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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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Subject: **Case M.10087 – PROXIMUS / NEXUS INFRASTRUCTURE / 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]

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").

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Dear Sir or Madam,

(1) On 17 February 2021, the European Commission received notification of a proposed concentration ("the Transaction") pursuant to Article 4 of the Merger Regulation by which Proximus, NV/SA ("Proximus") and Nexus Infrastructure, S.à r.l. ("Nexus", 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 Nexus Fiber BV (the "JV").[3] Proximus, Nexus 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,[4] Proximus owns 4.5% of its shares and 42% of Proximus' shares are publicly traded.

(3) **Nexus** (previously called "Delta Fiber Belgium") is a special purpose vehicle with no other current business activities than its use as a holding for purposes of the Transaction. Nexus is part of the EQT group ("EQT") and is indirectly controlled by EQT Fund Management S.à r.l. EQT is a global integrated alternative investments firm, which amongst other things, invests in infrastructure and infrastructure-related assets and businesses primarily in Europe and North America.

(4) **The JV**[5] will roll out and operate a dense passive[6] open point-to-point Fiber-To-The-Home ("FTTH") network[7] in certain parts of the Flanders Region of Belgium and

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3 Publication in the Official Journal of the European Union No C 65, 25.02.2021, p. 16.

4 Notifying Parties' response to RFI 7. The Notifying Parties submit that 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 point-to-point 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 The "dense passive FFTH network" covers a full and blanket coverage of all possible connections in a given area. Thus, a dense passive network can be used as an alternative to for example the traditional copper network infrastructure of an operator like Proximus. FTTH is one of the configurations of "Fiber-To-The-X" ("FTTx"). FTTx is a generic term for a telecommunications (optical fiber) network architecture that is used within the local loop – the last leg of the network that spans between the end-user

offer access services to its network infrastructure to telecommunication operators, including Proximus. This will allow Proximus and other telecommunications operators to provide (i) retail services to residential and business customers, as well as (ii) wholesale active network infrastructure access services. The JV itself will not operate at the retail level or provide any active wholesale access services.

2. THE OPERATION AND CONCENTRATION

(5) The main objective of the Transaction is for Proximus and Nexus, through the JV, to enlarge and accelerate the rollout of FTTH in the Flanders region of Belgium in a cost-efficient way. There is a rather low level of fiber penetration in the Flanders region 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 (instead of 2030), notably via the conclusion of partnerships with third parties such as Nexus.

(6) The JV will develop and deploy its own passive FTTH-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 26 November 2020, the Notifying Parties signed a Subscription and Shareholders' Agreement ("SSHA").

2.1. Joint control

(8) Proximus and Nexus will respectively be allotted 49.9% and 50.1% of the JV's share capital and will each have the ability to exercise decisive influence over the JV. Therefore, they exercise joint control over the JV. In particular, the JV's Board will consist of six Board members ("directors") and the Notifying Parties will each be entitled to nominate three directors, including the Chairman nominated by Nexus. The Chairman has a casting vote in case of a deadlock situation, however this only relates to matters that are not "Board Reserved Matters" or "Shareholder Reserved Matters" (i.e. the casting vote is only relevant in relation to matters not related to the JV's strategic business behaviour).[8]

(9) In relation to the strategic business behaviour of the JV, each of the Notifying Parties has veto rights that enable them to exercise decisive influence. First, the appointment of senior management (including the CEO, finance director, operations director, business development director and construction director) must be unanimous by the Board.[9] Second, the Notifying Parties have jointly developed and agreed on a Business Plan, which can only be amended by the shareholders as a "Shareholder

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premises and the edge of the carrier network – and delivers broadband connections to homes and places of business.

8 Article 7.3.2 of the SSHA.

9 Article 10.1.3 of the SSHA.

Reserved Matter" in a Shareholders' meeting.[10] A "Shareholder Reserved Matter" requires a simple majority of the votes cast by the Proximus shareholders, and a simple majority of the votes cast by the Nexus shareholders, which essentially provides each of the Notifying Parties with veto rights. Finally, the veto rights also relate to a number of major investments and market specific rights.[11]

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

2.2. Full-functionality

(11) 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 FFTH network.[12] Second, the JV will have activities beyond one specific function for the parents as it will deploy, run, and market the FTTH network, and offer access to and passive services on the FTTH network to operators based on the wholesale offer that it will determine and market to other operators. Accordingly, the JV will take the commercial and deployment risk.[13] 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. Moreover, the relationship between the JV and Proximus will be truly commercial in character, as the JV will deal with Proximus at arm's length on the basis of normal commercial conditions.[14] Fourth, the JV will operate and market the network following its construction for a period of minimum […] years, with a tacit renewal of […] years.[15] Accordingly, the JV is intended to operate on a lasting basis.

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

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10 Articles 8.3.2 and 11.1.4 of the SSHA.

11 Schedule 1 of the SSHA. This relates for instance to any decision to approve a Budget that is not consistent with the principles of the Business Plan.

