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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Proximus NV/SA
Koning Albert II-laan 27
Boulevard du Roi Albert II
1030 – Brussels
Belgium

Eurofiber NV
Belgicastraat 5 bus 7
Building Fountainplaza 504
1930 – Zaventem
Belgium

Subject: **Case M.10070 – EUROFIBER / PROXIMUS / JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 18 June 2021, the European Commission received notification of a proposed concentration ("the Transaction") pursuant to Article 4 of the Merger Regulation by

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

2 OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

which Proximus, NV/SA ("Proximus") and Eurofiber NV ("Eurofiber", together with Proximus, the "Notifying Parties") acquire, within the meaning of Articles 3(1)b and 3(4) of the Merger Regulation, joint control over a joint venture (the "JV").[3] Proximus, Eurofiber and the JV are collectively referred to as "the Parties".

1. THE PARTIES

(2) Proximus is the incumbent telecommunications operator in Belgium. It is active in a full range of electronic communications services providing wholesale and retail services, fixed and mobile telecommunications, voice and data services, mainly at national level within Belgium. Proximus is listed on the Brussels Stock Exchange. The Belgian State owns 53.5% of Proximus' shares, Proximus owns 4.5% of its shares and 42% of Proximus' shares are publicly traded.[4]

(3) Eurofiber is an operator of electronic communication services and networks in Belgium, with a specific focus on (wholesale and retail) dedicated connectivity services and networks over fiber to business customers and service providers with customised needs. Eurofiber does not develop mass-market solutions in Belgium. Eurofiber is part of the Antin Infrastructure Partners Group ("AIP"), which amongst other things, invests in infrastructure and infrastructure-related assets.

(4) The JV[5] will roll out and operate a dense passive[6] open point-to-point ("P2P") Fiber-To-The-X ("FTTx") network[7] in certain parts of Wallonia (Belgium) and offer access services to its network infrastructure to telecommunication operators, including Proximus and Eurofiber. This will allow Proximus, Eurofiber and other operators to provide (i) all types of retail services to residential and business customers, as well as (ii) wholesale active network infrastructure access services. In the future, the JV will likely develop (passive) dark fiber solutions, although not as

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3 Publication in the Official Journal of the European Union No C 248, 25.06.2021, p. 7.

4 Notifying Parties' response to RFI 6; Form CO, footnote 7. The Notifying Parties indicate that to their knowledge the Belgian State does not control a company that is active in the same market or upstream / downstream of the JV. In light of this, while the Belgian State is Proximus' largest shareholder, the Commission considers that, in any event, it is not necessary for the Commission to reach a definitive conclusion on the independence of Proximus from the Belgian State as the Transaction does not raise serious doubts as to its compatibility with the internal market regardless of whether or not Proximus has an independent power of decision from the Belgian state.

5 This JV constitutes a newly-created undertaking (see paragraph 139 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings).

6 The JV's future activity is about passive access allowing service providers to "physically" rent the JV's first-mile infrastructure. "Passive" (also referred to as "unlit" or "dark" services) means that there is no active equipment on the infrastructure to which access is provided. It is the responsibility of the service provider to build this extra layer (OSI model) in order to offer services and connectivity to end-customers. The passive P2P FTTH network includes: (i) infrastructure (i.e., physical elements that are required to build the FTTH network such as trenches, ducts and poles (areal) on which the network is deployed); and (ii) passive network layer (i.e., the physical elements that are required to build the FTTH Network such as the optical fiber cables, fiber enclosures, optical distribution frames, patch panels and splicing shelves).

7 FTTx refers to a telecommunications (optical fiber) network architecture used within the local loop to deliver broadband connections to homes and businesses. The passive FTTx Network means the fiber access network to which the operator (wholesale customer) is granted access for purposes such as Fiber-to-the-Home ("FTTH") or Fiber-to-the-Premises ("FTTP") network services.

its primary purpose.[8] The JV itself will not operate at the retail level or provide any active wholesale access services.

2. THE OPERATION

(5) The main objective of the Transaction is for Proximus and Eurofiber, through the JV, to enlarge and accelerate the rollout of FTTH in Wallonia in a cost-efficient way. There is a rather low level of fiber penetration in Wallonia compared to other Member States, owing to the exceptionally strong penetration of cable-TV networks and the significant investments that were made in the traditional copper network to enhance it with xDSL-technologies and techniques. Accordingly, end of March 2020, Proximus announced its ambition to accelerate its deployment plans to bring fiber to 2.4 million homes by 2025, notably via the conclusion of partnerships with third parties such as Eurofiber.[9]

(6) The JV will develop and deploy its own passive FTTx-infrastructure and will offer a new and additional choice to interested operators and service providers. According to the Notifying Parties, the network and services provided by the JV will be neutral and non-discriminatory to ensure access for all interested operators and to enhance competition on the relevant electronic communications downstream markets.

(7) On 28 October 2020, the Notifying Parties signed a Subscription and Shareholders' Agreement ("SSHA").[10]

2.1. Joint control

(8) Proximus and Eurofiber will respectively hold 49.9% and 50.1% of the JV's share capital and will exercise decisive influence over the JV.[11] Therefore, they exercise joint control over the JV. In particular, the JV's Board will consist of four Board members ("directors") and the Notifying Parties will each be entitled to nominate two directors, including the Chairman nominated by Eurofiber.[12] Each of the Notifying Parties has veto rights that are sufficient to enable them to exercise decisive influence in relation to the strategic business behaviour of the JV. These veto rights relate to the appointment and dismissal of members of senior

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8 Form CO, paragraphs 19, 21, 181 and following. When the Notifying Parties refer to "dark fiber solutions", they refer to the physical infrastructure required for the delivery of high-quality access services. See BIPT, 13 December 2019, *Analyse van de markt voor hoogwaardige toegang*, paragraph 319 (hereinafter the "BIPT decision of 13 December 2019").

9 See also Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV* in relation to the creation of similar JV by Proximus and Nexus Infrastructure in Flanders.

10 Annex 1 to the SSHA. The SSHA was amended in the course of the pre-notification phase. The amended and restated version of the SSHA is currently being prepared and has not yet been signed by the Notifying Parties. However, the Notifying Parties indicated "*that the amendments impacting joint control and included in Annexes 1.1 and 1.2 have been agreed upon by the Notifying Parties and are therefore already to be considered as part of the SSHA which they have entered into*", Form CO, footnote 26.

11 This is subject to the possibility of attracting a new shareholder (third party investor) as a minority shareholder of the JV (who could hold up to […]% of the shares), Article 5.1 of the SSHA.

12 Article 8 of the SSHA. […].

management, the business plan and any modifications thereof,[13] and other veto rights and market specific rights.[14]

(9) Therefore, as a result of the Transaction, Proximus and Eurofiber will jointly control the JV within the meaning of Article 3(1)(b) of the Merger Regulation.

2.2. Full-functionality

(10) The JV will be fully functional. First, the JV will have its own presence on the market independently from the Notifying Parties. It will have its own management, staff, assets and financial resources to conduct its business activities on a lasting basis. The JV will moreover have sole ownership of the FTTx network.[15] Second, the JV will have activities going beyond one specific function for the parents as it will deploy, run, and market the FTTx network, and it will offer access to and passive services on the FTTx network to operators based on the wholesale offer. Accordingly, the JV will take the commercial and deployment risk.[16] Third, as to sale/purchase relations with the parents, the network will be open and neutral meaning that it will be available to all interested service providers under non-exclusive and non-discriminatory terms.[17] Moreover, the relationship between the JV and its parents will be truly commercial in character, as the JV will deal with its parents at arm's length on the basis of normal commercial conditions.[18] Fourth, the JV will operate and market the network following its construction for a period of

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13 Articles 2.4.1, 8.3.2(f), 12.1 and Schedule 8 of the SSHA (affirmative vote of at least [details regarding strategic organisation/decision of the Parties] and [details regarding strategic organisation/decision of the Parties]).

14 The SSHA includes several mechanisms in relation to which both Parties have a veto right including, for example, [details regarding strategic decisions of the Parties]. Moreover, Proximus and Eurofiber have agreed in Schedule 2 of the SSHA to a "Strategic Plan" that contains elements that the Notifying Parties consider are key to determine the commercial and strategic conduct of an undertaking active as a wholesale market player in the roll-out of a dense FTTx-infrastructure (i.e., the network coverage, the deployment seed and coverage rate, the unit cost and the pricing principles). While the Strategic Plan is in principle not binding, according to the Notifying Parties, many provisions are binding because of their incorporation in the SSHA, such that Proximus and Eurofiber cannot deviate from them without both their consent. Form CO, paragraph 28.

15 Form CO, paragraphs 43-45.

16 Form CO, paragraphs 48-49.

17 Form CO, paragraphs 50-53.

18 Form CO, paragraph 50; Articles 5.5.6 and 20.5.1 of the SSHA. Proximus and Eurofiber expect that sales to third parties will reach approximately [20-30]% of the JV's total sales in the first year and that these sales will gradually increase, reaching at least [20-30]% in year […]. Such an expectation is also reflected in the business plan (Form CO, Annex 36). See also Q1 – Questionnaire to market participants, response to question 29, where a number of respondents indicated that they consider it critical or important to obtain access to the JV's infrastructure. In the present case, there are strong indications that the Parties will have access to the JV's infrastructure at market terms. First, the JV's FTTx network will be open and neutral, offering passive access to third parties and its parents on a non-discriminatory basis and pricing model. This means that each purchaser will be offered the same price per comparable unit regardless of the aggregate volume or amount of units purchased by such purchaser (including Proximus). These non-discriminatory pricing models are contained in Annex 2 to the Master Services Agreement on Wholesale ODF Access (Form CO, Annex 8). Second, the Commission recalls that Eurofiber, one of the parents of the JV together with Proximus, is not active on the downstream retail telecommunication markets in Belgium (except for business connectivity services) and therefore will not have any incentive to limit the JV's wholesale revenues by offering terms that are not at market price (see also paragraph (168)).

minimum […] years, with a tacit renewal of […] years.[19] Accordingly, the JV is intended to operate on a lasting basis.

(11) Therefore, the JV will be a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation.

3. EU DIMENSION

(12) In the last financial year, Proximus and Eurofiber achieved a combined aggregate world-wide turnover of more than EUR 5,000 million (Proximus: EUR 5,442.9 million; Eurofiber: […] million).[20] Each of the undertakings concerned has an EU-wide turnover in excess of EUR 250 million (Proximus: EUR […] million; Eurofiber: [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

(13) The notified operation therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

(14) The Transaction concerns the following markets in Belgium: (i) the wholesale broadband access market, where Proximus is currently active and the JV will become active (Section 4.1);[21] (ii) the wholesale leased lines market, where Proximus and Eurofiber are currently active and the JV will likely become active (Section 4.2); (iii) the retail mobile markets, where Proximus is active (Section 4.3); (iv) the retail fixed voice market, where Proximus is active (Section 4.4); (v) the retail fixed internet market, where Proximus is active (Section 4.5); (vi) the retail business connectivity services market, where Proximus and Eurofiber are active (Section 4.6); and (vii) a potential retail market for multi-play services, where Proximus is active (Section 4.7).

4.1. Wholesale broadband access

4.1.1. Relevant product market

(15) Wholesale broadband access (also defined as wholesale access to internet 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")[22]), (ii) non-physical or virtual

19 Form CO, paragraph 54; Article 27.1 of the SSHA.

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

21 Note that the JV will only be active with wholesale broadband local access services, while Proximus is active with wholesale broadband local, central, and resale access services (Section 4.1).

22 LLU (local loop unbundling): 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.

network access at a fixed location (such as "bitstream" access), and (iii) resale of a fixed provider's internet access services ("wholesale resale broadband access").[23]

4.1.1.1. The Commission's previous practice

(16) In previous decisions, including relating to the Belgian market,[24] 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 access (i.e., LLU, bitstream or resale (see paragraph (15) above)), or based on the level where the point of interconnection is situated.[25] The latter connects the infrastructure of the wholesale provider and that of the customer and comprises (i) local broadband access and (ii) central broadband access.[26]

(17) 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[27], (ii) stand-alone cable access, and (iii) cable access for all TV and internet services.[28] 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 fiber).[29]

4.1.1.2. The Notifying Parties' views

(18) The Notifying Parties do not object to the existence of a single overall wholesale broadband access market, but consider that a further segmentation according to the point of interconnection (i.e., local and central) and underlying technology (i.e., fiber) may also be relevant.[30] Such a segmentation would be in line with the 2014 Recommendation,[31] which defines distinct markets for wholesale local access, which

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23 Commission decisions of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 73; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 164.

24 Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 24.

25 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.

26 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.

27 The Notifying Parties indicated that standalone DSL access is, by definition, related to the use of a copper network only as the underlying access infrastructure for the provision of this service, given that the xDSL-technologies are specific to such copper infrastructure.

28 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.

29 Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 24.

30 Form CO, paragraphs 111 and 127.

31 European Commission's Recommendation on relevant product market and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2000/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 9 October 2014 (the "2014 Recommendation"), updated in 2020, i.e., Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of

includes LLU as well as virtual products that exhibit functionalities equivalent or comparable to key features of physical unbundling, and for wholesale central access, which includes bitstream products with certain characteristics (respectively markets 3(a) and 3(b)).

