assessment, the Commission considers that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles put forward by the Notifying Party may satisfy one of the three cumulative criteria required under the Horizontal Merger Guidelines of benefit to consumers. The Commission considers that the Notifying Party has failed to show that the efficiency according to which the Transaction will increase the quality of the Parties' FMC bundles is merger-specific or that it would be verifiable.

7.4.5.2.8.4. Conclusion on the efficiencies

(850) On the basis of the above, the Commission considers that none of the alleged efficiencies put forward by the Parties meets the three cumulative criteria of benefit to consumer, merger-specificity and verifiability set out in the Horizontal Merger Guidelines.

7.4.5.2.9. Efficiencies not sufficiently substantiated

(851) The Horizontal Merger Guidelines provide that it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have.[706]

(852) The Notifying Party's submits that the merger will generate efficiencies. As set out in Section 7.4.5.1 above, the Notifying Party first makes a general argument that its planned investments in the Targets (e.g. in infrastructure roll-out) will generate efficiencies. Second, the Notifying Party submits that the Transaction will not reduce infrastructure competition and, on the contrary, will actually increase the number of fully-convergent network operators on the territory of Belgium.

(853) For the reasons set out in Section 7.4.2.2.8 above, the Commission considers that the Notifying Party has not demonstrated to the required standard that the claimed efficiencies would benefit consumers, be merger-specific and be verifiable.[707]

7.4.5.2.10. Conclusion

(854) In light of the above, the Commission has come to the conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for FMC bundles within the Targets' footprint, including increased prices and/or reduced quality for end customers.

7.4.6. Retail supply of fixed-only bundles

7.4.6.1. The Notifying Party's view

(855) The Notifying Party submits that the Transaction will not give rise to any competitive concerns in the market for the retail supply of fixed-only bundles.

(856) First, the Notifying Party submits that the merged entity will continue to compete against several strong players post-Transaction.

(857) Second, the Notifying Party submits that the Transaction does not give rise to any increment in standalone retail mobile telecommunications services.

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[706] Horizontal Merger Guidelines. Paragraph 76.
[707] Horizontal Merger Guidelines, paragraph 78.

(858) Third, the Notifying Party submits that the Transaction will not reduce infrastructure-based competition. Rather, the Transaction will increase the number of fully-convergent network operators.

(859) Fourth, the Notifying Party submits that the Targets are not an important competitive force.

(860) Fifth, the Notifying Party submits that the Transaction will strengthen the competitive position of OBE vis-à-vis Proximus and Telenet.

(861) Sixth, the Notifying Party submits that the Parties are not close competitors.

(862) Seventh, the Notifying Party submits that market for the retail supply of mobile telecommunications services is characterised by easy switching.

(863) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies.

7.4.6.2. The Commission's assessment

(864) The Commission considers that the Transaction does not raise horizontal concerns in the market for the retail supply of fixed-only bundles in the Targets' footprint.

(865) First, the Transaction only gives rise to an insignificant market share increment. Indeed, in 2021, the Targets already accounted for [40-50]% (by value) and [40-50]% (by volume) whereas OBE only accounted for [0-5]% (by value) and [0-5]% (by volume) of the market.[708] This is further evidenced by the HHI calculation. Indeed, the delta between the pre-merger HHI and post-merger HHI is of 48 when considering value-based market shares and 65 when considering volume-based market shares.

(866) Third, the Commission notes that after the Transaction, there will remain at one larger alternative retail supplier of fixed-only bundles, namely Proximus, with a market shares of [50-60]% (by value) and [50-60]% (by volume).

(867) Finally, the Commission notes that it has not received any complaints from respondents to the market investigation regarding the market for the retail supply of mobile telecommunications services in Belgium.

(868) Therefore, the Commission concludes that the Transaction does not raise any competitive concern as a result of horizontal effects on the market for the retail supply of mobile telecommunications services in Belgium.

7.4.7. Retail supply of mobile telecommunications services

7.4.7.1. The Notifying Party's view

(869) The Notifying Party submits that the Transaction will not give rise to any competitive concerns in the market for the retail supply of mobile telecommunications services.

(870) First, the Notifying Party submits that the merged entity will continue to compete against several strong players post-Transaction.

708 The Notifying Party explains that since OBE is a mobile operator which has penetrated the fixed markets because of the market trend towards convergence, OBE markets above all FMC offers and its presence on fixed-only bundles is marginal. In particular, the Notifying Party explains that OBE has approximately […] users of retail fixed-only bundles. See Form CO, paragraph 1038.

(871) Second, the Notifying Party submits that the Transaction does not give rise to any increment in standalone retail mobile telecommunications services.

(872) Third, the Notifying Party submits that the Transaction will not reduce infrastructure-based competition. Rather, the Transaction will increase the number of fully-convergent network operators.

(873) Fourth, the Notifying Party submits that the Targets are not an important competitive force.

(874) Fifth, the Notifying Party submits that the Transaction will strengthen the competitive position of OBE vis-à-vis Proximus and Telenet.

(875) Sixth, the Notifying Party submits that the Parties are not close competitors.

(876) Seventh, the Notifying Party submits that market for the retail supply of mobile telecommunications services is characterised by easy switching.

(877) Finally, the Notifying Party submits that the Transaction will generate substantial efficiencies.

7.4.7.2. The Commission's assessment

(878) The Commission considers that the Transaction does not raise horizontal concerns in the market for the retail supply of mobile telecommunications services in Belgium.

(879) First, the Parties' combined market shares remain moderate, around [20-30]% when considering value-based market shares since 2019. When considering volume-based market shares, the Parties' combined market shares remained below 30% since 2020.

(880) Second, the Transaction only gives rise to an insignificant market share increment. Indeed, in 2021, OBE already accounted for [20-30]% (by value) and [20-30]% (by volume) whereas the Targets only accounted for [5-10]% (by value) and [0-5]% (by volume) of the market. This is further evidenced by the HHI calculation. Indeed, the delta between the pre-merger HHI and post-merger HHI is of 145 when considering volume-based market shares.

(881) Third, the Commission notes that after the Transaction, there will remain at least two large alternative retail supplier of mobile telephony services, namely Proximus, with a market shares of [40-50]% (by value) and [40-50]% (by volume) and Telenet, with a market share of [20-30]% (by value) and [20-30]% (by volume). Furthermore, there will still remain a number of MVNOs, including Lycamobile, FASTFiber, EDPnet, United Telecom, Mixtus, Tchamba Telecom, Carrefour Mobile, Vectone Mobile, L-Mobi Mobile, 5Telecom, Ello Mobile, One Bill Global and Youphone. Together, these MVNOs represent almost [5-10]% of all SIM cards in Belgium.

(882) Finally, the Commission notes that it has not received any complaints from respondents to the market investigation regarding the market for the retail supply of mobile telecommunications services in Belgium.

(883) Therefore, the Commission concludes that the Transaction does not raise any competitive concern as a result of horizontal effects on the market for the retail supply of mobile telecommunications services in Belgium.

7.4.8. Retail supply of fixed telephony services

7.4.8.1. The Notifying Party's view

(884) The Notifying Party submits that the Transaction will not give rise to any competitive concerns in the market for the retail supply of fixed telephony services.

(885) First, the Notifying Party submits that the merged entity will continue to compete against several strong players post-Transaction.

(886) Second, the Notifying Party submits that the Transaction does not give rise to any increment in standalone retail fixed telephony services.

(887) Third, the Notifying Party submits that the market for the retail supply of fixed telephony services is less and less relevant in Belgium.

(888) Fourth, the Notifying Party submits that the Transaction will not reduce infrastructure-based competition. Rather, the Transaction will increase the number of fully-convergent network operators.

(889) Fifth, the Notifying Party submits that the Parties are not close competitors.

(890) Finally, the Notifying Party submits that market for the retail supply of fixed telephony services is characterised by easy switching.

7.4.8.2. The Commission's assessment

(891) The Commission considers that the Transaction does not raise horizontal concerns in the market for the retail supply of fixed telephony services in the Targets' footprint.

(892) First, the Parties' combined market shares remain moderate and consistently below 25% when considering volume-based market shares since 2019. When considering value-based market shares, the Parties' combined market shares remained below 25% until 2020 and only marginally exceeded 25% in 2021.

(893) Second, the Transaction only gives rise to an insignificant market share increment. Indeed, in 2021, the Targets already accounted for [20-30]% (by value) and [20-30]% (by volume) whereas OBE only accounted for [0-5]% (by value) and [0-5]% (by volume) of the market. This is further evidenced by the HHI calculation. Indeed, the delta between the pre-merger HHI and post-merger HHI is of 123 when considering value-based market shares, and of 118 when considering volume-based market shares.

(894) Third, the Commission notes that after the Transaction, there will remain at least one very large alternative retail supplier of fixed telephony services, namely Proximus, with a market shares of [70-80]% (by value) and [70-80]% (by volume).

(895) Fourth, the Commission notes that the overall size of the market for retail supply of fixed telephony services in the Targets' footprint is rapidly declining. Over the period 2019-2021, the number of customers sharply declined by approximately […] subscribers, which represents a [10-20]% market size reduction. Similarly, when assessing the overall revenues generated by the market for the retail supply of fixed telephony services in the Targets' footprint, it appears that the overall revenue over the period 2019-2020 has declined by approximately EUR […], corresponding to a market size decline of [10-20]%.

(896) Finally, the Commission notes that it has not received any complaints from respondents to the market investigation regarding the market for the retail supply of fixed telephony services in the Targets' footprint.

(897) Therefore, the Commission concludes that the Transaction does not raise any competitive concern as a result of horizontal effects on the market for the retail supply of fixed telephony services in the Targets' footprint.

7.4.9. *Wholesale supply of TV channels (demand side)*[709]

7.4.9.1. The Notifying Party's view

(898) The Notifying Party considers that the Transaction does not raise any concern on the demand side of the wholesale market for the supply of TV channels even if the market is defined based on the Target's footprint for the following reasons.

(899) First, the Notifying Party argues that the new entity will continue to compete against several strong players at national level post-Transaction, in particular Proximus and Telenet. In that respect, the Notifying Party submits that the Parties' competitors, together, account for approximately [80-90]% of the total subscribers at the downstream level and that Telenet is and will remain the largest buyer closely followed by Proximus.

(900) Second, the Notifying Party indicates that OBE's increment brought about by the Transaction is not sizeable as it averages [10-20]% over the last three years when considered for all channel acquisition in the Target's footprint.

(901) Third, the Notifying Party argues that the Transaction will not increase the merged entity's buyer power as (i) OBE purchases TV channels for relatively limited amounts and has a limited retail AV customer base of less than […] subscribers representing a downstream market share of only [5-10]% in the Targets' footprint, (ii) OBE's expenditures in TV channels are primarily dedicated to customers based outside of the Targets' footprints where OBE's acquisition expenditure share is limited to [5-10]%.

(902) Fourth, the Notifying Party considers that Parties are not close competitors as (i) OBE positions itself at the downstream retail level as a low-cost player offering mainly basic TV channels while the Targets focus on premium TV channels, and (ii) the only premium TV channels acquired by both the Targets and OBE are the Eleven Sports channels which are also acquired and distributed by all other TV retailers, such as Proximus, Telenet and Télésat/TV Vlaanderen.[710]

(903) Finally, the Notifying Party submits that the TV channels broadcasters have significant countervailing buyer power as (i) TV channels providers are large and sophisticated corporations with significant total revenues of which the merged entity will account for a *de minimis* share, and (ii) the existence of a countervailing buyer power may be evidenced by the fact that only a few basic thematic channels are subject to exclusive broadcasting rights.[711]

(904) In the Article 6(1)(c) Response and in relation to our finding that the merged entity may be able to exercise a price pressure on TV channel suppliers in the Targets' footprint, the Notifying Party considers that such finding should be discarded since (i) TV channel providers have significant countervailing power; (ii) there is no evidence that TV channel suppliers would have the ability and incentive to raise

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[709] As explained in section 7.3.2.1 above, since the market shares in the market for the two segments of the market for the wholesale supply of TV channels (demand side) are not materially different between, namely, on the one hand, the market for the wholesale supply of premium pay TV channels in the Targets' footprint and, on the other side, the market for the wholesale supply of FTA and basic pay TV channels on the other hand, the Commission will conduct its assessment on the basis of an overall market for the wholesale supply of TV channels (demand side) since the effects of the Transaction would be the same irrespective of the specific segment assessed.

[710] Form CO, paragraph 1106.

[711] Form CO, paragraph 1112.

prices to the combined firm's rivals; and, (iii) there would be no effects on competition.

(905) In the Article 6(1)(c) Response and in relation to our finding that the merged entity would be able to seek exclusivity from some TV channel suppliers in the Targets' footprint, the Notifying Party considers that such finding should be discarded since (i) the market investigation did not entirely support our finding; (ii) the merged entity would not have the incentive to seek exclusivity as it would need to incur a significant increase in costs; and, (iii) there would be no effect on competition.

7.4.9.2. The Commission's assessment

(906) On the supply side (i.e. the supply of wholesale TV channel), in the Targets' footprint, OBE is not active and the Targets have a market share of less than [5-10]%. On the supply-side of the market for the wholesale supply of TV channels, the Targets compete with large TV broadcasters, such as BBC, Canal +, Warner Bros. Discovery, DPG Media, France Télévisions, Groupe TF1, RTL, RTBF, VRT and others.

(907) On the demand side (i.e. the acquisition of wholesale TV channels), in the Targets' footprint both the Notifying Party and the Targets are active, since both acquire TV channels for inclusion in their retail TV offers. The Notifying Party's presence is relatively moderate (less than [10-20]%)[712] and the Targets' market share exceeds [40-50]%.[713] On the demand-side of the market for the wholesale supply of TV channels, the Parties compete with Proximus to purchase TV channels from TV broadcasters to be included in their retail AV offerings.

(908) Therefore, the market for the wholesale supply of TV channels is horizontally affected on the demand side.[714]

(909) In this regard, some market participants raised that the Transaction will have a negative effect on their business because the Transaction will increase the bargaining power of the merged entity, thereby leading to a reduction in the distribution fees that the merged entity would be willing to pay to wholesale suppliers of TV channels, or otherwise affect the availability of TV channels to acquirers of TV channels.[715]

(910) For the reasons set out below, the Commission concludes that the Transaction does not lead to horizontal non-coordinated effects on the market for the wholesale supply of TV channels on the demand side.

(911) First, the Commission notes that the market investigation has provided mixed views on the likelihood of non-coordinated horizontal effects on the demand-side of the market for the wholesale supply of TV channels in the Targets' footprint as a result of the merged entity's increased bargaining power.

(912) In particular, the Commission notes that the majority of wholesale suppliers of TV channels consider that the Transaction will have a neutral effect on the market or their business and two respondents believe that the Transaction will actually have a positive effect (notably as it would increase the viewership base of some of their TV channels). On the other hand, 67% of the acquirers of TV channels i.e., the merged

712 Form CO, Annex 17.
713 Form CO, Annex 17.
714 Possible vertical effects resulting from the Transaction are further assessed in section 7.6.5 below.
715 Response to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 19.1 and responses to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 18.1.1.

entity's competitors at retail level that purchase such channels for their own retail AV offerings, consider that the Transaction will have a negative effect on their business and on the market more widely as all such acquirers believe that the Transaction will increase the merged entity's bargaining power.[716]

(913) In this regard, the Commission notes that any increase in bargaining power by the merged entity would technically and primarily affect the wholesale suppliers of TV channels rather than the competing acquirers, as the former could suffer from lower fees. As indicated above, the vast majority of the channels suppliers consider that the Transaction would generally not affect their business. The Commission therefore considers that the Transaction will not significantly impact the demand-side of the market for the wholesale supply of TV channels in the Targets footprint as a result of the merged entity's increased bargaining power.

(914) Second, the Commission notes that it actually is in the interest of wholesale suppliers of TV channels to distribute their TV channels as widely as possible to maximise their revenues. As a matter of fact, almost 78% of wholesale suppliers of TV channels on the supply-side active in the Targets footprint and who expressed a view consider that the merged entity will not be able to seek exclusivity from third party wholesale suppliers of TV channels post-Transaction despite the Parties' large share of acquisition on the market for the wholesale supply of TV channels in the Targets' footprint and its alleged increased bargaining power.[717]

(915) Finally, in previous decisions, the Commission considered that, should the increase in bargaining power result in lower fees paid by the merged entity to wholesale TV channel suppliers, it is doubtful that, given their international scale, those TV channel suppliers would seek to recoup any losses from other retail AV service providers by overcharging them for their channels.[718] The Commission has no evidence to suggest that a different conclusion should be reached with regards to the Targets' footprint.

7.4.9.3. Conclusion on horizontal non-coordinated effects on the market for the wholesale supply of TV channels (demand side)

(916) In light of the above, the Commission has come to conclusion that the Transaction would not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects in the market for the wholesale supply of TV channels (demand side) in the Targets' footprint.

7.4.10. Conclusion on horizontal non-coordinated effects

(917) In light of the above, the Commission has come to conclusion that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects on the retail market for fixed internet access services within the Targets' footprint, the retail market for AV services within the Targets' footprint, the retail market for multiple-play bundles within the Targets' footprint and the retail market for FMC bundles in the Targets' footprint including increased prices and/or reduced quality for end customers.

716 Responses to questionnaire Q3 to wholesale buyers of TV channels in Belgium, question 18.1.1.
717 Responses to questionnaire Q2 to wholesale suppliers of TV channels in Belgium, question 17.
718 Commission decision of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 417.

(918) Finally, in light of the above, the Commission has come to the conclusion that the Transaction would not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects in the markets for the retail supply of fixed-only bundles in the Targets' footprint, the market for the retail supply of mobile telecommunications services in Belgium, the market for the retail supply of fixed telephony services in the Targets' footprint and the market for the wholesale supply of TV channels (demand side) in the Targets' footprint.

7.5. Horizontal coordinated effects[719]

7.5.1. Legal framework

(919) A merger in a concentrated market may significantly impede effective competition due to horizontal coordinated effects where, through the creation or the strengthening of a collective dominant position, it increases the likelihood that firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU. A merger may also make coordination easier, more stable or more effective for firms that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.[720]

(920) To assess whether a merger gives rise to horizontal coordinated effects, the Commission should examine, first, whether it would be possible to reach terms of coordination and, second, whether the coordination would be likely to be sustainable.[721]

(921) As regards the possibility of reaching terms of coordination, coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.[722] Coordination may take various forms, including keeping prices above the competitive level, or dividing the market, for instance by customer characteristics or by allocating contracts in bidding markets.[723]

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[719] The Commission notes that the Transaction is unlikely to give rise to any horizontal coordinated effects in the markets for the retail supply of fixed telephony services in the Targets' footprint, the hypothetical market for the retail supply of fixed-only bundles in the Targets' footprint and for the retail supply of mobile telecommunications services in Belgium as the market share increment brought about by the Transaction on each of these markets is minimal. As such, the Commission does not consider that the Transaction will have any material impact on the likelihood of coordination in these two markets. Furthermore, the Commission does not consider that the Transaction could give rise to coordinated effects in the market for the wholesale supply of TV channels (demand-side) as a result of the Transaction, due to (i) the existence of several competitors with asymmetric market shares, different geographic focuses and financing models and methods; (ii) the existence of numerous market players at all the levels of the value chain; (iii) the increased innovation on the market in terms of customer reach and content produced; and, (iv) the constraints exercised by the levels of the value chain on one another (for example, since the wholesale supply of TV channels is an intermediate market, wholesalers would be constrained by AV content producers and retailers). Therefore, the Commission concludes that the Transaction will not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the markets for the wholesale supply of TV channels (demand-side) in the Targets' footprint, for the retail supply of fixed telephony services in the Targets' footprint, for the retail supply of fixed-only bundles and, for the retail supply of mobile telecommunications services in Belgium.

[720] Horizontal Merger Guidelines, paragraph 39.

[721] Horizontal Merger Guidelines, paragraph 42.

[722] Horizontal Merger Guidelines, paragraph 41.

[723] Horizontal Merger Guidelines, paragraph 40.

(922) As regards the sustainability of coordination, three conditions are necessary for coordination to be sustainable.[724] First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to.[725] Second, discipline requires that there is a credible deterrent mechanism that can be activated if deviation is detected.[726] Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.[727]

(923) Moreover, in examining the possibility and sustainability of coordination, the Commission should specifically consider the changes that the Transaction brings about.[728] The reduction in the number of firms in a market may in itself be a factor that facilitates coordination.

7.5.2. Retail supply of fixed internet access services

7.5.2.1. The Notifying Party's view

(924) The Notifying Party considers that no coordinated effects between (i) Proximus, Telenet and the merged entity at the national level or (ii) Proximus and the merged entity within the Targets' footprints, are likely to arise from the Transaction on the retail market for the supply of fixed internet access services for the following reasons.

(925) First, the Notifying Party submits that the Transaction will not increase the possibility of any hypothetic coordination since, at both national and the Targets' footprint level, the Transaction will not significantly decrease the market's asymmetry in terms of the main players' market shares.[729] The Notifying Party concludes that such situations will make it difficult for operators to align their interests and reach a common strategy irrespective of the geography considered. The Notifying party further argues that it expects that the Transaction will accelerate Telenet's expansion in the South of Belgium as: (i) it would be the most economically rational decision to take; (ii) Telenet's Chief Executive Officer has made public statements to that effect; and, (iii) Telenet has several cumulative options to expand in the Targets' footprint.[730]

(926) Second, the Notifying Party argues that (i) the Transaction brings no significant increment in the market as OBE's increment remains below 10% at both national and the Targets' footprint level, and that (ii) as such, the Transaction does not remove a maverick operator from the market.

(927) Third, the Notifying Party submits that the Transaction will not impact the existing heterogeneity between Proximus, Telenet and the Targets' fixed networks coverage as the Transaction would not reduce the number of fixed network operators on the Belgian telecommunications markets.

(928) Fourth, the Notifying Party considers that the Transaction will not ease any alignment between Proximus, Telenet and the Targets' costs, as they are

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724 Horizontal Merger Guidelines, paragraph 42.
725 Horizontal Merger Guidelines, paragraph 42.
726 Horizontal Merger Guidelines, paragraph 42.
727 Horizontal Merger Guidelines, paragraph 42.
728 Horizontal Merger Guidelines, paragraph 42.
729 Form CO, paragraph 1388.
730 Form CO, paragraphs 689-707.

fundamentally asymmetric given the differences in terms of footprints and technologies.[731]

(929) Fifth, the Notifying Party argues that the demand for fixed internet access services is complex and has not been stable over the last years as it is transitioning towards higher speeds and customers' usages will continue to require an ever-greater quality of internet services. In that context, the Notifying Party argues that (i) the complexity of telecommunications products in terms of tariffs and offerings and the volatility of the supply conditions because of innovations, and (ii) the changes in active players (such as new mobile entrants that are expected to also offer convergent services) would definitely not enable players to monitor deviations on the markets.