12 Form CO, paragraphs 36-37.

13 Form CO, paragraph 38.

14 In the present case, there are strong indications that the Parties will have access to the JV's infrastructure at market terms. First, Proximus provides a "take-or-pay" commitment to the JV and will gradually migrate its existing broadband customers to the passive fiber infrastructure services that it will purchase from the JV. According to the Notifying Parties, Proximus is expected to generate […] of the JV's total revenue in 2025, but this figure will decrease as other operators would be interested in the JV's wholesale offer. Such an expectation is also reflected in the business plan (Schedule 6 of the SSHA). See also Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 24, where a number of respondents confirmed that they consider it critical or important to obtain access to the JV's infrastructure. Second, the JV's FTTH network will be open and neutral, offering passive access to third parties on the basis of non-discriminatory pricing. 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 Schedule 3 of the SSHA (Master Services Agreement on wholesale access). Finally, the Commission recalls that Nexus, one of the parents of the JV together with Proximus, is not active on any of the telecommunication markets in Belgium 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 (146)).

15 Form CO, paragraph 40.

3. EU DIMENSION

(13) In the last financial year, Proximus and Nexus achieved a combined aggregate world-wide turnover of more than EUR 5,000 million (Proximus: EUR 5,637.9 million; EQT: 27,178.56 million).[16] Each of the undertakings concerned has an EU-wide turnover in excess of EUR 250 million (Proximus: EUR [...] million; EQT: [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

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

4. RELEVANT MARKETS

(15) Both Proximus and the JV will be active on the market for wholesale local broadband access (Section 4.1). Proximus is also active on the (i) wholesale markets for central and resale broadband access (Section 4.1) and the supply of leased lines (Section 4.2), and the (ii) retail markets for mobile telecommunications (Section 4.3), fixed voice (Section 4.4), fixed internet access (Section 4.5), business connectivity (Section 4.6) and a potential retail market for multiplay services (Section 4.7). Nexus, and any other subsidiary of EQT, is not active in Belgium on any of these markets, [details regarding EQT activities in Belgium].

4.1. Wholesale broadband access

4.1.1. Relevant product market

(16) 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")[17]), (ii) non-physical or virtual network access at a fixed location (such as "bitstream" access), and (iii) resale of a fixed provider's internet access services ("wholesale resale broadband access").[18]

4.1.1.1. The Commission's previous practice

(17) In previous decisions, including relating to the Belgian market, 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 (16) above)),[19] or based on the

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

17 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.

18 Commission decision 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.

19 Commission decision of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 76; 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; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 164.

level where the point of interconnection is situated.[20] 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.[21]

(18) 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[22], (ii) stand-alone cable access, and (iii) cable access for all TV and internet services.[23]

4.1.1.2. The Notifying Parties' views

(19) The Notifying Parties submit that the market should be segmented between wholesale local and central broadband access. First, the European Commission Recommendation of 9 October 2014 ("the 2014 Recommendation")[24] defines markets for the purpose of *ex ante* regulatory intervention.[25] The 2014 Recommendation defines distinct markets for wholesale local access at a fixed location, which includes LLU as well as virtual products that exhibit functionalities equivalent or comparable to key features of physical unbundling, and for wholesale central access at a fixed location, which includes bitstream products with certain characteristics (respectively markets 3(a) and 3(b) of the 2014 Recommendation). In relation to the local broadband access market specifically, the Parties note that it includes both fiber optic and copper access.

(20) Second, according to the Notifying Parties, the Belgian sectoral regulator ("BIPT") concluded[26] that the market for wholesale local access 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-

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20 Commission decision of 9 July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 76; 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; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 164.

21 Commission decision 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.

22 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.

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

24 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 (hereinafter the "2014 Recommendation").

25 The Commission published an updated recommendation in 2020, i.e. European Commission's 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 the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, 18 December 2020 (hereinafter the "2020 Recommendation").

26 BIPT, CSA, Medienrat, Vlaams regulator voor Media, Conferentie van regulatoren voor de elektronische communicatiesector, 29 June 2018, Analyse van de markten voor breedband en televisieomroep, paragraphs 1003 and 1015 (hereinafter the "BIPT decision of 29 June 2018").

Office ("FTTO").[27] Proximus is the only supplier in Belgium on this market at the national level. Proximus however considers that other forms of local access (notably on cable networks) and other players such as Eurofiber and Fluvius, should be included in the same market based on the fact that Virtual Unbundled Local Access ("VULA") on cable would be functionally interchangeable with other forms of active local wholesale access.

(21) 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.

4.1.1.3. The Commission's assessment

(22) The results of the market investigation are inconclusive regarding whether there is a single overall wholesale broadband access market in Belgium.[28] Similarly, the results of the market investigation are also inconclusive regarding a possible segmentation (i) according to the level where the point of interconnection is situated, that connects the infrastructure of the wholesale provider and that of the customer (i.e. local broadband access / central broadband access), (ii) according to the type of access to fixed connections, or (iii) according to the type of technology (cable or copper / DSL pair / fiber).[29]

(23) Some respondents referred to the BIPT's 2018 decision[30] where the BIPT identified a wholesale local broadband access market, 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 wholesale central broadband access market.[31] Another respondent criticized the BIPT's decision, noting that the Belgian wholesale broadband access markets should be technologically neutral (i.e. including both copper and cable).[32]

(24) 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., cable or copper, DSL pair 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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27 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.