(19) Nevertheless, the Notifying Parties consider that the exact product market definition can be left open as the Transaction does not raise serious doubts, regardless of the envisaged product market definition.[32]

4.1.1.3. The Commission's assessment

(20) A majority of the respondents consider that there is a single overall wholesale broadband access market in Belgium.[33] A minority of respondents consider that a possible segmentation according to the type of access to fixed connections (i.e., wholesale LLU, bitstream or resale broadband access) would be appropriate.[34]

(21) Some respondents also referred to a decision taken in 2018 by the Belgian telecom regulator ("BIPT").[35] In its decision, the BIPT identified a (i) local broadband access market (market 3(a)), which includes the passive physical access and the virtual access to copper and fiber networks at a local level, excluding possible forms of local access on the cable networks and access to Fiber-to-the-Office ("FTTO"), and which is separate from the (ii) central broadband access market (market 3(b)).[36] One respondent criticised the BIPT's decision, noting that the Belgian wholesale broadband access markets should be technologically neutral (i.e., including both copper and cable).[37]

(22) 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 (i.e., DSL/copper, cable or fiber)) can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible product market definitions considered.

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the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, 18 December 2020 (the "2020 Recommendation").

32 Form CO, paragraph 112.

33 Q1 – Questionnaire to market participants, response to question 17.

34 Q1 – Questionnaire to market participants, response to question 17.2.

35 Q1 – Questionnaire to market participants, response to question 17.1. BIPT decision of 29 June 2018, paragraphs 1003 and 1015. The BIPT concluded in the direction of technology segmentation (DSL and cable), i.e., excluding forms of local access on the cable networks (and access to the FTTO) because it did not consider that these were substitutable forms of access, both from a demand and a supply side.

36 Q1 – Questionnaire to market participants, response to question 17.1.

37 Q1 – Questionnaire to market participants, response to question 17.1.

4.1.2. Relevant geographic market

4.1.2.1. The Commission's previous practice

(23) 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.[38] In a recent decision concerning the Belgian market, the Commission concluded that, for the purpose of that decision, the geographical scope corresponded to the coverage area of each cable operator (i.e., Telenet, Brutélé and VOO/Nethys).[39] 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.[40]

4.1.2.2. The Notifying Parties' views

(24) The Notifying Parties consider that the markets could be national, but they may also need to be defined along more limited borders, such as for instance at regional/cable zone level[41] or on the basis of the network operator's footprint concerned.[42]

(25) In any event, the Notifying Parties consider that, when looking at those narrower geographic dimensions of the market, the respective wholesale broadband access offers of Proximus and the JV will not be in direct competition with each other but will in fact be complementary from a geographic perspective. Indeed, the JV will only deploy its own FTTx-infrastructure in areas in which there is no standalone deployment by Proximus of such infrastructure. Therefore, from a geographic perspective, the respective FTTx-network deployments by Proximus and the JV will be distinct.[43]

(26) Consequently, the Notifying Parties consider that the exact geographic market can be left open as the Transaction does not raise concerns under any possible delimitation.

4.1.2.3. The Commission's assessment

(27) The results of the market investigation are inconclusive regarding whether a wholesale broadband access market should be defined as national[44], according to the

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38 Commission decisions 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.

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

40 Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 31.

41 Form CO, Figure 33. In the Belgian market, the cable zone operator's coverage areas are very similar to the regions in Belgium. There are currently two cable operators active in Belgium: Telenet and VOO (Brutélé/Nethys – see M.9757). Telenet's cable zone coverage area mostly covers the Flemish region of Belgium (including part of Brussels), while VOO's cable zone coverage area mostly cover the Walloon region of Belgium (including part of Brussels).

42 Form CO, paragraphs 112, 128 and 139.

43 Form CO, paragraph 112.

44 Corresponding to the territory of Belgium.

coverage area of each cable operator/region[45] or according to the footprint of the operator's network (hereafter "operator's footprint").[46,47]

(28) In this respect, in its decision of 29 June 2018, the BIPT defined a separate (i) national wholesale local access market; (ii) national wholesale central access market (limited to copper and fibre networks); and a (iii) wholesale central access market (limited to cable networks) with a geographic dimension matching the coverage area of each cable operator.[48]

(29) In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic market is at the national level and at the level of the cable operator's coverage area/region, but it will also assess the effects of this Transaction on the wholesale broadband access market at the level of the operator's footprint.

(30) In any event, the exact delineation of the relevant geographic market can be left open given that the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

4.2. Wholesale supply of leased lines

(31) Wholesale leased lines are part-circuits that allow telecommunications providers to connect their own networks to end user sites for the supply of business connectivity services. In addition, wholesale leased lines are an input for the provision of fixed and mobile telecommunications services.[49]

4.2.1. Relevant product market

4.2.1.1. The Commission's previous practice

(32) In previous decisions, the Commission considered a general product market for wholesale supply of leased lines and potential further segmentations between trunk and terminating segments, passive and activated lines, as well as according to bandwidth (below/above 2Mbits/s).[50] The Commission has also considered a further segmentation of the wholesale leased lines market into passive (dark fiber) and active infrastructure (traditional managed leased lines, Ethernet services with

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45 See Footnote 41 above.

46 For instance, for the JV's footprint, the Notifying Parties have agreed upon a short list of administrative areas within Belgium (as identified by a numerical code granted by Statbel, the Belgian bureau of statistics, also known as "NIS zone"), i.e., cities and neighbourhoods in the Walloon region of Belgium within which the FTTx network will be deployed by the JV. These NIS zones constitute the JV's footprint. See Form CO, paragraph 25 and Schedule 2 to Annex 1, the SSHA.

47 Q1 – Questionnaire to market participants, response to question 18.

48 BIPT decision of 29 June 2018, Section S9.1-9.4 (page 32).

49 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 196.

50 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 41; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 199; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 146; of 14 April 2014 in case M.7109 – *Deutsche Telecom/GTS*, paragraph 70.

guaranteed bandwidth).[51] Ultimately, the Commission left the market definitions open. In the Commission's most recent decision relating to the Belgian market, the Commission found an overall wholesale leased lines market. The question whether this product market included dark fiber or not, was left open.[52]

4.2.1.2. The Notifying Parties' views

(33) The Notifying Parties submit that, for the purpose of the Transaction, the relevant market is the broader wholesale market for high-quality access provided at a fixed location, including the wholesale supply of leased lines, excluding dark fiber.[53] This is based on the evolving demand of business customers for high-quality access as a consequence of which operators use a number of different wholesale inputs, ranging from leased lines using traditional or alternative interfaces to other wholesale access products. These products fulfil certain high-quality characteristics such as: (i) connectivity providing a dedicated connection per user point to point very high (symmetrical) bandwidth lines; (ii) extremely low packet drop ratio (IP packet loss); (iii) service level agreement up to 7 days/7, 24 hours/24; (iv) symmetrical or near-symmetrical line profiles; (v) very high bit rates up to 10 Gbps, including often also a guaranteed bandwidth; (vi) possibility of security thanks to the redundancy of the equipment and of the physical line (double path, double connection to the network, double CPE, *etc*.); and (vii) jitter and wander guarantees.[54]

(34) Similarly, the 2014 and 2020 Recommendations identify such a wholesale high-quality access provided at a fixed location (market 2 of the 2020 Recommendation or the "wholesale dedicated access" market). In its most recent decision, the BIPT also identified a wholesale market for high-quality access, without distinction as to the technology or speed and use of these services, but excluding dark fiber.[55]

4.2.1.3. The Commission's assessment

(35) A large majority of respondents consider that there is a single overall market for leased lines in Belgium, without further segmenting the market.[56]

(36) In line with the BIPT's decision of 13 December 2019[57], a majority of respondents consider that the leased lines market includes various wholesale inputs, ranging from leased lines using traditional or alternative interfaces independently of the underlying infrastructure, to other wholesale access products, which fulfil certain high-quality access requirements.[58] This would include (i) all high-quality access services (whether or not they include a trunk segment); (ii) all Ethernet services, WDM[59] leased lines and SDH[60] leased lines, (iii) all P2P, point-to-multipoint and

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51 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 201; of 14 April 2014 in case M.7109 – *Deutsche Telecom/GTS*, paragraph 70.

52 Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 41.

53 Form CO, paragraphs 159 and 164.

54 Form CO, paragraph 155 and footnote 157.

55 BIPT decision of 13 December 2019, paragraphs 399 and 423 and Form CO, paragraph 366.

56 Q1 – Questionnaire to market participants, response to question 19.

57 BIPT decision of 13 December 2019, paragraphs 399-423.

58 Q1 – Questionnaire to market participants, response to question 19.

59 Wavelength-division multiplexing.

multipoint-to-multipoint Ethernet services; (iv) both "access" and "backhaul" type services; and (v) all of these high-quality access services independently of their speed.

(37) In its decision of 13 December 2019, the BIPT considered that dark fiber does not constitute a substitute for active leased lines (or any other substitutable wholesale high-quality access services). The BIPT determined that the wholesale leased lines services, and more generally all substitutable wholesale high-quality access services, encompass only active services since they require precisely the active intervention of the services provider in terms of "*control of the connectivity and proactive management of defects and incidents that may occur*".[61]

(38) However, contrary to that decision, a number of respondents to the market investigation consider that the leased lines market in Belgium should include dark fiber notably given its substitutability with a number of the services listed in paragraph (36) above. However, other respondents nuance that, while dark fiber (passive) can be substitutable to active products, this may not be the case for all customers on the leased lines market given that not all customers have the ability to self-supply and operate active equipment.[62]

(39) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the overall leased lines market (which includes various wholesale inputs, ranging from leased lines to other wholesale access products, which fulfil certain high-quality access requirements). The question whether this product market includes dark fiber or not can be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible product market definitions considered.

4.2.2. Relevant geographic market

4.2.2.1. The Commission's previous practice

(40) In previous decisional practice, the Commission considered that the geographic market for wholesale supply of leased lines is national in scope.[63]

4.2.2.2. The Notifying Parties' views

(41) The Notifying Parties submit that the relevant geographic market is national in scope.[64]

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60 Synchronous digital hierarchy.

61 BIPT decision of 13 December 2019, paragraph 392. Translation from: "*392. […] In geval van een kleine maar blijvende prijsverhoging van de hoogwaardige lijn zal de gebruiker van een hoogwaardige lijn niet migreren naar een dienst voor dark fibre, omdat hij dan deze onmisbare functies niet heeft om zijn eigen klanten een gewaarborgde dienst te kunnen verstrekken*."

62 Q1 – Questionnaire to market participants, response to questions 19.2 and 19.2.1.

63 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 45; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 201; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 148; of 14 April 2014 in case M.7109 – *Deutsche Telecom/GTS*, paragraph 74; and of 3 July 2012 in case M.6584 – *Vodafone/Cable & Wireless*, paragraph 31.

4.2.2.3. The Commission's assessment

(42) The results of the market investigation are inconclusive regarding the exact geographic scope of the leased lines market. While a number of respondents consider that this market is national in scope, others consider that it corresponds to the coverage area of each cable operator/region, or to an operator's footprint.[65] In its market analysis decision of 13 December 2019, the BIPT defined the geographical market as national in scope.[66]

(43) In light of the above, and for the purpose of this decision, the Commission considers that the relevant geographic market is at the national level, but it will also assess the effects of this Transaction on the leased lines market (irrespective of whether such market includes dark fiber or not, see paragraph (39) above) at the level of the cable operator's coverage area/region and at the level of the operator's footprint.

(44) In any event, the exact delineation of the relevant geographic market can be left open given that the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

4.3. Retail mobile telecommunications services

(45) Mobile telecommunications services to end customers consist of the sale of subscriptions enabling access to public mobile telecommunications networks. Such access allows end users to make voice national and international calls, send and receive messages and use mobile data.[67]

4.3.1. Relevant product markets

4.3.1.1. The Commission's previous practice

(46) In previous decisions, the Commission found that there is an overall retail market for mobile telecommunications services, constituting a separate market from retail fixed telecommunications services. The Commission did not divide that market further into possible sub-segments based on the type of customer (business or private), type of tariff (pre-paid or post-paid), network technology (2G/3G, 3G/UMTS and 4G/LTE), or type of service (national or international calls, internet data services, voice and text services).[68]

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64 Form CO, paragraph 172 and BIPT decision of 13 December 2019, paragraph 420.

65 Q1 – Questionnaire to market participants, response to question 20.

66 BIPT decision of 13 December 2019, paragraph 420.

67 Commission decisions of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 199; 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recital 118.