(930) Sixth, the Notifying Party considers that the Transaction will not increase the sustainability of any hypothetical coordination resulting from the existing lack of transparency on the market as the ability of the merged entity, Proximus and Telenet to monitor deviations would not be altered by the proposed Transaction.

(931) Finally, the Notifying Party considers that the Transaction would not enable the merged entity and its rivals (including outsiders and new entrants) to set up credible deterrence mechanisms[732] that are required to police possible retaliation attempts that could jeopardize the results expected from a hypothetical coordination.

(932) In the Article 6(1)(c) Response, the Notifying Party submits, first, that (i) the market for the retail supply of fixed internet access services should be national in scope; (ii) the Commission's assessment in the Article 6(1)(c) decision fails to take into account the interactions between the various retail services and bundles; (iii) the Commission's assessment in the Article 6(1)(c) decision fails to properly take into account the possible entry of Telenet and Digi in the Targets' footprint; and, (iv) the Commission's assessment in the Article 6(1)(c) decision assessment is not sufficiently backed by evidence to show any merger-specific change.

(933) Second, in the Article 6(1)(c) Response, the Notifying Party submits that market structure and characteristics of the market for the retail supply of fixed internet access services hinder reaching terms of coordination for the following reasons: (i) the Transaction does not reduce the number of operators; (ii) the Transaction does not remove a maverick or important competitive force from the market; (iii) there would be no market share, cost structure and level of vertical integration symmetry between the merged entity and Proximus in the Targets' footprint; (iv) the market investigation does not sufficiently support the finding that the market for the retail supply of fixed internet access services is sufficiently stable; and, (v) the wide availability of different bundles and discounts implies that the market for the retail supply of fixed internet access services is insufficiently transparent.

(934) Finally, in the Article 6(1)(c) Response, the Notifying Party submits that any hypothetical coordination would not be sustainable on the market for the retail supply of fixed internet access services post-Transaction for the following reasons: (i) the market is insufficiently transparent to monitor deviations from a hypothetical coordination; (ii) given the innovation towards convergence in the Belgian market, a temporary price war is not a credible deterrent mechanism; and, (iii) the entry of Telenet and Digi will jeopardise any coordination.

731 Form CO, paragraph 1396.
732 Form CO, paragraph 1436.

7.5.2.2. The Commission's assessment

(935) For the reasons set out below, the Commission concludes that it cannot exclude that the Transaction will lead to coordinated effects on the market for the retail supply of fixed internet access services.

(936) In the following sub-sections, the Commission assesses, first, whether reaching terms of coordination would be possible and, second, whether such coordination would likely be sustainable after the Transaction.

7.5.2.2.1. Reaching terms of coordination

(937) First, coordinated effects are more likely to arise in a concentrated market with a small number of players. Reaching terms of coordination is easier among fewer players,[733] *inter alia* because it is easier to identify a common pricing point. With fewer players, reaching terms of coordination is also more profitable as, given that the overall profits arising from coordination are to be shared between the coordinating firms, the lower the number of firms, the larger share of the overall profit each firm will get. The reduction in the number of firms in a market may therefore, in itself, be a factor that facilitates coordination.[734]

(938) In the present case, the Transaction will reduce the number of retail providers of fixed internet access services in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active on the market, they only account for a very small proportion of the market (collectively, [0-2]% in terms of subscribers and [0-2]% in terms of revenue). The large majority of the market (collectively, [98-100]% in terms of subscribers and [98-100]% in terms of revenue) will be in the hands of two FNOs.

(939) As it is easier and more profitable to coordinate among fewer players, the reduction in the number of operators resulting from the Transaction could both facilitate and incentivise coordination compared to today's situation.

(940) Second, mergers may increase the likelihood of coordinated effects if they involve a "maverick" firm that has a history of preventing or disrupting coordination or has characteristics that give it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate.[735]

(941) The Transaction will combine an FNO with the largest FVNO in the Targets' footprint. As explained above,[736] OBE is considered to be the most aggressive retail provider of fixed internet access services in the Targets' footprint. The Commission considers, therefore, that the Transaction may facilitate coordination by removing a "maverick" firm from the market.

(942) Third, firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetrical, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration.[737]

[733] Horizontal Merger Guidelines, paragraph 45.
[734] Horizontal Merger Guidelines, paragraph 42.
[735] Horizontal Merger Guidelines, paragraph 42.
[736] See section 7.4.2.2.4 above.
[737] Horizontal Merger Guidelines, paragraph 48.

(943) In this regard, OBE is the only existing MNO in Belgium that does not operate its own fixed network. As a result of the Transaction, OBE will become a fixed network operator, thereby aligning its structural symmetry with that of Proximus, the only other network operator in the Targets' footprint. However, the Commission notes that the merged entity and Proximus will rely on distribution technologies that are different and subject to materially different regulatory access prices.[738] Since the regulated access prices to Proximus' and the Targets' respective networks are cost-oriented, any discrepancy between the regulated access prices to Proximus' and the Targets' respective networks provides an indication that the underlying cost structure of Proximus and the Targets are not symmetrical.[739] In particular, this is further evidenced by the different technology with which Proximus and the Targets distribute their retail services, i.e., copper vs cable networks. As the Transaction will not change the fact that the merged entity and Proximus will operate distinct fixed networks with different underlying technologies (i.e., copper vs cable), the Commission does not consider that the cost structures of the merged entity and Proximus will be significantly more aligned post-Transaction than pre-Transaction thereby contributing to any increase in coordination.[740]

(944) Fourth, it is easier to coordinate on prices when demand and supply conditions are relatively stable than when they are continuously evolving. In particular, volatile demand, substantial internal growth by some firms or frequent new entry may indicate that the current situation is not sufficiently stable to make coordination likely.[741] In this context, coordination may take various forms, including keeping prices above the competitive level, limiting production or dividing the market.[742] Based on the information currently available, the most likely form of coordination in the present case would consist of keeping retail fixed internet access prices above the competitive level.

(945) In this regard, half of the respondents who expressed a view in the market investigation consider that the market for the retail supply of fixed internet access services in the Targets' footprint is stable.[743] In particular, one market participant explained that the market is characterised by "*stable demand and supply conditions, no or little growth in market share from the existing players year on year, no or few new players*".[744]

(946) The market investigation has also confirmed that the market is characterised by a **high degree of transparency**. All respondents to the market investigation who expressed a view confirmed that prices, terms and conditions are publicly available

738 For instance, see Form CO, figure 13 and tables 23 and 24 whereby, for similar 100 Mbps speed profiles, access to Proximus' DSL network nears EUR 15 per line, per month, whereas access to the Targets' network nears EUR 18 per line, per month on Brutélé's network and almost EUR 22 per line, per month on VOO's network.

739 CRC decision of 29 June 2018, Analyse des marchés du haut débit et de la radiodiffusion télévisuelle, section S.21.

740 The Commission however notes that with the progressive roll-out of fibre, the cost structures of the merged entity and of Proximus may become more and more aligned in the future.

741 Horizontal Merger Guidelines, paragraph 45.

742 Horizontal Merger Guidelines, paragraph 40.

743 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.3.

744 M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.3.1 (ID 731).

online, thereby allowing retail providers of fixed internet access services to be aware of the commercial policies of their competitors.[745]

(947) Accordingly, the market investigation has not conclusively demonstrated that the market for the retail supply of fixed internet access services is sufficiently stable to allow competitors to have a clear picture of their competitors' movements due to the existing transparency of the market.

(948) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, facilitate the reaching of terms of coordination.

7.5.2.2.2. Sustainability of coordination

(949) The paragraphs below examine the relevant factors for assessing the sustainability of coordination, including: (i) whether the degree of transparency would be sufficient to enable monitoring adherence to the terms of coordination; (ii) whether there would be credible mechanisms that would deter the FNOs from deviating, and (iii) to what extent the reactions of outsiders, including customers and actual or potential competitors, would be such as to jeopardise coordination between the FNOs.

(950) First, as outlined above in paragraphs (944)-(947), the Commission considers that it is easy for retail providers of fixed internet access services to obtain the prices, terms and conditions of their competitors. Furthermore, the Commission notes that it is common practice in the market to publicly announce retail price increases a few months ahead of their implementation.[746]

(951) Furthermore, even if a retail provider of fixed internet access services were to deviate from coordination (e.g., by cutting prices of certain services) without the other retail fixed internet access services providers noticing it, the deviation would be detected because it would lead to an uptick in the number of customers switching away from the non-deviating retail provider(s) of fixed internet access services to the one deviating. As such, while the monitoring of customer flows is not indispensable for the purposes of coordination on prices, as prices are sufficiently transparent, this additional monitoring mechanism can provide further assurances to retail providers of fixed internet access services that the terms of coordination are being adhered to.

(952) Accordingly, the Commission considers that the degree of transparency on the market is sufficient to enable the monitoring of the terms of coordination.

(953) Second, the Commission notes that coordination is not sustainable unless the consequences of deviation (i.e., retaliation by the non-deviating competitors) are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.[747] In particular, deviation is less likely to occur when the long-term benefit of coordination would outweigh the short-term benefit resulting from deviation. A simple form of retaliation consists in a return to competition.[748] Retaliation needs not necessarily take place in the same market as the deviation: if the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation.[749]

745 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 69.3.

746 For example, see Proximus' announcement of 1 March 2022 *Proximus will increase the prices of certain packs from May 1st, while making its entry-level Internet offer more affordable* (ID 2065).

747 Horizontal Merger Guidelines, paragraph 52.

748 Horizontal Merger Guidelines, paragraph 54.

749 Horizontal Merger Guidelines, paragraph 55.

(954) In this case, on the basis of the information available, the Commission considers that a conceivable deterrent mechanism would be that after noticing a deviation by another market participant, the non-deviating retail provider of fixed internet access services would punish the deviating market participant by lowering or adjusting its product offerings in such a way as to trigger a temporary price war. This is in particular possible given the absence of evidence that the operators would be capacity constrained post-Transaction; a non-deviating retail provider of fixed internet access services could thus easily take on new customers. Retaliation could therefore be perceived as a credible threat.

(955) Moreover, the profits from deviation would likely be short-lived, because the time lag between the deviating action and the disciplining response would likely be very short. As a result, the retail providers of fixed internet access services would be aware that deviation would lead to lower profits for all providers compared to coordination and would therefore have the incentive to adhere to the terms of coordination to keep it going.

(956) Third, for coordination to be sustainable, the foreseeable reaction of non-coordinating firms (including actual and potential competitors), as well as customers, should not jeopardise the outcome expected from coordination.[750]

(957) As regards customers, the buyer-side of the retail market for fixed internet access services consists of individual customers or SMEs who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.

(958) As regard potential FNO competitors, the Commission notes that barriers to entry in the Targets' footprint are high, as evidenced by the absence of entry in the Targets' footprint in the past years.[751] Moreover, the CRC's 2018 analysis of the broadband and broadcasting markets explained that the market for the retail supply of fixed internet access services is characterised by high and non-temporary barriers to entry, due to significant costs required to duplicate the infrastructure needed to distribute retail fixed internet access services.[752] Accordingly, the Commission considers it highly unlikely that FNO entry would occur in the next 2-3 years.

(959) With regards to actual and potential FVNO competitors, the Commission notes that entry by actual or potential MNOs (i.e., Telenet and Digi) is would be unlikely, untimely and insufficient.[753] With regards to existing FVNOs, the Commission notes that their presence on in the Targets' footprint is negligible, accounting, together, for [0-2]% of subscribers and [0-2]% of revenue.

(960) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, improve the sustainability of coordination.

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750 Horizontal Merger Guidelines, paragraph 56.

751 In this regard, the Commission notes that in line with the Horizontal Merger Guidelines, historical examples of entry and exit may be illustrative of the existence and size of any barriers to entry (see Horizontal Merger Guidelines, paragraphs 69-70).

752 CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, section 7.5.7.1 (ID 2058).

753 See section 7.4.2.2.7 above.

7.5.2.2.3. Conclusion on horizontal coordinated effects on the market for the retail supply of fixed internet access services

(961) In light of the above, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the market for the retail supply of fixed internet access services in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition.

7.5.3. Retail supply of AV services

7.5.3.1. The Notifying Party's view

(962) The Notifying Party considers that no coordinated effects between (i) Proximus, Telenet and the merged entity at the national level or (ii) Proximus and the merged entity within the Targets' footprints, are likely to arise from the Transaction on the retail market for the supply of AV services for the following reasons.

(963) First, the Notifying Party submits that the Transaction will not increase the possibility of any hypothetical coordination since, at both national and the Targets' footprint level, the Transaction will not significantly decrease the market's asymmetry in terms of the main players' market shares.[754] The Notifying Party concludes that such situations will make it difficult for operators to align their interests and reach a common strategy irrespective of the geography considered. The Notifying party further argues that it expects (i) other players on the market (Télésat/TV Vlaanderen, Youfone), as well as OTT players (Netflix, Disney+, Amazon Prime Video) to continue developing their AV services offering as they encounter an increasing success in Belgium, and (ii) that the proposed Transaction will accelerate Telenet's expansion in the South of the Belgium.

(964) Second, the Notifying Party argues that (i) the Transaction brings no significant increment in the market as OBE's increment remains well below 10%[755] at both national and the Targets' footprint level, and that (ii) as such, the Transaction does not remove a maverick operator from the market.

(965) Third, the Notifying Party submits that the Transaction will not impact the existing heterogeneity between Proximus, Telenet and the Targets' fixed networks coverage as the Transaction would not reduce the number of fixed network operators on the Belgian telecommunications markets.

(966) Fourth, the Notifying Party considers that the Transaction will not ease any alignment between Proximus, Telenet and the Targets' costs, as they are fundamentally asymmetric given the differences in terms of footprints and technologies.[756]

(967) Fifth, the Notifying Party argues that the supply and demand for AV services is complex and has not been stable over the last years as, like in other EU countries, the Belgian AV sector is featured by a decrease of traditional linear AV services to the benefit of non-linear offers and that OTT players take an increasingly important

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754 Form CO, paragraph 1388.

755 Form CO, paragraph 1391.

756 Form CO, paragraph 1396.

position in the competitive landscape. In that context, the Notifying Party argues that (i) the complexity of telecommunications products in terms of tariffs and offerings and the volatility of the supply conditions because of innovations, and (ii) the changes in active players (such as new mobile entrants that are expected to also offer convergent services of which AV services) would definitely not enable players to monitor deviations on the markets.

(968) Sixth, the Notifying Party considers that the Transaction will not increase the sustainability of any hypothetical coordination resulting from the existing lack of transparency[757] on the market as the ability of the merged entity, Proximus and Telenet to monitor deviations would not be altered by the proposed Transaction.

(969) Finally, the Notifying Party considers that the Transaction would not enable the merged entity and its rivals (including outsiders and new entrants) to set up credible deterrence mechanisms[758] that are required to police possible retaliation attempts that could jeopardize the results expected from a hypothetical coordination.

(970) In the Article 6(1)(c) Response, the Notifying Party submits, first, that (i) the market for the retail supply of AV services should be national in scope; (ii) the Commission's assessment in the Article 6(1)(c) decision fails to take into account the interactions between the various retail services and bundles; (iii) the Commission's assessment in the Article 6(1)(c) decision fails to properly take into account the possible entry of Telenet and Digi in the Targets' footprint; and, (iv) the Commission's assessment in the Article 6(1)(c) decision assessment is not sufficiently backed by evidence to show any merger-specific change.

(971) Second, in the Article 6(1)(c) Response, the Notifying Party submits that market structure and characteristics of the market for the retail supply of AV services hinder reaching terms of coordination for the following reasons: (i) the Transaction does not reduce the number of operators; (ii) the Transaction does not remove a maverick or important competitive force from the market; (iii) there would be no market share, cost structure and level of vertical integration symmetry between the merged entity and Proximus in the Targets' footprint; (iv) the market investigation does not sufficiently support the finding that the market for the retail supply of AV services is sufficiently stable; and, (v) the wide availability of different bundles and discounts implies that the market for the retail supply of AV services is insufficiently transparent.

(972) Finally, in the Article 6(1)(c) Response, the Notifying Party submits that any hypothetical coordination would not be sustainable on the market for the retail supply of AV services post-Transaction for the following reasons: (i) the market is insufficiently transparent to monitor deviations from a hypothetical coordination; (ii) given the innovation towards convergence in the Belgian market, a temporary price war is not a credible deterrent mechanism; and, (iii) the entry of Telenet and Digi will jeopardise any coordination.

[757] The Notifying Party illustrates this complexity and lack of transparency by the multiplicity of AV services offered in Belgium i.e., the Targets offer a basic package including 80 TV channels, as well as several extra TV options, Telenet offers two main TV packages with different channels included, as well as a number of TV options (BeTV, BeTV Sport, Netflix, Amazon Prime Video, Streamz, Family, etc.), Proximus' Pickx TV platform is included in bundles, on top of which customers may add extra content (Pickx Mix, Sports, Netflix, Disney+, BeTV, Streamz, etc.) and OBE only offers 2 TV subscriptions, with 20 or 70 channels, as well as one sport option (Eleven channels).

[758] Form CO, paragraph 1436.

7.5.3.2. The Commission's assessment

(973) For the reasons set out below, the Commission concludes that it cannot exclude that the Transaction will lead to coordinated effects on the market for the retail supply of AV services.

(974) In the following sub-sections, the Commission assesses, first, whether reaching terms of coordination would be possible and, second, whether such coordination would likely be sustainable after the Transaction.

7.5.3.2.1. Reaching terms of coordination

(975) First, coordinated effects are more likely to arise in a concentrated market with a small number of players. Reaching terms of coordination is easier among fewer players,[759] *inter alia* because it is easier to identify a common pricing point. With fewer players, reaching terms of coordination is also more profitable as, given that the overall profits arising from coordination are to be shared between the coordinating firms, the lower the number of firms, the larger share of the overall profit each firm will get. The reduction in the number of firms in a market may therefore, in itself, be a factor that facilitates coordination.[760]

(976) In the present case, the Transaction will reduce the number of retail providers of AV services in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active on the market, none of them provide retail AV services. The entirety of the market will be in the hands of two FNOs.

(977) As it is easier and more profitable to coordinate among fewer players, the reduction in the number of operators resulting from the Transaction could both facilitate and incentivise coordination compared to today's situation.

(978) Second, mergers may increase the likelihood of coordinated effects if they involve a "maverick" firm that has a history of preventing or disrupting coordination or has characteristics that give it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate.[761]

(979) The Transaction will combine an FNO with the largest FVNO in the Targets' footprint. As explained above,[762] OBE is considered to be the most aggressive retail provider of AV services in the Targets' footprint. The Commission considers, therefore, that the Transaction may facilitate coordination by removing a "maverick" firm from the market.

(980) Third, firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetrical, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration.[763]

(981) In this regard, OBE is the only existing MNO in Belgium that does not operate its own fixed network. As a result of the Transaction, OBE will become a fixed network operator, thereby aligning its structural symmetry with that of Proximus, the only

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759 Horizontal Merger Guidelines, paragraph 45.
760 Horizontal Merger Guidelines, paragraph 42.
761 Horizontal Merger Guidelines, paragraph 42.
762 See section 7.4.3.2.4 above.
763 Horizontal Merger Guidelines, paragraph 48.

other network operator in the Targets' footprint. However, the Commission notes that the merged entity and Proximus will rely on distribution technologies that are different and subject to materially different regulatory access prices.[764] Since the regulated access prices to Proximus' and the Targets' respective networks are cost-oriented, any discrepancy between the regulated access prices to Proximus' and the Targets' respective networks provides an indication that the underlying cost structure of Proximus and the Targets are not symmetrical.[765] In particular, this is further evidenced by the different technology with which Proximus and the Targets distribute their retail services, i.e., copper vs cable networks. As the Transaction will not change the fact that the merged entity and Proximus will operate distinct fixed networks with different underlying technologies (i.e., copper vs cable), the Commission does not consider that the cost structures of the merged entity and Proximus will be significantly more aligned post-Transaction than pre-Transaction thereby contributing to any increase in coordination..[766]

(982) Fourth, it is easier to coordinate on prices when demand and supply conditions are relatively stable than when they are continuously evolving. In particular, volatile demand, substantial internal growth by some firms or frequent new entry may indicate that the current situation is not sufficiently stable to make coordination likely.[767] In this context, coordination may take various forms, including keeping prices above the competitive level, limiting production or dividing the market.[768] Based on the information currently available, the most likely form of coordination in the present case would consist of keeping retail AV prices above the competitive level.

(983) In this regard, 60% of the respondents who expressed a view in the market investigation consider that the market for the retail supply of AV services in the Targets' footprint is stable. [769] In particular, one market participant explained that the market is characterised by "*stable demand and supply conditions, no or little growth in market share from the existing players year on year, no or few new players*".[770]

(984) The market investigation also confirmed that the market is characterised by a **high degree of transparency**. All respondents to the market investigation who expressed a view confirmed that prices, terms and conditions are publicly available online, thereby allowing retail providers of AV services to be aware of the commercial policies of their competitors.[771]

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764 For instance, see Form CO, figure 13 and tables 23 and 24 whereby, for similar 100 Mbps speed profiles, access to Proximus' DSL network nears EUR 15 per line, per month, whereas access to the Targets' network nears EUR 18 per line, per month on Brutélé's network and almost EUR 22 per line, per month on VOO's network.

765 CRC decision of 29 June 2018, Analyse des marchés du haut débit et de la radiodiffusion télévisuelle, section S.21.

766 The Commission however notes that with the progressive roll-out of fibre, the cost structures of the merged entity and of Proximus may become more and more aligned in the future.

767 Horizontal Merger Guidelines, paragraph 45.

768 Horizontal Merger Guidelines, paragraph 40.

769 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.4.

770 M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.4.1 (ID 731).

771 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 69.4.

(985) Accordingly, the market investigation has not conclusively demonstrated that the market for the retail supply of AV services is sufficiently stable to allow competitors to have a clear picture of their competitors' movements due to the existing transparency of the market.