28 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 17.

29 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 17.2.

30 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.

31 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 17.1.

32 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 17.1.

4.1.2. Relevant geographic market

4.1.2.1. The Commission's previous practice

(25) In its decisional practice, the Commission considered whether the geographic market for wholesale broadband access was national (i.e. Belgian) or limited to the footprint of the operators' cable network, but ultimately left the definition open.[33] In a recent decision concerning the Belgian market, the Commission concluded, for the purpose of that decision that the geographical scope corresponded to the coverage area of each cable operator (i.e. Telenet, Brutélé and VOO/Nethys).[34]

4.1.2.2. The Notifying Parties' views

(26) The Notifying Parties consider that the markets could be national, but they may also need to be defined along more limited borders than national, such as for instance at regional or cable zone level or on the basis of the catchment area of the network concerned.[35]

(27) 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 FTTH-infrastructure in areas in which there is no standalone deployment by Proximus of such infrastructure. Therefore, from a geographic perspective, the respective FTTH-network deployments by Proximus and the JV will be distinct.

(28) 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

(29) A large majority of respondents in the market investigation consider that the wholesale broadband access market should be defined as national.[36] A small number of respondents to the market investigation however consider that the geographical market should be defined according to the coverage area of each cable operator.[37]

(30) 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.[38]

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33 Commission decision 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.

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

35 Form CO, paragraphs 92 (regarding the overall wholesale broadband access market) and 107 (regarding the wholesale local broadband access market). According to the Notifying Parties, this is due to differences between the different regions and, specifically, between the different cable zones.

36 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 18.

37 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 18.

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

(31) In light of the above and for the purpose of this decision, the Commission considers that it is appropriate to consider the effects of this Transaction on both a national wholesale broadband access market and a wholesale broadband access market limited to the level of the cable operator's coverage area.

(32) 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

(33) 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.[39]

4.2.1. Relevant product market

4.2.1.1. The Commission's previous practice

(34) In previous decisions, the Commission has 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).[40] 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 guaranteed bandwidth).[41] Ultimately, the Commission left the market definition open.

4.2.1.2. The Notifying Parties' views

(35) The Notifying Parties submit that the relevant market is the broader wholesale market for high-quality access provided at a fixed location, including the wholesale supply of leased lines.[42] 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

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

40 Commission decision 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.

41 Commission decision 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.

42 Form CO, paragraph 125.

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.

(36) Similarly, the 2014 and 2020 Recommendation identifies such a wholesale high-quality access provided at a fixed location (market 2 of the 2020 Recommendation or the "wholesale dedicated access" market).[43] In its most recent decision, the BIPT has 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.[44]

4.2.1.3. The Commission's assessment

(37) A large majority of respondents consider that there is a single overall market for wholesale supply of leased lines in Belgium, without further segmenting the market.[45]

(38) In line with the BIPT's decision of 13 December 2019[46], a majority of respondents consider that the wholesale supply of 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.[47] This would include (i) all high-quality access services (whether or not they include a trunk segment); (ii) all Ethernet services, WDM leased lines and SDH leased lines, (iii) all point-to-point, point-to-multipoint and 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.

(39) In its decision of 13 December 2019, the BIPT considers that dark fiber does not constitute a substitute for active leased lines (or any other substitutable wholesale high-quality access services). The BIPT has 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*".[48]

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43 Annex to the Commission 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 the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the "2020 Recommendation").

44 BIPT, 13 December 2019, Analyse van de markt voor hoogwaardige toegang, paragraphs 399; 423. According to the BIPT, the market for wholesale high quality includes: (i) all high-quality access services (whether or not they include a trunk segment); (ii) all Ethernet services, WDM leased lines and SDH leased lines, (iii) all point-to-point, point-to-multipoint and 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 (hereinafter the "BIPT decision of 13 December 2019").

45 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 19.

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

47 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 19.3.

48 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*."

(40) However, contrary to that decision, a number of respondents to the market investigation consider that the wholesale supply of leased lines market in Belgium should include dark fiber given its substitutability with a number of the services listed in paragraph (38) above.[49] 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.

(41) In light of the above, the Commission considers that, for the purpose of this decision, the relevant product market is the overall wholesale supply of 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

(42) In previous decisional practice, the Commission considered that the geographic market for wholesale supply of leased lines is national in scope.[50]

4.2.2.2. The Notifying Parties' views

(43) The Notifying Parties submit that the relevant geographic market to be considered is national in scope.[51]

4.2.2.3. The Commission's assessment

(44) A large majority of respondents to the market investigation consider that the geographic market for wholesale supply of leased lines is national in scope.[52] These results are also consistent with the BIPT's market analysis decision of 13 December 2019, which defined the geographical market as national in scope.[53]

(45) In light of the above, and for the purposes of this decision, the Commission considers that the relevant geographic market for the wholesale supply of leased lines (irrespective of whether such market includes dark fiber or not, see paragraph (41) above) is national in scope and corresponds to the territory of Belgium.