68 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 51; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 65; 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*, paragraph 206; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recitals 146-149; 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 255, 261, 270, 279, and 287; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 32-35; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31-55; of 28 May 2014 in case M.6992 – *Hutchison 3G*

(47) The Commission considered possible distinctions within the overall retail market for mobile telecommunication services between pre-paid or post-paid services and private customers or business customers, concluding that these did not constitute separate product markets but represent rather market segments within an overall retail market and leaving the question of these possible further segmentations open.[69]

4.3.1.2. The Notifying Parties' views

(48) The Notifying Parties submit that, in line with the Commission's previous decisions, there is an overall market for retail mobile telecommunications services, including business and private customers, and pre-paid and post-paid services.[70]

4.3.1.3. The Commission's assessment

(49) A large majority of respondents to the market investigation stated that there is a single overall retail market for retail mobile telecommunications services.[71]

(50) In light of the above, for the purpose of this decision, the Commission considers that there is an overall retail market for mobile telecommunications services.

4.3.2. Relevant geographic market

4.3.2.1. The Commission's previous practice

(51) In its decisional practice, the Commission has consistently concluded that the market for the provision of retail mobile telecommunication services is national in scope.[72]

4.3.2.2. The Notifying Parties' views

(52) The Notifying Parties consider that the relevant geographic market is national in scope.[73]

4.3.2.3. The Commission's assessment

(53) A majority of respondents consider that the geographic market for retail mobile telecommunication services is national in scope.[74]

UK/Telefónica Ireland, recital 141; of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 58.

69 Commission decisions of 8 October 2018 in case M.8842 – *Tele2/Com Hem*, recital 47; of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recitals 149 and 161; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 74; of 11 May 2016 in case M.7612 – *Hutchison 3G UK/Telefónica UK*, recitals 255, 261, 270, 279, and 287; of 10 October 2014 in case M.7000 – *Liberty Global/Ziggo*, recital 141; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31-55; 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*, recital 58.

70 Form CO, paragraph 220.

71 Q1 – Questionnaire to market participants, response to question 7.

72 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 55; of 15 July 2019 in case M.9370 – *Telenor/DNA*; of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*; of 27 July 2018 in case M.8883 – *PPF/Telenor Target Companies*; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 32-35.

73 Form CO, paragraph 221.

(54) In light of the above, and for the purpose of this decision, the relevant geographic market for retail mobile telecommunication services is national in scope, and corresponds to the territory of Belgium.

4.4. Retail fixed voice services

(55) 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.[75]

4.4.1. Relevant product markets

4.4.1.1. The Commission's previous practice

(56) In previous decisions, the European Commission considered an overall market for retail fixed voice services ("retail fixed voice market") without further subdivisions between local/national and international calls, residential and non-residential customers,[76] and including Voice over Internet Protocol ("VoIP") services.[77]

4.4.1.2. The Notifying Parties' views

(57) The Notifying Parties agree with the Commission's decisional practice and consider that there is an overall retail fixed voice market, including all subdivisions between local/national and international calls, residential and non-residential customers, and including VoIP services.[78]

4.4.1.3. The Commission's assessment

(58) A large majority of respondents indicate that there is a single overall retail market for retail fixed voice services.[79]

(59) In light of the above, for the purpose of this decision, the Commission considers that there is an overall retail fixed voice market without further subdivisions between local/national and international calls, residential and non-residential customers,[80] and including VoIP services.

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74 Q1 – Questionnaire to market participants, response to question 8.

75 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 33.

76 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 60; of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraphs 16-17; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 35-39; of 7 September 2005 in case M.3914 – *Tele2/Versatel*, paragraph 10.

77 Commission decisions of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 40; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 25-26; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 67-69; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 131.

78 Form CO, paragraph 238.

79 Q1 – Questionnaire to market participants, response to question 9.

80 Commission decisions of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraphs 16-17; of 29 June 2009 in case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 35-39; of 7 September 2005 in case M.3914 – *Tele2/Versatel*, paragraph 10.

4.4.2. Relevant geographic market

4.4.2.1. The Commission's previous practice

(60) In its decisional practice, 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.[81] In some decisions, the Commission considered this market as national due to the continued importance of national regulation of the telecommunications sector, the provision of wholesale upstream services at national level and the fact that the tariff plan of telecommunications service providers is predominantly national.[82]

4.4.2.2. The Notifying Parties' views

(61) The Notifying Parties consider that the relevant geographic market is national in scope.[83]

4.4.2.3. The Commission's assessment

(62) The large majority of respondents to the market investigation indicate that the geographic market for retail fixed voice services is national in scope.[84] A few respondents consider that the market should be defined according to the coverage area of each cable operator/region or at the level of the operator's footprint.[85]

(63) In light of the above, while there are indications that the relevant geographic market is national in scope, the Commission considers that, for the purpose of this decision, it is appropriate to assess the effects of the Transaction at the national level, at the level of the coverage area of each cable operator/region, and at the level of the operator's footprint.

(64) In any event, the exact delineation of the relevant geographic market can be left open for the purpose of this decision, as the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

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81 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 65; and of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 73.

82 Commission decisions of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 150; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 29; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 37.

83 Form CO, paragraph 239.

84 Q1 – Questionnaire to market participants, response to question 10. One respondent notes that the market is national given that "*[b]oth Proximus and Orange operate nationwide fixed infrastructure, they have nation-wide product offerings at uniform prices and they compete at national level. Proximus and Orange commercial practice shows that the conditions of competition at national level are homogeneous. […]*", Q1 – Questionnaire to market participants, response to question 10.1.

85 Q1 – Questionnaire to market participants, response to question 10.

4.5. Retail fixed internet services

(65) Fixed internet access services at the retail level consist of the provision of subscriptions enabling customers to access the internet through a fixed telecommunications connection.[86]

4.5.1. Relevant product market

4.5.1.1. The Commission's previous practice

(66) In recent cases, within an overall product market for the supply of retail fixed internet access services ("retail fixed internet market"), the Commission considered but ultimately left open possible segmentations according to (i) product type (distinguishing between narrowband, broadband, and dedicated access), and (ii) distribution technology (distinguishing between xDSL, fibre, cable, and mobile broadband).

(67) Furthermore, the Commission also considered, but ultimately left open, possible segmentations as to customer type, distinguishing between residential and small business customers, on the one hand, and larger business and public authorities, on the other hand.[87] Conversely, the Commission acknowledged that the retail market for fixed internet access services should not be divided according to download speed.[88] In relation to the Belgian market specifically, the Commission recently concluded that there was an overall single retail market for the provision of internet access, without the need to segment it according to the technology used or download speed.[89]

(68) Finally, the Commission acknowledged that fixed internet services to large business and government customers form part of a separate market for the retail supply of business connectivity.[90]

(69) In the Commission's most recent decision relating to the Belgian market, the Commission concluded that, for the purpose of that decision, there exists an overall retail fixed internet market (excluding retail business connectivity services) without the need to further segment the market.[91]

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86 Commission decisions of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 45; of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 47.

87 Commission decisions of 8 October 2018 in case M.8842 – *Tele2/Com Hem*, paragraph 26; of 7 October 2016 in case M.8131 – *Tele2 Sverige/TDC Sverige*, recital 32; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recital 42; of 10 October 2014 in case M.7000 – *Liberty Global/Ziggo*, recital 132.

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

89 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 74; and of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraphs 46-48.

90 Commission decision of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 51.

91 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 74.

4.5.1.2. The Notifying Parties' views

(70) The Notifying Parties submit that there is an overall retail fixed internet market in line with the Commission's decisional practice.[92]

4.5.1.3. The Commission's assessment

(71) A large majority of the respondents to the market investigation indicate that there is an overall retail fixed internet market, excluding retail business connectivity services without the need to distinguish different customer and product types.[93]

(72) A very limited number of respondents consider that the market should be segmented according to the type of distribution technology (xDSL, fibre, cable, and mobile broadband). However, the majority of respondents disagree with the need for such a segmentation. For instance, one respondent notes: "*[t]he single retail market for the provision of fixed internet access in Belgium includes all types of technology […] as these are all interchangeable from the perspective of the retail customer.*"[94]

(73) Similarly, the large majority of respondents disagree with the need for a segmentation according to the download speed (e.g. above or below 30 Mbps).[95]

(74) In light of the above, for the purpose of this decision, the Commission considers that there is an overall market for the retail supply of fixed internet access services, excluding retail business connectivity services, and without the need to further segment the market.

4.5.2. Relevant geographic market

4.5.2.1. The Commission's previous practice

(75) In its previous decisions, the Commission concluded that the retail market for the provision of fixed internet services was national in scope, and in some cases, the Commission left open whether markets should potentially be defined on a regional basis or by reference to the footprint of the operators' networks.[96]

(76) In recent decisions concerning Belgium, the market investigations revealed elements tending towards a delineation corresponding to the operators' coverage area. Ultimately, the exact geographic market definition was left open.[97]

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92 Form CO, paragraph 230.

93 Q1 – Questionnaire to market participants, response to question 11.

94 Q1 – Questionnaire to market participants, response to question 11.1.

95 Q1 – Questionnaire to market participants, response to question 11.

96 Commission decisions of 12 November 2019 in case M.9064 – *Telia Company/Bonnier Broadcasting Holding*, recital 239; of 8 October 2018 in case M.8842 – *Tele2/Com Hem*; of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, recital 40; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, recital 197.

97 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 81; of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 52.

4.5.2.2. The Notifying Parties' views

(77) The Notifying Parties submit that the market structure in Belgium shows different competitive dynamics between the different regions and, more specifically, between the different cable zones, and that therefore the market is subnational in scope (i.e., region, cable zone or footprint of the operators' concerned).[98]

4.5.2.3. The Commission's assessment

(78) A majority of respondents to the market investigation consider that the geographic retail fixed internet market should be defined as national.[99]

(79) However, a number of respondents consider that the geographic retail fixed internet market should be defined at the level of the cable operator's coverage area/region or at the level of the operator's footprint.[100] For instance, one respondent noted: "*[c]ompetition is based on the presence of the provider in a specific area to be able to provide the offering. In Flanders, there are two main providers with sufficient coverage (and several small competitors): Proximus and Telenet. Brussels, because of its centrality and density, has multiple providers. In the Walloon area, Proximus is the main provider with limited competition especially on the larger download speed solutions.*"[101]

(80) In light of the above, the Commission considers that, for the purpose of this decision, it is appropriate to assess the effects of the Transaction on the retail fixed internet market at the national level, at the level of the cable operator's coverage area/region, and at the level of the operator's footprint.

(81) In any event, the exact delineation of the relevant geographic market can be left open for the purpose of this decision, as the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

4.6. Retail business connectivity services

(82) 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.[102]

4.6.1. Relevant product market

4.6.1.1. The Commission's previous practice

(83) In previous decisions, the Commission considered a product market for retail business connectivity services ("retail business connectivity market"), including (i) broadband access for large business customers; (ii) leased lines; and (iii) VPN[103]

98 Form CO, paragraph 231 and BIPT decision of 29 June 2018, paragraph 255.

99 Q1 – Questionnaire to market participants, response to question 12.

100 Q1 – Questionnaire to market participants, response to question 12.

101 Q1 – Questionnaire to market participants, response to question 12.1.

102 Commission decisions of 18 July 2019 in case M.8864 – *Vodafone/Certain Liberty Global Assets*, recital 166; of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 65.

103 Virtual Private Network ("VPN").

services,[104] but excluding connectivity services offered to residential, SMEs and small-office-home-offices 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.[105]

(84) 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 or (ii) download speed open.[106]

4.6.1.2. The Notifying Parties' views

(85) The Notifying Parties submit that there is an overall retail business connectivity market in line with the Commission's decisional practice.[107]

4.6.1.3. The Commission's assessment

(86) A large majority of respondents to the market investigation consider that there is an overall retail business connectivity market, including (i) broadband access for large business customers; (ii) leased lines; and (iii) VPN services, excluding connectivity services offered to residential, SMEs and small-office-home-offices customers, which are part of the retail fixed internet market.[108] The market investigation indicated that there is no need to segment the retail business connectivity services market according to technology or download speed and that this market also excludes fixed wireless access ("FWA") and fixed internet services to large business and government customers.[109]

(87) In light of the above, the Commission considers that, for the purpose of the decision, the relevant product market is the overall retail business connectivity market. The question whether this product market can be further segmented according to (i) technology or (ii) download speed can be left open as the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible product market definitions considered.

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104 Commission decisions of 14 April 2014 in case M.7109 – *Deutsche Telecom/GTS*, paragraph 26; of 29 January 2010 in case M.5730 – *Telefónica/Hansenet Telekommunikation*, paragraphs 6 and subsequent.

105 Commission decisions 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.

106 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 86.

107 Form CO, paragraph 248. The Notifying Parties refer to the BIPT's position in its decision of 13 December 2019, paragraph 190. The BIPT considers that all high-quality services allowing to satisfy those higher/tailored needs of businesses are considered as sufficiently interchangeable and therefore part of the same market, i.e., (i) classical leased lines, (ii) leased lines with high speed on WDM, (iii) connectivity based on Tline of circuit emulation, (iv) connectivity based on E-line, and (v) connectivity based on E-LAN. Moreover, the BIPT finds that high-quality connectivity services include both P2P connections (i.e., classical leased lines with traditional interfaces or Ethernet interfaces, new generation leased lines or Ethernet services) and P2MP service.