(986) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, facilitate the reaching of terms of coordination.

7.5.3.2.2. Sustainability of coordination

(987) The paragraphs below examine the relevant factors for assessing the sustainability of coordination, including: (i) whether the degree of transparency would be sufficient to enable monitoring adherence to the terms of coordination; (ii) whether there would be credible mechanisms that would deter the FNOs from deviating, and (iii) to what extent the reactions of outsiders, including customers and actual or potential competitors, would be such as to jeopardise coordination between the FNOs.

(988) First, as outlined above in paragraphs (982)-(985), the Commission considers that it is easy for retail providers of AV services to obtain the prices, terms and conditions of their competitors. Furthermore, the Commission notes that it is common practice in the market to publicly announce retail price increases a few months ahead of their implementation.[772]

(989) Furthermore, even if a retail provider of AV services were to deviate from coordination (e.g., by cutting prices of certain services) without the other retail AV services providers noticing it, the deviation would be detected because it would lead to an uptick in the number of customers switching away from the non-deviating retail provider(s) of AV services to the one deviating. As such, while the monitoring of customer flows is not indispensable for the purposes of coordination on prices, as prices are sufficiently transparent this additional monitoring mechanism can provide further assurances to retail providers of AV services that the terms of coordination are being adhered to.

(990) Accordingly, the Commission considers that the degree of transparency on the market is sufficient to enable the monitoring of the terms of coordination.

(991) Second, the Commission notes that coordination is not sustainable unless the consequences of deviation (i.e., retaliation by the non-deviating competitors) are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.[773] In particular, deviation is less likely to occur when the long-term benefit of coordination would outweigh the short-term benefit resulting from deviation. A simple form of retaliation consists in a return to competition.[774] Retaliation needs not necessarily take place in the same market as the deviation: if the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation.[775]

(992) In this case, on the basis of the information available, the Commission considers that a conceivable deterrent mechanism would be that after noticing a deviation by another market participant, the non-deviating retail provider of AV services would punish the deviating market participant by lowering or adjusting its product offerings

[772] For example, see Proximus' announcement of 1 March 2022 *Proximus will increase the prices of certain packs from May 1st, while making its entry-level Internet offer more affordable* (ID 2065).

[773] Horizontal Merger Guidelines, paragraph 52.

[774] Horizontal Merger Guidelines, paragraph 54.

[775] Horizontal Merger Guidelines, paragraph 55.

in such a way as to trigger a temporary price war. This is in particular possible given the absence of evidence that the operators would be capacity constrained post-Transaction; a non-deviating retail provider of AV services could thus easily take on new customers. Retaliation could therefore be perceived as a credible threat.

(993) Moreover, the profits from deviation would likely be short-lived, because the time lag between the deviating action and the disciplining response would likely be very short. As a result, the retail providers of AV services would be aware that deviation would lead to lower profits for all providers compared to coordination and would therefore have the incentive to adhere to the terms of coordination to keep it going.

(994) Third, for coordination to be sustainable, the foreseeable reaction of non-coordinating firms (including actual and potential competitors), as well as customers, should not jeopardise the outcome expected from coordination.[776]

(995) As regards customers, the buyer-side of the retail market for AV services consists of individual customers or SMEs who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.

(996) As regard potential FNO competitors, the Commission notes that barriers to entry in the Targets' footprint are high, as evidenced by the absence of entry in the Targets' footprint in the past years.[777] Moreover, the CRC's 2018 analysis of the broadband and broadcasting markets explained that the market for the retail supply of AV services is characterised by high and non-temporary barriers to entry, due to significant costs required to duplicate the infrastructure needed to distribute retail AV services.[778] Accordingly, the Commission considers it highly unlikely that FNO entry would occur in the next 2-3 years.

(997) With regards to actual and potential FVNO competitors, the Commission notes that entry by actual or potential MNOs (i.e., Telenet and Digi) is unlikely, untimely and insufficient.[779]

(998) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, improve the sustainability of coordination.

7.5.3.2.3. Conclusion on horizontal coordinated effects on the market for the retail supply of AV services

(999) In light of the above, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the market for the retail supply of AV services in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition..

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776 Horizontal Merger Guidelines, paragraph 56.

777 In this regard, the Commission notes that in line with the Horizontal Merger Guidelines, historical examples of entry and exit may be illustrative of the existence and size of any barriers to entry (see Horizontal Merger Guidelines, paragraphs 69-70).

778 CRC's decision of 29 June 2018 - *Analyse des marchés du haut débit et de la radiodiffusion télévisuelle*, section 8.5.5.1 (ID 2058).

779 See section 7.4.3.2.7 above.

7.5.4. Retail supply of multiple-play bundles

7.5.4.1. The Notifying Party's view

(1000) The Notifying Party considers that no coordinated effects between (i) Proximus, Telenet and the merged entity at the national level or (ii) Proximus and the merged entity within the Targets' footprints, are likely to arise from the Transaction on the hypothetical retail market for the supply of multiple-play bundles (including FMC bundles) for the following reasons.

(1001) First, the Notifying Party submits that the Transaction will not increase the possibility of any hypothetic coordination since, at both national and the Targets' footprint level, the Transaction will not significantly decrease the market's asymmetry in terms of the main players' market shares.[780] The Notifying Party concludes that such situations will make it difficult for operators to align their interests and reach a common strategy irrespective of the geography considered. The Notifying party further argues that it expects (i) Youfone to start providing multiple-play bundles, which will further increase market positions' asymmetry, and (ii) that the proposed Transaction will accelerate Telenet's expansion in the South of the Belgium.

(1002) Second, the Notifying Party argues that (i) the Transaction brings no significant increment in the market as OBE's increment remains well below 5%[781] at both national and the Targets' footprint level, and that (ii) as such, the Transaction does not remove a maverick operator from the market.

(1003) Third, the Notifying Party submits that the Transaction will not impact the existing heterogeneity between Proximus, Telenet and the Targets' fixed networks coverage as the Transaction would not reduce the number of fixed network operators on the Belgian telecommunications markets.

(1004) Fourth, the Notifying Party considers that the Transaction will not ease any alignment between Proximus, Telenet and the Targets' costs, as they are fundamentally asymmetric given the differences in terms of footprints and technologies.[782]

(1005) Fifth, the Notifying Party submits that (i) the demand for multiple-play bundles has been increasing steadily since many years and, (ii) lately, bundles combining a mobile and a fixed component have become increasingly popular and their success is expected to continue to grow sharply in the coming years. In that context, the Notifying Party argues that (i) the complexity of telecommunications products in terms of tariffs and offerings and the volatility of the supply conditions because of innovations, and (ii) the changes in active players (such as new mobile entrants that are expected to also offer multi-play services whether convergent or not) would definitely not enable players to monitor deviations on the markets.

(1006) Sixth, the Notifying Party considers that the Transaction will not increase the sustainability of any hypothetical coordination resulting from the existing lack of

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[780] Form CO, paragraph 1388.

[781] The Notifying Party further adds that, considering only standalone AV offers, there would be no increment as OBE only offers TV services within multiple-play or fixed-only bundles.

[782] Form CO, paragraph 1396.

transparency[783] on the market as the ability of the merged entity, Proximus and Telenet to monitor deviations would not be altered by the proposed Transaction.

(1007) Finally, the Notifying Party considers that the Transaction would not enable the merged entity and its rivals (including outsiders and new entrants) to set up credible deterrence mechanisms[784] that are required to police possible retaliation attempts that could jeopardize the results expected from a hypothetical coordination.

(1008) In the Article 6(1)(c) Response, the Notifying Party submits, first, that (i) the market for the retail supply of multiple-play bundles should be national in scope; (ii) the Commission's assessment in the Article 6(1)(c) decision fails to take into account the interactions between the various retail services and bundles; (iii) the Commission's assessment in the Article 6(1)(c) decision fails to properly take into account the possible entry of Telenet and Digi in the Targets' footprint; and, (iv) the Commission's assessment in the Article 6(1)(c) decision assessment is not sufficiently backed by evidence to show any merger-specific change.

(1009) Second, in the Article 6(1)(c) Response, the Notifying Party submits that market structure and characteristics of the market for the retail supply of multiple-play bundles hinder reaching terms of coordination for the following reasons: (i) the Transaction does not reduce the number of operators; (ii) the Transaction does not remove a maverick or important competitive force from the market; (iii) there would be no market share, cost structure and level of vertical integration symmetry between the merged entity and Proximus in the Targets' footprint; (iv) the market investigation does not sufficiently support the finding that the market for the retail supply of multiple-play bundles is sufficiently stable; and, (v) the wide availability of different bundles and discounts implies that the market for the retail supply of multiple-play bundles is insufficiently transparent.

(1010) Finally, in the Article 6(1)(c) Response, the Notifying Party submits that any hypothetical coordination would not be sustainable on the market for the retail supply of multiple-play bundles post-Transaction for the following reasons: (i) the market is insufficiently transparent to monitor deviations from a hypothetical coordination; (ii) given the innovation towards convergence in the Belgian market, a temporary price war is not a credible deterrent mechanism; and, (iii) the entry of Telenet and Digi will jeopardise any coordination.

7.5.4.2. The Commission's assessment

(1011) For the reasons set out below, the Commission concludes that it cannot exclude that the Transaction will lead to coordinated effects on the market for the retail supply of multiple-play bundles.

(1012) In the following sub-sections, the Commission assesses, first, whether reaching terms of coordination would be possible and, second, whether such coordination would likely be sustainable after the Transaction.

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783 The Notifying Party explains that lack of transparency by the multiple offers that are changing continuously based on new price propositions being brought on the market to such an extent that the entire pricing on the market would be extremely complex to follow and continuously shifting (because of the fact that the Belgian market is characterized by a wide range of technologies, bundle proposals functionalities, etc.).

784 Form CO, paragraph 1436.

7.5.4.2.1. Reaching terms of coordination

(1013) First, coordinated effects are more likely to arise in a concentrated market with a small number of players. Reaching terms of coordination is easier among fewer players,[785] *inter alia* because it is easier to identify a common pricing point. With fewer players, reaching terms of coordination is also more profitable as, given that the overall profits arising from coordination are to be shared between the coordinating firms, the lower the number of firms, the larger share of the overall profit each firm will get. The reduction in the number of firms in a market may therefore, in itself, be a factor that facilitates coordination.[786]

(1014) In the present case, the Transaction will reduce the number of retail providers of multiple-play bundles in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active on the market, none of them provide retail multiple-play bundles. The entirety of the market will be in the hands of two FNOs.

(1015) As it is easier and more profitable to coordinate among fewer players, the reduction in the number of operators resulting from the Transaction could both facilitate and incentivise coordination compared to today's situation.

(1016) Second, mergers may increase the likelihood of coordinated effects if they involve a "maverick" firm that has a history of preventing or disrupting coordination or has characteristics that give it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate.[787]

(1017) The Transaction will combine an FNO with the largest FVNO in the Targets' footprint. As explained above,[788] OBE is considered to be the most aggressive retail provider of multiple-play bundles in the Targets' footprint. The Commission considers, therefore, that the Transaction may facilitate coordination by removing a "maverick" firm from the market.

(1018) Third, firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetrical, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration.[789]

(1019) In this regard, OBE is the only existing MNO in Belgium that does not operate its own fixed network. As a result of the Transaction, OBE will become a fixed network operator, thereby aligning its structural symmetry with that of Proximus, the only other network operator in the Targets' footprint. However, the Commission notes that the merged entity and Proximus will rely on distribution technologies that are different and subject to materially different regulatory access prices.[790] Since the regulated access prices to Proximus' and the Targets' respective networks are cost-oriented, any discrepancy between the regulated access prices to Proximus' and the

785 Horizontal Merger Guidelines, paragraph 45.
786 Horizontal Merger Guidelines, paragraph 42.
787 Horizontal Merger Guidelines, paragraph 42.
788 See section 7.4.4.2.4 above.
789 Horizontal Merger Guidelines, paragraph 48.
790 For instance, see Form CO, figure 13 and tables 23 and 24 whereby, for similar 100 Mbps speed profiles, access to Proximus' DSL network nears EUR 15 per line, per month, whereas access to the Targets' network nears EUR 18 per line, per month on Brutélé's network and almost EUR 22 per line, per month on VOO's network.

Targets' respective networks provides an indication that the underlying cost structure of Proximus and the Targets are not symmetrical.[791] In particular, this is further evidenced by the different technology with which Proximus and the Targets distribute their retail services, i.e., copper vs cable networks. As the Transaction will not change the fact that the merged entity and Proximus will operate distinct fixed networks with different underlying technologies (i.e., copper vs cable), the Commission does not consider that the cost structures of the merged entity and Proximus will be significantly more aligned post-Transaction than pre-Transaction thereby contributing to any increase in coordination..[792]

(1020) Fourth, it is easier to coordinate on prices when demand and supply conditions are relatively stable than when they are continuously evolving. In particular, volatile demand, substantial internal growth by some firms or frequent new entry may indicate that the current situation is not sufficiently stable to make coordination likely.[793] In this context, coordination may take various forms, including keeping prices above the competitive level, limiting production or dividing the market.[794] Based on the information currently available, the most likely form of coordination in the present case would consist of keeping retail multiple-play bundles prices above the competitive level.

(1021) In this regard, 33% of the respondents who provided a substantiated view in the market investigation consider that the hypothetical market for the retail supply of multiple-play bundles in the Targets' footprint is stable.[795] In particular, one market participant explained that the market is characterised by "*stable demand and supply conditions, no or little growth in market share from the existing players year on year, no or few new players*".[796]

(1022) The market investigation has also confirmed that the market is characterised by a **high degree of transparency**. All respondents to the market investigation who expressed a view confirmed that prices, terms and conditions are publicly available online, thereby allowing retail providers of multiple-play bundles to be aware of the commercial policies of their competitors.[797]

(1023) Accordingly, the market investigation has not conclusively demonstrated that the market for the retail supply of multiple-play bundles is sufficiently stable to allow competitors to have a clear picture of their competitors' movements due to the existing transparency of the market.

(1024) In light of the above, the Commission concludes that it cannot exclude that the post-Transaction market structure and players as well as the high price transparency on the market could facilitate the reaching of terms of coordination.

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791 CRC decision of 29 June 2018, Analyse des marchés du haut débit et de la radiodiffusion télévisuelle, section S.21.

792 The Commission however notes that with the progressive roll-out of fibre, the cost structures of the merged entity and of Proximus may become more and more aligned in the future.

793 Horizontal Merger Guidelines, paragraph 45.

794 Horizontal Merger Guidelines, paragraph 40.

795 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.5.

796 M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.5.1 (ID 731).

797 Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 69.5.

(1025) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, facilitate the reaching of terms of coordination.

7.5.4.2.2. Sustainability of coordination

(1026) The paragraphs below examine the relevant factors for assessing the sustainability of coordination, including: (i) whether the degree of transparency would be sufficient to enable monitoring adherence to the terms of coordination; (ii) whether there would be credible mechanisms that would deter the FNOs from deviating, and (iii) to what extent the reactions of outsiders, including customers and actual or potential competitors, would be such as to jeopardise coordination between the FNOs.

(1027) First, as outlined above in paragraphs(1020)-(1023), the Commission considers that it is easy for retail providers of multiple-play bundles to obtain the prices, terms and conditions of their competitors. Furthermore, the Commission notes that it is common practice in the market to publicly announce retail price increases a few months ahead of their implementation.[798]

(1028) Furthermore, even if a retail provider of multiple-play bundles were to deviate from coordination (e.g., by cutting prices of certain services) without the other retail multiple-play bundles providers noticing it, the deviation would be detected because it would lead to an uptick in the number of customers switching away from the non-deviating retail provider(s) of multiple-play bundles to the one deviating. As such, while the monitoring of customer flows is not indispensable for the purposes of coordination on prices, as prices are sufficiently transparent, this additional monitoring mechanism can provide further assurances to retail providers of multiple-play bundles that the terms of coordination are being adhered to.

(1029) Accordingly, the Commission considers that the degree of transparency on the market is sufficient to enable the monitoring of the terms of coordination.

(1030) Second, the Commission notes that coordination is not sustainable unless the consequences of deviation (i.e., retaliation by the non-deviating competitors) are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.[799] In particular, deviation is less likely to occur when the long-term benefit of coordination would outweigh the short-term benefit resulting from deviation. A simple form of retaliation consists in a return to competition.[800] Retaliation needs not necessarily take place in the same market as the deviation: if the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation.[801]

(1031) In this case, on the basis of the information available, the Commission considers that a conceivable deterrent mechanism would be that after noticing a deviation by another market participant, the non-deviating retail provider of multiple-play bundles would punish the deviating market participant by lowering or adjusting its product offerings in such a way as to trigger a temporary price war. This is in particular possible given the absence of evidence that the operators would be capacity constrained post-Transaction; a non-deviating retail provider of multiple-play

[798] For example, see Proximus' announcement of 1 March 2022 *Proximus will increase the prices of certain packs from May 1st, while making its entry-level Internet offer more affordable* (ID 2065).

[799] Horizontal Merger Guidelines, paragraph 52.

[800] Horizontal Merger Guidelines, paragraph 54.

[801] Horizontal Merger Guidelines, paragraph 55.

bundles could thus easily take on new customers. Retaliation could therefore be perceived as a credible threat.

(1032) Moreover, the profits from deviation would likely be short-lived, because the time lag between the deviating action and the disciplining response would likely be very short. As a result, the retail providers of multiple-play bundles would be aware that deviation would lead to lower profits for all providers compared to coordination and would therefore have the incentive to adhere to the terms of coordination to keep it going.

(1033) Third, for coordination to be sustainable, the foreseeable reaction of non-coordinating firms (including actual and potential competitors), as well as customers, should not jeopardise the outcome expected from coordination.[802]

(1034) As regards customers, the buyer-side of the hypothetical market for the retail supply of multiple-play bundles consists of individual customers or SMEs who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.

(1035) As regard potential FNO competitors, the Commission notes that barriers to entry in the Targets' footprint are high, as evidenced by the absence of entry in the Targets' footprint in the past years.[803] Moreover, as explained above in paragraphs (958) and (996), the CRC's 2018 analysis of the broadband and broadcasting markets explained that the market for the retail supply of fixed internet access services and the market for the retail supply of AV services, which are commonly sold as part of multiple-play bundles, are characterised by high and non-temporary barriers to entry. Accordingly, the Commission considers it highly unlikely that FNO entry would occur in the next 2-3 years.

(1036) With regards to actual and potential FVNO competitors, the Commission notes that entry by actual or potential MNOs (i.e., Telenet and Digi) is unlikely, untimely and insufficient.[804]

(1037) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, improve the sustainability of coordination.

7.5.4.2.3. Conclusion on horizontal coordinated effects on the hypothetical market for the retail supply of multiple-play bundles

(1038) In light of the above, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the market for the retail supply of multiple-play bundles in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition.

802 Horizontal Merger Guidelines, paragraph 56.

803 In this regard, the Commission notes that in line with the Horizontal Merger Guidelines, historical examples of entry and exit may be illustrative of the existence and size of any barriers to entry (see Horizontal Merger Guidelines, paragraphs 69-70).

804 See section 7.4.4.2.7 above.

7.5.5. *Retail supply of FMC bundles*

7.5.5.1. The Notifying Party's view

(1039) The Notifying Party considers that no coordinated effects between (i) Proximus, Telenet and the merged entity at the national level or (ii) Proximus and the merged entity within the Targets' footprints, are likely to arise from the Transaction on the hypothetical retail market for the supply of FMC bundles for the following reasons.

(1040) First, the Notifying Party submits that the Transaction will not increase the possibility of any hypothetic coordination since, at both national and the Targets' footprint level, the Transaction will not significantly decrease the market's asymmetry in terms of the main players' market shares.[805] The Notifying Party concludes that such situations will make it difficult for operators to align their interests and reach a common strategy irrespective of the geography considered. The Notifying party further argues that it expects (i) Youfone to start providing multiple-play bundles including FMC bundles, which will further increase market positions' asymmetry, and (ii) that the proposed Transaction will accelerate Telenet's expansion in the South of the Belgium.

(1041) Second, the Notifying Party argues that (i) the Transaction brings no significant increment in the market as OBE's increment remains well below 5%[806] at both national and the Targets' footprint level, and that (ii) as such, the Transaction does not remove a maverick operator from the market.

(1042) Third, the Notifying Party submits that the Transaction will not impact the existing heterogeneity between Proximus, Telenet and the Targets' fixed networks coverage as the Transaction would not reduce the number of fixed network operators on the Belgian telecommunications markets.

(1043) Fourth, the Notifying Party considers that the Transaction will not ease any alignment between Proximus, Telenet and the Targets' costs, as they are fundamentally asymmetric given the differences in terms of footprints and technologies.[807]

(1044) Fifth, the Notifying Party submits that (i) bundles combining a mobile and a fixed component (i.e., FMC bundles) have become increasingly popular, and (ii) their success is expected to continue to grow sharply in the coming years. In that context, the Notifying Party argues that (i) the complexity of telecommunications products in terms of tariffs and offerings and the volatility of the supply conditions because of innovations, and (ii) the changes in active players (such as new mobile entrants that are expected to also offer multi-play services whether convergent or not) would definitely not enable players to monitor deviations on the markets.

(1045) Sixth, the Notifying Party considers that the Transaction will not increase the sustainability of any hypothetical coordination resulting from the existing lack of transparency[808] on the market as the ability of the merged entity, Proximus and Telenet to monitor deviations would not be altered by the proposed Transaction.

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805 Form CO, paragraph 1388.

806 The Notifying Party further adds that, considering only standalone AV offers, there would be no increment as OBE only offers TV services within multiple-play or fixed-only bundles.

807 Form CO, paragraph 1396.

808 The Notifying Party explains that lack of transparency by the multiple offers that are changing continuously based on new price propositions being brought on the market to such an extent that the entire pricing on the market would be extremely complex to follow and continuously shifting (because

(1046) Finally, the Notifying Party considers that the Transaction would not enable the merged entity and its rivals (including outsiders and new entrants) to set up credible deterrence mechanisms[809] that are required to police possible retaliation attempts that could jeopardize the results expected from a hypothetical coordination.

(1047) In the Article 6(1)(c) Response, the Notifying Party submits, first, that (i) the market for the retail supply of FMC bundles should be national in scope; (ii) the Commission's assessment in the Article 6(1)(c) decision fails to take into account the interactions between the various retail services and bundles; (iii) the Commission's assessment in the Article 6(1)(c) decision fails to properly take into account the possible entry of Telenet and Digi in the Targets' footprint; and, (iv) the Commission's assessment in the Article 6(1)(c) decision assessment is not sufficiently backed by evidence to show any merger-specific change.