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49 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 19.2.

50 Commission decision of 3 July 2012 in case M.6584 -*Vodafone/Cable & Wireless*, paragraph 31; 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; of 18 July 2019 in case M.8864 – Vodafone/Certain Liberty Global Assets, recital 201.

51 Form CO, paragraph 136 and BIPT decision of 13 December 2019, paragraph 420.

52 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 20.

53 BIPT decision of 13 December 2019, paragraph 420.

4.3. Retail mobile telecommunications services

(46) 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.[54]

4.3.1. Relevant product markets

4.3.1.1. The Commission's previous practice

(47) 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).[55]

(48) The Commission has 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.[56]

4.3.1.2. The Notifying Parties' views

(49) 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.[57]

4.3.1.3. The Commission's assessment

(50) A large majority of respondents to the market investigation stated that there is a single overall retail market for retail mobile telecommunications services.[58]

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

55 Commission decision 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 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 32-35; 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, 287; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31-55; of 30 May 2018 in case M.7000 – *Liberty Global/Ziggo*, paragraph 206; 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.

56 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, 287; of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31 to 55; of 10 October 2014 in case M.7000 – *Liberty Global/Ziggo*, recital 141; 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.

57 Form CO, paragraph 168.

(51) 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

(52) In its decisional practice, the Commission has consistently concluded that the market for the provision of retail mobile telecommunication services is national in scope.[59]

4.3.2.2. The Notifying Parties' views

(53) The Notifying Parties consider that the relevant market should be considered as national in scope.[60]

4.3.2.3. The Commission's assessment

(54) First, a large majority of respondents consider that the geographic market for retail mobile telecommunication services is national in scope.[61]

(55) In light of the above, and for the purposes 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

(56) 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.[62]

4.4.1. Relevant product markets

4.4.1.1. The Commission's previous practice

(57) 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,[63] and including Voice over Internet Protocol ("VoIP") services.[64]

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58 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 7.

59 Commission decision of 15 July 2019 in case M.9370, *Telenor/DNA*; of 27 July 2018 in case M.8883, *PPF/Telenor Target Companies*; of 27 November 2018 in case M.8792, *T-Mobile NL/Tele2 NL*, of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 32-35.

60 Form CO, paragraph 168.

61 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 8.

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

63 Commission decision 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.

64 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 40; of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recitals 67-69; of 3 August 2016 in case

4.4.1.2. The Notifying Parties' views

(58) 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 Voice over Internet Protocol ("VoIP") services.[65]

4.4.1.3. The Commission's assessment

(59) A large majority of respondents confirm that there is a single overall retail market for retail fixed voice services.[66]

(60) In light of the above, for the purpose of this decision, there is an overall retail fixed voice market without further subdivisions between local/national and international calls, residential and non-residential customers,[67] and including Voice over Internet Protocol ("VoIP") services.

4.4.2. Relevant geographic market

4.4.2.1. The Commission's previous practice

(61) In its decisional practice, the Commission has 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.[68] In some decisions, the Commission has 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.[69]

4.4.2.2. The Notifying Parties' views

(62) The Notifying Parties consider that the relevant geographic market should be defined as national in scope.[70]

4.4.2.3. The Commission's assessment

(63) The large majority of respondents to the market investigation confirm that the geographic market for retail fixed voice services is national in scope.[71] A few

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M.7978, *Vodafone/Liberty Global/Dutch JV*, paragraphs 25-26; of 20 September 2013 in case M.6990 – *Vodafone/Kabel Deutschland*, paragraph 131.

65 Form CO, paragraph 186.

66 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 9.

67 Commission decision 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.

68 Commission decision of 4 February 2016 in case M.7637 – *Liberty Global/BASE Belgium*, recital 73.

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

70 Form CO, paragraph 187.

71 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 10. One respondent notes that the market is national given that "*both Proximus and Orange operate a nationwide fixed infrastructure, they have nation-wide product offerings at uniform prices and they compete at*

respondents to the market investigation consider that the market should be defined according to the coverage area of each cable operator or at the level of the operator's footprint.[72]

(64) In light of the above, while there are indications that the relevant geographic market is national in scope, the Commission considers that, for the purposes 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, and at the level of the operator's footprint.

(65) 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.

4.5. Retail fixed internet services

(66) 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.[73]

4.5.1. Relevant product market

4.5.1.1. The Commission's previous practice

(67) 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).

(68) 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.[74] Conversely, the Commission acknowledged that the retail market for fixed internet access services should not be divided according to download speed.[75] In relation to the Belgian market specifically, the Commission recently concluded that there was an overall single retail market for the provision of internet

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national level. […] Proximus' and Orange's commercial practice shows that the conditions of competition at national level are homogeneous. […]".

72 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 10.

73 Commission decision 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.

74 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.