108 Q1 – Questionnaire to market participants, response to question 13.

109 Q1 – Questionnaire to market participants, response to question 13.

4.6.2. Relevant geographic market

4.6.2.1. The Commission's previous practice

(88) In previous decisions, the Commission found that the retail market for business connectivity was national in scope.[110] In the Commission's most recent decision relating to the Belgian market, the exact delineation of the relevant geographic market was left open.[111]

4.6.2.2. The Notifying Parties' views

(89) According to the Notifying Parties, the geographic retail business connectivity market is national in scope. [112]

4.6.2.3. The Commission's assessment

(90) The same number of respondents consider that the geographic market for retail business connectivity services should be defined at the national level or at the level of the operator's footprint. A minority of respondents consider that the scope of the market is the cable operator's coverage area/region.[113]

(91) In light of the above, for the purpose of this decision, the Commission considers that the relevant geographic market is at the national level, but it will also assess the effects of the Transaction at the level of the cable operator's coverage area/region and at the level of the operator's footprint for any of the plausible product market definitions considered in paragraph (87) above.

(92) In any event, the exact delineation of the relevant geographic market can be left open for the purpose of this decision, as the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

4.7. Potential market for the retail supply of multi-play services

(93) Multi-play services include several telecommunications products (mobile services and one or more of the fixed services such as fixed internet, fixed voice and TV), which are provided to consumers through a common offer.[114]

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110 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.

111 Commission decision of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 91.

112 Form CO, paragraph 249.

113 Q1 – Questionnaire to market participants, response to question 14.

114 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 54.

4.7.1. Relevant product market

4.7.1.1. The Commission's previous practice

(94) In its decisional practice, the Commission has left the question open as to whether this market was separate from the retail markets for television, voice and Internet access.[115] In *Liberty Global/BASE Belgium* and *Providence/VOO/Brutélé*, the Commission noted an upward trend in sales of bundled offers in Belgium, but concluded that it was not necessary to define a separate retail multi-play market.[116]

4.7.1.2. The Notifying Parties' views

(95) The Notifying Parties submit that, in line with the position of the BIPT, a multi-play market does not exist.[117]

(96) First, customers can easily switch between the purchase of bundled services and separate services, and the same applies on the supply-side. Second, the BIPT noted that the asymmetry observed in the development of individual retail mobile shares in the Belgian market, appears to contradict the existence, at this stage, of a separate multi-play market. If such a separate market existed in Belgium, in response to a price increase of a bundle, consumers would switch to a bundle with another operator and not unpick the bundle and revert to purchasing mobile services on a standalone basis, implying a symmetrical development at the level of the market shares of the different products among the different operators.[118]

4.7.1.3. The Commission's assessment

(97) Some respondents to the market investigation consider that a separate market for multi-play services exists in Belgium, notably because such bundles are increasingly offered by operators.[119]

(98) However, other respondents consider that there is no such separate market. As noted above (paragraph (96)), from the demand side, customers can and do switch easily between purchasing their services as part of a multi-play offering or separately (e.g. "unpicking" the bundle), subject to their needs. From the supply side, operators who already offer separate services can easily offer these services as a bundle, and *vice versa*. Finally, while the popularity of multi-play offers in Belgium is certainly growing, its commercial development is still evolving.[120]

(99) Similarly, the BIPT considered that the sale of bundles is growing; however, it left open the question of whether a separate market for multi-play services exists in Belgium.[121] Furthermore, in its 2014 Recommendation,[122] the Commission

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115 Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 99; of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 60; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 98.

116 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 54.

117 Form CO, paragraphs 255 and 260.

118 BIPT decision of 29 June 2018, paragraphs 3303-3306.

119 Q1 – Questionnaire to market participants, response to questions 15 and 15.1.

120 Q1 – Questionnaire to market participants, response to questions 15 and 15.1.

121 BIPT decision of 29 June 2018, Section 10.2.

122 Explanatory Notes to the 2014 and 2020 Recommendations.

acknowledges the increased demand for packages of services offered by the same operator at a flat rate (also known as "bundles"). However, the Recommendation did not propose to define a separate retail market for bundles because individual wholesale markets will, in all likelihood, constitute (previously regulated) inputs to replicate the retail market for bundles. Therefore, in case of competition concerns at the retail level, such concerns would be addressed at the level of the relevant wholesale market.[123]

(100) In light of the above, and for the purpose of this decision, the question as to whether there exist one or more multi-play markets that are distinct from each of the underlying individual telecommunications services can be left open given that the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement, independently of the existence of a separate market, or a lack thereof.

4.7.2. Relevant geographic market

4.7.2.1. The Commission's previous practice

(101) In previous decisions, the Commission considered that the geographic scope of any possible retail market for multi-play services would be national since the components of the multi-play offers are offered individually at a national level, and the bundling of the services would not change the geographic scope of the components.[124] In two recent decisions relating to the Belgian market, the Commission however left the question of the geographic market definition open.[125]

4.7.2.2. The Notifying Parties' views

(102) The Notifying Parties submit that a multi-play market does not exist, and have therefore not commented on its potential geographic scope (see paragraphs (95)-(96) above).

4.7.2.3. The Commission's assessment

(103) A majority of the respondents to the market investigation considered that a possible market for multi-play offers (irrespective of what type of bundles are included in such a possible market) would be national in scope.[126] This view, however, does not necessarily align with the results of the market investigation obtained in relation to retail fixed internet access services, which would be one of the components of such a hypothetical market. A number of other respondents considered that the coverage area of each cable operator was also relevant, notably because multi-play offers in Belgium are generally limited to the coverage area of the cable operator.

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[123] Explanatory Note to the 2014 Recommendation, page 18. See also Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 59.

[124] Commission decisions of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraph 112; of 19 May 2015 in case M.7421 – *Orange/Jazztel*, recitals 89-90; of 10 October 2014 in case M.7000 – *Liberty Global/Ziggo*, recitals 152-153; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraphs 263-265; of 16 June 2011 in case M.5900 – *LGI/KBW*, paragraphs 183-186.

[125] Commission decisions of 24 March 2021 in case M.10087 – *Proximus/Nexus Infrastructure/JV*, paragraph 104; of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraphs 63-64.

[126] Q1 – Questionnaire to market participants, response to question 16.

(104) On this basis, the Commission considers that, for the purpose of this decision, it is appropriate to assess the effects of the Transaction at the national level, at the level of the cable operator's coverage area, and at the level of the operator's footprint, to the extent one or more separate retail multi-play markets exist as considered in paragraph (100) above.

(105) In any event, the exact delineation of the relevant geographic market can be left open for the purpose of this decision, as the Transaction would not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement under any of the plausible geographic market definitions considered.

5. COMPETITIVE ASSESSMENT

5.1. Analytical framework

(106) Article 2 of the Merger Regulation requires the Commission to examine whether notified concentrations are compatible with the internal market, by assessing whether they 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.[127]

(107) In this respect, a merger may entail horizontal and/or non-horizontal (i.e., 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. Non-horizontal effects are those deriving from a concentration where the undertakings concerned are active in different relevant markets. In a case where a merger entails both horizontal and non-horizontal effects, the Commission will appraise these effects in accordance with the guidance set out in the relevant notices.[128]

(108) Horizontal mergers involve companies which are actual or potential competitors of each other in one or more of the relevant markets concerned. 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, such as 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, or the fact that the merger would eliminate an important competitive force.[129]

(109) Vertical mergers involve companies operating at different levels of the supply chain. There are two main ways in which vertical mergers may significantly impede effective competition: input foreclosure and customer foreclosure.

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[127] With regard to the application of the Merger Regulation in the EEA, see Annex XIV to the EEA Agreement.

[128] 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, 18.10.2008, paragraph 7.

[129] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31, 5.2.2004, paragraphs 27 and following.

(110) Input foreclosure may raise competition problems only if it concerns an important input for the downstream market, and if the combined entity has a significant degree of market power upstream.[130] In assessing the likelihood of an anticompetitive input foreclosure strategy, the Commission examines: (i) whether the combined entity would have the ability to substantially foreclose access to inputs; (ii) whether it would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental effect on competition downstream.[131] These three conditions are cumulative, therefore the absence of any of them is sufficient to rule out the likelihood of anti-competitive input foreclosure.[132]

(111) For a transaction to raise customer foreclosure competition concerns, the combined entity must be an important customer with a significant degree of market power in the downstream market.[133] In assessing the likelihood of an anticompetitive customer foreclosure strategy, the Commission examines: (i) whether the combined entity would have the ability to foreclose access to downstream markets by reducing its purchases from upstream rivals; (ii) whether it would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market.[134]

(112) In addition, under Article 2(4) of the Merger Regulation, to the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101(1) and (3) of the TFEU, with a view to establishing whether or not the operation is compatible with the common market.

(113) Under Article 2(5) of the Merger Regulation, in making this appraisal, the Commission shall take into account in particular: (i) whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and (ii) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

(114) A restriction of competition under Article 101(1) TFEU is established when the coordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture, be it as its object or its effect.

5.2. Identification of affected markets

(115) Following the start-up of the JV's activities in 2022, the Transaction gives rise to the following horizontally and vertically affected markets.

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130 Non-Horizontal Merger Guidelines, paragraphs 34-35.

131 Non-Horizontal Merger Guidelines, paragraph 32.

132 Judgment of the General Court on 23 May 2019 in case T-370/17, *KPN BV v European Commission*, paragraph 119.

133 Non-Horizontal Merger Guidelines, paragraph 58.

134 Non-Horizontal Merger Guidelines, paragraph 59.

(116) *Horizontal overlaps:* First, on the wholesale overall broadband access market, Proximus and the JV's combined market share exceeds 20%[135] in Wallonia[136] (expected 2024). On a potential local broadband access market, Proximus and the JV's combined market also exceeds 20% in Belgium and in VOO's coverage area/Wallonia[137] (expected 2022). Therefore, the wholesale (local) broadband access market is horizontally affected (see paragraph (120) below). Second, on the leased lines market (including dark fiber), Proximus, Eurofiber and the JV's combined market share exceeds 20% (expected 2022) in Belgium, VOO's coverage area/Wallonia and in the JV's footprint. On a potential segment for the supply of dark fiber,[138] the Parties' combined market share exceeds 20% (expected 2022) in Belgium (see paragraph (135) below).

(117) *Vertical relationships:* First, the wholesale local broadband access market, where both Proximus and the JV are active, is upstream from (A) Proximus' wholesale and retail activities downstream on the (i) wholesale resale broadband access,[139] and (ii) retail telecommunications markets (retail mobile, fixed internet, fixed voice, business connectivity and a potential supply of multi-play services) and (B) Proximus' and Eurofiber's wholesale activities downstream on the leased lines markets. These markets are vertically affected (see paragraph (150) below). Second, the leased lines market (including dark fiber), where Proximus, Eurofiber and the JV are active, is upstream from Proximus' and Eurofiber's retail activities downstream on the retail business connectivity market. Finally, a potential segment for the supply of dark fiber, where Eurofiber and the JV are active, is upstream from Proximus' and Eurofiber's wholesale activities downstream on the leased lines market (excluding dark fiber). These markets are vertically affected (see paragraph (150) below).

(118) Proximus and Eurofiber will both remain independently active in Belgium on two markets that can be considered as situated downstream from the activities of the JV, namely (i) the wholesale supply of leased lines and (ii) the retail supply of business connectivity services.[140]

(119) Each of these potential effects of the Transaction is separately discussed in the following sections: horizontal non-coordinated effects (Section 5.3); non-horizontal effects (Section 5.4); and finally, potential cooperative effects (Section 5.5).

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135 All market shares of the Notifying Parties are volume-based, unless specified otherwise.

136 See footnote 41. However, in this case, the overall broadband access market is affected in Wallonia (JV: [0-5]%, expected 2024) but not at the level of VOO's coverage area (JV: [0-5]%, expected 2024). At both geographic levels, Proximus has [10-20]% (2020).

137 See footnote 41.

138 See paragraph (32) above in relation to the existence of a potential dark fiber segment within an overall wholesale leased lines market. The JV will likely provide dark fiber services.

139 Note that the wholesale resale broadband access market is included in a potential overall wholesale broadband access market. Therefore, this market is only considered downstream from the potential narrower wholesale local access broadband market (see paragraph (22) above).

140 The Notifying Parties will retain their respective independent activities in the Netherlands and on certain EEA/global markets, which cannot be considered as being in the same or a neighbouring market, or upstream of downstream, from the JV. See Form CO, Annexes 6 and 7.

5.3. Horizontal relationships

5.3.1. Horizontal relationship on the wholesale (local) broadband access market

(120) Following the start-up of the JV's activities, in 2022, the Transaction is expected to give rise to a very limited horizontal overlap between the JV's and Proximus' activities in the wholesale (i) overall broadband access market in Wallonia[141]; (ii) local broadband access market in Belgium, and VOO's coverage area/Wallonia; and (iii) local broadband access market limited to fiber and copper distribution technology in Belgium and in VOO's coverage area/Wallonia. Eurofiber is not active on the wholesale (local) broadband access market in Belgium.