(1048) Second, in the Article 6(1)(c) Response, the Notifying Party submits that market structure and characteristics of the market for the retail supply of FMC bundles hinder reaching terms of coordination for the following reasons: (i) the Transaction does not reduce the number of operators; (ii) the Transaction does not remove a maverick or important competitive force from the market; (iii) there would be no market share, cost structure and level of vertical integration symmetry between the merged entity and Proximus in the Targets' footprint; (iv) the market investigation does not sufficiently support the finding that the market for the retail supply of FMC bundles is sufficiently stable; and, (v) the wide availability of different bundles and discounts implies that the market for the retail supply of FMC bundles is insufficiently transparent.

(1049) Finally, in the Article 6(1)(c) Response, the Notifying Party submits that any hypothetical coordination would not be sustainable on the market for the retail supply of FMC bundles post-Transaction for the following reasons: (i) the market is insufficiently transparent to monitor deviations from a hypothetical coordination; (ii) given the innovation towards convergence in the Belgian market, a temporary price war is not a credible deterrent mechanism; and, (iii) the entry of Telenet and Digi will jeopardise any coordination.

7.5.5.2. The Commission's assessment

(1050) For the reasons set out below, the Commission concludes that it cannot exclude that the Transaction will lead to coordinated effects on the market for the retail supply of FMC bundles.

(1051) In the following sub-sections, the Commission assesses, first, whether reaching terms of coordination would be possible and, second, whether such coordination would likely be sustainable after the Transaction.

7.5.5.2.1. Reaching terms of coordination

(1052) First, coordinated effects are more likely to arise in a concentrated market with a small number of players. Reaching terms of coordination is easier among fewer players,[810] *inter alia* because it is easier to identify a common pricing point. With fewer players, reaching terms of coordination is also more profitable as, given that the overall profits arising from coordination are to be shared between the

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of the fact that the Belgian market is characterized by a wide range of technologies, bundle proposals functionalities, etc.).

809 Form CO, paragraph 1436.

810 Horizontal Merger Guidelines, paragraph 45.

coordinating firms, the lower the number of firms, the larger share of the overall profit each firm will get. The reduction in the number of firms in a market may therefore, in itself, be a factor that facilitates coordination.[811]

(1053) In the present case, the Transaction will reduce the number of retail providers of FMC bundles in the Targets' footprint from 3 to 2, thus significantly increasing the market concentration level. While a number of FVNOs would remain active on the market, none of them provide retail FMC bundles. The entirety of the market will be in the hands of two FNOs.

(1054) As it is easier and more profitable to coordinate among fewer players, the reduction in the number of operators resulting from the Transaction could both facilitate and incentivise coordination compared to today's situation.

(1055) Second, mergers may increase the likelihood of coordinated effects if they involve a "maverick" firm that has a history of preventing or disrupting coordination or has characteristics that give it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate.[812]

(1056) The Transaction will combine an FNO with the largest FVNO in the Targets' footprint. As explained above,[813] OBE is considered to be the most aggressive retail provider of FMC bundles in the Targets' footprint. The Commission considers, therefore, that the Transaction may facilitate coordination by removing a "maverick" firm from the market.

(1057) Third, firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetrical, especially in terms of cost structures, market shares, capacity levels and levels of vertical integration.[814]

(1058) In this regard, OBE is the only existing MNO in Belgium that does not operate its own fixed network. As a result of the Transaction, OBE will become a fixed network operator, thereby aligning its structural symmetry with that of Proximus, the only other network operator in the Targets' footprint. However, the Commission notes that the merged entity and Proximus will rely on distribution technologies that are different and subject to materially different regulatory access prices.[815] Since the regulated access prices to Proximus' and the Targets' respective networks are cost-oriented, any discrepancy between the regulated access prices to Proximus' and the Targets' respective networks provides an indication that the underlying cost structure of Proximus and the Targets are not symmetrical.[816] In particular, this is further evidenced by the different technology with which Proximus and the Targets distribute their retail services, i.e., copper vs cable networks. As the Transaction will not change the fact that the merged entity and Proximus will operate distinct fixed networks with different underlying technologies (i.e., copper vs cable), the

811 Horizontal Merger Guidelines, paragraph 42.
812 Horizontal Merger Guidelines, paragraph 42.
813 See section 7.4.5.2.4 above.
814 Horizontal Merger Guidelines, paragraph 48.
815 For instance, see Form CO, figure 13 and tables 23 and 24 whereby, for similar 100 Mbps speed profiles, access to Proximus' DSL network nears EUR 15 per line, per month, whereas access to the Targets' network nears EUR 18 per line, per month on Brutélé's network and almost EUR 22 per line, per month on VOO's network.
816 CRC decision of 29 June 2018, Analyse des marchés du haut débit et de la radiodiffusion télévisuelle, section S.21.

Commission does not consider that the cost structures of the merged entity and Proximus will be significantly more aligned post-Transaction than pre-Transaction thereby contributing to any increase in coordination..[817]

(1059) Fourth, it is easier to coordinate on prices when demand and supply conditions are relatively stable than when they are continuously evolving. In particular, volatile demand, substantial internal growth by some firms or frequent new entry may indicate that the current situation is not sufficiently stable to make coordination likely.[818] In this context, coordination may take various forms, including keeping prices above the competitive level, limiting production or dividing the market.[819] Based on the information currently available, the most likely form of coordination in the present case would consist of keeping retail FMC bundles prices above the competitive level.

(1060) In this regard, 33% of the respondents who provided a substantiated view in the market investigation consider that the hypothetical market for the retail supply of FMC bundles in the Targets' footprint is stable.[820] In particular, one market participant explained that the market is characterised by "*stable demand and supply conditions, no or little growth in market share from the existing players year on year, no or few new players*".[821]

(1061) The market investigation has also confirmed that the market is characterised by a **high degree of transparency**. All respondents to the market investigation who expressed a view confirmed that prices, terms and conditions are publicly available online, thereby allowing retail providers of FMC bundles to be aware of the commercial policies of their competitors.[822]

(1062) Accordingly, the market investigation has not conclusively demonstrated that the market for the retail supply of FMC bundles is sufficiently stable to allow competitors to have a clear picture of their competitors' movements due to the existing transparency of the market.

(1063) In light of the above, the Commission concludes that it cannot exclude that the post-Transaction market structure and players as well as the high price transparency on the market could facilitate the reaching of terms of coordination.

(1064) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, facilitate the reaching of terms of coordination.

7.5.5.2.2. Sustainability of coordination

(1065) The paragraphs below examine the relevant factors for assessing the sustainability of coordination, including: (i) whether the degree of transparency would be sufficient to enable monitoring adherence to the terms of coordination; (ii) whether there would be credible mechanisms that would deter the FNOs from deviating, and (iii) to what

[817] The Commission however notes that with the progressive roll-out of fibre, the cost structures of the merged entity and of Proximus may become more and more aligned in the future.
[818] Horizontal Merger Guidelines, paragraph 45.
[819] Horizontal Merger Guidelines, paragraph 40.
[820] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.7.
[821] M7's response to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 73.7.1 (ID 731).
[822] Responses to questionnaire Q1 to providers and customers of telecommunication services in Belgium, question 69.7.

extent the reactions of outsiders, including customers and actual or potential competitors, would be such as to jeopardise coordination between the FNOs.

(1066) First, as outlined above in paragraphs(1059)-(1062), the Commission considers that it is easy for retail providers of FMC bundles to obtain the prices, terms and conditions of their competitors. Furthermore, the Commission notes that it is common practice in the market to publicly announce retail price increases a few months ahead of their implementation.[823]

(1067) Furthermore, even if a retail provider of FMC bundles were to deviate from coordination (e.g., by cutting prices of certain services) without the other retail FMC bundles providers noticing it, the deviation would be detected because it would lead to an uptick in the number of customers switching away from the non-deviating retail provider(s) of FMC bundles to the one deviating. As such, while the monitoring of customer flows is not indispensable for the purposes of coordination on prices, as prices are sufficiently transparent, this additional monitoring mechanism can provide further assurances to retail providers of FMC bundles that the terms of coordination are being adhered to.

(1068) Accordingly, the Commission considers that the degree of transparency on the market is sufficient to enable the monitoring of the terms of coordination.

(1069) Second, the Commission notes that coordination is not sustainable unless the consequences of deviation (i.e., retaliation by the non-deviating competitors) are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.[824] In particular, deviation is less likely to occur when the long-term benefit of coordination would outweigh the short-term benefit resulting from deviation. A simple form of retaliation consists in a return to competition.[825] Retaliation needs not necessarily take place in the same market as the deviation: if the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation.[826]

(1070) In this case, on the basis of the information available, the Commission considers that a conceivable deterrent mechanism would be that after noticing a deviation by another market participant, the non-deviating retail provider of FMC bundles would punish the deviating market participant by lowering or adjusting its product offerings in such a way as to trigger a temporary price war. This is in particular possible given the absence of evidence that the operators would be capacity constrained post-Transaction; a non-deviating retail provider of FMC bundles could thus easily take on new customers. Retaliation could therefore be perceived as a credible threat.

(1071) Moreover, the profits from deviation would likely be short-lived, because the time lag between the deviating action and the disciplining response would likely be very short. As a result, the retail providers of FMC bundles would be aware that deviation would lead to lower profits for all providers compared to coordination and would therefore have the incentive to adhere to the terms of coordination to keep it going.

823 For example, see Proximus' announcement of 1 March 2022 *Proximus will increase the prices of certain packs from May 1st, while making its entry-level Internet offer more affordable* (ID 2065).

824 Horizontal Merger Guidelines, paragraph 52.

825 Horizontal Merger Guidelines, paragraph 54.

826 Horizontal Merger Guidelines, paragraph 55.

(1072) Third, for coordination to be sustainable, the foreseeable reaction of non-coordinating firms (including actual and potential competitors), as well as customers, should not jeopardise the outcome expected from coordination.[827]

(1073) As regards customers, the buyer-side of the hypothetical market for the retail supply of FMC bundles consists of individual customers or SMEs who purchase internet access services through a multitude of small transactions. Accordingly, such customers have very little buyer power.

(1074) As regard potential FNO competitors, the Commission notes that barriers to entry in the Targets' footprint are high, as evidenced by the absence of entry in the Targets' footprint in the past years.[828] Moreover, as explained above in paragraphs (958) and (996), the CRC's 2018 analysis of the broadband and broadcasting markets explained that the market for the retail supply of fixed internet access services and the market for the retail supply of AV services, which are commonly sold as part of FMC bundles, are characterised by high and non-temporary barriers to entry. Accordingly, the Commission considers it highly unlikely that FNO entry would occur in the next 2-3 years.

(1075) With regards to actual and potential FVNO competitors, the Commission notes that entry by actual or potential MNOs (i.e., Telenet and Digi) is unlikely, untimely and insufficient.[829]

(1076) On the basis of the above, the Commission considers that it cannot exclude that the present Transaction does, on its own, improve the sustainability of coordination.

7.5.5.2.3. Conclusion on horizontal coordinated effects on the hypothetical market for the retail supply of FMC bundles

(1077) In light of the above, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the market for the retail supply of FMC bundles in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition.

7.5.6. Conclusion on horizontal coordinated effects

(1078) In light of the above, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the markets for the retail supply of fixed internet access services in the Targets' footprint, the retail supply of AV services in the Targets' footprint, the retail supply of multiple-play bundles in the Targets' footprint, and the retail supply of FMC bundles in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition.

827 Horizontal Merger Guidelines, paragraph 56.

828 In this regard, the Commission notes that in line with the Horizontal Merger Guidelines, historical examples of entry and exit may be illustrative of the existence and size of any barriers to entry (see Horizontal Merger Guidelines, paragraphs 69-70).

829 See section 7.4.5.2.7 above.

(1079) Furthermore, the Commission has come to the conclusion that the Transaction will not significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the markets for the wholesale supply of TV channels (demand-side) in the Targets' footprint, for the retail supply of fixed telephony services in the Targets' footprint, for the retail supply of fixed-only bundles and, for the retail supply of mobile telecommunications services in Belgium.

7.6. Vertical effects

7.6.1. Legal framework

(1080) 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 Transaction, thereby reducing these companies' ability and/or incentive to compete.[830]

(1081) 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).

(1082) Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger.[831]

(1083) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs; second, whether it would have the incentive to do so; and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream. In practice, these factors are often examined together since they are closely intertwined.[832]

(1084) 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.[833]

(1085) 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.[834]

[830] Non-Horizontal Merger Guidelines, paragraph 29.
[831] Non-Horizontal Merger Guidelines, paragraph 31.
[832] Non-Horizontal Merger Guidelines, paragraph 32.
[833] Non-Horizontal Merger Guidelines, paragraph 58.
[834] Non-Horizontal Merger Guidelines, paragraph 59.

7.6.2. *Relevance of ex ante sectorial regulation in the Commission's assessment*

(1086) Recital 29 of the European Electronic Communications Code[835] states that: "Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that ex ante regulatory obligations are imposed only where there is no effective and sustainable competition on the markets concerned. The objective of ex ante regulatory intervention is to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. Obligations at wholesale level should be imposed where otherwise one or more retail markets are not likely to become effectively competitive in the absence of those obligations."[836]

(1087) The Commission's Guidelines on market analysis and the assessment of significant market power indicates that the national regulatory authority shall carry out its assessment taking into account "existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation,"[837] which is known as the "Modified Greenfield Approach".

(1088) The Commission, on the other hand, evaluates mergers in the market context within which they arise, which includes the regulatory environment. Anticipated changes to the regulatory environment within the timeframe of the prospective merger analysis can only be taken into account if future changes can be reasonably predicted.[838]

(1089) Accordingly, in the following sections, the Commission will only take into account future changes to the regulatory environment that can be reasonably predicted.

7.6.3. *Vertically affected markets arising from the vertical relationships between the Parties activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream)*

(1090) The vertical relationships between the Parties' activities consist of the Targets' upstream activities on the market for the wholesale supply of broadband access and the Parties' activities in the downstream markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% both on the upstream and downstream markets, except on the market for the retail supply of business connectivity services.

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835 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17 December 2018, page 36.

836 European Electronic Communications Code, recital 29.

837 Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications and services, C(2018)2374, OJ C 159, 7 May 2018, pages 1–15, paragraphs 17 and following.

838 According to paragraph 9 of the Horizontal Merger Guidelines, generally, the conditions existing at the time of the merger constitute the relevant comparison for evaluation the effects of a merger. Only in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.

7.6.3.1. Input foreclosure concerns

7.6.3.1.1. Notifying Party's views

(1091) The Notifying Party submits that the Transaction will not give rise to any input foreclosure concerns resulting from the vertical links arising from the relationships between the market for the wholesale supply of broadband access (upstream), and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) for the following reasons.

(1092) First, the Notifying Party submits that any input foreclosure concerns are purely hypothetical as OBE is already pre-Transaction, by far, the largest customer of the Targets.

(1093) Second, the Notifying Party submits that the merged entity would not have the ability to foreclose downstream rivals from the upstream inputs necessary to provide services at the retail level as it will not enjoy any market power on the market for the wholesale supply of access to broadband services due to (i) the existence of specific *ex ante* regulation;[839] (ii) the existence of alternative wholesale suppliers (i.e., Proximus); and, (iii) the fact that the remaining large provider of retail fixed telecommunications services in the Targets' footprint (i.e., Proximus) is already fully vertically integrated.

(1094) Third, the Notifying Party submits that the merged entity would have no incentive to engage in any input foreclosure strategy. In particular, the Notifying Party stresses that (i) pre-Transaction, OBE is the Targets' largest customer of wholesale broadband access services by far with no other significant access seeker to be foreclosed; (ii) the merged entity will have a strong incentive to provide wholesale access to competing retail providers of fixed telecommunications services to finance the merged entity's network deployment plans; (iii) the merged entity will continue to have spare capacity to market, since OBE is already fully hosted on the Targets' fixed networks and the Transaction does not bring any change in that respect.

(1095) Finally, the Notifying Party submits that, in any event, any input foreclosure strategy would have no effects on the market as OBE is the largest wholesale customer of the Targets by far and any other retail provider of fixed telecommunications services could,in any event, turn to the alternative wholesale providers.

7.6.3.1.2. Commission's assessment

(1096) In the following paragraphs, the Commission will show that the merged entity will not have the ability or incentive to engage in input foreclosure as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) and that there will consequently be no anti-competitive effects on those markets.

7.6.3.1.2.1. Preliminary remarks

(1097) The market for the wholesale supply of broadband access is currently subject to *ex ante* Wholesale Access Regulation by Belgium's CRC. Under the current terms of the Wholesale Access Regulation, the Targets have an obligation to provide

[839] Form CO, paragraph 1150.

wholesale access to their respective fixed networks until sometime in 2023.[840] After such date, the CRC will conduct a market review on the basis of which it will decide whether to prolong, adapt or repeal the Wholesale Access Regulation.

(1098) During its investigation, the Commission has not received any indication as to the most likely future of the Wholesale Access Regulation that is currently in place.

(1099) Accordingly, for the purposes of the current decision, the Commission considers that, due to the existence and applicability of the Wholesale Access Regulation, the merged entity would not have the ability to engage in any input foreclosure strategy resulting from the vertical relationships arising from the Transaction between the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles and business connectivity services (downstream)..

(1100) For reasons of completeness of its competitive assessment, the Commission will nevertheless assess the effects of the Transaction in the case the Wholesale Access Regulation were to be repealed.

7.6.3.1.2.2. Commission's assessment

(1101) On the basis of the preliminary remarks, the Commission will only conduct its assessment of the scenario under which the Wholesale Access Regulation would be repealed at some point in the future. In that context and acknowledging that no market participant raised concerns to the Commission with regards to any input foreclosure strategy during its market investigation, the Commission will explain that the merged entity would not have the ability or the incentive to engage in any input foreclosure strategy with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to broadband services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only FMC bundles and business connectivity services (downstream).

(1102) **Ability.** The Commission considers that the Transaction will not affect the merged entity's ability to engage in any input foreclosure of rival retail providers of fixed telecommunications services as a result of the vertical relationships arising from the Transaction between the market for the wholesale supply of access to broadband services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) for the following main reasons

(1103) First, the Commission notes that prior to the Transaction, the Targets already supply almost exclusively their wholesale broadband access services in their footprint to OBE. Indeed, while the Targets' wholesale broadband access revenues from third parties in 2021 were almost EUR […], EUR […] million of those revenues (i.e., more than […]%) were generated by OBE. In addition, the Commission notes that all of those other third party sales are made to operators supplying downstream business customers on the basis of commercially negotiated accesses that have been agreed pre-Transaction as opposed to OBE's access under the Wholesale Regulation used to provide broadband access to retail end users. In other words, there is in practice no other network access seeker active at retail level that could possibly be foreclosed by the merged entity.

840 As explained in the Form CO, paragraph 450: "*No expiry date is indicated in the reference offer. They may expire in 2023 depending on the review of the market analysis decisions.*"

(1104) Second, as is already the case pre-Transaction, should the merged entity decide to implement a strategy that would foreclose downstream competitors from accessing its broadband network at the wholesale market level, downstream rivals could always seek access from Proximus' competing broadband network. Given the extremely limited sales of wholesale broadband access services by the Targets to third parties other than OBE in their footprint, Proximus would easily be able to take up this demand. This means that the merged entity would in practice not be able to protect its market position on the downstream market as rivals could still enter and compete on that market in any event.[841]

(1105) The Commission therefore considers that the downstream rivals have an alternative to have adequate access to inputs, without incurring significantly higher costs, and that the merged entity would consequently lack the ability to engage into an input foreclosure strategy.

(1106) For completeness, the Commission also considers that the merged entity will not have the ability to engage in any form of partial input foreclosure in the form of network quality degradation either. As explained by the Notifying Parties, while the merged entity could, in theory, lower or deteriorate the quality of the services offered to the FVNOs, they would not be able to do it selectively due to the technical specificities of the fixed networks of the Targets not enabling such manipulations.[842]

(1107) **Incentive.** The Commission considers that the Transaction will not affect the merged entity's incentive to engage in any input foreclosure of competing retail providers of fixed telecommunications services as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access to broadband services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

(1108) In particular, the Commission considers that, given the fact that downstream retail market rivals will always be able to get access to a broadband network to provide services at retail level in competition with the merged entity, the merged entity will not have the incentive to forego wholesale network access revenues in order to try and protect its downstream retail markets revenues to the extent that rivals would in any event always be present at that level and that, consequently, such strategy would not make any financial sense.

(1109) In any event, given the lack of ability to engage in input foreclose and the existence of an alternative network access as explained in the preceding paragraph, it is not necessary to conclude further as to whether the merged entity will have the incentive to implement a strategy aimed at foreclosing competing rivals active in the market for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services by no longer supplying such rivals with wholesale access to broadband services.

841 Form CO, paragraph 1162.

842 Indeed, while cable network operators could in theory lower or deteriorate the quality of services offered to FVNOs, they could however not do so selectively. This is because cable is a shared medium, common to wholesale and retail services. VOO/Brutélé cable networks are common to all types of customers (retail and wholesale) meaning that a hypothetical deterioration would affect not only the FVNOs' customers but also the customers of the network owner. According to the best knowledge of the Notifying Party, such deterioration has never happened on cable networks in Belgium in the past and OBE has never complained to VOO, Brutélé, Telenet or the regulator of such quality degradation on the cable operators' networks (see Form CO, paragraph 1154).

(1110) In addition, the merged entity will have spare capacity available that it will want to monetize by making it available to any interested third party thereby further excluding any possibility for any input foreclosure strategy.[843]

(1111) **Conclusion.** In view of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of potential input foreclosure with respect to the vertical relationships between Parties' activities on the market for the wholesale supply of access to broadband services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

7.6.3.2. Customer foreclosure concerns

(1112) Acknowledging that no market participant raised concerns to the Commission with regards to any customer foreclosure strategy during its market investigation, the Commission considers that the merged entity would not have the ability or the incentive to engage in any customer foreclosure strategy with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to broadband services (upstream) and the markets for the retail supply of fixed internet access services.