75 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.

access, without the need to segment it according to the technology used or download speed.[76]

(69) Finally, the Commission previously considered that fixed internet access services provided through mobile network infrastructure (so-called "fixed wireless access" or FWA services) do not form part of the retail fixed internet access market.[77] Similarly, 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.[78]

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.[79]

4.5.1.3. The Commission's assessment

(71) A large majority of the respondents to the market investigation confirm that there is an overall retail fixed internet market, excluding FWA services and retail business connectivity services without the need to distinguish different customer and product types.[80]

(72) As regards a potential distinction according to the type of distribution technology (xDSL, fibre, cable, and mobile broadband), the majority of respondents disagrees with the need for such a segmentation. For instance, one respondent notes "*[r]etail customers switch relatively easily between technologies in case the coverage of the networks allows it*".[81]

(73) As regards a potential distinction according to the download speed (e.g. above or below 30 Mbps), the large majority of respondents disagrees with the need for such a segmentation.[82]

(74) In light of the above, for the purpose of this decision, the Commission concludes that an overall market for the retail supply of fixed internet access services exists, excluding FWA services and 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

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76 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraphs 46-48.

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

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

79 Form CO, paragraph 178.

80 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 11.

81 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 11.2.1.

82 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 11.2.2.

Commission left open whether markets should potentially be defined on a regional basis or by reference to the footprint of the operators' networks.[83]

(76) In a recent decision, concerning the Belgian market, the market investigation revealed elements tending towards a delineation corresponding to the operators' coverage area. Ultimately, the exact geographic market definition was left open.[84]

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 catchment area of the operators' concerned).[85]

4.5.2.3. The Commission's assessment

(78) A majority of respondents in the market investigation consider that the geographic retail fixed internet market should be defined as national.[86]

(79) However, a number of respondents to the market investigation consider that the geographical retail fixed internet market should be defined at the regional level, at the level of the cable operator's coverage area or at the level of the operator's footprint.[87] For instance, one respondent noted: "*there is a clear regional split as the fixed internet market is dominated by 3 main provider: Proximus, Voo & Telenet where Voo & Telenet are regionally bound because of their network. This makes competition very different in the 2 areas*".[88]

(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 on a(i) national level, (ii) regional level, (iii) the cable operator's coverage area, and (iv) 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.

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83 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.

84 Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraph 52.

85 Form CO, paragraphs 107 and 179 and BIPT decision of 29 June 2018, paragraph 255.

86 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 12.

87 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 12.

88 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 11.

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.[89]

4.6.1. Relevant product market

4.6.1.1. The Commission's previous practice

(83) In previous decisions, the Commission has 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[90] services,[91] 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.[92]

4.6.1.2. The Notifying Parties' views

(84) The Notifying Parties submit that there is an overall retail business connectivity market in line with the Commission's decisional practice.[93]

4.6.1.3. The Commission's assessment

(85) A large majority of respondents confirm 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.[94] A majority of respondents also confirmed that there is no need to distinguish the retail business connectivity services market according to technology or download speed and this market also excludes fixed wireless access ("FWA") and fixed internet services to large business and government customers.[95]

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89 Commission decision 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.

90 Virtual Private Network ("VPN").

91 Commission decision 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.

92 Commission decision 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.

93 Form CO, paragraph 196. The Notifying Parties refer to the BIPT's position. BIPT 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.

94 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 13.

95 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 13.2.

(86) 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.

4.6.2. Relevant geographic market

4.6.2.1. The Commission's previous practice

(87) In previous decisions, the Commission has found that the retail market for business connectivity was national in scope.[96]

4.6.2.2. The Notifying Parties' views

(88) According to the Notifying Parties, the geographic retail business connectivity market can be considered as national in scope. [97]

4.6.2.3. The Commission's assessment

(89) A majority of respondents confirm that the geographic market for retail business connectivity services is national in scope.[98]

(90) In light of the above, while there are indications that a national retail business connectivity market exists, for the purpose of this decision, the Commission considers that it is appropriate to consider a (i) national geographic scope, and a narrower scope ((ii) regional, (iii) the cable operator's coverage area, and (iv) the operator's footprint) for any of the plausible product market definitions considered in paragraph (86) above.

(91) 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

(92) Multi-play services include several telecommunications products (mobile services and one or more of the fixed services such as fixed internet, fixed telephony and TV), which are provided to consumers through a common offer.[99]

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96 Commission decision 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.

97 Form CO, paragraph 197.

98 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 14.

99 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

(93) 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.[100] In *Liberty Global/BASE Belgium* and *Providence/VOO/Brutélé*, the Commission has 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.[101]

4.7.1.2. The Notifying Parties' views

(94) The Notifying Parties submit that, in line with the position of the BIPT[102], a multi-play market does not exist.[103]

(95) First, customers can easily switch between the purchase of bundled services and separate services, and the same applies from 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 a separate multi-play market in Belgium existed, 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.[104]

4.7.1.3. The Commission's assessment

(96) A large majority of respondents to the market investigation consider that no separate market for multi-play services exists in Belgium.[105]

(97) As noted above (paragraph (95)), 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.[106]

(98) Similarly, the BIPT confirmed 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.[107] Furthermore, in its 2014 Recommendation,[108] the Commission acknowledges the increased demand for packages of services offered by the same operator at a flat rate (also known as "bundles"). However, the Recommendation has

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100 Commission decision 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.