(121) First, in an overall wholesale broadband access market,[142] Proximus' market share is [10-20]% (2020) and the JV is expected to hold [0-5]% market share (2024) in Wallonia.[143] Second, Proximus' market share in a potential wholesale local broadband access market[144] would be close to 100%[145] (2020) with the JV expecting to hold less than [0-5]% (2022) in Belgium and in VOO's coverage area/Wallonia. Finally, the same figures apply in a segment of the wholesale local broadband access market, which is limited to fiber and copper distribution technology.[146] There are no other horizontally affected wholesale broadband access markets under any other possible product market definition.

5.3.1.1. The Notifying Parties' views

(122) The Notifying Parties state that the Transaction does not raise any horizontal non-coordinated concerns on the wholesale broadband access market (and all its possible sub-segments) for the following reasons.

(123) First, the Transaction entails the entry of a new competitor on the overall wholesale broadband access market in Belgium by which it creates a new future-proof and technologically more advanced infrastructure that offers higher speeds to the benefit of customers.[147]

(124) Second, the Notifying Parties emphasise that the broadband access' activities of Proximus have a modest scale on the market as compared with the activities of the cable operators on the market.[148] For instance, the largest wholesale customer for broadband access services is Orange Belgium. Orange Belgium has chosen to procure the wholesale broadband access services mainly from Telenet and VOO, based on Telenet's regulated offer instead of the copper-based wholesale broadband access services provided by Proximus.[149]

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141 See Footnote 136 above.

142 Including cable in line with the BIPT's analysis of the overall wholesale broadband access market.

143 The JV's expected market share in 2022 will be less than [0-5]% and in 2023 less than [0-5]%. See Form CO, Annex 37.

144 Excluding cable in line with the BIPT's analysis of the local wholesale broadband access market.

145 BIPT decision of 29 June 2018, paragraph 1020.

146 Form CO, Annex 37.

147 Form CO, paragraph 354.

148 Form CO, paragraph 355 and BIPT decision of 29 June 2018, paragraph 296.

149 BIPT decision of 29 June 2018, paragraph 296.

(125) When looking at the local broadband access market in Wallonia and VOO's coverage area/Wallonia, as defined by the BIPT[150], Proximus holds close to 100% market share (see paragraph (121) above) given that the BIPT has excluded wholesale broadband access offers on the cable network from this market. However, the Notifying Parties recall that these offers on the cable network are the most successful on the market, while the volumes of sales achieved by Proximus are extremely limited. Concretely, the total volume of unbundled local loop services that are currently purchased from Proximus covers less than […] access lines (end of December 2020) and shows even a downward trend. Proximus' VULA offers for virtual local unbundling is currently not being purchased given that no market player has expressed an interest.[151]

(126) Third, Proximus' wholesale broadband access services (i.e., LLU, VULA on copper and VULA on fiber) are subject to *ex ante* regulatory obligations.[152] The BIPT has imposed physical and virtual access obligations on Proximus. Additionally, the BIPT imposed non-discrimination, transparency and price control obligations.[153] Such regulatory obligations will also apply to the JV's activities.[154] Similar regulatory obligations apply on the competing wholesale broadband access offers provided by the cable network operators in Belgium. Moreover, in line with the harmonised EU regulatory framework for electronic communications, the sector regulator can intervene at all times to conduct a market analysis and to impose amended or adapted *ex ante* regulatory obligations based on its findings regarding the market evolution.[155]

(127) Finally, the JV will deploy its FTTx-infrastructure in areas in which there is no standalone deployment or plans to deploy by Proximus of such infrastructure.[156] Consequently, from a geographic perspective, the respective FTTx network deployments by Proximus and the JV will be clearly distinct but complementary.[157]

5.3.1.2. Commission's assessment

(128) The Commission considers that the Transaction does not raise horizontal concerns in the market for wholesale broadband access in Wallonia, in the market for wholesale local broadband access in Belgium and in VOO's coverage area/Wallonia or the local broadband access market limited to fiber and copper distribution technology in Belgium and in VOO's coverage area/Wallonia, for the following reasons.

(129) First, as stated above in paragraph (121), the Transaction does not involve an appreciable market share increment.

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150 BIPT decision of 29 June 2018, paragraph 1020.

151 Form CO, paragraph 356.

152 Form CO, paragraphs 357 and 359.

153 BIPT decision of 29 June 2018, paragraph 1020.

154 Form CO, paragraph 359 and see paragraph (161) below.

155 Form CO, paragraph 357.

156 Form CO, paragraphs 76-77, 358 and 361: Proximus indicated that its FTTx-infrastructure standalone deployment plans will be outside the defined deployment area of the JV in accordance with Proximus' non-overbuild obligations as set out in Clause 20.1 of the SSHA.

157 Form CO, paragraph 361.

a. In the overall wholesale broadband access market in Wallonia, the JV's increment is extremely low (less than [0-5]% expected in 2022). This figure is expected to increase to [0-5]% by 2024. The Parties' combined market shares are modest ([20-30]%).[158]

b. Similarly, when considering the wholesale local broadband access market or a wholesale local broadband access market limited to copper and fiber distribution technology, the JV's increment is extremely low. In both of these local access markets, the JV is expected to hold [0-5]% by 2022 and [0-5]% by 2024 at national level; [0-5]% by 2022 and [0-5]% by 2024 in VOO's coverage area; and [0-5]% by 2022 and [0-5]% by 2024 in Wallonia.[159]

(130) Second, the JV and the Notifying Parties are currently not competing on the Belgian market. Therefore, this Transaction will not eliminate any important competitive constraint on market players. On the contrary, the JV is a new entrant in the wholesale broadband access market (and possible narrower markets) and thus a new additional choice on this market for customers.

(131) Third, as the Notifying Parties point out (see paragraph (127) above), from a geographic perspective, the respective FTTx network deployments by Proximus and the JV will be clearly distinct.[160]

(132) Fourth, a large majority of respondents to the market investigation considered that this new entrant would not have a negative impact on the wholesale broadband access market. A competitor of Proximus noted that "*Today, the Belgian market for wholesale broadband access services is characterised by competition between the incumbent copper network and the cable HFC networks. We expect the JV to compete with them which may further drive competition and thus foster innovation and development of new services and business models*".[161] Furthermore, a customer of Proximus noted "*Infrastructure sharing seems to be extremely important for new entrants, more providers will be able to use the FTTx network with a positive impact for the customers*."[162] Finally, an important customer on this market specified that they consider an "*increased provision of wholesale local broadband access services to the market as a welcome development with the potential for significant positive impact on both the business environment and on the diversity and quality of choices available to Belgian retailers and end-consumers.*"[163]

(133) Finally, a number of respondents to the market investigation also considered that the existence of sector-specific regulation makes it possible to exclude or limit any potential anti-competitive effect resulting from the Transaction on the wholesale broadband access market. At the same time, an equal number of respondents disagreed, but did not fully substantiate why sector-specific regulation would not be

158 Form CO, Annex 37. This market share is based on Proximus' market share in the last financial year (2020) and the JV's expected market share in 2024.

159 Form CO, Annex 37.

160 See footnote 156.

161 Q1 – Questionnaire to market participants, response to question 21. Emphasis added.

162 Q1 – Questionnaire to market participants, response to question 21. Emphasis added.

163 Q1 – Questionnaire to market participants, response to question 21. Emphasis added.

effective.[164] In any event, the Commission notes that the BIPT 2018 decision has imposed a regulatory obligation on Proximus to grant wholesale access to third parties to its copper pair network as well as its fiber network, insofar as this fiber network is destined to eventually replace Proximus' copper network.[165] The Parties and the BIPT have indicated that the same regulatory obligations will apply to the JV's wholesale broadband access activities. Namely, the JV will be obliged to provide a non-discriminatory non-exclusive open access for all interested third parties to its passive network (see paragraph (161) below).

(134) Therefore, for the reasons set out above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of horizontal effects on the market for wholesale broadband access, or any possible narrower affected markets, either at the national level, in Wallonia or at the level of VOO's coverage area.

5.3.2. Horizontal relationship on the wholesale leased lines market

(135) Following the start-up of the JV's activities, in 2022, the Transaction is expected to give rise to a very limited horizontal overlap between the JV's, Proximus' and Eurofiber's activities in the wholesale (i) leased lines market (including dark fiber) in Belgium, VOO's coverage area/Wallonia and in the JV's footprint, and (ii) on a potential segment for the supply of dark fiber in Belgium.[166]

(136) First, in a leased lines market (including dark fiber), Proximus' market share is approximately [50-80]%, Eurofiber's market share is approximately [0-10]% (both 2020) and the JV's market share below [0-5]% (2022-2024) in Belgium, VOO's coverage area/Wallonia and in the JV's footprint.[167] Second, in a potential segment for the supply of dark fiber in Belgium, Proximus' market share would be below [0-5]% (2020), with Eurofiber holding approximately [20-30]% (2020) and the JV below [0-5]% (2022).[168] There are no other horizontally affected leased lines markets under any other possible product market definition.

5.3.2.1. The Notifying Parties' arguments

(137) The Notifying Parties state that the Transaction is unlikely to raise any horizontal non-coordinated concerns on the wholesale leased lines market (and all its possible sub-segments) for the following reasons.[169]

(138) First, the Transaction entails the entry of a new competitor, creating an additional dark fiber offering in the Walloon region of Belgium.[170]

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[164] Q1 – Questionnaire to market participants, response to question 23. One respondent appeared concerned by the threat of the JV's network triggering a potential de-regulation of the zones covered by the JV's network. This concern is assessed in paragraph (164) below.

[165] BIPT decision of 29 June 2018, Section S.2.

[166] See Form CO, Annex 37. Market shares are only available in this potential segment on a national basis.

[167] Form CO, Annex 37.

[168] Form CO, Annex 37.

[169] Note that the Notifying Parties refer to the "*wholesale high-quality access market*", which is in line with the terminology that the BIPT also uses. See Form CO, paragraphs 363 and following.

[170] Form CO, paragraph 365.

(139) Second, the Notifying Parties consider that, in line with the BIPT's analysis,[171] there is only a limited degree of substitution between the active and passive services offered by the Parties.[172] The Notifying Parties refer to the BIPT's substitutability analysis[173] (set out in paragraph (37) above), which sets out that dark fiber is not considered to be substitutable with the high-quality services (both from a demand- and supply-side) on a Belgian leased lines market.[174] While these substitutability arguments have not been accepted to define a distinct leased lines market excluding dark fiber (see Section 4.2.1.3 above), the Notifying Parties still consider these arguments relevant for the purpose of their competitive analysis. According to the Notifying Parties, given the lack of substitution between dark fiber and the "other" high-quality services, any competition that would hypothetically be affected, would in any event in itself be very limited as compared to the overall market.

(140) Third, on a leased lines market (including dark fiber), a number of competitors are active (with active and/or passive offerings) such as Telenet and other (national and international) players in Belgium.[175]

(141) Fourth, only Eurofiber is currently active on a potential segment for the supply of dark fiber.[176] Proximus does not provide any dark fiber solutions, and the JV's primary activity is to provide wholesale local broadband access. Any dark fiber services that the JV will likely develop in the future would be a secondary activity.

(142) Fifth, in any event, all Proximus' leased lines activities are subject to *ex ante* regulatory obligations.[177] Therefore, Proximus is not in a position to modify at will the qualitative and quantitative conditions under which it provides leased lines offers on the market. The Parties note that, based on the BIPT's most recent market analysis (which does not include dark fiber[178]) such regulatory obligations will not extend to the JV's activities. Nonetheless, the BIPT can intervene at all times to conduct a market analysis and to impose amended or adapted *ex ante* regulatory obligations based on its findings regarding the market evolution.

5.3.2.2. Commission's assessment

(143) The Commission considers that the Transaction does not raise horizontal concerns in the leased lines market in Belgium, VOO's coverage area/Wallonia and in the JV's footprint, and in a potential segment for the supply of dark fiber in Belgium or any possible narrower affected markets, for the following reasons.

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171 BIPT decision of 13 December 2019, paragraph 399.

172 Form CO, paragraph 366.

173 BIPT decision of 13 December 2019, paragraph 190.

174 See footnote 169 in relation to terminology.

175 Form CO, paragraph 367. According to the Parties, the LCL Report is the only publicly available information regarding individual dark fiber offers available in Belgium (Connectivity in Belgium, LCL's guide to connecting you to the world, 3 November 2020, available at https://www.lcl.be/media/xixpftvk/connectivity-guide-03-11-2020.pdf). The Parties are unable to provide reliable market share estimates for these operators or provide an exhaustive list of the relevant competitors.

176 Form CO, paragraph 368.

177 Form CO, paragraph 369 and BIPT decision of 13 December 2019, paragraphs 495 and following.

178 BIPT decision of 13 December 2019.

(144) First, as stated above in paragraph (136), the Transaction does not involve an appreciable market share increment.

a. In the leased lines market in Belgium, VOO's coverage area/Wallonia and in the JV's footprint, the JV's increment is extremely low (less than [0-5]% expected in 2022). This figure is not expected to increase by 2024.

b. Similarly, when considering the supply of dark fiber, the JV's increment is extremely low. The JV is expected to hold below [0-5]% by 2024 in Belgium.[179]

(145) Second, the JV is currently not competing on the Belgian market. Therefore, this Transaction will not eliminate any important competitive constraint on market players. On the contrary, the JV is a new entrant in the leased lines market and thus a new additional choice on this market for customers.