(1113) Indeed, pre-Transaction, the Targets do not purchase wholesale broadband access from competing wholesale providers and OBE supplies retail fixed internet access, multiple-play bundles, fixed-only bundles and FMC bundles through the Targets' network in the Targets' footprint. Specifically with respect to the market for the supply of fixed internet access services, the Commission notes that the alternative suppliers other than the Parties and Proximus have very limited market shares and, in any event, do not purchase access from the Targets but rather exclusively from Proximus. As such, the Commission considers that there is not any merger-specific change that could raise customer foreclosure concerns in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

(1114) In addition, with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access (upstream) and the market for the retail supply of business connectivity services (downstream) specifically, the Commission considers that the merged entity' share of the market for the retail supply of business connectivity in the Targets' footprint of approximately [5-10]% does not give the merged entity the ability or the incentive to engage in any customer foreclosure of rival wholesale broadband network access suppliers.

(1115) On the basis of the above, the Commission considers that the Transaction will not change the merged entity's ability and incentive to engage in any customer foreclosure strategy in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) on the one hand and the

843 Form CO, paragraph 1164.

market for the retail supply of business connectivity services (downstream) on the other hand.

7.6.3.3. Conclusion

(1116) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between Parties' activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

7.6.4. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream)

(1117) The vertical relationships between the Parties' activities consist of the Targets' upstream activities on the market for the wholesale supply of access to TV services and the Parties' activities in the downstream markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% both on the upstream and downstream markets, except for the market for the retail supply of business connectivity services.

7.6.4.1. Input foreclosure concerns

7.6.4.1.1. Notifying Party's views

(1118) The Notifying Party submits that the Transaction will not give rise to any input foreclosure concerns resulting from the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) for the following reasons.

(1119) First, the Notifying Party submits that any input foreclosure concerns are purely hypothetical as OBE is already pre-Transaction, by far, the largest customer of the Targets for the wholesale supply of access to TV services.

(1120) Second, the Notifying Party submits that the merged entity would not have the ability to foreclose rivals from the upstream inputs necessary to provide services at the retail level as it will have no market power on the wholesale supply of access to TV services due to (i) the existence of specific *ex ante* regulation; (ii) the existence of alternative wholesale suppliers (i.e., Proximus); and, (iii) the fact that the remaining large provider of retail fixed telecommunications services in the Targets' footprint (i.e., Proximus) is already vertically integrated.

(1121) Third, the Notifying Party submits that the merged entity would have no incentive to engage in any input foreclosure strategy. In particular, the Notifying Party stresses that (i) OBE is by far the Targets' only customer of wholesale supply of access to TV services; (ii) the merged entity will have a strong incentive to provide wholesale access to competing retail providers of fixed telecommunications services to finance the merged entity's network deployment plans; and (iii) the merged entity will have spare capacity to market, since OBE is already hosted on the Targets' fixed networks.

(1122) Finally, the Notifying Party submits that, in any event, any input foreclosure strategy would have no effects on the market as OBE is the largest wholesale customer of the Targets by far and any other retail provider of fixed telecommunications services could turn to alternative wholesale providers.

7.6.4.1.2. Commission's assessment

(1123) In the following paragraphs, the Commission will show that the merged entity will not have the ability or incentive to engage in input foreclosure as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

7.6.4.1.2.1. Preliminary remarks

(1124) The market for the wholesale supply of access to TV services is currently subject to *ex ante* Wholesale Access Regulation. Under the current terms of the Wholesale Access Regulation, the Targets have an obligation to provide wholesale access to their fixed network until 2023.[844] After such date, the CRC will conduct a market review on the basis of which it will decide whether to prolong, adapt or repeal the Wholesale Access Regulation.

(1125) During the investigation, the Commission has not received any indication as to the most likely future of the Wholesale Access Regulation currently in place.

(1126) Accordingly, the Commission considers that the merged entity would not have the ability to engage in any input foreclosure strategy resulting from the vertical relationships between the Parties' activities on the market for the wholesale supply of broadband access (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream) due to the existence of Wholesale Access Regulation.

(1127) For reasons of completeness of its competitive assessment, the Commission will nevertheless assess the effects of the Transaction in the case the Wholesale Access Regulation were to be repealed.

7.6.4.1.2.2. Commission's assessment

(1128) On the basis of the preliminary remarks, the Commission will only conduct its assessment of the scenario under which the Wholesale Access Regulation would be repealed at some point in the future. In that context and acknowledging that no market participant raised concerns to the Commission with regards to any input foreclosure strategy during its market investigation, in the following paragraphs, the Commission will explain that the merged entity would not have the ability or incentive to engage in any input foreclosure strategy with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

844 As explained in the Form CO, paragraph 450: "*No expiry date is indicated in the reference offer. They may expire in 2023 depending on the review of the market analysis decisions.*"

(1129) **Ability.** The Commission considers that the Transaction will not affect the merged entity's ability to engage in any input foreclosure of rival retail providers of fixed telecommunications services as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

(1130) First, the Commission notes that prior to the Transaction, the Targets already supply almost exclusively their wholesale TV access services in their footprint to OBE. Accordingly, the Commission considers that given the extremely limited sales of wholesale TV access services by the Targets to third parties other than OBE in their footprint, the merged entity would not, in practice, have the ability to engage in any meaningful input foreclosure strategies. In addition, the Commission notes that all of those third party sales are made to operators supplying downstream business customers on the basis of commercially negotiated accesses as opposed to OBE's access under the Wholesale Regulation used to provide AV services to retail end users.

(1131) Second, the Commission considers that the merged entity will not have the ability to foreclose downstream competitors from the retail market through input foreclosure strategies that would deprive them from accessing its TV network access services at the wholesale market level. Indeed, as is already the case pre-Transaction, should the merged entity decide to implement such a strategy, the downstream rivals could always seek access from Proximus' competing fixed network. Given the extremely limited sales of wholesale fixed network access services by the Targets to third parties other than OBE in their footprint, Proximus would easily be able to take up this demand. This means that the merged entity would in practice not be able to protect its market position on the downstream market as rivals could still enter and compete on that market in any event.[845]

(1132) The Commission therefore considers that the downstream rivals have an alternative to have adequate access to inputs, without incurring significantly higher costs, and that the merged entity would consequently lack the ability to engage into an input foreclosure strategy.

(1133) For completeness, the Commission also considers that the merged entity will not have the ability to engage in any form of partial input foreclosure in the form of network quality degradation either. As explained by the Notifying Parties, while the Parties could, in theory, lower or deteriorate the quality of the services offered to the FVNOs, they would not be able to do it selectively due to the technical specificities of the fixed networks of the Targets not enabling such manipulations.[846]

(1134) **Incentive.** The Commission considers that the Transaction will likely not affect the merged entity's incentive to engage in any input foreclosure of competing retail

845 Form CO, paragraph 1162.

846 Indeed, while cable network operators could in theory lower or deteriorate the quality of services offered to FVNOs, they could however not do so selectively. This is because cable is a shared medium, common to wholesale and retail services. VOO/Brutélé cable networks are common to all types of customers (retail and wholesale) meaning that a hypothetical deterioration would affect not only the FVNOs' customers but also the customers of the network owner. According to the best knowledge of the Notifying Party, such deterioration has never happened on cable networks in Belgium in the past and OBE has never complained to VOO, Brutélé, Telenet or the regulator of such quality degradation on the cable operators' networks (see Form CO, paragraph 1154).

providers of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

(1135) In particular, the Commission considers that downstream retail market rivals will always be able to get access to a TV services network (as at least one alternative network access supplier is available in the Targets' footprint allowing rival retail competitors to change providers even if such switch may take some time and generate some costs) to provide their own AV services in competition with the merged entity on the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services. As a result, the merged entity will not have the incentive to forego wholesale network access revenues in order to try and protect its downstream retail markets revenues to the extent that, as explained above, rivals would in any event always be present at that level and that such strategy would, consequently, not make financial sense.

(1136) In any event, given the lack of ability to engage in input foreclose and the presence of an alternative network access as explained in the preceding paragraph, it is not necessary to conclude further as to whether the merged entity will have the incentive to implement a strategy aimed at foreclosing competing rivals active in the market for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services by no longer supplying such rivals with wholesale supply of TV network access services.

(1137) In addition, the merged entity will have spare capacity available that it will want to monetize by making it available to any interested third party thereby further excluding any possibility for any input foreclosure strategy.[847]

(1138) **Conclusion.** In view of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of potential input foreclosure with respect to the vertical relationships between Parties' activities on the market for the wholesale retail supply of TV services access (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

7.6.4.2. Customer foreclosure concerns

(1139) Acknowledging that no market participant raised concerns to the Commission with regards to any customer foreclosure strategy during its market investigation, the Commission considers that the merged entity would not have the ability or the incentive to engage in any customer foreclosure strategy with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of fixed internet access services.

(1140) Indeed, pre-Transaction, the Targets do not purchase wholesale TV services access from competing wholesale providers and OBE supplies retail AV services, multiple-play bundles, fixed-only bundles and FMC bundles only through the Targets' network in the Targets' footprint. As such, the Commission considers that there is

847 Form CO, paragraph 1164.

not any merger-specific change that could raise customer foreclosure concerns in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV network services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream). In any event, given the Targets' market shares of [90-100]% at the upstream market level there cannot be any foreclosure of rival wholesale access of TV services suppliers.

(1141) In addition, with regards to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the market for the retail supply of business connectivity services (downstream) specifically, the Commission considers that the merged entity' share of the market for the retail supply of business connectivity services in the Targets' footprint of approximately [5-10]% does not give the merged entity the ability or the incentive to engage in any customer foreclosure of rival wholesale access to TV services suppliers. In any event, given the Targets' market shares of [90-100]% at the upstream market level there cannot be any foreclosure of rival wholesale access of TV services suppliers.

(1142) On the basis of the above, the Commission considers that the Transaction will not change the merged entity's ability and incentive to engage in any customer foreclosure strategy in relation to the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream) on the one hand and the market for the retail supply of business connectivity services (downstream) on the other hand.

7.6.4.3. Conclusion

(1143) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access to TV services (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles, FMC bundles and business connectivity services (downstream).

7.6.5. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of premium pay TV channels (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1144) The vertical relationships between the Parties' activities consist of the Targets' upstream activities on the market for the wholesale supply of TV channels and the Parties' activities in the downstream markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream markets.

(1145) Given the limited market share of the merged entity on the Wholesale supply of premium pay TV channels in the Targets' footprint, which are consistently below 5%, the Commission considers that the merged entity will not have the ability to engage in any form of input foreclosure as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of TV channels (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

(1146) With regards to a possible customer foreclosure strategy, the Commission notes that pre-Transaction, OBE and the Targets are subject to must-carry obligations in the French-speaking part of Belgium due to their significant number of end-users.[848] In particular, OBE must carry[849] TV channels broadcast by the following third party broadcasters: RTBF, VRT, BRF, TV5 Monde, ASBL Canal C, ASBL Canal Zoon, ASBL TV Lux, ASBL Télévision Mons-Borinage, ASBL Antenne Centre Télévision, ASBL Télévesdre, ASBL Maatélé, ASBL Notélé, ASBL RTC Télé-Liège, ASBL Télésambre, ASBL TV Com and ASBL Télé Bruxelles – TLB. These must-carry obligations will prevent the merged entity from adopting an exclusive purchasing behaviour which would be at the expense of its upstream market rivals.

(1147) Given that the overall size of the customer base of the merged entity will be larger than that of OBE or the Targets individually post-Transaction, the Commission does not have any reason to believe that the merged entity would not be subject to similar must-carry obligations and that, as a consequence, the merged entity would not be able to engage in any form of customer foreclosure strategy as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of TV channels (upstream) and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

(1148) Furthermore, during the market investigation, no market participant raised concerns with regards to any possible foreclosure strategy on those markets.

(1149) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of TV channels (upstream), and the markets for the retail supply of AV services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

7.6.6. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream)

(1150) The vertical relationships between the Parties' activities consist of OBE's upstream activities on the market for the wholesale supply of access and call origination services on mobile networks on the one hand, and the Parties' activities in the downstream markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles on the other hand. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream markets, except for the downstream market for the retail supply of mobile telecommunications services.

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848 In addition, the Targets are also subject to must-carry obligations in the German speaking community of Belgium. Even though the must-carry obligations extends to areas which partly overlap with the Targets' footprint, the Commission notes that the Targets and OBE are currently subject to must-carry obligations on a very large proportion of the Targets' footprint. Accordingly, any difference in footprint is not material to the Commission's assessment.

849 Must-carry obligations, managed by several competent authority, oblige TV retailers, by virtue of the existence of a significant number of end-users (subscribers) using their network to receive TV channels, to mandatorily distribute some defined channels that satisfy certain general interest criteria.

(1151) With respect to the risk of input foreclosure, the Commission observes that the presence of the merged entity on the market for the wholesale supply of access and call origination services on mobile networks (upstream) is limited (i.e., below 30%) and that, therefore, the merged entity would not have the ability to engage in input foreclosure after the Transaction.

(1152) With respect to the risk of customer foreclosure, the Commission first notes that during the market investigation no market participant raised concerns with regards to any customer foreclosure strategy.

(1153) Second, the Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[850] In this regard, the Commission notes that the merged entity will have a market share of just about [40-50]% on the downstream market for the retail supply of FMC bundles in the Targets' footprint, with the remaining [60-70]% being served by Proximus.[851]

(1154) Third, the Commission notes that the upstream input can be relevant for the mobile component of the multiple-play or FMC bundles as well as for the wider market for the retail supply of mobile telecommunications services. Based on the data provided by the Notifying Party, the total FMC market in the Targets' footprint in 2021 only represented 19.6% of the market for the retail supply of mobile telecommunications services in the Targets' footprint.[852] Accordingly, alternative suppliers of wholesale access and call origination services on mobile networks will, in any event, always be able to offer their services to the wider market for the retail supply of mobile telecommunications services.

(1155) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of multiple-play bundles and FMC bundles (downstream).

(1156) In the following section, the Commission will assess any possible risk of customer foreclosure strategies resulting from the vertical relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunications services (downstream).

7.6.6.1. Customer foreclosure resulting from the vertical relationships between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunications services (downstream)

(1157) OBE provides wholesale access and call origination for mobile telecommunication services to MVNOs to enable them to provide retail mobile telecommunications and

850 Non-Horizontal Merger Guidelines, paragraph 60.

851 Form CO, Annex 17. Since all multiple-play bundles including a mobile component would qualify as FMC bundles, the Commission considers that the Parties' combined market shares for FMC bundles constitute the relevant metric to assess the customer foreclosure concerns in this regard.

852 Form CO, Annex 17. This calculation is done without prejudice to the geographic scope of the market for the retail supply of mobile telecommunications services assessed above.

FMC bundles to end-customers. Therefore, mobile networks are an upstream input for MVNOs to provide mobile and/or FMC bundles at the downstream retail level.

(1158) Pre-Transaction, VOO is an MVNO hosted on Telenet/BASE and Proximus' mobile networks. Before 2021, VOO was only hosted on the Telenet/BASE network. Post-Transaction VOO will switch from Proximus' and Telenet/BASE's networks to OBE's network.[853]

(1159) During the market investigation, Telenet/BASE raised the concern that, post-Transaction, it would lose the revenues associated with the volume of VOO's mobile traffic hosted on the Telenet/BASE mobile network and that such a foreclosure situation could be detrimental to competition on the retail market for the supply of mobile telecommunications services in particular in the Targets' footprint.

7.6.6.1.1. Notifying Party's views

(1160) The Notifying Party submits that the Transaction does not raise any customer foreclosure concerns for the following main reasons.

(1161) First, customer foreclosure concerns could only arise if Telenet/BASE and/or Proximus depended on wholesale revenues from VOO to compete on the downstream retail mobile telecommunications services market. In that respect, the Notifying Party submits that Telenet/BASE and Proximus do not depend on VOO's wholesale revenues as the Targets are a small downstream player with market shares of less than [10-20]% on FMC bundles and paid in 2021 approximately […] EUR to Proximus and […] EUR to Telenet/BASE under the MVNO agreements.[854]

(1162) Second, the Notifying Party argues that, in line with the Commission's reasoning for dismissing similar customer foreclosure concerns in previous decisions, Proximus and Telenet/BASE are both fully vertically integrated and provide their own FMC bundles at the retail level. Proximus is the leading player with a market share of over [40-50]% for FMC bundles. Telenet/BASE is the second player as regards FMC bundles with a share of around [30-40]%. The Notifying Party therefore concludes that any hypothetical foreclosure at upstream level is not plausible (and would consequently not have in impact on the downstream services markets either).

(1163) Third, the Notifying Party submits that Telenet/BASE is already and in any event the market leader of the wholesale market for access and call origination services on mobile networks and is expected to remain so after the Transaction as it hosts, and will continue to do so even after the move of VOO's traffic away from the Telenet/BASE network, several MVNOs such as Lycamobile and Vectone as well as FASTfiber, United Telecom, Ello Mobile, Mixtus, Destiny, Tellink, Effortel, Tchamba Telecom (via Tellink), Cloud Communications (via Tellink) and Carrefour Mobile (via Effortel). The Notifying Party further indicates that, on its side, Proximus hosts six MVNOs and is the MNO which has welcomed the most MVNOs in the last two years in addition to having recently acquired Mobile Vikings and will shortly host this MVNO on its mobile network as well.[855]

(1164) Finally, the Notifying Party indicates that the many independent MVNOs that will remain after the Transaction constitute potential customers for Proximus and

853 Form CO, paragraph 1269.

854 Form CO, paragraph 1273.

855 Form CO, paragraphs 1274 and 1275.

Telenet/BASE in addition to the new MVNO players that it expects will enter the market in the near future.[856]

(1165) In addition to the above elements, in the Article 6(1)(c) Response, the Notifying Party argues that the merged entity will not have the ability nor the incentive to foreclose Telenet/BASE from the upstream mobile network access market and that, in any event, such a hypothetical foreclosure would not have any effect on the upstream and/or the downstream mobile retail services markets. To that effect, the Notifying Party explains that VOO had already decided, pre-Transaction, to […] and that, consequently, such development is not merger-specific (even more so that its contract with VOO can be terminated in any event on […]). The Notifying Party therefore concludes that Telenet/BASE has thus no assurance that, absent the Transaction, VOO would have renewed the current agreement and that it would have maintained the same level of revenues.

(1166) The Notifying Party further submits, in the Article 6(1)(c) Response, that, in any event, the merged entity will not have the ability to foreclose Telenet/BASE because (i) the revenues (i.e., […] euros) derived from the VOO contract are too small to foreclose Telenet/BASE as they account, in the worst case, for less than [0-5]% of Telenet/BASE's overall wholesale and retail mobile revenues in 2021, (ii) Telenet/BASE is subject to national coverage regulatory obligations as part of the 5G auction, which prevents it from focusing its network investments on only one part of the country (i.e., Flanders), and (iii) Telenet/BASE should be able to attract other MVNOs, including future MVNO players such as Digi, which announced that it would rely on wholesale offers to launch its services as early as 2023/2024.

(1167) The Notifying Party additionally argues, in the Article 6(1)(c) Response, that the merged entity will not have the incentive to foreclose Telenet/BASE since it needs access to Telenet's fixed network in the north of the country and that such a foreclosure would put at risk the possibility of negotiating that access at more attractive terms as part of a broader agreement that would also involve providing Telenet access to the Targets' fixed network in the south of the country. The Notifying Party further submits that VOO's migration to Orange's network will not allow the merged entity to raise its price on the upstream market for the wholesale network access as it will not possibly weaken Telenet/BASE on this market since (i) Telenet/BASE does not depend on the VOO contract revenues to compete, (ii) it will still have access to a sufficiently large customer base, and (iii) Proximus will, in any event, continue to provide access to its mobile network.

(1168) Finally, in the Article 6(1)(c) Response, the Notifying Party argues that the migration of VOO's mobile customers from Telenet/BASE's network to Orange's network post-Transaction cannot have any anticompetitive effect as the loss of VOO as a customer does not in any way weaken Telenet/BASE's retail offering or affect its incentive to be competitive at the retail level.

7.6.6.1.2. Commission's assessment

(1169) While, as can be seen in Table 18 above, the merged entity's market shares do not *per se* exceed the threshold for vertically affected markets, they are close to these values and the Commission will carry a further investigation given the specific

[856] Form CO, paragraph 1276.

conditions of the concerned upstream and downstream markets as well as the situation of Telenet/BASE on those markets in the South of Belgium.

(1170) The Commission has therefore undertaken to examine (i) whether the merged entity would have the ability to engage in a targeted customer foreclose strategy vis-à-vis the competing mobile network of Telenet/BASE, (ii) whether it would have the economic incentive to do so, and (iii) what overall impact such a foreclosure strategy would have on competition in those markets.

7.6.6.1.2.1. Ability to engage in customer foreclosure

(1171) The results of the Commission's in-depth investigation exclude that the merged entity could have the ability to engage in a targeted customer foreclosure vis-à-vis Telenet/BASE for the following main reasons.

(1172) First, while VOO, pre-Transaction, is an important customer of Telenet/BASE, the wholesale revenues generated by the wholesale agreement with VOO represent a very limited portion of Telenet/BASE's revenues originating from the South of Belgium and, as such, those revenues cannot realistically be considered to affect Telenet/BASE's incentive to roll out more activities and investments in that area. Indeed, the amount paid by VOO in 2021 (slightly over […] EUR)[857] accounts for far less than [0-5]% of Telenet/BASE's total revenues. With respect to the volumes, it cannot be overlooked that Telenet/BASE is vertically integrated to the extent that it owns a mobile network and is active at the retail services markets level with its own "BASE" brand and customers using its own infrastructure and that VOO's customers represent only [0-5]% of all mobile customers at national level. The relevance of VOO as a customer of that infrastructure, and consequently the possible financial impact on Telenet/BASE's viability in the South of Belgium, must therefore be considered in that context and, as such, cannot be assumed to provide the merged entity with the ability to foreclose Telenet/BASE from either one of the upstream wholesale or the downstream retail markets.

(1173) Second, post-Transaction, several existing and expected independent MVNOs will remain available as potential customers of Telenet/BASE's network and will contribute to replacing part, if not all over time, of the lost VOO business. Indeed, the Commission considers that Telenet/BASE should be able to attract other MVNOs active in the Targets' footprint such as Lycamobile, Vectone Mobile, Carrefour Mobile, Youfone and others including Digi as an expected significant new entrant in the retail mobile telecommunications market which publicly announced that it would rely on wholesale offers from competing MNOs such as Telenet to launch its services as early as 2023/2024.