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

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

103 Form CO, paragraphs 207-209.

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

105 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 15.

106 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 15.

107 BIPT decision of 29 June 2018, Section 10.2.

108 Explanatory Notes to the 2014 and 2020 Recommendations.

not proposed 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.[109]

(99) 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 which 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

(100) 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.[110] In the recent *Providence/VOO/Brutélé* decision, the Commission however left the question of the geographic market definition open.[111]

4.7.2.2. The Notifying Parties' views

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

4.7.2.3. The Commission's assessment

(102) A majority of the respondents to the market investigation of this case 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.[112] This view, however, does not necessarily align with the results from the market investigation obtained in relation to retail fixed internet access services, which would be one of the components of such a hypothetical market.

(103) On this basis, the Commission considers that, for the purpose of this decision, it is appropriate to consider a (i) national geographic scope, and a narrower scope ((ii) regional, (iii) the cable operator's coverage area, and (iv) the operator's footprint) to

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[109] 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.

[110] Commission decisions of 3 August 2016 in case M.7978 – *Vodafone/Liberty Global/Dutch JV*, paragraphs 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.

[111] Commission decision of 30 June 2020 in case M.9757 – *Providence/VOO/Brutélé*, paragraphs 63-64.

[112] Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 15.

the extent one or more separate retail multi-play markets exist as considered in paragraph (99) above.

(104) 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

(105) 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.[113]

(106) 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.[114]

(107) 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.[115]

(108) 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.

(109) 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.[116] In assessing the likelihood of an anticompetitive input

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

[114] 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.

[115] 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.

[116] Non-Horizontal Merger Guidelines, paragraphs 34-35.

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.[117]

(110) 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.[118] 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.[119]

5.2. Identification of affected markets

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

(112) First, on the wholesale broadband access market, Proximus and the JV's combined market share exceeds 20% (based on expected 2022 figures)[120] in Telenet's coverage area. In the wholesale local broadband access market, including a potential narrower segment of the wholesale local broadband access market which is limited to DSL technology (fiber and copper), this is also the case on a potential national Belgian market and in Telenet's coverage area. Therefore, the wholesale (local) broadband access market is horizontally affected (see paragraphs (115)-(116) below).

(113) Second, this wholesale (local) broadband access market, where both Proximus and the JV are active, is upstream from Proximus' wholesale and retail activities downstream on the (i) wholesale resale broadband access[121] and supply of 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). These markets are vertically affected (see paragraph (130) below).

(114) The Transaction does not give rise to any cooperative effects given that the Notifying Parties will not both be independently active on any of the same markets as the JV, or in a market which is upstream or downstream from that of the JV or in a neighbouring market closely related to this market. As set out above in paragraph (15), Nexus, and any other subsidiary of EQT, is not active in Belgium, [details regarding EQT activities in Belgium].[122]

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117 Non-Horizontal Merger Guidelines, paragraph 32.

118 Non-Horizontal Merger Guidelines, paragraph 58.

119 Non-Horizontal Merger Guidelines, paragraph 59.

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

121 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 (24) above).

122 Form CO, paragraph 457.

5.3. Horizontal relationships

(115) 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 (i) the overall wholesale broadband access market in Telenet's coverage area, (ii) the wholesale local broadband access market in Belgium and in Telenet's coverage area and (iii) the wholesale local broadband access market limited to DSL distribution technology in Belgium and in Telenet's coverage area.

(116) In an overall wholesale broadband access market, Proximus' market share is [20-30]% in Telenet's coverage area (based on 2019 figures) and the JV is expected to hold less than [0-5]% market share (based on expected 2022 figures).[123] Proximus' market shares in a wholesale local broadband access market[124] would be close to 100%[125] (based on 2019 figures) with the JV expected to hold less than [0-5]% (based on expected 2022 figures) in Belgium and in Telenet's coverage area. The same figures apply in a segment of the wholesale local broadband access market, which is limited to DSL distribution technology (DSL, i.e. fiber and copper).[126] There are no other horizontally affected markets under any other possible product market definition.

5.3.1. The Notifying Parties' views

(117) The Notifying Parties state that the Transaction is unlikely to raise any horizontal non-coordinated concerns on the wholesale broadband access market (and all its possible sub-segments) for the following reasons.

(118) 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 infrastructure that offers higher speeds to the benefit of customers.[127]

(119) Second, the Notifying Parties emphasize that the wholesale broadband access' activities of Proximus have a modest scale on the market as compared with the activities of the cable operators on the market.[128] 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.[129] Concretely, at the level of Telenet's coverage area, Orange Belgium is understood to purchase [...] wholesale lines with the cable operators, while Proximus only has [...] lines.[130]

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123 Form CO, Annex 18.