(146) Third, the overlaps between the JV and the Notifying Parties are minimal. Proximus offers active leased lines on copper and fiber, Eurofiber offers active and passive high-quality services (including dark fiber),[180] whereas the JV would develop dark fiber solutions on the Belgian market.[181]

(147) Fourth, a large majority of respondents to the market investigation considered that this new entrant would not have a negative impact on the leased lines market. A competitor of Proximus noted, "*The market is characterised by competition between various providers. We expect the proposed JV to compete with the existing providers which may further drive competition and thus foster innovation and development of new services and business models*".[182] Furthermore, a customer of Proximus noted, "*This new joint venture can do the required investments in Wallonia to enable improved service offerings in Wallonia*."[183] The majority of respondents also indicated that they expect the level of competition on the leased lines market to increase post-Transaction.[184]

(148) Finally, the majority of respondents to the market investigation also considered that the existence of sector-specific regulation makes it possible to exclude or limit any potential anti-competitive effect resulting from the Transaction on the leased lines market.[185] The Commission notes that the BIPT's 2019 decision has imposed a regulatory obligation on Proximus to grant (i) active wholesale access to third parties to its copper pair network as well as its fiber network; and (ii) passive wholesale access to third parties to its fiber network. In addition, Proximus is obliged to provide a non-discriminatory non-exclusive open access for all interested third parties.[186] Consequently, while similar obligations will not apply to the JV's dark fiber services, customers can still rely on this regulated alternative on the leased lines market.

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179 Form CO, Annex 37.

180 Form CO, paragraph 167. Eurofiber offers Ethernet over the First Mile (EFM) solutions and passive dark fiber (FTTO) solutions.

181 Form CO, paragraph 370.

182 Q1 – Questionnaire to market participants, response to question 24. Emphasis added.

183 Q1 – Questionnaire to market participants, response to question 24. Emphasis added.

184 Q1 – Questionnaire to market participants, response to question 25.

185 Q1 – Questionnaire to market participants, response to question 28.

186 BIPT decision of 13 December 2019, Section 2.

(149) Therefore, for the reasons set out above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of horizontal effects on the market for wholesale leased lines, or any possible narrower affected markets, either at the national level, at the level of VOO's coverage area/Wallonia or in the JV's footprint.

5.4. Vertical relationships

5.4.1. Vertical relationship between the wholesale broadband access market upstream, and the wholesale access and retail telecommunications markets downstream

(150) The JV's upstream activities in the (i) overall broadband access market in Wallonia ([0-5]% expected by 2022, and [0-5]% by 2024) and in the JV's footprint ([20-30]% expected by 2022, and [40-50]% by 2024)[187] and (ii) local broadband access market[188] at national level ([0-5]% expected by 2022, and [0-5]% by 2024),[189] in Wallonia ([0-5]% expected by 2022, and [0-5]% by 2024), VOO's coverage area ([0-5]% expected by 2022, and [0-5]% by 2024)[190] and in the JV's footprint ([20-30]% expected by 2022, and [40-50]% by 2024) are vertically linked to Proximus' and Eurofiber's[191] activities in the following downstream markets in Belgium. This gives rise to the following vertically affected markets:

a. *Wholesale markets*: broadband resale market (Proximus, [90-100]%),[192] leased lines market (Proximus, [50-60]%; Eurofiber, [5-10]%);[193] and

b. *Retail markets*: retail mobile (Proximus, [30-40]%), fixed internet (Proximus, [40-50]%), fixed voice (Proximus, [50-60]%), business connectivity (Proximus, [40-50]%; Eurofiber, [0-5]%) and a potential market for multiple-play services (Proximus, [40-50]%).[194]

(151) The Commission notes that the Notifying Parties' arguments and the Commission's analysis is the same in relation to all downstream markets (including all possible segments). There are no vertically affected markets under any possible market definition other than those listed in paragraph (150) above and paragraphs (183)-(184) below.

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187 Form CO, Annex 37.

188 The same figures apply irrespective of whether the market is limited to copper and fiber distribution technology or not.

189 Form CO, Annex 37.

190 Form CO, Annex 37.

191 Eurofiber is only active on the leased lines market and the retail business connectivity market.

192 Form CO, Annex 37. The Notifying Parties indicate that if the wholesale broadband resale market is limited to the resale offers provided by Proximus, Proximus would – by definition – hold a market share of [90-100]% on said market, which represents however a limited number of lines that are sold to third parties (approximately […] in total). However, based on publicly available information, the Notifying Parties cannot exclude that a resale-like offer currently exists on other network infrastructure, in particular on the cable infrastructure of Telenet (see https://www2.telenet.be/nl/business/sector/carriers/). Form CO, paragraphs 118, 208, 304, and 429.

193 Form CO, Annex 37. Proximus has an approximately [50-60]% market share at the national level and at the level of its footprint. Figures are not available at the regional level or at the level of the cable operator's coverage area.

194 Form CO, Annex 37. According to the BIPT's Communication of 30 June 2020, market shares on a hypothetical market for multiple-play services would be between 40% and 50%. All market share figures quoted are at the national level.

5.4.1.1. Input foreclosure

(A) The Notifying Parties' views

(152) The Notifying Parties argue that there will be no input foreclosure by restricting access to the JV's network for competing providers of wholesale and/or retail telecommunications services for the following reasons.[195]

(153) First, through the Transaction a new provider of local broadband access services (fiber-based) will enter at the wholesale level. The JV will offer an alternative to any interested operator for realising high bandwidth access to customers. Therefore, the Transaction does not involve a possible foreclosure upstream of an existing (important) input that is currently used downstream.

(154) Second, for input foreclosure to be a concern, the firm resulting from the merger (in this case the JV) must have a significant degree of market power in the upstream market. In the present case, the JV is a new entrant and it is unlikely to have any significant degree of market power in the near future.

(155) Third, as Eurofiber is not active on the retail telecommunications markets in Belgium (except for business connectivity services) it will have no incentive to limit sales to third parties (which would limit the JV's revenues).

(156) Fourth, downstream providers of fixed electronic communications services are vertically integrated cable operators which benefit from access to their own cable infrastructure network, covering the entire territory of Belgium. Moreover, alternative operators are currently able to access the network infrastructure of both Proximus and the cable operators, which have an obligation to provide access to their networks under regulated terms throughout Belgium. Such regulation will apply to any wholesale broadband access product that will be provided in the future by Proximus and that will use as an input the passive wholesale fiber access services that will be provided by the JV.

(157) Finally, in relation to mobile network operators, the Notifying Parties submit there is only an indirect vertical link between the market on which the JV will be active upstream and the retail mobile market. While mobile network operators could use the JV's network to connect their mobile (antenna) sites with their backhaul network, these connections are only one of the elements making up their mobile networks.

(B) Commission's assessment

(158) For the reasons set out below, the Commission considers that the Transaction does not lead to input foreclosure concerns in the downstream markets for (i) wholesale resale broadband access and leased lines services, and (ii) retail mobile services, fixed internet services, fixed voice services, business connectivity services and potential multi-play services (see paragraph (150) above).

[195] Form CO, paragraphs 378-381 (fixed operators) and paragraphs 382-384 (mobile operators).

(B.i) Ability to engage in input foreclosure

(159) The Commission considers that the Parties will not have the ability to engage in input foreclosure by restricting access to the JV's wholesale offer to downstream operators.

(160) First, the Commission recalls that the JV will have a very limited market position in the wholesale (local) broadband access market. The JV is expected to hold [0-5]% by 2022 and [0-5]% by 2024 at national level and in VOO's coverage area, and [0-5]% by 2022 and [0-5]% by 2024 in Wallonia (see paragraphs (129) and (150) above).[196] Therefore, the JV cannot be considered as having significant market power in the upstream wholesale (local) broadband access market at national level, in VOO's coverage area and in Wallonia. Similarly, while the JV is expected to hold approximately [20-30]% by 2022 and [40-50]% of the market within its own footprint by 2024, this relates to a limited geographic area in Belgium. As set out in Footnote 46, the JV's footprint consists of a limited list of NIS zones in in the Walloon region of Belgium within which the FTTx network will be deployed by the JV. Further, as set out in paragraph (25) above, the JV will only deploy its own FTTx-infrastructure in areas in which there is no standalone deployment by Proximus of such infrastructure.

(161) Second, the Commission notes that the JV's activities are subject to sector-specific regulation, which prevents the Parties from refusing access to JV's network and from charging excessive fees.[197] In its decision of 29 June 2018, the BIPT has designated Proximus as an SMP operator (i.e., operators with significant market power in the relevant markets) with regard to its wholesale local broadband access activities.[198] The designation of Proximus as an SMP operator also includes the JV (as an affiliated company, which is jointly controlled by the Notifying Parties).[199] This has also been acknowledged by the Notifying Parties.[200] Under the BIPT's decision, the JV (and Proximus) (i) must meet all requests for physical (and virtual) access to their (copper and) fibre networks[201], and (ii) are bound by non-discrimination obligations which state that access to the wholesale inputs must be similar in terms of functionalities and price.[202] Other key obligations include transparency obligations by which SMP operators must make public specific information such as reference offer specifying the technical and tariff conditions of the access to their networks and price control obligations which includes an obligation to apply fair tariffs (as defined in the BIPT's decision).[203] As a result of

196 Form CO, Annex 37.

197 Market 1: wholesale local access provided at a fixed location of the European Commission, the 2020 Recommendation (former Market 3a: *wholesale local access provided at a fixed location* of the 2014 Recommendation).

198 BIPT decision of 29 June 2018.

199 See also European Commission comments pursuant to Article 7(3) of Directive 2002/21/EC in Commission decision in Case DE/2019/2200: Wholesale local access provided at a fixed location in Germany, page 9 regarding a JV between DT and EWE. The Commission determined that a different interpretation (i.e., where the SMPT designation would not extend to the JV) would result in regulatory gaming allowing the SMP operator to circumvent the SMP status by simply setting up a new legal entity.

200 Form CO, paragraph 359.

201 The JV's activities are limited to the provision of physical unbundled (i.e., passive) access to the fiber local loop.

202 BIPT decision of 29 June 2018, S2.3 (page 35).

203 BIPT decision of 29 June 2018, S21 (page 36).

this sector-specific regulation, the JV would not have the ability to foreclose wholesale network access.

(162) Third, following the Transaction, customers will have a new and additional supplier of wholesale local broadband access services, in addition to the existing offers by market players such as Proximus and the cable operators.[204] Concretely, the JV represents a new and additional wholesale input on the (local) broadband access market in Belgium (as opposed to a (particularly important) existing input access to which is being limited or prohibited).

(163) Fourth, in terms of alternatives to the JV's services, in the wholesale broadband access market, the offers by Proximus and the cable operators are similarly subject to sector-specific regulation. For instance, the BIPT's decision of 29 June 2018 regulates Proximus' copper pair network (at national level) and the coaxial cable network of Brutélé, Nethys and Telenet (including SFR) (respective coverage areas).[205] Therefore, customers will have the choice with Proximus and the cable operators as alternatives to the JV's offer. Any strategy by the JV to foreclose downstream operators would therefore not be successful.

(164) Finally, a respondent to the market investigation appears concerned by the threat of the JV's network triggering a potential de-regulation of the zones covered by the JV's network.[206] The BIPT's market regulation provides that, in the geographic zones where at least three independent Next Generation Access ("NGA")-operators compete, in line with the definitions of the BIPT decision, the regulatory obligations that were imposed would no longer apply.[207] However, the JV cannot constitute such an independent NGA-operator. First, the BIPT assesses the presence of an NGA-operator at the level of the retail markets. The JV is not present on these retail markets, therefore, it cannot be considered as an independent NGA-operator. This has also been indicated by the Notifying Parties.[208] Second, the BIPT has also submitted that it does not consider the JV to be independent from Proximus.[209] Therefore, the Commission considers that this threat is not credible.

(165) Therefore, for the reasons set out above, the Commission concludes that the JV would not have the ability to foreclose rival operators by engaging in an input foreclosure strategy.

(B.ii) Incentive to engage in input foreclosure

(166) While the conditions to find an input foreclosure strategy are cumulative (see paragraph (110) above), and the Commission has concluded that the JV would not have the ability to engage in a successful foreclosure strategy (see paragraph (165)

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[204] The Notifying Parties do not have reliable market data available on the number of wholesale broadband local access lines currently offered by the various operators. According to the BIPT's market analysis decision of 29 June 2018, which identified a market for wholesale broadband local access including both copper- and fiber-technologies, Proximus was the only player on this market. A broader market would include the cable operators (Telenet, Brutélé and VOO/Nethys).

[205] BIPT decision of 29 June 2018, S9.4 (page 32).

[206] Q1 – Questionnaire to market participants, response to question 30.1.

[207] BIPT decision of 29 June 2018, paragraph 1496.

[208] Form CO, footnote 93 and BIPT decision of 29 June 2018, paragraph 1500.