(1174) Finally, the above elements have to be considered in the context of VOO's decreasing importance as a customer of Telenet in the Targets' footprint. Indeed, already pre-Transaction, VOO had decided to […]. Consequently, the migration of VOO's business away from the Telenet/BASE network cannot be viewed as merger-specific and VOO should not be considered as a "perpetual customer" of Telenet/BASE. This is even more the case that Telenet/BASE's contract with VOO covering the remainder of VOO's business will end on […]. Telenet/BASE has thus no assurance that, absent the Transaction, VOO would have renewed the current agreement and that it would have maintained the same level of revenues in particular knowing that VOO has been paying […] euros per month per SIM card on average to

857 Form CO, paragraph 1273.

[…] in 2022, against […] euros for the SIM cards hosted by […]. In other words, should Telenet/BASE align its own price to that of Proximus to try to retain the remaining of the VOO SIM cards, Telenet/BASE would, in any event, lose some wholesale revenues and such a loss of revenues is not merger-related.

(1175) Based on the above, the Commission considers that the Transaction will not provide the merged entity with the ability to engage in a targeted customer foreclosure strategy vis-à-vis Telenet/BASE by depriving it of the above revenues and traffic through the merged entity's control over the Targets.

7.6.6.1.2.2. Incentive to engage in customer foreclosure

(1176) The results of the Commission's in-depth investigation exclude that, following the Transaction, the merged entity could have the incentive to engage in a targeted customer foreclosure vis-à-vis Telenet/BASE for the following main reasons.

(1177) First, the facts that, as foreseen and implemented pre-Transaction, (i) VOO's contract with Telenet/BASE ends in […] and, (ii) the […], both confirm that the Transaction is not expected to provide the merged entity with any more incentive to engage in a targeted customer foreclosure of Telenet/BASE to the extent that most of it has already happened or can contractually be expected to happen very soon, irrespective of the actual Transaction.

(1178) Second, the Commission considers that since the merged entity will continue to need access to Telenet/BASE's fixed network in the North of the country, the merged entity will not have the incentive to engage in a targeted customer foreclosure vis-à-vis Telenet/BASE in the South to the extent that such a foreclosure may put at risk the possibility of negotiating access to Telenet/BASE's fixed network in the North of the country at more attractive terms than those provided by the Wholesale Access Regulation.

(1179) Finally, VOO's migration to Orange's network will not provide the merged entity with the incentive to foreclose Telenet/BASE by, for instance, raising Telenet/BASE's costs on the upstream market for the wholesale network access and thereby possibly weakening it on this market. Indeed, the VOO contract is sufficiently small that Telenet/BASE does not depend on the Targets' revenues to compete on the upstream market where it will still have access to a sufficiently large customer base. Furthermore, Proximus will also continue to provide access to its mobile network.

7.6.6.1.2.3. Impact on effective competition of customer foreclosure

(1180) The Commission further concludes that it can exclude that a targeted customer foreclosure strategy vis-à-vis Telenet/BASE could have a significant negative impact on consumers and effective competition in Belgium for the following main reasons.

(1181) First, the Commission considers that the merged entity's migration of VOO's traffic from Telenet/BASE's network onto Orange's mobile network cannot be considered as reducing Telenet/BASE's ability or incentive to roll-out 5G services given the coverage obligations that mobile operators, including Telenet/BASE, are required to respect when deploying their 5G network across Belgium and including in the Targets' footprint. Indeed, even in the event of a loss of the VOO as a wholesale customer in the course of 2023, Telenet/BASE nevertheless committed to 5G investments across the entire country by bidding for spectrum allocation. This confirms that the revenues generated from VOO in the Targets' footprint are not decisive for Telenet/BASE's investment decisions with respect to its mobile networks deployment and upgrade in the Targets' footprint.

(1182) Finally, the Commission considers that the migration of VOO's mobile customers from Telenet/BASE's network to Orange's network post-Transaction cannot have any anticompetitive effect as the loss of VOO as a customer does not in any way weaken Telenet/BASE's retail offering or affect its incentive to be competitive at the retail level as, while Telenet/BASE will lose some wholesale revenues, its revenues and profitability at retail level will remain unaffected.

7.6.6.1.2.4. Conclusion

(1183) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the relationship between the Parties' activities on the market for the wholesale supply of access and call origination services on mobile networks (upstream) and the markets for the retail supply of mobile telecommunications services (downstream).

7.6.7. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of call termination services on fixed networks (upstream), and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1184) The vertical relationships between the Parties' activities consist of the Parties' upstream activities on the market for the wholesale supply of call termination services on fixed networks and the Parties' activities in the downstream markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the upstream market and the downstream markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles.

(1185) First, with regards to a possible input foreclosure strategy, the Commission notes that the market for the wholesale supply of call termination services on fixed networks is regulated in Belgium by the BIPT decision of 20 November 2018.[858] In application of the Commission recommendation 2014/710/EU of 9 October 2014, which allows national authorities to impose regulatory obligations on markets not effectively competitive, the BIPT has imposed several remedies on each network operator, such as obligations for access to specific network facilities, transparency, non-discrimination and price control.

(1186) Furthermore, as established by Article 75 of the European Electronic Communications Code, the Commission has adopted, on 18 December 2020, a delegated act setting Eurorates, i.e., a single Union-wide fixed termination rate on fixed and mobile networks, applicable since 1 January 2022.[859]

(1187) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European

858 BIPT's decision of 20 November 2018 *Analyse du marché de la terminaison d'appel sur le réseau téléphonique public en position déterminée* (ID 2069).

859 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 maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, C/2020/8703, OJ L 137, 22 April 2021, page 1.

telecommunications operators active on the wholesale market for call termination on fixed networks from discriminating.[860]

(1188) Accordingly, the Commission considers that, in the present case, *ex ante* regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose.

(1189) Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the Transaction are similar to the competitive conditions that would result from the proposed Transaction on the upstream market as the Parties will continue to have a [90-100]% market share on each of their respective individual fixed network.

(1190) In any event, the Parties will have no incentive to foreclose access to fixed call termination services as they will continue to require fixed termination services from rival fixed operators to ensure that their customers can receive calls from other networks. Any attempt to foreclose could therefore lead to retaliation measures.

(1191) Second, with regards to a possible customer foreclosure strategy, the Commission notes that, in light of the characteristics of the upstream market for the wholesale supply of call termination services on fixed networks which result in each network being defined as a distinct product market, there are no upstream wholesale suppliers of call termination services on fixed networks that could possibly be foreclosed. Furthermore, during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1192) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of call termination services on fixed networks (upstream) and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

7.6.8. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream) and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1193) The vertical relationships between the Parties' activities consist of OBE's upstream activities on the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers and the Parties' activities in the downstream markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream markets.

(1194) With respect to the risk of input foreclosure, the Commission observes that the presence of the merged entity in the upstream markets is limited (i.e., below 10%) and therefore, that the merged entity would not have the ability to engage in input foreclosure after the Transaction.

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860 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 504; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraph 112.

(1195) With respect to the risk of customer foreclosure, the Commission first notes that during the market investigation no market participant raised concerns with regards to any customer foreclosure strategy.

(1196) Second, the Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[861] While the Transaction is going to combine OBE and the Targets' respective market shares on the downstream markets for the retail supply of multiple-play bundles to levels around [40-50]% in the Targets' footprint,[862] there will remain a larger significant alternative, namely Proximus, with around [50-60]% of those markets for the upstream market providers to sell their services to. In addition, Proximus itself is, by far, the leader with a share of over [80-90]%[863] of the upstream services market while the other suppliers are large multinational telecommunications companies such as BT, Colt, Telenet and Verizon.

(1197) Furthermore, the Commission notes that the upstream input can be relevant for a wider set of markets, which would include – in addition to the vertically affected downstream markets – the market for the retail supply of fixed telephony services in the Targets' footprint and the market for the retail supply of mobile telecommunications services in Belgium.[864] Based on the data provided by the Notifying Party, the total multiple-play market in the Targets' footprint in 2021 only represented [30-40]% of the market for the retail supply of mobile telecommunications services in the Targets' footprint.[865] Accordingly, in addition to excluding the possibility of Proximus being foreclosed given its significant level of vertical integration, alternative suppliers of wholesale termination and hosting of calls services to non-geographic numbers will, in any event, have access to a sufficiently large customer base to sell their services so as not to be themselves foreclosed.

(1198) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between Parties' activities on the market for the wholesale supply of termination and hosting of calls services to non-geographic numbers (upstream) and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

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861 Non-Horizontal Merger Guidelines, paragraph 60.

862 Since the market for the retail supply of multiple-play bundles includes the markets for the retail supply of fixed-only and FMC bundles, the Commission considers that the market share on the wider market for the retail supply of multiple-play bundles constitute the relevant metric to assess the customer foreclosure concerns in this regard.

863 Form CO, paragraph 1295.

864 Form CO, paragraph 1292.

865 Form CO, Annex 17. This calculation is done without prejudice to the geographic scope of the market for the retail supply of mobile telecommunications services assessed above. The Commission has made its assessment on the basis of the market for the retail supply of mobile telecommunications services as it is the largest market, by total size, which could be addressed by the upstream market for the wholesale supply of termination and hosting of calls services to non-geographic numbers.

7.6.9. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of domestic call transit services on fixed networks (upstream) and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1199) The vertical relationships between the Parties' activities consist of OBE's upstream activities on the market for the wholesale supply of domestic call transit services on fixed networks and the Parties' activities in the downstream markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream markets.

(1200) With respect to the risk of input foreclosure, the Commission observes that the presence of the merged entity in the upstream markets is limited (i.e., [5-10]%) and therefore, that the merged entity would not have the ability to engage in input foreclosure after the Transaction.

(1201) With respect to the risk of customer foreclosure, the Commission first notes that during the market investigation no market participant raised concerns with regards to any customer foreclosure strategy.

(1202) Second, the Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[866] While the Transaction is going to combine OBE and the Targets' respective market shares on the downstream markets for the retail supply of multiple-play bundles to levels around [40-50]% in the Targets' footprint,[867] there will remain a larger significant alternative, namely Proximus, with around [50-60]% of those markets for the upstream market providers to sell their services to. Furthermore, Proximus itself is, by far, the leader with a share of over [70-80]%[868] of the upstream services market while the other suppliers are large multinational telecommunications companies such as Telenet.

(1203) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of domestic call transit services on fixed networks (upstream) and the markets for the retail supply of multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

7.6.10. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of internet connectivity services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1204) The vertical relationships between the Parties' activities consist of OBE's upstream activities on the market for the wholesale supply of internet connectivity services and the Parties' activities in the downstream markets for the retail supply of fixed internet

866 Non-Horizontal Merger Guidelines, paragraph 60.

867 Since the market for the retail supply of multiple-play bundles includes the markets for the retail supply of fixed-only and FMC bundles, the Commission considers that the market share on the wider market for the retail supply of multiple-play bundles constitute the relevant metric to assess the customer foreclosure concerns in this regard.

868 Form CO, paragraph 1304.

access services, multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the downstream markets.

(1205) With respect to the risk of input foreclosure, the Commission observes that the presence of the merged entity in the upstream markets is limited (i.e., below 5%) and therefore, that the merged entity would not have the ability to engage in input foreclosure after the Transaction.

(1206) With respect to the risk of customer foreclosure, the Commission first notes that during the market investigation no market participant raised concerns with regards to any customer foreclosure strategy.

(1207) Second, the Commission considers that, for customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.[869] While the Transaction is going to combine OBE and the Targets' respective market shares on the downstream markets for the retail supply of multiple-play bundles to levels around [40-50]% in the Targets' footprint,[870] there will remain a larger significant alternative, namely Proximus, with around [50-60]% of those markets for the upstream market providers to sell their services to.

(1208) Furthermore, the Commission notes that the upstream input can be relevant for a wider set of markets, which would include – in addition to the vertically affected downstream markets – the market for the retail supply of mobile telecommunications services in Belgium.[871] Based on the data provided by the Notifying Party, the total multiple-play market in the Targets' footprint in 2021 only represented 32.5% of the market for the retail supply of mobile telecommunications services in the Targets' footprint.[872] Accordingly, in addition to excluding the possibility of Proximus being foreclosed given its significant level of vertical integration, alternative suppliers of wholesale termination and hosting of calls services to non-geographic numbers will, in any event, have access to a sufficiently large customer base to sell their services so as not to be themselves foreclosed.

(1209) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of internet connectivity services (upstream) and the markets for the retail supply of fixed internet access services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

7.6.11. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of call termination services on mobile networks (upstream), and the markets for the retail supply of fixed telephony

869 Non-Horizontal Merger Guidelines, paragraph 60.

870 Since the market for the retail supply of multiple-play bundles includes the markets for the retail supply of fixed-only and FMC bundles, the Commission considers that the market share on the wider market for the retail supply of multiple-play bundles constitute the relevant metric to assess the customer foreclosure concerns in this regard.

871 Form CO, paragraph 1310.

872 Form CO, Annex 17. This calculation is done without prejudice to the geographic scope of the market for the retail supply of mobile telecommunications services assessed above. The Commission has made its assessment on the basis of the market for the retail supply of mobile telecommunications services as it is the largest market, by total size, which could be addressed by the upstream market for the wholesale supply of termination and hosting of calls services to non-geographic numbers.

services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream)

(1210) The vertical relationships between the Parties' activities consist of OBE's upstream activities on the market for the wholesale supply of call termination services on mobile networks and the Parties' activities in the downstream markets for the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the upstream and downstream markets, except on the market for the retail supply of mobile telecommunications services.

(1211) First, with regards to a possible input foreclosure strategy, the Commission notes that the market for the wholesale supply of call termination services on fixed telephony networks is regulated in Belgium by the BIPT decision of 26 May 2017.[873] In application of the Commission recommendation 2014/710/EU of 9 October 2014, which allows national authorities to impose regulatory obligations on markets not effectively competitive, the BIPT has imposed several remedies on each network operator, such as obligations for access to specific network facilities, transparency, non-discrimination and price control.

(1212) Furthermore, as established by Article 75 of the European Electronic Communications Code, the Commission has adopted, on 18 December 2020, a delegated act setting Eurorates, i.e., a single Union-wide fixed termination rate for fixed and mobile networks, applicable since 1 January 2022.[874]

(1213) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European telecommunications operators active on the wholesale market for call termination on fixed telephony networks from discriminating.[875]

(1214) Accordingly, the Commission considers that, in the present case, *ex ante* regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose. Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the Transaction are similar to the competitive conditions that would result from the proposed Transaction on the upstream market (OBE will continue to have a [90-100]% market share on its individual mobile network). In any event, the merged entity will have no incentive to foreclose access to mobile call termination services as they will continue to require mobile termination services from rival mobile operators to ensure that their customers can receive calls from other networks. Any attempt to foreclose could therefore lead to retaliation measures.

(1215) Second, with regards to a possible customer foreclosure strategy, the Commission notes that, in light of the characteristics of the upstream market for the wholesale supply of call termination services on mobile networks which result in each network

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873 BIPT's decision of 26 May 2017 concerning market analysis 2: *Terminaison d'appel vocal sur les réseaux mobiles individuels* (ID 2070).

874 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 maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, C/2020/8703, OJ L 137, 22 April 2021, page 1.

875 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 522; of 26 October 2020 in case M.9963 – *Iliad/Play Communications*, paragraphs 79-81.

being defined as a distinct product market, there are no upstream wholesale supply of call termination services on mobile networks that could possibly be foreclosed. Furthermore, during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1216) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities on the market for the wholesale supply of call termination services on mobile networks (upstream) and the markets for the retail supply of fixed telephony services, mobile telecommunications services, multiple-play bundles, fixed-only bundles and FMC bundles (downstream).

7.6.12. Vertically affected markets arising from the relationships between the Parties' activities on the market for the wholesale supply of international roaming services (upstream) and the markets for the retail supply of mobile telecommunications services, multiple-play bundles and FMC bundles (downstream)

(1217) The vertical relationships between the Parties' activities consist of the OBE's upstream activities on the market for the wholesale supply of international roaming services and the Parties' activities in the downstream markets for the retail supply of fixed internet access services, mobile telecommunications services, multiple-play bundles and FMC bundles. The markets are vertically affected within the meaning of the Merger Regulation, as the Parties' combined market share is above 30% on the upstream and downstream markets.

(1218) First, with regards to a possible input foreclosure strategy, the Commission notes that the wholesale market for international roaming services is regulated by the European Regulation on roaming on public mobile communications networks within the Union.[876] In particular, the European Regulation requires MNOs to grant all reasonable requests for access which may be necessary to allow the access seeker to provide a roaming service (and relevant ancillary services) of reasonable quality and specification, charged at a fair and reasonable price. Thus, the Commission considers that OBE will not have the ability to foreclose competing providers of mobile telecommunications services in Belgium as the wholesale market for international roaming services is subject to *ex ante* regulation.

(1219) In previous decisions, the Commission found that this regulatory context, and in particular the existence of Eurorates was sufficient to prevent European telecommunications operators active on the wholesale market for call termination on fixed networks from discriminating.[877]

(1220) Accordingly, the Commission considers that, in the present case, *ex ante* regulation excludes any vertical foreclosure scenario arising from the Transaction as the Parties will not have any ability to foreclose. Furthermore, the Parties' incentives to foreclose will not change as the competitive conditions prevailing before the Transaction are similar to the competitive conditions that would result from the proposed Transaction on the upstream market, as the Targets are not active on the upstream market.

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876 Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (recast), OJ L 115, 13 April 2022, page 1.

877 Commission decisions of 28 July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 527.

(1221) Second, with regards to a possible customer foreclosure strategy, the Commission notes that during the market investigation, no market participant raised concerns with regards to any customer foreclosure strategy.

(1222) In light of the above, the Commission considers that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical links arising from the relationships between the market for the wholesale supply of international roaming services (upstream), and the markets for the retail supply of fixed internet access services, mobile telecommunications services, multiple-play bundles and FMC bundles (downstream).

7.6.13. Conclusion on vertical effects

(1223) In light of the above, the Commission has come to the conclusion that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of the vertical relationships between the Parties' activities arising from the Transaction.

7.7. Conclusion on the competitive assessment

(1224) In light of the above, the Commission has come to the conclusion that the Transaction will significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal non-coordinated effects in the markets for the retail supply of fixed internet access services in the Targets' footprint, the retail supply of AV services in the Targets' footprint, the retail supply of multiple-play bundles in the Targets' footprint, and the retail supply of FMC bundles in the Targets' footprint.

(1225) In addition, the Commission has come to the conclusion that the Transaction does not raise a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation as a result of (i) horizontal non-coordinated effects in the market for the retail supply of mobile telecommunications services in Belgium, the market for the retail supply of fixed-only bundles in the Targets' footprint, the market for the retail supply of fixed telephony services in the Targets' footprint and the market for the wholesale supply of TV channels (demand side) in the Targets' footprint; and, (ii) horizontal coordinated effects in the markets for the wholesale supply of TV channels (demand-side) in the Targets' footprint, for the retail supply of fixed telephony services in the Targets' footprint, for the retail supply of fixed-only bundles and, for the retail supply of mobile telecommunications services in Belgium.

(1226) Furthermore, the Commission has come to the conclusion that it is not necessary to reach a conclusion as regards the Transaction's ability to significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation as a result of horizontal coordinated effects in the markets for the retail supply of fixed internet access services in the Targets' footprint, the retail supply of AV services in the Targets' footprint, the retail supply of multiple-play bundles in the Targets' footprint, and the retail supply of FMC bundles in the Targets' footprint as the Commitments described in section 8 below would have the effect of removing this (potential) significant impediment to effective competition.

(1227) Finally, the Commission has come to the conclusion that the Transaction does not raise a significant impediment to effective competition within the meaning of Article

2(3) of the Merger Regulation as a result of the vertical links between the Parties' activities arising from the Transaction.

(1228) In light of the above, the Commission has come to the conclusion that the concentration, as notified, is incompatible with the internal market and the functioning of the EEA Agreement.

8. COMMITMENTS

8.1. Analytical framework

(1229) When a concentration raises competition concerns, the merging parties may seek to modify the concentration in order to resolve those competition concerns and thereby obtain clearance for the merger.[878]

(1230) Under the Merger Regulation, the Commission must show that a concentration would significantly impede effective competition in the internal market, or in a substantial part of it. It is then for the notifying party/parties to the concentration to propose appropriate commitments.[879] The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified.[880]

(1231) The commitments must eliminate the competition concerns entirely and must be comprehensive and effective in all respects. The commitments must also be proportionate to the competition concerns identified.[881] Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.[882]

(1232) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including *inter alia* the type, scale and scope of the proposed commitments, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market.[883]

(1233) In order for the commitments to comply with those principles, commitments must be capable of being implemented effectively within a short period of time.[884] However, where the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of

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878 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ C 267, 22.10.2008, p.1, paragraph 5.

879 Remedies Notice, paragraph 6.

880 Remedies Notice, paragraph 9.

881 Recital 30 of the Merger Regulation. The General Court set out the requirements of proportionality as follows: "*the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*" (Case T-177/04 easyJet v Commission [2006] ECR II-1931, paragraph 133).

882 Remedies Notice, paragraphs 9, 10, 11, 63 and 64.

883 Remedies Notice, paragraph 12.

884 Remedies Notice, paragraph 9.

certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted.[885]

(1234) Regarding the form of acceptable commitments, the Merger Regulation leaves discretion to the Commission as long as the commitments meet the requisite standard.[886] Divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps, although other structural commitments, such as access remedies, may be suitable to resolve concerns if those remedies are equivalent to divestitures in their effects.[887]

(1235) It is against that background that the Commission analysed the proposed commitments in this case.

8.2. Procedure

(1236) In order to render the concentration arising from the Transaction compatible with the internal market, the Notifying Party submitted commitments pursuant to Article 8(2) of the Merger Regulation on 30 January 2023 ("**Commitments**"), consisting of a wholesale broadband access commitment ("**WBA Commitment**").

(1237) In parallel, the Notifying Party informed the Commission that it had entered into a commercial wholesale agreement on 30 January 2023 with Telenet in respect of the Targets' footprint ("**South Wholesale Agreement**"),[888] which was identified as the potential remedy taker of the WBA Commitment. The Commitments were derived and carved out from the South Wholesale Agreement.