124 Form CO, Annex 18. The Notifying Parties clarify that these figures exclude cable operators, in line with the BIPT's analysis and in view of the still hypothetical nature of such offer for local access to the cable networks.

125 BIPT decision of 29 June 2018, paragraph 1020.

126 Form CO, Annex 18.

127 Form CO, paragraph 295.

128 BIPT decision of 29 June 2018, paragraph 296.

129 BIPT decision of 29 June 2018, paragraph 296.

130 Form CO, paragraph 226.

(120) When looking at the wholesale local broadband access market, as defined by the BIPT[131], Proximus holds close to 100% market share (see paragraph (116) 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.[132]

(121) Third, Proximus' wholesale broadband access services (i.e. LLU, VULA on copper and VULA on fiber) are subject to *ex ante* regulatory obligations. The BIPT has imposed physical and virtual access obligations on Proximus. Additionally, the BIPT imposed non-discrimination, transparency and price control obligations.[133] Such regulatory obligations will also apply to the JV's activities.[134] 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.[135]

(122) Finally, the JV will deploy its FTTH-infrastructure in areas in which there is no standalone deployment or plans to deploy by Proximus of such infrastructure. Consequently, from a geographic perspective, the respective FTTH network deployments by Proximus and the JV will be clearly distinct but complementary.[136]

5.3.2. Commission's assessment

(123) The Commission considers that the Transaction is unlikely to raise horizontal concerns in the market for wholesale broadband access at the level of Telenet's coverage area, in the national market for wholesale local broadband access or any possible narrower affected markets, for the following reasons.

(124) First, as stated above in paragraph (116), the Transaction does not involve an appreciable market share increment.

(a) In the overall wholesale broadband access market at the level of Telenet's coverage area, the JV's increment is extremely low (less than [0-5]% expected in 2022). This figure is expected to increase to [5-10]% by 2024 in

131 BIPT decision of 29 June 2018, paragraph 1020.
132 Form CO, paragraph 297.
133 BIPT decision of 29 June 2018, paragraph 1020.
134 Form CO, paragraph 300.
135 Form CO, paragraph 298.
136 Form CO, paragraph 299.

Telenet's coverage area. The Parties' combined market shares are modest ([20-30]%).[137]

(b) Similarly, when considering the wholesale local broadband access market or a wholesale local broadband access market limited to DSL 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, and [0-5]% by 2022 and [5-10]% by 2024 in Telenet's coverage area.[138]

(125) 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 thus a new additional choice on this market for customers.

(126) Third, as the Notifying Parties point out (see paragraph (122) above), from a geographic perspective, the respective FTTH network deployments by Proximus and the JV will be clearly distinct.[139]

(127) Fourth, a large majority of respondents to the market investigation confirmed 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*".[140] Furthermore, 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.*"[141]

(128) Finally, a majority of respondents to the market investigation also confirmed 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.[142] In this respect, the Commission notes that the BIPT's 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.[143] The Parties and the BIPT have confirmed that the same regulatory obligations will

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137 Form CO, Annex 18. This market share is based on Proximus' market share in the last financial year (2019) and the JV's expected market share in 2022.

138 Form CO, Annex 18.

139 Form CO, paragraph 299.

140 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 21. Emphasis added.

141 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 21. Emphasis added.

142 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 23.

143 BIPT decision of 29 June 2018, Section S.2.

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 (137) below).

(129) Therefore, for the reasons set out above, the Commission concludes that the Transaction does not raise serious doubts as to the 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, or at the level of Telenet's coverage area.

5.4. Vertical relationships

(130) The JV's upstream activities in the wholesale broadband access market in Telenet's coverage area ([0-5]%, expected 2022)[144] and in the wholesale local broadband access market[145] at national level ([0-5]%, expected 2022)[146] and in Telenet's coverage area ([0-5]%, expected 2022)[147] are vertically linked to Proximus' activities in the following downstream markets in Belgium. This gives rise to the following vertically affected markets:

(a) Wholesale markets: broadband resale market ([90-100]%, 2019)[148], supply of leased lines (approx. [50-60]%, 2019)[149]; and

(b) Retail markets: retail mobile ([30-40]%, 2019), fixed internet ([40-50]%, 2019), fixed voice ([50-60]%, 2019), business connectivity ([40-50]%, 2019) and a potential market for multiple-play services (approx. [40-50]%, 2019).[150]

(131) 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 (130) above.

144 Form CO, Annex 18.

145 The same figures apply irrespective of whether the market is limited to DSL distribution technology or not.

146 Form CO, Annex 18.

147 Form CO, Annex 18.

148 Form CO, Annex 18. The Notifying Parties confirm 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/).

149 Form CO, Annex 18. Proximus has an approx. [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.

150 Form CO, Annex 18. 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. Input foreclosure

5.4.1.1. The Notifying Parties' views

(132) 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.

(133) First, through the Transaction a new provider of passive fiber-based services 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.[151]

(134) 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.[152]

(135) Third, 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.[153]

5.4.1.2. Commission's assessment

(136) 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 (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 (130) above).