[209] Call with BIPT, 4 March 2021.

above), the Commission has nevertheless also assessed the other conditions for completeness. The Commission considers that the Parties will not have the incentive to engage in input foreclosure by restricting access to the JV's wholesale offer to downstream operators.

(167) Only a few respondents believe it is credible that the JV would have the incentive to restrict or limit access to its network in view of the presence of alternative networks and the existence of sector-specific regulation.[210] However, as indicated in paragraph (161) above, the JV's activities are subject to sector-specific regulation, which will prevent the JV from refusing access to their network or from imposing unfavourable terms or charging excessive fees. This was notably indicated by a market participant who explained that "*sector-specific regulation may help [t]o prevent the new entity from restricting access to its wholesale broadband services*."[211]

(168) Further, the Commission recalls that Eurofiber, one of the parents of the JV together with Proximus, is not active on the downstream telecommunication markets in Belgium (except for business connectivity services) and therefore, will not have any incentive to limit the JV's wholesale offers to third parties (i.e., limiting the JV's wholesale revenues). On the contrary, Eurofiber is incentivised to maximise the JV's wholesale revenues in light of the significant investments that the JV is expected to make, including on the basis of equity investments from the Notifying Parties.[212]

(169) For the reasons set out above, the Commission concludes that the JV would not have the incentive to foreclosure rival operators by engaging in an input foreclosure strategy.

(B.iii) Impact on effective competition

(170) The Commission considers that due to the lack of ability and incentive, it is not needed to conclude on the question whether any foreclosure strategy would have a negative impact on effective competition.

(171) Most respondents to the market investigation consider that the Transaction will not have a negative impact on their business or on the relevant downstream markets (as identified in paragraph (150) above).[213] A majority of respondents agree that a potential positive impact from the JV's entry on the market would depend on (i) the conditions that will apply to gain wholesale access to the JV's infrastructure, and (ii) whether or not there is a risk that the deployment of the JV's network would lead to a de-regulation in the market. As set out above in paragraphs (161) and (167), it is clear that the JV will be subject to sector-specific regulation, and that the JV's entry on the market will not lead to de-regulation.

(B.iv) Conclusion

(172) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to possible input foreclosure practices under any of the alternative product markets for

[210] Q1 – Questionnaire to market participants, response to questions 30-32.
[211] Q1 – Questionnaire to market participants, response to question 32.1.
[212] Form CO, paragraph 379.
[213] Q1 – Questionnaire to market participants, response to questions 41-43.

the (i) wholesale resale broadband access and leased lines markets, and the (ii) retail telecommunications markets (retail mobile, fixed internet, fixed voice, business connectivity and a potential supply of multi-play services), irrespective of the geographic scope.

5.4.1.2. Customer foreclosure

(A) The Notifying Parties' views

(173) The Notifying Parties submit that there will be no customer foreclosure by restricting or limiting competing wholesale broadband access providers from their access to Proximus and Eurofiber as customers. The Notifying Parties indicate that neither Proximus nor Eurofiber currently purchases wholesale broadband access services from other operators, and therefore a risk of customer foreclosure does not exist.[214]

(B) Commission's assessment

(174) For the reasons set out below, the Commission considers that the Transaction does not lead to customer foreclosure concerns in the upstream wholesale (local) broadband access market. The Parties will not have the ability nor the incentive to foreclose rival wholesale broadband access suppliers by restricting access to Proximus, Eurofiber or the JV as a (potential) customer.

(B.i) Ability to engage in customer foreclosure

(175) The JV, Proximus and Eurofiber currently do not purchase any wholesale broadband access services from other operators in Belgium. As set out above (see paragraph (162)), post-Transaction, the JV will constitute a new operator on the market, offering wholesale local broadband access services. The JV is currently not yet active on the market, as it will be created as a greenfield operation.[215]

(176) At the same time, neither Proximus nor Eurofiber purchases any wholesale broadband access services in Belgium. Proximus noted that it has [details regarding wholesale broadband access services].[216]

(177) For the reasons set out above, the Commission concludes that the JV would not have the ability to foreclose downstream operators by engaging in a customer foreclosure strategy.

(B.ii) Incentive to engage in customer foreclosure

(178) The Commission considers that due to the JV's lack of ability, it is not needed to assess whether the JV would have an incentive to engage in a foreclosure strategy.

(179) In any event, there were no elements in the market investigation that pointed towards the JV having an incentive to engage in customer foreclosure. In particular, a majority of respondents to the market investigation submitted that there is no

214 Form CO, paragraphs 387 and 390.

215 The Notifying Parties will not contribute assets or existing activities to the JV.

216 Form CO, paragraph 387.

scenario in which Proximus would have started purchasing access from them, but would no longer have an incentive to do so post-Transaction.[217]

(B.iii) Impact on effective competition

(180) The Commission considers that due to the lack of ability, it is not needed to assess whether any foreclosure strategy would have a negative impact on effective competition.

(181) In any event, most respondents to the market investigation consider that this Transaction will not have a negative impact on their business or on the relevant broadband access market. For instance, one respondent noted that: "*Provided that the JV will offer equal, transparent access terms and conditions, the JV will allow smaller alternative telecom operators to get access to a physical fiber network, therefore further enhancing competition*".[218]

(B.iv) Conclusion

(182) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market under any of the considered alternative product markets for wholesale broadband access, whether at national level, at the level of VOO's coverage area, in Wallonia or at the level of the JV's footprint.

5.4.2. Vertical relationship between the wholesale supply of leased lines (active and passive) upstream, and the wholesale supply of leased lines (active) and retail supply of business connectivity services downstream

(183) The JV's upstream activities in the leased lines market (including dark fiber) in Belgium (JV, below [0-5]%, expected 2024) are vertically linked to Proximus' and Eurofiber's activities in the downstream retail supply of business connectivity services in Belgium (Proximus, [40-50]%; Eurofiber, [0-5]%),[219] which gives rise to an affected market.

(184) The JV's upstream activities on a potential wholesale market for the supply of dark fiber in Belgium (JV, below [0-5]% expected by 2024) are vertically linked to activities in the downstream leased lines (excluding dark fiber) market in Belgium (Proximus, [50-60]%; Eurofiber, [5-10]%),[220] which gives rise to an affected market.

(185) The Commission notes that the Notifying Parties' arguments and the Commission's analysis is the same in relation to all downstream markets (including all possible segments). There are no vertically affected markets under any possible market definition other than those listed in paragraphs (150) and (183)-(184) above.

[217] Q1 – Questionnaire to market participants, response to question 32.2.

[218] Q1 – Questionnaire to market participants, response to question 42.6 in relation to the wholesale broadband access market.

[219] Form CO, Annex 37.

[220] Form CO, Annex 37.

5.4.2.1. Input foreclosure

(A) The Notifying Parties' views

(186) The Notifying Parties argue that there will be no input foreclosure by restricting access to the JV's dark fiber offering for competing providers of wholesale leased lines (active) and/or business connectivity services for the following reasons.[221]

(187) First, through the Transaction, a new provider of dark fiber solutions will enter at the wholesale level. The JV will offer an alternative to any interested operator. Therefore, the Transaction does not involve a possible foreclosure upstream of an existing (important) input that is currently used downstream.

(188) Second, as explained in paragraph (154) above, the JV is a new entrant and it is unlikely to have any significant degree of market power in the near future, which is necessary for input foreclosure to be a concern.

(189) Third, for the reasons explained in paragraph (155) above, Eurofiber will have no incentive to limit sales of dark fiber to third parties (which would limit the JV's revenues).

(190) Finally, as explained in paragraph (140) above, vertically integrated cable operators as well as other (national and international) market players will offer active and/or passive solutions at the wholesale level competing with the JV.

(B) Commission's assessment

(191) For the reasons set out below, the Commission considers that the Transaction does not lead to credible input foreclosure concerns in the downstream markets for the (i) wholesale supply of leased lines (active) and (ii) retail supply of business connectivity services.

(B.i) Ability to engage into input foreclosure

(192) The Commission considers that the Parties will not have the ability to engage in input foreclosure by restricting access to the JV's dark fiber offering to downstream operators.

(193) First, the Commission recalls that the JV will have a very limited market position in the leased lines market (including dark fiber). The Parties expect the JV's market share to remain below [0-5]% by 2024 in Belgium in both a market for leased lines including dark fiber and in a narrower potential segment for the supply of dark fiber.[222] The JV can therefore not be considered to have significant market power in the upstream leased lines market.

(194) Second, following the Transaction, customers will have a new and additional supplier of leased lines services, in addition to the existing offers from a large number of market players in Belgium. As indicated in paragraph (147) above, the leased lines market is characterised by competition between various providers with

[221] Form CO, paragraphs 378-381.

[222] Form CO, Annex 37.

active and/or dark fiber offerings. These include for example Eurofiber[223], Proximus[224], Telenet, Fluvius, VOO, Colt and others.[225] Concretely, the JV represents a new and additional wholesale input on to the leased lines (active only) market and the retail business connectivity access market in Belgium, as opposed to a (particularly important) existing input access to which is being limited or prohibited.

(195) Third, in terms of alternatives to the JV's services, in the leased lines market (including dark fiber), the offers by Proximus are subject to sector-specific regulation. As explained in paragraph (148) above, the BIPT's 2019 decision has imposed a regulatory obligation on Proximus to grant (i) active wholesale access to third parties to its copper pair network as well as its fiber network; and (ii) passive wholesale access to third parties to its fiber network.[226] In addition, Proximus is obliged to provide a non-discriminatory non-exclusive open access for all interested third parties.[227] A majority of the respondents to the market investigation indicated that the existence of sector-specific regulation relating to the conditions of access to leased lines operators' networks (active infrastructure only) would prevent the JV from restricting access to its dark fiber offerings.[228] Consequently, while similar obligations will not apply to the JV's dark fiber services, customers can always rely on this regulated alternative on the leased lines market.

(196) Therefore, for the reasons set out above, the Commission concludes that the JV would not have the ability to foreclose rival operators by engaging in an input foreclosure strategy.

(B.ii) Incentive to engage into input foreclosure

(197) While the conditions to find an input foreclosure strategy are cumulative (see paragraph (110) above), and the Commission has concluded that the JV would not have the ability to engage in a successful foreclosure strategy (see paragraph (196) above), the Commission has nevertheless also assessed the other conditions for completeness. The Commission considers that the Parties will not have the incentive to engage in input foreclosure by restricting access to the JV's dark fiber offerings to downstream operators.

(198) Only a few respondents to the market investigation believe it is credible that the JV would have the incentive to restrict or limit access to its dark fiber offerings.[229] However, these respondents did not substantiate their claims. In contrast, several respondents explained why the JV would likely not have an incentive to restrict or limit access to its dark fiber offerings. For instance, one respondent considered: "*We*

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223 Form CO, paragraph 180. Eurofiber provides active services (P2P fiber connectivity solutions such as EFM lines) and passive services (dedicated/bespoke dark fiber FTTO solutions).

224 Form CO, paragraph 175. Proximus offers active services (wholesale leased lines including traditional and Ethernet leased lines as well as regulated Next Generation Leased Lines (P2P connections, both fiber and copper ("EFM")) and the commercially offered (i) Explore services (P2P connections, both fiber and copper ("EFM")) and (ii) E-line services (P2P connections, both fiber and copper ("EFM")).).

225 Q1 – Questionnaire to market participants, response to questions 6.1 and 27.1.

226 BIPT decision of 13 December 2019, Section 2.

227 BIPT decision of 13 December 2019, Section 2.

228 Q1 – Questionnaire to market participants, response to question 37.

229 Q1 – Questionnaire to market participants, response to questions 35 and 36.

understand the JV intends to build an open network, so we are expecting no intention to restrict access on their part" and "*the presence of alternative networks and the potential for regulation under sector-specific regulation may reduce the risk*."[230] Another respondent explained that "*As a pure wholesale player, the JV, as an independent company, should welcome every wholesale customer on its network, and would therefore need to propose an attractive offer to its wholesale customers.*"[231]

(199) The Notifying Parties indicate that "*the offer will be available, provided any such party is interested in buying the services concerned, to the JV's Parents as well as to any interested third parties given that the services concerned will be available on an open, neutral and non-discriminatory basis*".[232] The Parties' internal documents also show these statements: "*For B2B customers (individual or clustered on Industrial Zones) one of both founding parties or 3rd parties can signal their interest to JV. The offering shall be open and neutral*"[233] and "*the Joint-Venture will be open, non-discriminating, for other wholesale providers in both residential and B2B*".[234]

(200) For the reasons set out above, the Commission concludes that the JV would not have the incentive to foreclose rival operators by engaging in an input foreclosure strategy.

(B.iii) Impact on effective competition

(201) The Commission considers that due to the lack of ability and incentive, it is not needed to conclude on the question whether any foreclosure strategy would have a negative impact on effective competition.