(1238) The Commission launched a market test of the Commitments on 31 January 2023 (the "**Market Test"**).[889] Questionnaires were sent to the Notifying Party's competitors in the markets for the retail supply of fixed internet access services in the Targets' footprint, the retail supply of AV services in the Targets' footprint, the retail supply of multiple-play bundles in the Targets' footprint, and the retail supply of FMC bundles in the Targets' footprint as well as competing wholesale suppliers of broadband access and TV services. In addition, the BIPT and the Belgian competition authority ("**BCA**") were consulted.

(1239) The Commission gave the Parties detailed feedback on the outcome of the Market Test on 10 February 2023.

8.3. Assessment of the Commitments

8.3.1. Description of the WBA Commitment

(1240) Orange commits to providing wholesale broadband access to Telenet on the following terms:

(a) The merged entity shall provide active access services, which will include all active services that are provided in the scope of the current and any possible future regulation of the BIPT or the CRC ("**Cable Wholesale Access**

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885 Remedies Notice, paragraphs 13, 14 and 61 et seq.

886 Case T-177/04 easyJet v Commission [2006] ECR II-1913, paragraph 197.

887 Remedies Notice, paragraph 19.

888 While the Commission will assess the suitability of the Commitments under the Merger Regulation, antitrust rules, in particular Articles 101 and 102 TFEU, will continue to apply to the South Wholesale Agreement as well as to the effects that any reading of the South Wholesale Agreement and any other agreement, whether in isolation or in combination, may produce on any relevant market.

889 Questionnaire Q4 – Commitments.

Services")[890] to Telenet to its cable network. Such Cable Wholesale Access Services shall be provided to Telenet for [10-15] years, starting from the date of Telenet's request following the adoption of this decision or […], whichever is earlier subject to any delays caused by acts or omissions of Telenet or otherwise outside the control of the Parties ("**Access Date**").

(b) Orange shall offer the Cable Wholesale Access Services through the entirety of the merged entity's cable network and at the maximum speeds available on the cable network at any point in time.

(c) In consideration for the provision of the Cable Wholesale Access Services, Telenet shall, until 31 December 2023, pay the prices defined in the Wholesale Access Regulation ("**Regulated Prices**") or, for products where no Regulated Prices are available, the prices negotiated with Orange. Telenet and Orange shall negotiate in good faith the Cable Wholesale Access Services prices to be applicable as from 1 January 2024. Absent any agreement, the Regulated Prices will apply or, absent any regulated price, the prices will be based on the last Regulated Price with a [0-5]% annual increase, with two market escalation reviews applicable: (i) a cost review by independent experts to ensure access conditions remain in line with market index evolution of the various cost components of OBE; and, (ii) a review in case continuing to provide or receive the Cable Wholesale Access Services at the then-current recurring and non-recurring charges has become economically unviable, because of market and/or cost evolutions beyond its reasonable control.

(d) The prices of the Cable Wholesale Access Services for the 1 Gpbs speed profile shall be capped at [25-35] euros. These caps will increase every year by [0-5]% as of January 2023.

(e) Orange shall grant discounts to Telenet on the prices of Cable Wholesale Access Services for the first five years starting as of the Access Date ("**Market Entry Discount**"). The Market Entry Discount shall be set at [[20-30]% over 5 years to [0-10]%]. The Market Entry Discount to be granted to Telenet will not be based on the volume of the Cable Wholesale Access Services provided to Telenet or subject to any minimum uptake requirements by Telenet.

(f) While Orange and the Targets have not deployed any FTTH infrastructure as of the date of this decision, at the request of Telenet, Orange shall provide passive FTTP services in the areas of the Targets' footprint where FTTP technology will be deployed by the Merged Entity ("**Future Wholesale FTTP Access Services**").

(g) [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

(i) [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

(j) [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

890 These services shall include all active services that are provided in the scope of the current and any possible future regulation of the BIPT or the CRC. For completeness, in the absence of regulation, Orange shall provide all active Wholesale Access Services included in the latest regulation of the BIPT or the CRC.

(k) [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

(l) Orange shall offer Telenet any new wholesale service or technology provided to other wholesale customer under non-discriminatory conditions and no later than when these are offered to other wholesale customers.

(m) During the period in which the Market Entry Discount will apply, Orange shall ensure that should another wholesale customer be granted lower prices (after discounts) for the Cable Wholesale Access Services or Future Wholesale FTTP Access Services in case of decommissioning of the cable network than those charged to Telenet, the prices (after discounts) of the Cable Wholesale Access Services or Future Wholesale FTTP Access Services in case of decommissioning of the cable network charged to Telenet shall be amended so as to ensure that these are equal to or lower than the prices (after discounts) under which the merged entity provides Cable Wholesale Access Services or Future Wholesale FTTP Access Services in case of decommissioning of the cable network to other wholesale customers.

8.3.2. Monitoring and Arbitration

(1241) Orange commits to propose one or several monitoring trustees ("**Monitoring Trustee**") to the Commission for approval no later than two weeks after the date of the adoption of this decision and to appoint the Monitoring Trustee within one week of the Commission's approval. The Monitoring Trustee shall assume its specified duties in order to ensure compliance with the Commitments.

(1242) Any arbitration shall be conducted in Brussels under the rules of arbitration of the Belgian Centre for Arbitration and Mediation ("**CEPANI**").

(1243) In the event that Telenet claims that the Notifying Party is failing to comply with the requirements of the WBA Commitment, the Commitments provide for a fast track dispute resolution procedure. First, Telenet should send a written request to the merged entity, with a copy to the Monitoring Trustee setting out in detail the reasons leading Telenet to believe that the merged entity is failing to comply with the Commitments. Within 15 working days following the written request, Telenet and the merged entity will use commercially reasonable efforts to resolve all differences of opinion and settle all disputed ("**Pre-Dispute Escalation**")

(1244) The Monitoring Trustee shall present its own proposal for resolving the dispute within 8 working days after receipt of the written request.

(1245) Should Telenet and the merged entity fail to resolve their differences of opinion during the Pre-Dispute Escalation, Telenet may, within 20 calendar days of such failure, serve a notice to the CEPANI ("**Notice**"), with a copy of such notice to the merged entity. The merged entity shall submit its answer to the CEPANI within 30 calendar days from the date of the Notice ("**Answer**").

(1246) The procedure shall be a fast track procedure, aligned to the CEPANI's expedited procedure. Under such procedure, no later than 15 days after the date on which the file is transmitted to CEPANI, CEPANI shall determine a procedural timetable. Any final award shall be rendered within 4 months after the establishment of the procedural timetable.[891]

[891] Rules of CEPANI, Article 29.

(1247) The Commission shall be allowed and enabled to participate in all stages of the procedure. In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments, the arbitral tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any party to the arbitration and shall be bound by the interpretation.

8.3.3. Results of the Market Test

(1248) The respondents to the Market Test made a number of positive as well as more critical comments about the WBA Commitment which are discussed in the following paragraphs.

8.3.3.1. The WBA Commitment

(1249) One respondent welcomed the Commitment and considered that in the short-term Telenet will likely increase competition on the relevant markets in the Targets' footprint because they will want to gain market share in this region.[892]

(1250) Other respondents raised the following issues about the Commitment:

(a) Wholesale broadband access to the Targets' cable networks is already available under the BIPT and/or CRC regulatory framework. Therefore, the Commitment would not resolve any competition concern;[893]

(b) The Commitment constitutes a breach of non-discrimination obligations under the BIPT and/or CRC regulation and increases the barriers to entry for any potential new entrant;[894]

(c) The Commitment increases the risk of coordination between the operators at national level;[895]

(d) The discounts extended by the Commitment to Telenet will imply pricing below costs and constitute predatory pricing.[896]

8.3.3.2. Monitoring and Arbitration

(1251) The results of the Market Test did not provide any particular comment on the Monitoring and Arbitration section of the Commitments.[897]

8.3.3.3. Overall results of the Market Test

(1252) The Market Test only raised a limited number of issues that would not make the Commitments unsuitable and insufficient to eliminate the competition concerns expressed and according to which the Transaction would result in a significant impediment to effective competition. The Commission directly addresses those issues in the following paragraphs.

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892 Test-Achat's response to the Market Test, question F.7.2 (ID 1923).

893 Proximus' response to Market Test, attachment to the response (ID 1962); Citymesh's response to Market Test, question F.8 (ID 1953).

894 Proximus' response to Market Test, attachment to the response (ID 1962).

895 Test-Achat's response to the Market Test, question F.7.2 (ID 1923).

896 Proximus' response to Market Test, attachment to the response (ID 1926).

897 Responses to Market Test, question E.C.1.

8.3.4. *The Commission's assessment of the Commitments*

8.3.4.1. The WBA Commitment

8.3.4.1.1. Scope

(1253) As noted in Section 8.1 above, divestiture commitments are generally the best way to eliminate competition concerns resulting from horizontal overlaps, although other structural commitments, such as access remedies, may be suitable to resolve concerns if those remedies are equivalent to divestitures in their effects.[898]

(1254) For example, in circumstances where one of the merging parties itself relies on wholesale access to infrastructure and networks to effectively compete, commitments granting access to such infrastructure and networks in order to facilitate market entry may be considered to have a similar effect on competition in the market as a divestiture, provided such entry that can be verified as being likely, timely and sufficient to resolve the competition concerns identified. If it cannot be concluded that the lowering of the entry barriers by the proposed commitments will lead to the likely, timely and sufficient entry in the market, the Commission will reject such a remedies package.[899]

(1255) In the present case, the Commitments provide for access by Telenet to the VOO/Brutélé HFC (cable) network, to which Orange has access pre-Transaction on foot of the CRC and/or BIPT regulation, and to the merged entity's future FTTP network pursuant to the South Wholesale Agreement.

(1256) The Remedies Notice states that "commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled."[900]

(1257) The Commission considers that the Commitments satisfy these requirements. In particular, the Commitment is (i) comprehensive and effective, (ii) entirely addresses any perceived competition concerns, and (iii) will be implemented effectively within a short period of time.

8.3.4.1.1.1. The Commitments are sufficiently comprehensive and effective

(1258) The Commitments are sufficiently comprehensive and effective for the following reasons.

8.3.4.1.1.1.1. The Commitments enable a likely, timely and sufficient entry of Telenet in the Targets' footprint

(1259) As noted in Section 7.4 above, there is currently uncertainty around the future of Wholesale Access Regulation, as a review of the current regulatory framework is scheduled for 2023. The Commitments however provide certainly over access for the coming [10-15] years, contrary to the argument raised by some respondents to the Market Test that such access would be available in any event. In the absence of Wholesale Access Regulation, OBE commits to provide all active cable network services included in the latest Wholesale Access Regulation.

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[898] Remedies Notice, paragraph 19.
[899] Remedies Notice, paragraph 63.
[900] Remedies Notice, paragraph 9.

(1260) With respect to the nature of the Cable Wholesale Access Services, OBE's commitment is to provide access to all active cable network services that are provided in the scope of the current and any possible future Wholesale Access Regulation throughout Targets' cable networks, in line with the scope of the access Orange benefits from pre-Transaction.

(1261) On this basis, the Commission considers that the Commitments will enable Telenet to compete with the same retail fixed internet access services, retail AV services, retail multiple-play bundles and retail FMC bundles as OBE and the Targets in the Targets' footprint. Indeed, both the Targets and OBE currently entirely rely on the Targets' cable network to provide retail fixed internet access services, retail AV services, retail multiple-play bundles and retail FMC bundles in the Targets' footprint. In addition, the merged entity is expected to continue to rely on the Targets' cable network going forward to provide retail telecom services in the Targets' footprint.[901]

(1262) In addition, OBE will provide Telenet with Future Wholesale FTTP Access Services in areas where FTTP services will be deployed by the merged entity, at the request of Telenet.

(1263) The Commitments will thus enable Telenet to replicate the pre-merger competition in a timely manner. They will enable Telenet to provide retail fixed internet access services, retail AV services, retail multiple-play bundles and retail FMC bundles to retail customers at the maximum speeds available on the Targets' cable network, and to provide similar services based on the merged entity's future FTTP network, once rolled-out by the Merged Entity. In addition, thanks to the Commitments Telenet will be able to provide multiple-play and FMC services in the Targets' footprint given that it owns a national mobile network and already provides retail mobile telecommunications services in the Targets' footprint (via its BASE brand).

(1264) In terms of the geographic scope, the WBA Commitment will cover the entirety of the relevant geographic market in which the Commission identified a significant impediment to effective competition in Section 7.7 above, i.e., the Targets' cable network footprint, corresponding to approximately [30-40]% of Belgian households passed.

8.3.4.1.1.1.2. The Commitments provide predictability to Telenet but do not increase transparency or the risk of coordination

(1265) Contrary to the argument made by some Market Test respondents as listed under paragraph (1250)(a), the Commitments do not increase the risk of coordination in Belgium. This is because it brings a new player into the Target's footprint for the first time to replace the pre-Transaction competitive force that will be lost through the merger, and the Commitments ensure that the new entrant is equipped with all the necessary tools to exert significant competition on its retail markets rivals as well as having the incentive to increase its market presence in the short term in the Targets' footprint.[902]

[901] Form CO, Annex 2, Exhibit E, Schedule 4, page 7.

[902] For the same reasons, the Commission considers that the Commitments will resolve any (potential) significant impediment to effective competition resulting from coordinated horizontal effects in the markets for the retail supply of fixed internet access services in the Targets' footprint, retail supply of AV services in the Targets' footprint, retail supply of multiple-play bundles in the Targets' footprint and retail supply of FMC bundles in the Targets' footprint.

(1266) In that regard, Telenet will notably have certainly and predictability as to its wholesale access costs for the duration of the Commitments. Under the provision of the Cable Wholesale Access Services limb of the Commitments, Telenet shall, until 31 December 2023, pay the prices defined in the Wholesale Access Regulation ("**Regulated Prices**") or, for products where no Regulated Prices are available, the prices negotiated with Orange. Telenet and Orange shall negotiate in good faith the Cable Wholesale Access Services prices to be applicable as from 1 January 2024. Absent any agreement, the Regulated Prices will apply or, absent any regulated price, the prices will be based on the last Regulated Price with a [0-5]% annual increase, […] described in paragraph (1240)(j) above. The aim of this pricing structure will provide Telenet with sufficient predictability regarding its variable cost structure in the Target's footprint.

(1267) Telenet will also benefit from very attractive prices for the 1 Gbps speed profile on the merged entity's cable network, which are materially lower than those available to OBE today,[903] as they will be capped at [25-35 euros]. These caps will increase every year by [0-5]% as of January 2023.

(1268) The rationale for the price caps for the 1 Gbps HFC speed profile is to ensure predictability and, as a result, a better retail competitiveness of Telenet for these high speed profiles.

(1269) The Commission considers that such price caps will also incentivize Telenet to build a wide offer including competing services on the high speed segments which are the most expensive on the wholesale broadband market and for which the demand is expected to increase in the long term.[904]

(1270) The Future Wholesale FTTP Access Services list prices will be defined based on a combination of (i) the costs, (ii) the targeted internal rate of return in the overall business plan and (iii) benchmarks. Telenet will also be able to benefit from additional discounts on the Future Wholesale FTTP Access Services list prices, based on the actual volume used.

8.3.4.1.1.1.3. The Commitments create strong incentives for timely and sufficient entry in the Targets' footprint

(1271) As a result of the Commitments, Telenet will be strongly incentivized to irrevocably make the relevant investments so as to enter the relevant markets in the near future and no later than […], and following such entry to seek to gain retail customers and market share quickly. Indeed, Telenet has publicly stated that it "*expects to launch in early 2024 following certain investments in IT and product development in the course of 2023*."[905] In line with this, the Commitments provide that the discounts will start to run as of the activation of Telenet's first end user on the Merged Entity's HFC Network post-Transaction and at the latest on […]. They will not be based on the volumes actually used or committed by Telenet.

903 See Form CO, figure 12, which illustrates that as of 2023, cable access tariffs for 1 Gbps speed profiles will near EUR 37 on Brutélé's cable network, and EUR 44 on VOO's cable network.

904 Form CO, paragraphs 625 and 777.

905 See Telenet's press release of 30 January 2023 *Telenet and Orange Belgium sign two commercial wholesale agreements, providing access to each other's HFC and FTTH networks for a 15-year period* (ID 2067).

(1272) As can be seen from the below table, the fact that the level of discount decreases over time will incentivise Telenet to enter at the latest on […] and acquire customers as quickly as possible to benefit from the higher discount levels.

Table 47: Discounts afforded to Telenet to access the Targets' cable network

	Year 1[906]	Year 2	Year 3	Year 4	Year 5
Discount on Wholesale HFC Access Services on the combined firm's footprint	[20-30]% decreasing over 5 years to [0-10]%				

Source: RM, paragraph 24

(1273) The Commission considers that these discounts will allow Telenet to enter the Targets' footprint at conditions that are significantly better than those available to OBE under the current regulation and the prices that were available to OBE when it entered the fixed telecommunication services markets in 2016.[907] The Commission therefore considers that they should improve Telenet's cost structure since Wholesale Service Access costs will represent a large part of Telenet's total costs for the provision of fixed services within the Targets' footprint.

(1274) [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

(1275) The Commission considers that the pricing provisions described in paragraphs (1271) to (1275) and, in particular, the discount scheme foreseen, go beyond the existing regulation and contribute to enabling the sufficient entry of Telenet in the Targets' footprint thereby replacing the competitive constraint that existed pre-Transaction.

(1276) The Commission further considers that, unlike the claim made by some Market Test respondents as listed under paragraph (1250)(a), to the extent that the merged entity complies with all of its obligations under the Wholesale Access Regulation[908] [Details on Orange's wholesale prices], they do not constitute a breach of non-discrimination obligations imposed by the Wholesale Access Regulation and, consequently do not increase the barriers to entry for any potential new entrant given that one of the BIPT's missions is to monitor compliance with the regulatory framework and therefore the non-discriminatory obligations applicable to all operators in Belgium.

(1277) Finally, the Commission considers that, unlike the claim made by some Market Test respondents as listed under paragraph (1250)(a), the discounts extended by the Commitments to Telenet do not imply pricing below costs and do not constitute predatory pricing. Indeed, the Commission considers that fact that those discounts are below the Regulated Price does not necessarily imply that they are below the average variable cost of production of the Merged Entity's network. In particular, the Commission refers to its comments to the CRC of 5 May 2020 pursuant to Article

906 Year 1 will start when Telenet launches the services in the Targets' footprint and at the latest on […].

907 Form RM, paragraph 25.

908 Including, where applicable, non-discrimination obligations.

7(3) of Directive 2002/21/EC[909] regarding case BE/2020/2242 on the wholesale central access provided at a fixed location for mass-market products in Belgium – monthly rental fees for wholesale access to the cable networks ("**Commission's 2020 Comments**").[910] In particular, in section 3.1 of the comments, the Commission highlighted that: "*the wholesale prices for access to cable infrastructure are not strictly based on underlying costs (determined through a BU LRIC+ cost model), but maintain a link to such costs.*"[911]

(1278) More in detail, the Commission explained that: "Firstly, the Commission points to the effects of the mark-ups for over-head costs and IT. The combined mark-up of 12.5% is in the higher end of the spectrum when compared to mark-ups applied in other Member States. Secondly, CRC allows for the additional margin on top of estimated costs of 5% and 10% for high and very high speeds. Thirdly, the effect of tiering, although as such justified, allocates yet additional margin to the high and very high speeds. Lastly, as the variable part of the costs, namely the price per Mbps in peak, increases with the consumption, it has an even greater impact on the access price for high speed category. In that regard the Commission notes that the combined effect of all adjustments leads to a relatively large gap between wholesale access prices for lower and higher speeds and therefore carries the potential risk of unjustified overcompensation for the higher speeds."[912]

(1279) Accordingly, the Commission considers that merely pricing below the Regulated Price does not, in and of itself, imply any form of predatory pricing, especially when Regulated Prices take into account a regulatory goal to create proper incentives for network operators to deploy high capacity networks.[913]

(1280) Furthermore, the Commission notes that: (i) those discounts are only applicable for a limited duration (5 years); (ii) those discount do not evidence any intention to eliminate competitors, quite the contrary as they will contribute to facilitate the entry of a new competitor on the relevant fixed and FMC retail markets; and, (iii) neither Telenet nor Orange hold a dominant position in the Targets' footprint which would make them more likely to engage in anti-competitive behaviour.

8.3.4.1.1.1.4. The Commitments are sufficiently long and future-proofed to enable sufficient entry by Telenet

(1281) The Commission considers that (i) the [10-15]-year duration of the Commitments; as well as, (ii) OBE's commitment to provide Future Wholesale FTTP Access Services to Telenet, will provide Telenet with a long term and future-proof perspective for entry in the markets for the retail supply of fixed internet access services, AV services, multiple-play bundles and FMC bundles in the Targets' footprint.

(1282) Telenet itself has publicly stated that following its entry into the Targets' footprint on the basis of the Commitments it has "*an ambitious plan to reach a regional off-footprint [i.e. within the Targets' footprint] fixed market share of around 10% over*

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909 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, page 33.

910 Commission's 2020 Comments (ID 2061).

911 Commission's 2020 Comments, section 3.1 (ID 2061).

912 Commission's 2020 Comments, section 3.1 (ID 2061).

913 Commission's 2020 Comments, section 3.1 (ID 2061).

the medium term,"[914] which the Commission notes is higher than the 2021 market share of Orange in retail fixed internet access services in the Target's footprint ([5-10]%) and similar to Orange's 2021 market share in retail multiple play services in the Target's footprint ([5-10]%).

(1283) While market share projections are necessarily uncertain, taken together with the other elements outlined above, notably the Market Entry Discount and the fact that the Commitments are future-proofed through the inclusion of Future Wholesale FTTP Access Services, in addition to Telenet's independence, financial resources and proven expertise in the North of Belgium where it is one of the leading retail players, enable the Commission to conclude that Telenet's entry into the relevant markets in the Targets' footprint will be sufficient to remove the significant impediment to effective competition that the merger would have caused on those markets.

8.3.4.1.2. Effective implementation and monitoring

(1284) In order for the commitments to be capable of being implemented within a short period of time, there has to be an effective implementation and ability to monitor the commitments. Whereas divestitures, once implemented, do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties.[915]

(1285) As regards the implementation time, the Commission notes that the period until the Access Date of up to […] is a sufficiently short period of time.

(1286) Besides, the Commission notes that the WBA Commitment is not too extensive or too complex in order for the Commission to determine with the requisite degree of certainty, at the time of this decision, that it will be fully implemented and it will likely maintain effective competition in the market.[916] Furthermore, market participants did not identify any concern regarding the effective implementation and monitoring of the Commitment.[917]

(1287) Overall, the Commission considers that the effectiveness of the WBA Commitment is provided for.