(A) Ability to engage in input foreclosure

(137) 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.

(138) First, the Commission recalls that the JV will have a very limited market position in the wholesale (local) broadband access market. The JV will have less than [0-5]% market share both at national level and at the level of Telenet's coverage area (expected in 2022) (see paragraphs (124) and (130) above). The JV can therefore not

[151] Form CO, paragraph 313.
[152] Form CO, paragraph 314.
[153] Form CO, paragraph 315.

be considered to have significant market power in the upstream wholesale (local) broadband access market.

(139) Second, the Commission notes that the JV's activities are subject to sector-specific regulation, which prevents the JV from refusing access to their network and from charging excessive fees.[154] 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.[155] The designation of Proximus as an SMP operator also includes the JV (as an affiliated company, which is jointly controlled by the Notifying Parties).[156] This has also been acknowledged and confirmed by the Notifying Parties.[157] 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[158], 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.[159] 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).[160] As a result of this sector-specific regulation, the JV would not have the ability to foreclose wholesale network access.

(140) Third, following the proposed 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.[161] 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).

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154 Market 1: wholesale local access provided at a fixed location of the European Commission, 18 December 2020, 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 the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (former Market 3a: *wholesale local access provided at a fixed location* of the Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2014/710/EU).

155 BIPT, decision of 29 June 2018.

156 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.

157 Form CO, paragraph 300.

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

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

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

161 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).

(141) 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).[162] 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.

(142) 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.[163] The BIPT's market regulation provides that, in the geographic zones where at least 3 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.[164] 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 confirmed by the Notifying Parties.[165] Second, the BIPT has also confirmed that it does not consider the JV to be independent from Proximus.[166] Therefore, the Commission considers that this threat is not credible.

(143) 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) Incentive to engage in input foreclosure

(144) 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.

(145) A majority of respondents does not 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.[167] In this respect, one customer emphasizes that Nexus is "*a pure infrastructure player with no retail activities in Belgium today*", and they would consider "*it is unlikely to seek to corner the FTTH market in any way. The JV will deploy significant capital expenditures and, in theory, should be open to allowing whole[sale] buyers unfettered access to its passive network so as to expand its market opportunities as much as possible*.".

(146) Further, the Commission recalls that Nexus, one of the parents of the JV together with Proximus, is not active on any of the downstream telecommunication markets in Belgium 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,

[162] BIPT, decision of 29 June 2018, S9.4 (page 32).
[163] Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 22.
[164] BIPT decision of 29 June 2018, paragraph 1496.
[165] Notifying Parties' response to RFI 8, question 2 and BIPT decision of 29 June 2018, paragraph 1500.
[166] Call with BIPT, 4 March 2021.
[167] Q1 – Questionnaire to market participants – telecommunications Belgium, response to questions 25-27.

Nexus is incentivized 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.[168]

(147) 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.

(C) Impact on effective competition

(148) 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.

(149) Most respondents to the market investigation consider that the Transaction will not have a negative impact on their business or on the relevant markets (as set out in Section 4 above).[169] 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 (137) and (144), 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.

(D) Conclusion

(150) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to the compatibility with the internal market with respect to possible input foreclosure practices under any of the alternative product markets for the (i) wholesale resale broadband access and supply of 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.

5.4.2. Customer foreclosure

5.4.2.1. The Notifying Parties' views

(151) 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 as a customer. The Notifying Parties confirm that Proximus currently does not purchase any wholesale broadband access services from other operators, and therefore a risk of customer foreclosure does not exist.[170]

5.4.2.2. Commission's assessment

(152) For the reasons set out below, the Commission considers that the Transaction does not lead to credible customer foreclosure concerns in the upstream wholesale (local)

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168 Form CO, paragraph 314.

169 Q1 – Questionnaire to market participants – telecommunications Belgium, response to questions 29-31.

170 Form CO, paragraphs 320-324.

broadband access market. The Parties will not have the ability or the incentive to foreclose rival wholesale broadband access suppliers by restricting access to Proximus or the JV as a (potential) customer.

(A) Ability to engage in customer foreclosure

(153) The JV and Proximus currently do not purchase any wholesale broadband access services from other operators in Belgium. As set out above (see paragraph (140)), 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.[171]

(154) At the same time, Proximus does not purchase any wholesale broadband access services in Belgium. [details regarding wholesale broadband access services].[172]

(155) 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) Incentive to engage in customer foreclosure

(156) A majority of respondents to the market investigation confirmed 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.[173]

(157) Therefore, the Commission concludes that the JV would not have the incentive to foreclose downstream operators by engaging in a customer foreclosure strategy.

(C) Impact on effective competition

(158) 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.

(159) In any event, as indicated in paragraph (149), most respondents to the market investigation consider that this Transaction will not have a negative impact on their business or on the relevant markets.

(D) Conclusion

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

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

172 Notifying Parties' response to RFI 8, question 1.

173 Q1 – Questionnaire to market participants – telecommunications Belgium, response to question 28.

6. CONCLUSION

(161) 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