(202) In any event, most respondents to the market investigation consider that the Transaction will not have a negative impact on their business or the relevant markets (as set out in paragraph (183)-(184) above).[235] On the contrary, a number of respondents consider that the Transaction will have a positive impact on the retail business connectivity market. For instance, one customer states: "*Given increasingly growing internet bandwidth demands for businesses, the roll-out of a fiber network could indeed have positive effects*".[236] In relation to the leased lines market, one customer states: "*More fiber for the customers*".[237]

(B.iv) Conclusion

(203) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to possible input foreclosure practices under any of the alternative products markets for the (i) wholesale supply of leased lines (active and passive) and the (ii) wholesale

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230 Q1 – Questionnaire to market participants, response to question 36.1.
231 Q1 – Questionnaire to market participants, response to question 36.1.
232 Form CO, paragraphs 182-183 and 185.
233 Form CO, Annex 41, *Follow-up discussion on B2B customers and bespoke connections*, 20 May 2021, slide 3 (emphasis added).
234 Form CO, Annex 12, *Ambiorix – Status update final deck*, 21 October 2020, slide 2 (emphasis added).
235 Q1 – Questionnaire to market participants, response to questions 41-43.
236 Q1 – Questionnaire to market participants, response to question 42.4.
237 Q1 – Questionnaire to market participants, response to question 42.7.

supply of leased lines (active) and retail supply of business connectivity services, irrespective of the geographic scope.

5.4.2.2. Customer foreclosure

(A) The Notifying Parties' views

(204) The Notifying Parties submit that there will be no customer foreclosure by restricting or limiting competing leased lines providers from their access to Proximus and Eurofiber as customers. The Notifying Parties claim that (i) Proximus does not currently purchase any active leased lines products from third parties or any dark fiber services for its national electronic communications activities in Belgium[238] and (ii) Eurofiber's presence on the market as a purchaser is limited.[239] Therefore, the Notifying Parties argue that a risk of customer foreclosure does not exist.

(B) Commission's assessment

(205) For the reasons set out below, the Commission considers that the Transaction does not lead to c customer foreclosure concerns in the upstream leased lines (active and passive) market. The Parties will not have the ability of the incentive to foreclose rivals lease lines suppliers by restricting access to Proximus, Eurofiber or the JV as a (potential) customer.

(B.i) Ability to engage into customer foreclosure

(206) Post-Transaction, the JV will constitute a new operator on the market, offering dark fiber solutions. The JV is currently not yet active on the market, as it will be created as a greenfield operation.[240]

(207) First, the JV and Proximus currently do not purchase any active leased lines or dark fiber solutions from other operators in Belgium. Proximus noted that in the past it has [details on the business strategy applied by Proximus in the past regarding dark fiber]. In addition, Proximus noted that [details regarding Proximus' business strategy in respect of active leased lines and dark fiber services].[241]

(208) Second, as noted by the Notifying Parties, Eurofiber's presence on the market as a purchaser is limited. Eurofiber currently purchases […] dark fiber connections (from […] different providers) and […] (active) Ethernet lines (from […] different providers).[242] These purchases are limited compared to (i) the total market for high-quality wholesale services, as defined by the BIPT (approximately 14,500 lines in 2018)[243] and (ii) the total aggregate number of wholesale dark fiber connections in Belgium ([…] lines).[244] In addition, the majority of respondents to the market

238 Form CO, paragraph 388. Proximus indicates that in the past it has [details on the business strategy applied by Proximus in the past regarding dark fiber].

239 Form CO, paragraphs 391-393.

240 The Notiyfing Parties will not contribute assets or existing activities to the JV.

241 Form CO, paragraph 388.

242 Form CO, paragraph 391.

243 BIPT decision of 13 December 2019, paragraph 431.

244 IDC Report, "Belgian Data Connectivity Market Model 2020 for Eurofiber", 29 January 2020, Form CO, Annex 39. In addition, Eurofiber has [details regarding Eurofiber's strategy in respect of wholesale dark

investigation, who are active as a supplier of leased lines at the wholesale level, do not consider having access to Eurofiber as a client is critical or important.[245]

(209) For the reasons set out above, the Commission concludes that the JV would not have the ability to foreclose downstream operators by engaging in a customer foreclosure strategy.

(B.ii) Incentive to engage into customer foreclosure

(210) The Commission considers that due to the JV's lack of ability, it is not needed to assess whether the JV would have an incentive to engage in a foreclosure strategy.

(211) In any event, there were no elements in the market investigation that pointed towards the JV having an incentive to engage in customer foreclosure. A majority of respondents to the market investigation indicated that there is no scenario in which Proximus would have started purchasing access from them, but would no longer have an incentive to do so post-Transaction.[246]

(B.iii) Impact on effective competition

(212) The Commission considers that due to the lack of ability and incentive, it is not needed to assess whether any foreclosure strategy would have a negative impact on effective competition.

(213) In any event, most respondents to the market investigation consider that this Transaction will not have a negative impact on their business or on the relevant leased lines market (as set out in paragraph (202) above).[247]

(B.iv) Conclusion

(214) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market under any of the considered alternative products markets for leased lines, whether at national level, at the level of VOO's coverage area, in Wallonia or at the level of the JV's footprint.

5.5. Cooperative effects

(215) Proximus and Eurofiber will both remain independently active in Belgium on two markets that can be considered as situated downstream from the activities of the JV, namely (i) the wholesale supply of leased lines (excluding dark fiber) and (ii) the retail supply of business connectivity services.[248] Further, the Notifying Parties will remain independently active in Belgium in the same market as the JV, namely (i) the wholesale leased lines market (including dark fiber).

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fiber connections in Belgium], Form CO, paragraph 392. Eurofiber has only limited purchases of dark fiber services in Wallonia. Indeed, according to Eurofiber, its purchases of dark fiber from third party providers in Wallonia represents approximately […] of its total purchases in Belgium, Form CO, paragraph 393.

245 Q1 – Questionnaire to market participants, response to question 39.

246 Q1 – Questionnaire to market participants, response to question 38.

247 Q1 – Questionnaire to market participants, response to questions 41-43.

248 See footnote 140.

5.5.1. The Notifying Parties' views

(216) The Notifying Parties argue that the creation of the JV does not have the object or effect of – and will not lead to – coordination between the Notifying Parties in the markets for the wholesale supply of leased lines and the retail supply of business connectivity services in Belgium, because the market conditions are not conducive to tacit coordination, the information barriers set out in the SSHA will prevent the disclosure of confidential information between the Notifying Parties, and the JV will deal at arm's length with the Notifying Parties and other operators.[249]

5.5.2. The Commission's assessment

(217) The Commission considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of cooperative effects in the markets for (i) the wholesale supply of leased lines and (ii) the retail supply of business connectivity services for the reasons set out below.

(218) First, the Commission observes that the relevant markets are not conducive to coordination between the Parties. The market shares of the Parties are asymmetric (see paragraphs (219)-(221) below), the Transaction does not eliminate a market player, and several competitors would remain post-Transaction, which would be likely to disrupt any attempts of the Notifying Parties to coordinate their activities on the relevant markets. Moreover, the JV will not become a vertically integrated player with its own active wholesale and retail services on the market.

(219) As regards the market for the wholesale supply of leased lines (including dark fiber), or any segments, Proximus and Eurofiber will retain activities with market shares of respectively approximately [50-60]% and [5-10]% in 2020 in Belgium and the JV's footprint, and approximately [70-80]% and less than [0-5]% in VOO's coverage area/Wallonia.[250] As explained above in paragraph (4), the JV will likely become active on the leased lines market (including dark fiber) as a supplier. In any event, even by 2024, the JV would only have a limited market share below [0-5]% in Belgium, VOO's coverage area/Wallonia and in its footprint. Post-Transaction, the Notifying Parties will continue to face competitive constraints from a number of market participants identified by the BIPT in its decision of 13 December 2019. These include Telenet, with a market share of 20-30% in Belgium, as well as a number of several operators that are part of international groups (such as BT, Colt, Verizon, *etc*.). The number of competitors would even be larger if dark fiber is included in the market for the wholesale supply of leased lines.[251]

(220) As regards the market for the retail supply of business connectivity services, or any segments, Proximus and Eurofiber will retain activities with market shares of respectively [40-50]% and [0-5]% in 2020 in Belgium, and approximately [70-80]% and less than [0-5]% in VOO's coverage area/Wallonia and in the JV's footprint.[252] The JV itself will not be active on this market as either a supplier or a purchaser. Post-Transaction, the Notifying Parties will continue to face competitive constraints from vertically integrated cable operator Telenet, with market shares between 10-

[249] Form CO, paragraphs 534-542.
[250] Form CO, Annex 37.
[251] Form CO, paragraph 367.
[252] Form CO, Annex 37.

20% in Belgium, and smaller players that, taken together, account for approximately 10% of the market (with an upward trend).

(221) Second, the small size of the JV relative to Proximus' and Eurofiber's activities makes it unlikely that the latter Parties would have any incentive to coordinate their competitive behaviour. According to its business plan, the JV is expected to generate revenues in the range of approximately EUR […] million by 2024, which represents approximately [0-5]% of Proximus' and [0-5]% of Eurofiber's EU-wide turnover.[253] Even in 2027, which according to the JV's business plan is the year where it is expected to achieve most revenues, its projected EUR […] million will only represent approximately [0-5]% of Proximus' and [0-5]% of Eurofiber's EU-wide turnover. In line with the Commission's conclusions in precedent cases, this suggests that the conduct of the Notifying Parties on the markets is unlikely to be influenced by their cooperation in the JV.[254]

(222) Third, information barriers set out in the SSHA will make it difficult for the Notifying Parties to coordinate their behaviour post-Transaction. Information barriers will be in place between the Notifying Parties on the one hand and the JV on the other hand, and between the Notifying Parties.[255] They will prevent information flows that could otherwise help to coordinate the retained activities of the Notifying Parties. More specifically, the information barriers will ensure that the Notifying Parties cannot access commercially sensitive information and/or strategic information that belongs to the other Notifying Party and/or the JV. In particular, the JV is required to create codes of conduct and/or internal policies to ensure compliance with all applicable laws and regulations. These include rules and principles required at Board level and at the level of reporting towards the JV's parents, "*so as to avoid that any Commercially Sensitive Information* [of the JV] *would become available in a manner that (i) is incompatible with the applicable laws and regulations or (ii) would result in any* [of its parents] *gaining a competitive advantage*."[256] In addition, the Notifying Parties will set up "Chinese walls", team separation mechanisms, and other types of information barriers as needed in order "*to ensure adequate compliance with any and all applicable laws and regulations (including competition law) or to avoid that any Shareholder would gain a competitive advantage*". These mechanisms will ensure that "*no Commercially Sensitive Information* [of the JV] *becomes accessible to persons within* [Proximus and Eurofiber] *who do not have an objective need to have access to such information and/or who exercise a function in respect of which such information could represent a competitive advantage and/or could influence the commercial conduct*."[257]

(223) Fourth, the JV will deal at arm's length with the Notifying Parties and other operators. The JV will therefore not lead to any cooperative effects amongst the Notifying Parties, and between each of the Notifying Parties and third party

253 Business Plan, Form CO, Annex 35.

254 See Commission Decisions of 12 August 2020 in M.9802 – Liberty Global/DPG Media/JV, paragraph 341; of 5 July 2010 in case M.5838 – *Bertelsmann/Planeta/Circulo*, paragraphs 69-73; of 17 June 2010 in case M.5841 – *Cathay Pacific Airways/Air China/ACC*, paragraph 30; of 10 November 2004 in case M.3542 – *Sony Pictures,/Disney/ODG/JV*, paragraphs 17-19.

255 Form CO, paragraph 540.

256 Article 29.1 of the SSHA.

257 Article 29.2 of the SSHA.

operators in relation to the access terms to the JV's passive infrastructure.[258] Moreover, as the JV's passive infrastructure is only one component of network infrastructure, it does not affect the key facets of competition between Proximus and Eurofiber in the downstream markets for wholesale supply of leased lines and retail supply of business connectivity services.

(224) Finally, only two respondents to the market investigation considered that the Transaction could give rise to cooperative effects. However, these respondents did not substantiate their claims.[259]

5.5.3. Conclusion

(225) In light of the above, the Commission concludes that the Transaction does not give rise to serious doubts as to its compatibility with the internal market in relation to cooperative effects in Belgium in (i) the markets for the wholesale supply of leased lines and (ii) the retail supply of business connectivity services in Belgium.

6. CONCLUSION

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

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

[258] Form CO, paragraphs 541-42.

[259] In relation to the wholesale supply of leased lines, one respondent indicated that the Transaction "*will give rise to coordination between Eurofiber and Proximus, what will reduce Proximus incentive to grant good conditions on the wholesale market*", without further elaborating on how this Transaction could lead to coordination on the markets or the reasons for an increase in Proximus' incentive to grant good conditions on this market, Q1 – Questionnaire to market participants, response to questions 40.1 and 40.1.1. In relation to the retail supply of business connectivity services, the same respondent merely indicated that the Transaction "*will reduce competitive constraints on Proximus*", without explaining how this reduction in competitive constraint would result from coordination between the Notifying Parties, Q1 – Questionnaire to market participants, response to questions 40.2 and 40.2.1. In both instances, the other respondent referred to "*previous responses*" without indicating which responses would be relevant.