8.3.4.2. Overall Assessment

(1288) In light of the above, the Commission concludes that the Commitments in their entirety are suitable and sufficient to eliminate the competition concerns expressed, according to which the Transaction would result in a significant impediment to effective competition. The Commission also concludes that the Commitments are capable of being implemented effectively within a short period of time.

8.4. Suitability of Telenet as New Entrant

(1289) The Commission considers that Telenet complies with the standard requirements detailed in the Remedies Notice in terms of independence, financial resources and the absence of prima facie competition concerns.

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914 See Telenet's press release of 30 January 2023 *Telenet and Orange Belgium sign two commercial wholesale agreements, providing access to each other's HFC and FTTH networks for a 15-year period* (ID 2067).

915 Remedies Notice, paragraph 13.

916 Remedies Notice, paragraph 14.

917 See section 8.3.3.2 above.

8.4.1. Independence

(1290) Telenet is independent of and unconnected to Orange and its affiliated undertakings.

(1291) Telenet is a cable network operator and mobile network operator in Belgium. Telenet Group Holding N.V., the parent company of Telenet, is controlled by the Liberty Global Group which currently holds 58.28% of the shares, and is listed on the Euronext Brussels Stock Exchange.

(1292) Telenet does not have any share or any direct or indirect ownership in Orange or any of its affiliated undertakings and vice versa. In addition, no director of Orange or any of its affiliated undertakings is on the board of Telenet (or its controlling shareholders) and vice versa.

8.4.2. Financial resources

(1293) Telenet has the financial resources to become a viable and active competitor in the Targets' footprint.

(1294) Telenet had revenues in 2021 of 2.6 billion euros and approx. 1.950 billion euros in Q1 to Q3 2022. Telenet is the most profitable Belgian operator with an EBITDA margin of 52.7% in 2021 and 52.1% in Q1 to Q3 2022. Its net profit reached approx. 400 million euros in 2021 and 1 billion euros in Q3 2022. Telenet also benefits from the financial backing of its owner, the multinational company Liberty Global.

8.4.3. Proven expertise

(1295) Telenet is already a cable operator and the largest telecommunications operator outside the Targets' footprint. Telenet is also a cable operator in the botte du Hainaut in the South of Belgium and is also active in the Targets' footprint via its fLTE Tadaam offer. Telenet will be able to leverage its mobile-only customer base within the Targets' footprint, alongside its specific TV content assets, existing equipment, proven marketing strategy in French-speaking areas (outside the Targets' footprint), a distribution network already located within the Targets' footprint (with the BASE shops) and its existing technicians fleet.

8.4.4. Ability and incentive to operate as a viable and active competitor

(1296) Telenet will be able to become a viable and active player in the Targets footprint thanks to the combination of the favourable access conditions of the Commitments and the key assets and financial resources it can leverage on. In addition, (i) the decreasing trend of the Market Entry Discounts provided by the Commitments, (ii) Telenet's access, at its request, to Orange future passive FTTP services in the areas of the Targets' footprint where FTTP technology will be deployed, and (iii) the prominence of FMC bundles in Belgium, will further incentivize Telenet to become a viable and active competitor both in the short and longer terms.

8.4.5. Absence of prima facie competition problem

(1297) The Commission has not identified any *prima facie* competition concern arising from the implementation of the WBA Commitment with Telenet, as Telenet is not active in the relevant markets in which the Commission identified a significant impediment to effective competition, namely the markets for the retail supply of fixed internet access services, TV services, multiple-play bundles and FMC bundles in the Targets' footprint.

8.5. Overall conclusion

(1298) In the light of the above, the Commission considers the Commitments capable of rendering the Transaction compatible with the internal market as they will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified.

(1299) Moreover, the Commission considers Telenet is a suitable remedy taker pursuant to the Commitments.

9. CONDITIONS AND OBLIGATIONS

(1300) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

(1301) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

(1302) In accordance with the basic distinction described in recital (1300) as regards conditions and obligations, this decision should be made conditional on the full compliance by the Notifying Party with the section B of the Commitments submitted by the Notifying Party on 30 January 2023 and all other sections should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as an Annex to this decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Orange S.A. acquires sole control of VOO S.A. and the telecommunications, media and technology activities[918] of Société Intercommunale pour la Diffusion de la Télevision within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in the Section B of Annex.

[918] The telecommunications, media and technology activities of Société Intercommunale pour la Diffusion de la Télévision includes all the assets and liabilities of Société Intercommunale pour la Diffusion de la Télévision with the exception of: (i) minority shareholdings in Network Research Belgium S.A., EthiasCo S.C.R.L. and Enodia S.C.; (ii) ownership of lands and buildings located in Brussels and Couillet and the liabilities related to those assets; and, (iii) the statutory personnel and associated liabilities of Société Intercommunale pour la Diffusion de la Télévision.

Article 3

Orange S.A. shall comply with the obligations set out in the Sections C to G of Annex not referred to in Article 2.

Article 4

This Decision is addressed to:

Orange S.A.

111, Quai du Président Roosevelt

92130, Issy-les-Moulineaux

France

Done at Brussels, 20.3.2023

For the Commission

(Signed)

Margrethe VESTAGER
Executive Vice-President

Case COMP/M. 10663 – Orange/VOO/Brutélé

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) of Council Regulation (EC) No 139/2004 (the "**Merger Regulation**"), Orange S.A. ("**Orange**" or the "**Notifying Party**") hereby enters into the following commitments (the "**Commitments**") *vis-à-vis* the European Commission (the "**Commission**") with a view to rendering the acquisition by Orange Belgium S.A. ("**OBE**"), itself controlled by Orange, of VOO S.A. ("**VOO**") and Brutélé SC's telecommunications activities[1] ("**Brutélé**") (together, the "**Targets**") (Orange, VOO and Brutélé together referred to as the "**Parties**") compatible with the internal market and the functioning of the EEA Agreement (the "**Transaction**").

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Transaction compatible with the internal market and the functioning of the EEA Agreement (the "**Decision**"), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "**Remedies Notice**").

The Commitments shall take effect upon the date of adoption of the Decision.

Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

Access Date: has the meaning given in paragraph 5.

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "**Consolidated Jurisdictional Notice**").

HFC Network: the Merged Entity's HFC network after the completion of the Transaction, corresponding to the current network footprints of VOO and Brutélé that represent approximately 35% of the Belgian households passed.

Closing: the completion of the Transaction.

Commitments: the undertakings (*i.e.*, the Wholesale Access part of the Wholesale Agreement) subscribed by Orange before the Commission and detailed in the present document.

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

Decision: Merger Clearance Decision of the Commission in case M.10663.

Effective Date: means the date of the adoption of the Decision.

HFC: Hybrid Fiber Coaxial.

FTTP: Fiber-to-the-Premises.

Future Wholesale FTTP Access Services: has the meaning given in paragraph 5(vii).

[1] The entire corporate name of Brutélé S.C.R.L. is *Société Intercommunale pour la Diffusion de la Télévision*.

Market Entry Discount: has the meaning given in paragraph 5(vi).

Merged Entity: the combined business of Orange, VOO and Brutélé following the completion of the Transaction.

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

New Provider: Telenet B.V.

Orange or **the Notifying Party**: Orange S.A. and all its Affiliated Undertakings, including Orange Belgium S.A. (**OBE**)

Targets: VOO S.A. (**VOO**) and Brutélé SC's telecommunications activities (**Brutélé**).

Wholesale Agreement: Wholesale access agreement concluded between OBE and the New Provider.

Wholesale Access: has the meaning given in paragraph 2.

Wholesale HFC Access Services: has the meaning given in paragraph 5(ii).

Working Day: refers to the calendar followed by the Kingdom of Belgium. For the avoidance of doubt, this shall not include Saturdays or Sundays.

Section B. The Commitments to provide Wholesale Access

2. Orange commits to provide, or procure its Affiliated Undertakings to provide, the New Provider with wholesale HFC access in accordance with paragraph 5 below, in order for the New Provider to be able to provide fixed internet, audiovisual, multiple-play and fixed-mobile convergence ("**FMC**") services in the Targets' footprint ("**Wholesale Access**").

3. The Transaction shall not be implemented before OBE has entered into the Wholesale Agreement with the New Provider and the Commission has approved the Wholesale Access part of the Wholesale Agreement. Orange shall be deemed to have complied with these Commitments if by Closing, Orange has entered into a final binding Wholesale Agreement with the New Provider and the Commission has approved the Wholesale Access part of the Wholesale Agreement.

4. In order to maintain the structural effect of the Commitments, Orange shall, for a period of ten (10) years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the New Provider's activities in relation to retail fixed internet, audiovisual, multiple-play and FMC services in the Targets' footprint unless, following the submission of a reasoned request from Orange showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 53 of the Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the New Provider's activities in the Targets' footprint is no longer necessary to render the Transaction compatible with the internal market.

5. Wholesale Access shall be provided to the New Provider on substantially the following terms:

   (i) The HFC Network shall be enabled for the provision of Wholesale HFC Access Services to the New Provider as soon as practicable upon the New Provider's request after the Effective Date, which should intervene in any event by […], subject to any delays caused by acts or omissions of the New Provider or otherwise outside the control of the Parties ("**Access Date**").

(ii) Orange shall provide all active HFC services that are provided in the scope of the current and any possible future regulation of the Belgian Institute for Postal Services and Telecommunications (the "**BIPT**") or the Conference of regulators of the electronic communications sector (the "**CRC**") (the "**Wholesale HFC Access Services**").[2] In the absence of regulation, Orange shall provide all active HFC services included in the latest regulation of the BIPT or the CRC.

(iii) Orange shall offer the Wholesale HFC Access Services through the whole HFC Network and at the maximum speeds available on the HFC Network at any point in time.

(iv) The Wholesale HFC Access Services terms and conditions in the Wholesale Agreement shall include terms that are based on the current or future HFC regulation implemented through VOO/Brutélé's reference offers (or the Merged Entity's reference offer, where applicable), meaning that terms and conditions (including the quality and performance requirements) shall be at least as advantageous to the New Provider as those provided in the applicable reference offers of VOO and Brutélé (or the merged entity's reference offer, where applicable).

(v) In consideration for the provision of the Wholesale HFC Access Services, the New Provider shall until 31 December 2023 pay the prices defined in the regulation or, for products where no regulated prices are available, the prices negotiated with Orange. The New Provider and Orange shall negotiate in good faith the Wholesale HFC Access Services prices to be applicable as from 1 January 2024. Absent any agreement, the regulated prices will apply or, absent any regulated price, the prices will be based on the last regulated price with a [0-5]% annual increase, with two market escalation reviews applicable: (i) a cost review by independent experts to ensure access conditions remain in line with market index evolution of the various cost components of Orange Belgium; and (ii) a review in case continuing to provide or receive the Wholesale HFC Access Services at the then-current recurring and non-recurring charges has become economically unviable, because of market and/or cost evolutions beyond its reasonable control.

The prices of the Wholesale HFC Access Services for the 1 Gpbs speed profile shall be capped at [25-35 euros]. These caps will increase every year by [0-5]% as of January 2023.

(vi) Orange shall grant discounts to the New Provider on the prices of Wholesale HFC Access Services for the first five years starting as of the date of activation of the New Provider's first end user on the HFC Network and in any event no later than […] ("**Market Entry Discount**"). The Market Entry Discount shall be set at [20-30%] decreasing [over 5 years to [0-10]%]. The Market Entry Discount to be granted to the New Provider will not be based on the volume of the Wholesale HFC Access Services provided to the New Provider.

(vii) At the request of the New Provider, Orange shall provide passive FTTP services in the areas of the Targets' footprint where FTTP technology will be deployed by the Merged Entity (the "**Future Wholesale FTTP Access Services**").

2 Active HFC services are currently regulated by the CRC decisions of 29 June 2018 on the analysis of the broadband and television broadcasting markets and of 26 May 2020 on the access tariffs to cable networks. The CRC is the body for cooperation between the BIPT (representing the Federal State), the Conseil Supérieur de l'Audiovisuel (representing the French speaking Community), the Vlaamse Regulator Voor de Media (representing the Flemish Community) and the Medienrat (representing the German speaking Community).

[Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].[3]

(viii) Orange shall provide the New Provider with at least the same service levels under which it provides Wholesale Access to other wholesale customers.

(ix) Orange shall offer the New Provider any new wholesale service or technology provided to other wholesale customer under non-discriminatory conditions and no later than when these are offered to other wholesale customers.

(x) During the period in which the Market Entry Discount will apply, Orange shall ensure that should another wholesale customer be granted lower prices (after discounts) for the Wholesale HFC Access Services or Future Wholesale FTTP Access Services in case of HFC decommissioning than those charged to the New Provider, the prices (after discounts) of the Wholesale HFC Access Services or Future Wholesale FTTP Access Services in case of HFC decommissioning charged to the New Provider shall be amended so as to ensure that these are equal to or lower than the prices (after discounts) under which the Merged Entity provides Wholesale HFC Access Services or Future Wholesale FTTP Access Services in case of HFC decommissioning to other wholesale customers.

(xi) Orange commits to provide Wholesale Access to the New Provider under the Commitments for a duration of [10-15] years.

Section C. Monitoring Trustee

I. Appointment procedure

6. Orange shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee.

7. The Monitoring Trustee shall:

(i) at the time of appointment, be independent of the Parties;

(ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and

(iii) neither have nor become exposed to a Conflict of Interest.

8. The Monitoring Trustee shall be remunerated by the Orange in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by Orange

9. No later than two (2) weeks after the Effective Date, Orange shall submit the name or names of one or more natural or legal persons whom Orange proposes to appoint as the Monitoring Trustee to the Commission for approval.

10. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph 7 of these Commitments and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments; and

[3] [Clause discussing the prices for Future Wholesale FTTP Access Services and volume-based discounts].

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

11. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Orange shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Orange shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by Orange

12. If all the proposed Monitoring Trustees are rejected, Orange shall submit the names of at least two more natural or legal persons within one (1) week of being informed of the rejection, in accordance with paragraphs 6 and 11 of these Commitments.

Trustee nominated by the Commission

13. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Orange shall appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the Commission.

II. Functions of the Trustee

14. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments and monitor the implementation of the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or Orange, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

15. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision. This first report should be provided to the Commission within one (1) month as from the Effective Date;

(ii) monitor compliance by the Merged Entity with the conditions and obligations attached to the Decision. In particular, the Monitoring Trustee shall specifically monitor compliance with the Commitments in paragraph 5;

(iii) propose to Orange such measures as the Monitoring Trustee considers necessary to ensure the Merged Entity's compliance with the conditions and obligations attached to the Decision;

(iv) act as a contact point for any requests from third parties, and in particular the New Provider, in relation to the Commitments;

(v) provide to the Commission, sending Orange a non-confidential copy at the same time, a written report within fifteen (15) days after the end of each quarter in relation to: (i) the implementation of the Wholesale Access, from the Effective Date until the Access Date, and (ii) compliance with the Commitments from the Access Date until the termination or expiry of the Commitments;

(vi) promptly report in writing to the Commission, sending Orange a non-confidential copy at the same time, if it concludes on reasonable grounds that Orange is failing to comply with any of the Commitments; and

(vii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

III. Duties and obligations of Orange

16. Orange shall provide and shall cause its advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of Merged Entity's books, records, documents, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Merged Entity shall provide the Monitoring Trustee upon request with copies of any document. Orange shall make available to the Monitoring Trustee one or more offices on its premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

17. Orange shall indemnify the Monitoring Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Orange for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the willful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.

18. At the expense of Orange, the Monitoring Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Orange's approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should Orange refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard Orange. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 17 of these Commitments shall apply *mutatis mutandis*.

19. Orange agrees that the Commission may share Confidential Information proprietary to Orange with the Monitoring Trustee. The Monitoring Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

20. Orange agrees that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.

21. For a period of [10-15] years from the Effective Date, the Commission may request all information from the Merged Entity that is reasonably necessary to monitor the effective implementation of these Commitments.

IV. Replacement, discharge and reappointment of the Monitoring Trustee

22. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:

(a) the Commission may, after hearing the Monitoring Trustee and Orange, require Orange to replace the Monitoring Trustee; or

(b) Orange may, with the prior approval of the Commission, replace the Monitoring Trustee.

23. If the Monitoring Trustee is removed according to paragraph 22 of these Commitments, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 6-13 of these Commitments.

24. Unless removed according to paragraph 22 of these Commitments, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after the Commitments with which the Monitoring Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section D. Fast-track Dispute resolution

25. In the event that there is a dispute between the Merged Entity and the New Provider as to the implementation of the Commitments described in paragraph 5, the New Provider shall have recourse to the following dispute resolution procedures.

26. For the avoidance of any doubt, the fast-track Dispute resolution procedure only applies to claims related to Orange's compliance with its Commitments, not with other disputes between Orange and the New Provider.

I. Pre-Dispute escalation

27. Should the New Provider wish to avail itself of the fast track dispute resolution procedure, it shall send a written request (the "**Request**") to the Merged Entity (with a copy to the Monitoring Trustee) setting out in detail the reasons leading it to believe that the Merged Entity is failing to comply with the requirements of the Commitments. The New Provider and the Merged Entity will use their commercially reasonable efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen (15) Working Days after receipt of the Request.

28. The Monitoring Trustee shall present its own proposal (the "**Trustee Proposal**") for resolving the dispute within eight (8) Working Days after receipt of the Request, specifying in writing the action if any, to be taken by the Merged Entity in order to ensure compliance with the Commitments *vis-a-vis* the New Provider and be prepared, if requested, to facilitate the settlement of the dispute. To the extent that the Merged Entity and the New Provider have settled a dispute on the basis of the Trustee Proposal and the Merged Entity complies with such settlement, the Merged Entity shall be deemed not to be in breach of the Commitments.

II. Dispute

Notice

29. Should the New Provider and the Merged Entity (together the "**Parties to the Arbitration**") fail to resolve their differences of opinion in the Pre-Dispute escalation phase described above, the New Provider may, within twenty (20) calendar days of such failure, serve a notice (the "**Notice**"), in the sense of a request for arbitration, to the CEPANI (Belgian Centre for Arbitration and Mediation) (hereinafter the "**Arbitral Institution**"), with a copy of such Notice to the Merged Entity.

30. The Notice shall set out in detail the dispute, difference or claim (the "**Dispute**") and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, *e g.*, documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the Merged Entity and the Trustee Proposal, including a comment as to its appropriateness.

Answer

31. The Merged Entity shall, within thirty (30) calendar days from receipt of the Notice, submit its answer (the "**Answer**"), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, *e.g.*, documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the Merged Entity proposes to undertake *vis-a-vis* the New Provider and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

32. The Arbitral Tribunal shall consist of three (3) persons. The Requesting Party shall nominate its arbitrator in the Notice; the Merged Entity shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by the Merged Entity shall, within five (5) Working Days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three (3) arbitrators. The right to challenge an arbitrator pursuant to procedural rules of the Arbitral Institution shall apply.

33. Should the New Provider wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the New Provider and the Merged Entity shall agree on the nomination of a sole arbitrator within five (5) Working Days from the communication of the Answer, communicating this to the Arbitral Institution which shall forthwith confirm the appointment of the arbitrator.

34. Should the Merged Entity fail to nominate an arbitrator, or if the two (2) arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.

35. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the Arbitral Tribunal.

Arbitration Procedure

36. The Dispute shall be finally resolved by arbitration under the CEPANI Rules of Arbitration, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the "**Rules**"). The arbitration shall be conducted in Brussels in the English language.

Fast-track procedure

37. The procedure shall be a fast-track procedure (*i.e.*, the expedited procedure under the CEPANI Rules). For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

38. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-

table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.

Provision of information

39. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.

Confidentiality

40. The Arbitral Tribunal shall not disclose Confidential Information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting Confidential Information in particular by restricting access to Confidential Information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.

Burden of proof

41. Each of the Parties to the Arbitration shall bear the burden of proof for the facts on which it relies in order to substantiate its claim, counter-claim or defence.

Involvement of the Commission

42. The Commission shall be allowed and enabled to participate in all stages of the procedure by:

(i) Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;

(ii) Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural timetable);

(iii) Having the opportunity to file *amicus curiae* briefs; and

(iv) Being present at the hearings and being allowed to ask questions to the Parties to the Arbitration, witnesses and experts.

43. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

44. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

45. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, European Union law and Belgium law. The Arbitral Tribunal shall take all decisions by majority vote.

Interim and conservatory measures

46. Upon request of the New Provider, the Arbitral Tribunal may issue urgent interim and conservatory measures on the Dispute. The decision on interim and conservatory measures shall be rendered within fifteen (15) calendar days after receipt of the New Provider's request

and, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered by the Arbitral Tribunal.

Final award

47. The Arbitral Tribunal shall, in the decision on interim and conservatory measures as well as in the final award, specify the action, if any, to be taken by the Merged Entity in order to comply with the Commitments *vis-à-vis* the New Provider. The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting interim or conservatory measures or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

Timeframe

48. The final award shall, as a rule, be rendered within four (4) months after the date of establishment of the procedural time-table. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.

Publication of award

49. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. The Parties to the Arbitration, the Arbitral Tribunal, all other persons participating in the proceedings and all further persons involved, *i.e.* in the administration of the arbitral proceedings, shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings. All proceedings will be held in private and remain confidential.

No restriction of the Commission

50. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

Section E. Duration

51. The Commitments shall not expire before [10-15] years from the Access Date unless, in response to a request by Orange in accordance with the Review Clause, the Commission decides to waive, modify or substitute these Commitments on grounds that the conditions of competition would no longer justify the undiminished continuation of these Commitments.

Section F. The review clause

52. The Commission may extend the time periods foreseen in the Commitments in response to a request from Orange or, in appropriate cases, on its own initiative. For the avoidance of doubt, the Commission cannot extend the duration of the Commitments. Where Orange requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one (1) month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Orange. Only in exceptional circumstances shall Orange be entitled to request an extension within the last month of any period.

53. The Commission may further, in response to a reasoned request from Orange showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the

Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Orange. In determining whether a waiver, modification or substitution of the Commitments is justified, the Commission will take into account *inter alia* changes in market structure, market circumstances, applicable laws and/or the regulatory environment. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

54. The Commitments shall take effect upon the date of adoption of the Decision.

Duly authorised for and on behalf of Orange S.A.

[signed]